TABLE OF CONTENTS

I. Overview of Uniform Trust Code

II. Other Uniform Acts on Trusts

III. Relationship of UTC to Restatement of Trusts

IV. Scope and Organization

V. Amendments to UTC, 2001-2004

VI. Significant Policy Issues
   A. Changing the Judge-Made Law
   B. Default Rules (Section 105)
   C. Procedural Rules
   D. Principal Place of Administration (Section 108)
   E. Representation and Settlements (Article 3)
   F. Trust Modification and Termination (Sections 410-417)
   G. Charitable Trusts (Section 413)
   H. Spendthrift Provisions and Rights of Beneficiary’s Creditors (Article 5)
   I. Revocable Trusts (Article 6)
   J. Trustee Removal (Section 706)
   K. Mutual Fund Investment (Section 802(f))
   L. Duty to Keep the Beneficiaries Informed (Section 813)
   M. Retroactivity (Section 1106)

VII. The Limits of Legislation

Note: With 10 jurisdictions now having enacted the UTC, it is no longer feasible for this outline to list all of the variations made in the enacting jurisdictions.
I. OVERVIEW OF UNIFORM TRUST CODE

A. What is the Uniform Trust Code (UTC)? The Uniform Trust Code (2000) is the first effort by the Uniform Law Commissioners to provide the states with a comprehensive model for codifying the law of trusts.

B. Current Status. The UTC was approved by the Uniform Law Commissioners on August 3, 2000. Following a review by the Commissioners’ Style Committee, the final text of the statute was completed on October 9, 2000. The comments to the UTC were completed on April 25, 2001. The UTC was approved by the American Bar Association’s House of Delegates at its mid-year meeting in February, 2001. Amendments to the Code were approved by the Commissioners in Summers 2001, 2003 and 2004 and by the Commissioners’ Executive Committee in January 2005 and are primarily, but not always, technical in nature. The Code with comments can be accessed through the Commissioners’ websites at www.nccusl.org or www.utcproject.org.

The UTC has been enacted to date in the following ten jurisdictions:

2. Nebraska (Effective January 1, 2005; codified at Neb. Stat. ch. § 30-3801 to 30-38,110)
3. New Mexico (Effective July 1, 2003; codified at N.M Stat. ch. §46A-1-101 et seq.)
4. Wyoming (Effective July 1, 2003; codified at Wyo. Stat. §4-10-101 et seq.)
5. District of Columbia (Effective March 10, 2004; codified at D.C. Stat. 19-1301 et seq.)
6. Utah (Effective July 1, 2004; codified at U.C.A. 75-7-101 et seq.)
7. Tennessee (Effective July 1, 2004; codified at T.C.A. Title 35 §§2 to 95)
8. New Hampshire (Effective October 1, 2004; codified at N.H. Chapter 564B:1-101 to 11-1104)
9. Maine (Effective July 1, 2005; codified at M.R.S.A. Title 18-B §§101-1104)

The UTC was also enacted in Arizona in 2003, but was repealed by Arizona in 2004. The Arizona Bar is working on another version of the bill for possible introduction. A UTC bill is also currently pending in Pennsylvania. At least ten
UTC bill introductions are expected in 2005 and numerous other state study groups continue to work toward possible enactment in future years.

C. Who are the Uniform Law Commissioners? Uniform Law Commissioners are volunteer lawyers appointed by the Governors or Legislatures of their respective states to draft model state laws. Well known uniform acts in the probate area include the Uniform Probate Code, the Uniform Prudent Investor Act, and the Uniform Principal and Income Act. While new uniform acts are technically approved by the Commissioners meeting as a group, the heavy lifting is done by the drafting committee.

D. Who Drafted the Uniform Trust Code? The UTC was drafted by a committee chaired by Maurice Hartnett, a Judge of the Delaware Supreme Court and former Justice of the Delaware Chancery Court with long experience with trust cases. This writer 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 on Real Property Probate and Trust Law (3 advisors), the American College of Trust and Estate Counsel, 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.

E. What Process Was Followed? 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 extended over a period of six years.

F. What Models Did the Drafting Committee Use? While the UTC is the first comprehensive uniform act on the subject of trusts, comprehensive trust statutes are already in effect in several states. Notable examples include California, Georgia, Indiana, and Texas. However, during the drafting process, the trust statutes in all states were reviewed.

G. Why a Uniform Trust Code? There are several reasons why the drafting of a Uniform Trust Code was timely. The primary stimulus for the drafting of the UTC is the much greater use of the trust in recent years, both in family estate planning and in commercial transactions, in the United States and internationally. This greater use of the trust, and consequent rise in the number of day-to-day
questions involving trusts, led to a recognition that the trust law in many states is thin. It also led to a recognition that the existing uniform acts relating to trusts, while numerous, are fragmentary. The primary source of trust law in most States is thus the Restatement (Second) 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 which 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.

H. What Process Should States Follow in Considering the UTC? For states considering the UTC, the following process is suggested:

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 modifications. The other approach is to begin with existing law and to add selected provisions of the uniform law. Relying on the UTC as the starting point will result in greater consistency with other states. It 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 modifications 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 Sections 112 (rules of construction), 203 (subject-matter jurisdiction), 204 (venue), and 604 (contest of revocable trusts). The 2004 amendments provide additional bracketed provisions in Sections 105 (mandatory notice), 110 (charitable trust notice to attorneys general), and 411 (modification and termination of noncharitable irrevocable trust by consent).

4. Decide on Key Local Law Issues. Certain existing local law provisions may be so well established that change may be unwise or impossible. For example, in Missouri, the State Bar Committee, while generally receptive to the UTC, has elected not to alter well-ingrained rules on trust termination.

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 What to do About “Fiduciary” Statutes. In many states, general provisions applicable to all types of fiduciaries have been enacted. The UTC only addresses actions by trustees. Repeal of one or more of these “fiduciary” statutes due to enactment of the UTC may require amendment of the enacting jurisdiction’s provisions with respect to other types of fiduciaries such as personal representatives or guardians.

7. 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.

8. Identify and Repeal Statutes Duplicating UTC Provisions. Numerous local trust statutes may address issues also covered in the UTC. States that have enacted the Uniform Probate Code should repeal UPC Article VII and the UPC provision on animal trusts.

9. Identify Other Policy and Political Issues. While much of the UTC simply codifies the common law, the UTC does make some changes. Many of these changes were decided on only following extensive discussion. Most were decided by consensus, others by close votes. On these close votes, some state committees may reach opposite conclusions. In the interests of uniformity, the Commissioners ask that state committees at least start with the presumption that the uniform law approach is correct. The more significant policy issues are discussed in Part VI of this outline.

II. OTHER UNIFORM ACTS ON TRUSTS

A. Introduction. There are numerous Uniform Acts on trusts and related subjects, but none provide comprehensive coverage on trust law issues. Certain of these acts are incorporated into the UTC; others must be repealed. Still others, addressing specialized topics, will continue to be available for enactment in freestanding form.

B. Uniform Acts Requiring Replacement or Other Action. The following Uniform Acts are incorporated into or otherwise superseded by the UTC:
1. Uniform Probate Code Article VII – Originally approved in 1969, Article VII has been enacted in about 15 jurisdictions. Article VII, although titled “Trust Administration,” is a modest statute, addressing only a limited number of topics. Except for its provisions on trust registration, Article VII is superseded by the UTC. The provisions of Article VII on jurisdiction are incorporated into Article 2 of the UTC, and its provision on trustee liability to persons other than beneficiaries are replaced by Section 1010.

2. Uniform Prudent Investor Act (1994) – This Act has been enacted in 42 jurisdictions. This Act, and variant forms enacted in a number of other states, has displaced the older “prudent man” standard, bringing trust law into line with modern investment practice. States that have enacted the Uniform Prudent Investor Act are encouraged to recodify it as part of their enactment of the UTC. A place for this is provided in Article 9.

3. Uniform Trustee Powers Act (1964) – This Act has been enacted in 16 states. The 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. States enacting the UTC should repeal their existing trustee powers legislation.

4. Uniform Trusts Act (1937) – This largely overlooked Act of similar name was enacted in only six states, none within the past several decades. Despite a title suggesting comprehensive coverage of its topic, this Act, like Article VII of the Uniform Probate Code, addresses only a limited number of topics. These include the duty of loyalty, the registration and voting of securities, and trustee liability to persons other than beneficiaries. States enacting the UTC should repeal this earlier namesake.

C. Uniform Acts Not Requiring Action. The following Uniform Acts are not affected by enactment of the UTC and do not need to be amended, repealed, or recodified:

1. Uniform Common Trust Fund Act – Originally approved in 1938, this Act has been enacted in 34 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 may also be available to non-trust customers. The UTC addresses investment in mutual funds at Section 802(f).
2. Uniform Custodial Trust Act (1987) – This Act has been enacted in 18 jurisdictions. This Act allows standard trust provisions to be automatically incorporated into the terms of a trust simply by referring to the Act. This Act is not displaced by the UTC but complements it.

3. Uniform Management of Institutional Funds Act (1972) – This Act has been enacted in 47 jurisdictions. It governs the administration of endowment funds held by charitable, religious, and other eleemosynary institutions. The Uniform Management of Institutional Funds Act 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.

4. Uniform Principal and Income Act (1997) – The 1997 Uniform Principal and Income Act, which has been enacted in 37 jurisdictions, is a major revision of the widely enacted Uniform Act of the same name approved in 1962. Because this Act addresses issues with respect both to decedents’ estates and trusts, a jurisdiction enacting the revised Uniform Principal and Income Act may wish to include it either as part of this Code or as part of its probate laws.

5. Uniform Probate Code – Originally approved in 1969, and enacted in close to complete form in about 20 states but influential in virtually all, the UPC overlaps with trust topics in several areas. One area of overlap, already mentioned, is UPC Article VII. Another area of overlap concerns representation of beneficiaries. UPC Section 1-403 provides principles of representation for achieving binding judicial settlements of matters involving both estates and trusts. The UTC refines these representation principles, and extends them to nonjudicial settlement agreements and to optional notices and consents. *See UTC Section 111 and Article 3.* A final area of overlap between the UPC and trust law concerns rules of construction. The UPC, in Article II, Part 7, extends certain of the rules on the construction of wills to trusts and other nonprobate instruments. The UTC similarly extends to trusts the rules on the construction of wills. Unlike the UPC, however, the UTC does not prescribe the exact rules. Instead, Section 112 of the UTC is an optional provision applying to trusts whatever rules the enacting jurisdiction already has in place on the construction of wills.

6. Uniform Statutory Rule Against Perpetuities -- Originally approved in 1986, this Act has been enacted in about half of the states. The 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 must otherwise 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.

7. Uniform Supervision of Trustees for Charitable Purposes Act (1954) – This Act, which has been enacted in four states, is limited to mechanisms for monitoring the actions of charitable trustees. Unlike the UTC, the Supervision of Trustees for Charitable Purposes Act does not address the substantive law of charitable trusts.

8. Uniform Testamentary Additions to Trusts Act – This Act is available in two versions: the 1960 Act, with 25 enactments; and the 1991 Act, with 21 enactments. As its name suggests, this Act validates pourover devises to trusts. Because it validates provisions in wills, it is incorporated into the Uniform Probate Code, not into the UTC.

III. RELATIONSHIP OF UTC TO RESTATEMENTS OF LAW

A. What are Restatements? 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.

B. Restatement (Third) of Trusts. 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 tentative draft of the 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, and the portion relating to trust modification and termination was approved in 2001.

C. What is Relationship of UTC to Restatement of Trusts? The Uniform Trust Code was drafted in close coordination with the revision of the Restatement. This coordination has hopefully made both into better products. The UTC offers the
benefit of certain rules. The Restatement provides a wealth of background materials for interpreting the language of the UTC.

D. Relationship to Restatement of Property. Much of the law on voluntary transfer of property, both during life and at death, is collected in the portion of the Restatement of Property entitled Wills and Other Donative Transfers. The portions of this 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. While less influential on the UTC than the Restatement of Trusts, several sections of the UTC are patterned on the Restatement of Property. These include Section 414 (reformation to correct mistakes) and Section 415 (modification to achieve settlor’s tax objectives).

E. Why Not Rely on Restatements Alone? 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.

IV. SCOPE AND ORGANIZATION

A. Scope (Section 102).

1. Express Trusts. The Uniform Trust Code states the law relating to express trusts. These are trusts created by settlors who transfer property to a trustee or declare themselves as trustee of their own property. 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 and which are excluded from the Code.

2. Commercial Trusts. Trusts are best known in the United States as a device for planning an individual’s personal estate. But trusts are increasingly being used as tools for facilitating commercial transactions. Examples of commercial transactions where the use of trusts is prevalent if not predominant include pension funds, mutual funds for pooling investment assets, and trusts to secure repayment of corporate debt. The UTC is not directed specifically at commercial trusts but neither does it exclude them. The extent to which commercial trusts are subject to the
UTC depends on the type of trust and the laws, other than the UTC, under which the trust was created. Even if the commercial trust is governed exclusively by another body of law, in interpreting this other law the courts are free to look to the UTC for guidance. NCCUSL is currently in the process of drafting a Uniform Business Trust Act which is expected to be finalized in July 2005.

B. Organization. The breadth of the UTC is indicated by its organization. The UTC is organized into 11 articles.

1. Article 1. This article, in addition to providing definitions, addresses topics such as the ability of a trust instrument to override the Code’s provisions, the validity of choice of law provisions and the law to govern in the absence of such a provision, and the procedure for transferring the principal place of administration to another jurisdiction.

2. Article 2. This article addresses selected topics involving judicial proceedings concerning trusts. 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.

3. Article 3. This article deals with the important topic of representation of beneficiaries, specifying circumstances when another person, such as a guardian, may receive notice or give a consent on a beneficiary’s behalf.

4. Article 4. This article, the first article of the UTC devoted to the basic substantive law of trusts, prescribes the requirements for creating, modifying and terminating trusts. The provisions on the creation of trusts largely track traditional doctrine; those relating to modification and termination liberalize the prevailing law.

5. Article 5. This article covers spendthrift provisions and rights of creditors, both of the settlor and beneficiaries.

6. Article 6. This article collects the special rules relating to revocable trusts, including the standard of capacity, the procedure for revocation or modification, and the statute of limitations on contests.

7. Article 7. This article deals with the office of trustee, specifying numerous procedural rules that apply absent special provision in the trust. Included are the rules on trustee acceptance, the rights and obligations of cotrustees, the procedure for resignation, the grounds for removal, the methods for appointing successors, and trustee compensation.
8. Article 8. This article details the duties and powers of the trustee. The powers listed are an updated version of the Uniform Trustee Powers Act, including coverage of such current topics as the power to deal with environmental hazards. The specified duties of the trustee, like the duty of loyalty, 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.

9. Article 9. This article provides a place for a jurisdiction enacting the Code to codify its version of the Uniform Prudent Investor Act.

10. Article 10. This article addresses the liability of trustees and rights of beneficiaries. With respect to the rights of beneficiaries, the article

   a. lists the remedies for breach of trust;

   b. specifies how money damages are to be determined;

   c. 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;

   d. specifies certain trustee defenses, including the addition of a statute of limitations for claims alleging breach of trust and a provision on enforcing exculpatory clauses;

   e. with respect to transactions by trustees with third persons, encourages trustees and third persons to engage in commercial transactions to the same extent as if no trust was involved; and

   f. to protect the privacy of the trust, authorizes trustees to provide, and for third persons to rely on, written certifications by the trustee as to the trustee’s authority. The trustee need not provide the third person with a complete copy of the trust instrument.

11. Article 11. This article 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.
V. THE NEED FOR AMENDMENT

A. The Need for Amendment. Uniform laws are frequently amended. Glitches and inconsistencies in language are discovered, necessitating technical amendments. Sometimes, major policy issues arise on which the Commissioners find themselves in a minority position, necessitating more substantive amendments. Generally, the more complex the uniform act, the more likely it will be amended. Perhaps surprisingly, the more popular the Act the more likely it will be amended. Uniform acts that attract no interest may remain on the shelf in a pristine condition. The UTC is both complicated and receiving wide consideration. That both technical and substantive amendments have been made is not surprising.

B. 2001 Amendments. The 2001 amendment were almost entirely technical in nature. Inconsistencies in language were corrected in Sections 105, 110, and 602. The only substantive amendment was to amend Section 705 to require that a resigning trustee send notice to a living settlor, although this amendment, like the others, was designed to fill in an unintended gap. For an explanation of each of the amendments, see the comments to each of the mentioned sections in the text of the UTC at www.nccusl.org.

C. 2003 Amendments. The 2003 amendments were exclusively technical in nature. Sections amended were 411, 602, 603, 802, and 815. For an explanation of each of the amendments, see the comments to each of the mentioned sections in the text of the UTC at www.nccusl.org.

D. 2004 Amendments. The 2004 amendments are the most significant and are primarily substantive, not technical. The amendments can be divided into the following categories:

1. Notice: Section 105(b)(8)-(9), which addresses the extent to which a settlor may waive otherwise required notices to beneficiaries, is made optional by being placed in brackets. For additional discussion of the amendment to Section 105(b)(8)-(9), see Part VI, Sections B and L of this outline. Selected portions of Section 813, which specifies the notice requirements for trusts which have not addressed the issue in the trust instrument, are also made prospective only. For additional discussion of the amendment, see Part VI, Sections L and M of this outline. In addition, Section 603 is amended to allow an enacting jurisdiction, if so inclined, to permit a revocable trust to be kept totally secret from the remainder beneficiaries even if the settlor becomes incapacitated. For additional discussion of the amendment, see Part VI, Section I of this outline. More technical in nature and not discussed in this outline are clarification of the definition of “qualified beneficiary” (Section 103) and clarification of which distributees of charitable trusts are entitled to notice as if they were
qualified beneficiaries (Section 110).

2. Estate Tax Concern. Section 411(a) codifies the common law rule that a settlor and beneficiaries may jointly terminate an irrevocable trust. The ACTEC Committee on Estate and Gift Taxation became concerned that any modification of the state’s previous common law might raise a possible estate tax issue. Although nearly all states provide that a settlor and beneficiaries may jointly terminate an irrevocable trust, they differ on lesser details, such as whether court approval is required. Section 411(a) is amended to allow an enacting jurisdiction to add a court approval requirement. Alternatively, the state may elect to make Section 411(a) prospective only. A final option is to simply delete Section 411(a), in which event the state’s previous law on trust termination and modification would presumably control. For additional discussion of the amendment to Section 411(a), see Part VI, Section F of this outline. To implement the amendment to Section 411(a), conforming amendments to Sections 301 and 410 may also be necessary.

In addition, a new Section 301(d) is added, which provides that a settlor cannot represent a beneficiary with respect to a Section 411(a) termination and modification. For additional discussion of this amendment, see Part VI, Section F of this outline.

3. Material Purpose. Section 411(c), which by the 2004 amendment was placed in brackets and therefore made optional, provides that a spendthrift provision is not presumed to constitute a material purpose of the trust. Several states that have enacted the Code have not agreed with the provision and have either deleted it or have reversed the presumption. Given these developments, the drafting committee concluded that uniformity could not be achieved.

4. Role of Attorney General. Because the role of Attorneys General with respect to enforcement of charitable trusts varies greatly around the country, the language in Section 110(c) [now Section 110(d)] granting the attorney general the rights of a qualified beneficiary has been placed in brackets and made optional. States deleting or amending Section 110(c) may also need to amend Section 704(d), dealing with appointment of successor trustees of charitable trusts.

5. Trustee/beneficiary Creditor Issue. Although not specifically addressed in the UTC, concern has arisen that a trustee/beneficiary’s ability to make distributions for the trustee/beneficiary’s own benefit could result in a creditor of the beneficiary being able to reach the trustee/beneficiary’s
interest. The UTC is amended to create a safe harbor from such creditor claims as long as the trustee’s discretion is limited by an ascertainable standard. The sections amended are Sections 103, 504, and 814. For additional discussion of these amendments, see Part VI, Section H of this outline.

E. 2005 Amendments. Discussions held in connection with the 2004 amendments led to the identification of other issues in the area of creditor rights. Several amendments were approved in January 2005 by the Commissioners’ Executive Committee. Section 501 was revised to clarify that it applies only to the rare trust that does not contain a spendthrift provision. Section 503, which lists exception creditors, was revised to clarify that the court may use its equitable powers to limit relief and that attachment is the only remedy available to exception creditors under the Code. Finally, Section 506 was revised to add a definition of “mandatory distribution,” to avoid any implication that “mandatory distribution” as used in the section might include a distribution subject to the trustee’s discretion.

VI. SIGNIFICANT POLICY ISSUES

A. Changing the Judge-Made Law. The Uniform Trust Code 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, which is why they are highlighted here.

B. Default Rules (Section 105).

1. UTC Provisions. Much of American trust law consists of rules subject to override by the terms of the trust. But prior to the UTC, neither the Restatement, treatise writers, nor state legislatures had attempted to describe the principles of law that are not subject to the settlor’s control. The UTC collects these principles in Section 105. Included are:

   a. the requirements for creating a trust (subsection (b)(1));

   b. the requirement that a trustee act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries (subsection (b)(2));

   c. the power of the court to take certain actions, such as to remove a trustee, to modify or terminate a trust on prescribed grounds, and
to specify a trustee’s compensation (subsections (b)(4), (6), (7), (13));

d. the effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in Article 5 (subsection(b)(5));

e. the rights of third parties in their dealings with the trustee (subsection (b)(11)); and

f. the trustee’s duty to inform the qualified beneficiaries age 25 and over of certain matters relating to the administration of an irrevocable trust and to respond to the request of any beneficiary for information (subsection (b)(8)-(9)). The 2004 amendments bracket these provisions as optional, but the comments will reiterate the drafting committee’s continued belief that providing notice to beneficiaries should not be totally waiveable. Keeping a trust totally secret prevents discovery of trustee mismanagement and opens the possibility that the trust might be deemed illusory by the courts. For additional discussion, see Part VI, Section L of this outline.

“Qualified beneficiary,” a term which is defined in Section 103 and which is used with some frequency in the UTC, excludes beneficiaries who hold remote remainder interests.

2. Policy Issues. The most discussed issue in the drafting of the UTC and also since its approval is the extent to which a settlor may waive reporting to the beneficiaries and responding to a beneficiary’s request for information. The provision most at issue is summarized in f immediately above. The waiver issue is discussed further in Part V, Section L of this outline.

3. Modifications in Enacting Jurisdictions. The 2004 amendments to Section 105(b)(8)-(9), which are described above, acknowledge that a number of the enacting jurisdictions have either deleted or made substantial modifications to these provisions, usually but not always by allowing a settlor greater leeway to waive an otherwise required notice.

C. Procedural Rules. 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 will frequently 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, but the drafters of the UTC expect that many scriveners of trust instruments may prefer to rely on the Code.

1. The Rules. Among the procedural issues addressed in the UTC are:
   a. the method for transferring a trust’s principal place of administration to or from another country or American state (Section 108);
   b. the method for revoking or amending a revocable trust (Section 602);
   c. the requirements for rejecting or accepting appointment as trustee (Section 701);
   d. the division of responsibilities among cotrustees (Section 703);
   e. the procedure for appointing a successor trustee (Section 704); and
   f. the requirements for an effective trustee resignation (Section 705).

2. Policy Issues. All of the above items were the subject of extensive discussion during the drafting of the UTC. The rules try to further several not always consistent objectives.
   a. Honoring Intent: The UTC generally prefers honoring of intent over required formalities. Consequently, absent specific provision in the terms of the trust, a trustee may accept the trusteeship (Section 701) or a settlor may revoke or amend a revocable trust (Section 602) by any method indicating the necessary intent.
   b. The Better-Drafted Document: Many trust documents allow a trustee to resign following notice to a specified class of beneficiaries. Under the UTC, the specified class of beneficiaries are known as the “qualified beneficiaries” [defined in Section 103], and a trustee may resign by giving notice to that group (Section 705).
   c. Keeping Issues Out of Court. The UTC strongly encourages the resolution of disputes outside of court (see Section 111). This philosophy also applies to matters of procedure. While the court is always available, a trustee may transfer the principal place of administration upon notice to the qualified beneficiaries (Section
absent a successor appointment in the terms of the trust, a successor trustee may be appointed upon unanimous agreement of the qualified beneficiaries (Section 704).

d. The Cotrustee Dilemma. While appointment of cotrustees is common, 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 in drafting. Yet, this issue is often neglected. Among the matters the trust instrument should address:

(a) 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 (Section 703(a)).

(b) 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 perform personally (Section 703(c)). The standard is appropriate but may be difficult to apply in practice.

(c) To what extent should a nonparticipating cotrustee be liable for another trustee’s breach. The UTC generally immunizes a nonparticipating trustee from liability (Section 703(f)). However, the Code also assumes that the settlor did not intend for the trustee to totally 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 (Section 703(g)).

Modifications in Enacting Jurisdictions. Several of the enacting jurisdictions have modified the procedures specified in Section 602 for revoking a trust but not in a uniform way.

Utah amends Section 703 to provide an alternative test for delegation to a corporate trustee. Wyoming allows unlimited delegation between cotrustees.

D. Principal Place of Administration (Section 108).

1. Why Concept Important? Determining a trust’s principal place of
administration is important for a variety of reasons. The location of the trust’s principal place of administration may determine in which state the trust is subject to income tax. It will also establish which court has primary jurisdiction concerning trust administrative matters.

2. Determining the Principal Place. 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.

3. The Code’s Approach. The UTC does not and probably cannot resolve the difficult cases. Attempts to define principal place of administration in the terms of the trust were not successful. For cases in which determining a trust’s principal place of administration is important, settlors are encouraged to address the issue in the terms of the trust. Under Section 108(a) of the UTC, 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.

4. Transfer of Principal Place of Administration. Frequently it becomes necessary to change a trust’s principal place of administration. This issue ideally should be addressed in the terms of the trust. But absent such a provision, Section 108(b)-(f) of the UTC specifies a procedure for transfer. The transfer must facilitate the trust’s administration, and the trustee must inform the qualified beneficiaries of the transfer at least 60 days in advance. The transfer may proceed if no qualified beneficiary objects by the date specified in the notice. If the transfer involves the appointment of a new trustee, the requirements for the appointment of a successor trustee, either under the trust instrument or otherwise, must first be satisfied before the transfer can be accomplished.

5. Policy Issues. The most debated issue in the drafting process and on the floor during the final approval process was the appropriate default rule for transferring the principal place of administration. The draft as presented to the Commissioners at the 2000 Annual Meeting allowed the trustee to transfer the principal place of administration upon giving 60 days advance notice to the qualified beneficiaries. Should a beneficiary then object, the beneficiary would have been forced to go to court to block the transfer. During the floor debate, the suggestion was made that a transfer should be
allowed only if all qualified beneficiaries consented or a court order had been obtained. The provision as finally approved, allowing any qualified beneficiary to block the transfer by filing an objection with the trustee, was a compromise solution.

Modifications in Enacting Jurisdictions. Wyoming provides that the settlor may designate the settlor’s domicile as the principal place of administration even though the domicile does not otherwise have any connection to the trust. New Hampshire and Tennessee allow a trustee to transfer the trust’s principal place of administration unless a “majority of qualified beneficiaries” object.

E. Representation and Settlements (Article 3).

1. Overview. The UTC strives to keep administration of trusts outside of the courts. Numerous actions are allowed solely upon notice to the beneficiaries. Other actions can be accomplished upon consent of the beneficiaries. 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. The UTC also encourages resolution of disputes by nonjudicial means.

2. Notice to Beneficiaries. Actions that can be accomplished by giving notice to beneficiaries include:

   a. transfer of a trust’s principal place of administration to or from another country or American state (Section 108);

   b. combination of separate trusts into one or the division of a single trust into two or more separate trusts (Section 417);

   c. resignation of a trustee (Section 705);

   d. submission of a trustee’s report (Section 813); and

   e. trustee’s notice of proposed plans of distribution (Section 817).
3. Consent of Beneficiaries. Other actions can be accomplished upon consent of the beneficiaries. These include:

a. selection of a successor trustee (Section 704); and

b. release of a trustee from potential liability (Section 1009).

4. Representation Principles. The UTC provides comprehensively for the representation of beneficiaries and others unable to represent themselves, both with respect to notices and consents. Among the representation concepts:

a. While the settlor is competent, the rights of the beneficiaries of a revocable trust are within the settlor’s exclusive control (Section 603(a)).

b. Because the UTC generally treats the holder of a power of withdrawal the same as the settlor of a revocable trust (Section 603), the rights of beneficiaries whose interests may be eliminated by the holder’s exercise of the power are similarly subject to the holder’s exclusive control.

c. Absent a conflict of interest with respect to the particular matter or dispute, the holder of a general testamentary power of appointment may represent and bind those whose interests are subject to the power (Section 302).

d. Absent a conflict of interest with respect to the particular matter or dispute between the representative and the person represented or conflict of interest among those represented:

   (a) a conservator [defined in Section 103 as person appointed to manage property] may represent and bind the estate the conservator controls (Section 303(1));

   (b) a guardian [defined in Section 103 as a person appointed to make decisions with respect to personal care] may represent and bind the ward if a conservator has not been appointed (Section 303(2));

   (c) an agent having authority to act with respect to the particular matter or dispute may represent and bind the principal (Section 303(3));
(d) a trustee may represent and bind the beneficiaries of the trust (Section 303(4));

(e) a personal representative of a decedent’s estate may represent and bind persons interested in the estate (Section 303(5)); and

(f) a parent may represent and bind the parent’s minor or unborn child if neither a conservator nor guardian for the child has been appointed (Section 303(6)).

e. A virtual representative may represent and bind someone who is otherwise not represented. Virtual representation may be used to give notice to or bind persons who are minors, incapacitated, unborn, or whose identity or location is unknown or not reasonably ascertainable. The virtual representative must also have a substantially identical interest with respect to the particular matter or dispute. Usually the interests of the representative and the person represented are identical, such as membership in the same beneficiary class. Also, virtual representation is available only to the extent there is no conflict of interest between the virtual representative and the person represented (Section 304).

f. Whether or not a person is otherwise represented, the court may appoint a special representative (the equivalent of a guardian ad litem) to represent a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown. In making decisions, a representative may consider general family benefit accruing to living members of the individuals’s family (Section 305).

5. 2004 Amendments. Section 603(a) is amended to grant states the option of continuing the settlor’s exclusive control of the beneficiaries’ rights even if the settlor becomes incompetent. For a discussion, see Part VI, Section I of this outline. Section 301 is amended to provide that a settlor cannot represent a beneficiary with respect to the joint decision of the settlor and beneficiaries to terminate an irrevocable trust as provided in Section 411(a). For a discussion, see Part VI, Section F of this outline.

6. Nonjudicial Settlements. The representation provisions of the UTC can be utilized as to any notice required to be given to the beneficiaries, not only for the matters detailed above, but also to settle any dispute whether in or out of court. Pursuant to Section 111, interested persons may enter into a binding judicial settlement with respect to any matter and upon such terms
and conditions as a court could properly approve. Matters that can be settled by nonjudicial settlement include:

a. interpretation or construction of the terms of the trust;

b. approval of a trustee’s report or accounting;

c. direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power;

d. resignation or appointment of a trustee and the determination of a trustee’s compensation;

e. transfer of a trust’s principal place of administration; and

f. liability of a trustee for an action relating to the trust.

7. Policy Issues. Among the issues discussed during the drafting process:

a. The Court Could Have Approved Requirement. Section 111 requires a nonjudicial settlement to contain only such terms and conditions as a court *could* have approved. 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.

b. The Parent Trap. Section 303 authorizes a parent to represent and bind the parent’s minor or unborn child. This will be a novel concept for many states. However, a similar concept has since 1969 been codified without controversy in Section 1-403 of the Uniform Probate Code.

c. Powers of Appointment. Section 302 authorizes the holder of a testamentary general power of appointment to represent and bind those whose interests are subject to the power. The authority is effective, however, only if the holder does not have a conflict of interest with respect to the particular matter or dispute. A broader approach rejected by the drafting committee would have provided for binding representation whether or not the holder has a conflict of interest and also allowed representation by the holder of a special power.
F. Trust Modification and Termination (Sections 410-417).

1. Philosophy and Significant Changes. 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. Among the provisions enhancing the ability to modify or terminate a trust:

   a. It is no longer automatically presumed that a spendthrift provision is a material purpose barring the beneficiaries from compelling termination of a trust (Section 411(c)). The 2004 amendments to the UTC place Section 411(c) in brackets to encourage states considering reversing the presumption to delete it instead. The longer life of trusts makes the need for flexibility more important. Overreliance on the importance of often boilerplate spendthrift provisions can inhibit desired flexibility.

   b. A court may not only modify a trust because of circumstances not anticipated by the settlor, but may also modify the trust’s dispositive terms or even terminate the trust (Section 412).

   c. A trust may be reformed due to the settlor’s mistake of fact or law even if the original terms of the trust, as originally but mistakenly created, are unambiguous (Section 415).

   d. To achieve the settlor’s tax objectives, the court may modify the terms of the trust as long as the modification does not violate the settlor’s probable intention. The court may also give the modification retroactive effect (Section 416).

2. 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. The UTC also follows traditional doctrine in allowing for termination of an irrevocable trust by unanimous agreement of the beneficiaries. However, the trust may be terminated by the beneficiaries alone only if it no longer serves a material purpose, or may be modified by the beneficiaries alone only if such modification is not inconsistent with a material purpose. Provision is made for partial termination or modification if obtaining the consent of all beneficiaries is impracticable. 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.

3. 2004 Amendments. The 2004 UTC amendments adopt recommendations of the ACTEC Committee on Estate and Gift Taxation. The objective is to eliminate concerns that the provisions of Sections 301 and 411 might conceivably trigger inclusion of an irrevocable trust in the settlor’s gross estate.

Section 301 is amended to eliminate the ability to represent a beneficiary with respect to a joint settlor-beneficiary termination of an irrevocable trust under Section 411(a).

The ACTEC Committee recommends that enacting jurisdictions enact Section 411(a) in a way so as to preserve the jurisdiction’s prior common law. Some states allow the settlor and beneficiaries to jointly terminate an irrevocable trust without approval of court. Other states require court approval. Section 411(a) is amended to provide optional language for states requiring court approval. Also, the entire subsection is placed in brackets, signaling that states are free to delete the subsection in its entirety, in which event prior law would remain in effect. As an alternative, an enacting jurisdiction may also opt to make the entire subsection prospective only.

4. 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. Without regard to unanticipated circumstances, the court may modify an administrative term if continuation of the trust on its existing terms would be impracticable, wasteful, or impair the trust’s administration.

5. 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. 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. The figure $50,000 is placed in brackets in recognition that many states may wish to change the amount. Initial indications are that many states will increase the amount to $100,000.

6. Reformation. Consistent with 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 whether or not the terms of the trust are ambiguous.

7. 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. 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.

8. Combination and Division of Trusts. Consistent with many state statutes, Section 417 of the UTC authorizes a trustee to divide a trust or combine trusts without approval of court. Prior notice to the qualified beneficiaries of a proposed combination or division is required. “Qualified beneficiaries,” which is defined in Section 103(12) and which is a term used frequently in the UTC, excludes beneficiaries having remote remainder interests.

9. Policy Issues. The sections of the UTC on trust modification and termination are innovative and there was considerable debate on each of the changes. These innovations are detailed in Number 1 above. The ultimate issue comes down to whether liberalizing the standards enables the settlor’s purposes to be better fulfilled or instead presents too great a risk that the trust as modified or terminated will bear little resemblance to what the settlor would have preferred.

10. Modifications in Enacting Jurisdictions. The majority of states increase the $50,000 small trust termination limit, most to $100,000.

G. Charitable Trusts (Section 413).

1. Scope. 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. The UTC, being a trust code, only addresses the law with respect to charitable trusts. However, the topics addressed in the UTC, such as permitted charitable purpose and cy pres, are also relevant to other forms of charitable giving.

2. Charitable Purpose. The concept of charitable purpose was firmly
established by the Statute of Charitable Uses of 1601. The UTC does not depart from this standard list. A charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, government or municipal purposes, or other purposes the achievement of which is beneficial to the community (Section 405(a)). A charitable trust does not fail because the settlor has insufficiently specified a charitable purpose. Similar to cy pres, the court may save the trust by selecting a charitable purpose or beneficiaries (Section 405(b)).

3. Cy Pres. Upon failure of a charitable purpose, the court may apply cy pres to reform the disposition to better carry out the settlor’s charitable purposes. If the settlor’s charitable purpose is deemed specific rather than general, however, under traditional principles the charitable disposition fails and the property is returned to the settlor or settlor’s successors in interest. Section 413(a) of the UTC liberalizes the doctrine of cy pres in a way believed more likely to carry out the average settlor’s intent. First, the UTC expands the ability of the court to apply cy pres. 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, the UTC 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.

4. Remote Gifts Over. Section 413(b) of the UTC eliminates a severe administrative inefficiency. The UTC 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 UTC a gift over to a noncharity upon failure or impracticality of the original charitable purpose is effective only for the settlor’s lifetime, if the trust property is to revert to the settlor, or if fewer than 21 years have elapsed since the date of the trust’s creation.

5. Enforcement. Traditionally, standing to enforce a charitable trust is conferred on the Attorney General and 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 drafters added language authorizing a settlor to maintain an action to enforce a charitable trust (Section 405(c)), or to bring an action requesting modification of the trust under the doctrine of cy pres (Section 410(b)).


a. The Appropriate Cy Pres Standard. Some may prefer the
traditional cy pres standard. The difference between the traditional standard and the standard in the UTC is the possibility that under the traditional standard the property will revert upon failure of a charitable purpose if the court concludes that the settlor did not have a general charitable intent.

Section 413 also authorizes the court to apply cy pres if the original means chosen have proved to be impracticable or wasteful. In some states, cy pres can be applied only if the original means have failed. By allowing the court to apply cy pres if the original scheme has become impracticable or wasteful, the drafters concluded that the court will be able more efficiently to structure the gift to better carry out the settlor’s charitable purposes. Some may conclude that it gives the court too much discretion to divert the gift in a manner inconsistent with the settlor’s intent.

b. Validity of Remote Gifts Over. While the UTC generally recognizes gifts over to a noncharity upon failure of a charitable purpose, Section 413(b) imposes a time limit. The failure of charitable purpose must occur within 21 years unless the trust property is to revert, in which case the failure of charitable purpose must occur within the longer of the settlor’s lifetime or 21 years. Some may conclude that the period in Section 413(b) 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 anytime during the lives of the settlor or settlor’s descendants alive at the creation of the trust. Whichever period is chosen, the effect of Section 413(b) is to promote administrative convenience, with the shorter period in the UTC being the more efficient.

H. Spendthrift Provisions and Rights of Beneficiary’s Creditors (Article 5).

1. Background. Spendthrift provisions, when effective, prohibit a creditor or assignee of a beneficiary from attaching the beneficiary’s interest. Spendthrift provisions are not recognized in England, where trust law originated, and they are of limited utility in the United States. A spendthrift provision provides only limited protection to the beneficiary. The creditor or assignee may pounce upon the trust funds as soon as distribution is made. But even funds retained in trust are not always protected. Numerous exceptions to spendthrift protection are recognized, depending on the type of creditor, the category of beneficiary, or the time when the claim is made.
2. Summary of Provisions. Article 5, which contains the Code’s provisions relating to spendthrift protection and the rights of a beneficiary’s creditors, was the most widely debated article of the UTC. The result, however, largely tracks the law in effect in many states but not in others. In some states, enactment of Article 5 will significantly change the law. The more significant of the rules:

a. 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 (Section 502);

b. 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 (Section 502);

c. exceptions to spendthrift for alimony and child support claims are recognized (Sections 503-504).

3. Trustee/beneficiary Creditor Issue. Although not specifically addressed in the UTC, concern has arisen that a trustee/beneficiary’s ability to make distributions for the trustee/beneficiary’s own benefit could result in a creditor being able to reach the trustee/beneficiary’s interest. The concern was triggered by a statement in Restatement (Third) of Trusts §60, comment g, that discretionary interests of a trustee/beneficiary are subject to claims of the trustee/beneficiary’s creditors no matter how limited the discretion. Concluding that the Restatement position, if valid, could disrupt much conventional estate planning, the 2004 amendments revise Sections 103, 504, and 814 to create a safe harbor from creditor claims if the discretionary power is subject to an ascertainable standard.

4. Self-Settled Trusts. The drafting committee 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 UTC rejects the approach taken in the legislation enacted in Alaska and Delaware, Rhode Island, Nevada, and, most recently, Utah. A creditor of the settlor can fully reach the settlor’s beneficial interest (Section 505(a)(2)). Although not encouraged, it is possible for states to combine the UTC with a provision insulating self-settled spendthrift trusts from creditor claims, as has been done in Utah. Self-settled spendthrift trust provisions alone are not a substitute for the many advantageous to a codified comprehensive trust law such as the UTC. In addition, substantial doubt currently exists as to the validity of self-settled creditor avoidance trusts due to Full Faith and Credit, federal bankruptcy law, and other issues.
5. Public Policy Exceptions. A key policy issue in drafting the UTC 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. The following are the principal exceptions:

a. Child Support/Alimony. The Restatement of Trusts, 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 UTC allows a child, spouse, or former spouse to attach the trust to collect on a court order for support (Section 503(b)(1)). However, if the beneficiary’s interest is discretionary, the child, spouse, or former spouse can collect only to the extent the trustee has abused the discretion (Section 504). Other creditors are not allowed to collect from a discretionary trust, no matter how stingy the trustee has been in exercising the discretion.

b. Other Exceptions. The UTC creates an exception for claims by governmental units to the extent a state statute or federal law so provides (Section 503(b)(3)), 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 UTC does not create a specific public policy exception for a provider of necessaries but allows a judgment creditor who has provided services to the beneficiary to reach the beneficiary’s interest (Section 503(b)(2)).

6. Overdue Distributions. To protect a trust from an immediate attachment as soon as a payment becomes due, whether current or upon termination of the trust, Section 506 of the UTC provides that spendthrift protection is lost only after the trustee has had a reasonable time in which to make the distribution.

7. Crummey and 5 and 5 Powers: Although Section 505 of the UTC treats the holder of a power of withdrawal the same as the settlor of a revocable trust, an exception is created for Crummey and 5 and 5 powers. Upon the release or lapse of a power of withdrawal, assets falling within the annual exclusion or 5 and 5 limit are exempt from claims of the holder’s creditors.
8. Policy Issues. Among the issues debated during the drafting process:

a. Should Spendthrift be Automatic? This is the law currently in Illinois and New York. Given that spendthrift provisions are routinely inserted in trust instruments, the argument is made 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.

b. Should a Beneficiary be Allowed to Assign Even Though the Beneficiary’s Creditors are Prohibited From Reaching Trust? The drafting committee concluded that it was undesirable as a matter of policy for a beneficiary to be able to transfer the beneficiary’s interest while at the same time denying the beneficiary’s creditors the right to reach the trust in payment of their claims. The rule is the opposite in some states, that is, a settlor may allow a beneficiary to assign while at the same time erecting a spendthrift shield against the claims of the beneficiary’s creditors. 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 settlor a power of appointment.

c. The Alimony/Child Support Exception. The issue ultimately comes down to the question of the extent to which public policy concerns ought to override the settlor’s intent. Many estate planners argue that the settlor’s intent should be paramount, particularly with respect to claims of an ex-spouse. The Uniform Law Commissioners, however, have long had a priority for seeing that family support obligations are honored. Support for honoring child support obligations is higher among both Commissioners and estate planners than is support for an alimony exception. The same split exists in the states. More states recognize an exception to spendthrift protection for child support claims than recognize an exception for alimony claimants.

9. Modifications in Enacting Jurisdictions. Several states have eliminated the alimony exception or made other changes, generally to conform to the state’s prior law.

I. Revocable Trusts (Article 6).
1. Summary. The revocable trust is the most common trust created today in the United States. This heavy use of the revocable trust is a recent phenomenon, beginning decades if not centuries after most traditional trust law was formulated. The provisions of the UTC on revocable trusts are among its most important and most innovative, dealing largely with issues unaddressed at common law. The UTC recognizes that on many issues the revocable trust should be treated as the functional equivalent of the will. Most of the relevant provisions on revocable trusts are contained in Article 6.

2. Presumption of Revocability. Section 602(a) of the UTC adopts the minority rule that a trust is revocable unless stated otherwise, an approach which prior to the UTC was the law in five states (California, Iowa, Montana, Oklahoma, Texas). Providing a presumption in the statute is most relevant for homegrown trusts. Professional drafters routinely state whether the trust is revocable or irrevocable. Because the Code’s presumption will in many jurisdictions reverse the present rule, Section 602(a) provides that the presumption of revocability is prospective only.

3. Capacity Standard. Reflecting the trend in the case law, Section 601 of the UTC provides that the standard for creating, amending, revoking, adding property to a revocable trust, or otherwise directing the actions of a trustee, is the same as that required for a will.

4. Rights While Settlor Competent. Section 603 provides that while the settlor has capacity, all of the rights of the beneficiaries are subject to the settlor’s exclusive control. Notices that would otherwise be given to the beneficiaries must instead be given to the settlor, and the settlor is authorized to give binding consents on a beneficiary’s behalf. Access to the trust document is also within the settlor’s control. Upon a settlor’s loss of capacity, however, the beneficiaries may exercise their rights as beneficiaries absent contrary intent in the terms of the trust. Concluding that there is a lack of consensus on the appropriate rule for beneficiary rights upon the settlor’s loss of capacity, the 2004 amendments bracket the language in 603(a) “and the settlor has capacity to revoke the trust,” thereby giving enacting jurisdictions the option to provide that a settlor’s exclusive control does not end upon loss of capacity.

5. Contest of Revocable Trust. Contest of a will is typically barred under one of two alternative statutes. Normally, a contest is barred following some period of time, such as four or six months, following notice of probate. 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. Most states currently have no limitation period on contest of a revocable trust. Section 604 of the UTC corrects this omission by providing that a potential contestant must file a contest within the earlier of 120 days following receipt of a notice or three years following the settlor’s death. These time limits have been placed in brackets, however. States are encouraged to substitute the periods under their comparable will contest statutes. In addition, to encourage expeditious distribution of trust assets, Section 604 absolves a trustee from liability for making distributions even before the contest period has expired as long as the trustee has not received notice of the contest. Liability in such cases is solely on the distributees.

6. Rules of Construction. The drafters agreed that the rules of construction for trusts should track those applicable to wills, but were fully aware that disagreements will arise when one gets down to specifics. Disagreements may arise as to which rules of will construction ought to be extended to trusts as well as with the specific content of those rules. Section 112 of the UTC provides that the rules of will construction apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property. However, the section is placed in brackets with the suggestion made in the comments that the enacting jurisdiction would be better served by enacting specific and detailed rules.

7. Creditor Claims. Section 505(a)(3) of the UTC clarifies that the assets of a revocable trust are liable for the claims of a settlor’s creditors to the extent the probate estate is insufficient. The UTC 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.

8. Policy Issues. Among the policy issues:

a. Presumption of Revocability. The presumption of revocability is a major change for most states. The question may be raised whether the benefits of the switch are sufficient to justify reversal of a long-ingrained rule. One alternative being discussed is to apply the presumption of revocability only to trusts in which the settlor has retained a beneficial interest. A trust in which the settlor has not retained a beneficial interest would be presumed to be irrevocable.
b. Settlor’s Rights While Incompetent. Reading Sections 105 and 603 together, upon a settlor’s incompetency, the settlor’s right to control the beneficiary’s rights ends and the beneficiaries have the right to know about the trust and exercise other beneficiary rights. The debate over this provision was spirited. 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 position was that upon the settlor’s incapacity the trust beneficiaries should only learn of the trust if no agent or conservator for the settlor has been appointed. But then the question was raised whether the rule should be different if the agent or conservator also was the trustee. A final approach emphasized the use of a trust as a lifetime management device. Those holding this view argued that disclosure of the trust upon the settlor’s incapacity should be required even despite a statement of contrary intent in the terms of the trust. The provision as finally drafted was a compromise. Settlors for whom confidentiality is important can so provide in the terms of the trust.

c. Contest of Revocable Trusts. There was a general consensus that adding a statute of limitations on contests was desirable. Debated was the exact period, with some preferring one or two years instead of the three-year period appearing in the final draft. Also debated was the question of notice. Section 603 as finally approved allows the trustee to shorten the contest period by giving an optional notice to potential contestants. In California, this notice is mandatory.

J. Trustee Removal (Section 706).

1. Traditional Grounds. Removal of a trustee traditionally has been based on a good cause standard, focusing primarily on misconduct or unfitness of the trustee. Section 706 of the UTC retains a standard based in part on misconduct of the trustee, allowing a trustee to be removed for such grounds as serious breach of trust, unfitness, and unwillingness or persistent failure to effectively perform the function. A trustee may also be removed due to lack of cooperation among cotrustees. 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 additionally requires a finding by the court that removal would best serve the interests of the beneficiaries. “Interests of the beneficiaries,” defined in Section 103,
means the beneficial interests provided in the terms of the trust.

2. Newer Grounds. In deciding whether to remove the trustee, Section 706(b) of the UTC authorizes the court also to consider whether a substantial change of circumstances has occurred or whether removal was unanimously requested by the qualified beneficiaries. In neither case, however, may the trustee be removed unless the court also concludes that:

a. removal of the trustee would best serve the interests of the beneficiaries;

b. removal of the trustee is not inconsistent with a material purpose of the trust; and

c. a suitable cotrustee or successor trustee is available.

3. Policy Issues. Trustees in many states may be removed only for breach of trust or other untoward act. This standard gives great weight to the settlor’s particular selection of trustee. Because trust instruments typically place weight on a trustee’s judgment and exercise of discretion, the particular trustee selected becomes an important term of the trust, a term which should not easily be changed. The Code changes the law on trustee removal in two respects. First, it allows removal for less serious but still ineffective performance, in particular the persistent failure to effectively administer the trust. Second, in situations where the link between the settlor and trustee has been broken, the emphasis turns to whether the particular trustee is appropriate to the trust, not whether the trustee has committed particular acts of misconduct. The trigger for this alternative test, described in 2. above, is substantial change of circumstances or request of the qualified beneficiaries.

During the drafting process, the American Banker’s Association Advisor strongly advocated for the traditional good cause standard. Concerns were expressed that a more liberal standard would encourage beneficiaries to petition for removal because of decisions that the beneficiaries simply did not like, such as a refusal to exercise discretion. Permeating much of the concern on the topic of trustee removal as well as other areas where the Code has made the law more flexible, is a concern that the courts will not properly apply the new standard, making the job of trustee more perilous and less attractive.

K. Mutual Fund Investment (Section 802(f)).

1. The Controversy. The common trust fund has in recent years been
disappearing from the portfolios of financial institution trustees, and is being replaced by proprietary and other forms of mutual funds. An advantage of mutual funds is that taxation of capital gains can be avoided upon the trust’s termination. Holdings of common trust funds, because they could not be held other than in trust, had to be liquidated. Mutual funds, on the other hand, can be distributed in kind. Despite this advantage, investment in proprietary mutual funds has caused considerable controversy and litigation, implicating the trustee’s duty of loyalty, the duty to invest with prudence, and the right to receive only reasonable compensation. Because financial institution trustees ordinarily provide advisory services to and receive compensation from the very proprietary funds which they created, the contention is made that investing the assets of individual trusts in proprietary mutual funds is not necessarily prudent but is made primarily to generate additional fee income. In addition, because the financial institution trustee often will also charge its regular fee for administering the trust, the contention is made that the financial institution trustee’s total compensation, both direct and indirect, is excessive.

2. The Code’s Approach. Despite these concerns, nearly all states have passed statutes authorizing financial institution trustees to invest in mutual funds, even if the investment will generate additional fees for the trustee. Recognizing this political reality, Section 802(f) of the UTC does not prohibit investment in mutual funds from which the trustee derives additional fee income but provides instead that such investments, while not automatically self-dealing, are subject to all other fiduciary responsibilities. When investing in a fund from which the trustee, or its affiliate, receives fees for providing services other than as trustee, the trustee must not place its interests over those of the beneficiaries and the investment must otherwise comply with the enacting jurisdiction’s prudent investor rule. Furthermore, the trustee must disclose at least annually to the persons entitled to receive the trustee’s annual report the rate of extra compensation received for providing services to the fund and the method by which this compensation was determined.

3. Policy Issues. In addition to sponsoring mutual funds, financial institutions have expanded into other forms of affiliated businesses, including insurance and real estate brokerage. States considering enactment should anticipate efforts to extend the Code’s provision on mutual fund investment to other forms of affiliated businesses.

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

1. Philosophy. Section 813 of the UTC fills out and adds detail to the
trustee’s duty to keep the beneficiaries informed of administration. 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 as well as several specific notice requirements.

2. Specific Notice Requirements. A trustee is required to notify the qualified beneficiaries of the trustee’s acceptance of office and of any change in the method or rate of the trustee’s compensation (Section 813(b)). Regular reporting by the trustee is required. 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 (Section 813(c)). The trustee must also promptly respond to any beneficiary’s request for information, unless unreasonable under the circumstances (Section 813(a)). This includes a requirement that the trustee provide a beneficiary upon request with a copy of the trust instrument (Section 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.

3. The Waiver Issue. The most discussed issue in the drafting of the UTC and subsequent to its approval is the extent to which a settlor may waive the requirements of Section 813. Most of the specific notice requirements can be waived. This issue is addressed in Section 105(b)(8)-(9). Not waiveable is the requirement that the trustee inform qualified beneficiaries age 25 or older of the trust’s existence and of the right to request trustee’s reports. With respect to any beneficiary of an irrevocable trust regardless of age, the trustee also may not waive the trustee’s obligation to respond to a request for trustee’s report and other information reasonably related to the trust’s administration. 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.

4. Possible State Responses. While not yet enacted in any state, the ability of the settlor to waive the Code’s notice requirements has received considerable comment among state bar committees. One response has been to eliminate or lower the age limit in Section 105(b)(8) so that the obligation to inform the beneficiaries of the existence of the trust is applicable to all adult beneficiaries. Another approach is to allow a settlor to waive notice to remainder beneficiaries regardless of age. Yet another response is to allow a settlor to direct a trustee to keep silent about the
trust even in response to a specific request by a beneficiary.

The waiver issue brings into direct conflict the goal of carrying out 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. The extent to which a settlor may waive notices and other information requirements is not a new issue. Limitations on the ability to waive is found in case law and in the Restatement (Second) of Trust Law. Considering the issue in the form of a statute brings the issue into much sharper focus, however.

5. 2004 Amendments. Realizing that there is a lack of consensus on the issue, the Commissioners in 2004 amended Section 105(b)(8)-(9) by placing it in brackets, thereby making it an optional provision. Alternatively, the state may modify Section 105(b)(9) to make it applicable only to “qualified” beneficiaries. Rather than deleting the provision, however, states are encouraged to remain some requirement of notice, particularly for current beneficiaries. Allowing a trust to be kept totally secret makes the trustee less accountable and opens the possibility that the trust will be held invalid as illusory.

5. Policy Issues. The waiver issue is discussed immediately above. The other major issue discussed was the right of a beneficiary to demand a copy of the complete trust instrument if such right is not waived in the terms of the trust. Some states limit required disclosure to provisions material to the beneficiary’s interest. Such a limitation certainly promotes privacy for settlors for whom privacy is a desired goal. But who determines which provisions are relevant? The trustee or the beneficiaries? Perhaps the answer is to let the court determine in camera which provisions are relevant. But who should be responsible for bringing the petition - the trustee or the beneficiary?

6. Modifications in Enacting Jurisdictions. Several states have deleted both Sections 105(b)(8) and (b)(9) in their entirety, allowing a settlor to waive all reporting to the beneficiaries, even if a beneficiary makes a request. Other states make more modest changes such as allowing a settlor to waive notice to remaindermen.

M. Retroactivity (Section 1106).

1. Summary of Provision. Section 1106 provides that the Code generally applies to trusts created prior to its effective date. With respect to a judicial proceeding concerning a trust, the UTC applies unless the court determines that the Code provision would substantially interfere with
effective control of the judicial proceedings or interfere with the rights of
the parties. Rules of construction in the UTC, which are far fewer than in
a typical probate code, apply to trust instruments executed prior to the
Code’s effective date unless there is a clear indication of a contrary intent
in the terms of the trust. The Code’s provisions are subject to
constitutional limitation. The Code cannot be applied retroactively to
divest accrued property rights.

The 2004 amendments include an amendment clarifying that the duty to
notify beneficiaries under 813(b)(2) and (3) is prospective only. Because
both provisions trigger required notices 60 days following a trustee’s
acceptance or the date a trust becomes irrevocable, applying these
provisions to preexisting trusts would have been impractical.

2. Policy Issues. To avoid problems of transition, an enacting jurisdiction
might be tempted to apply the Code only to trusts executed after its
effective date. But this would mean that two systems of law would apply
for generations or even centuries until all trusts in existence at the
effective date are extinguished. A better alternative would be to make
prospective only selected provisions over which the enacting jurisdiction
has particular concerns, for example, the provisions relating to reporting to
beneficiaries. Experience in the states enacting the Uniform Probate
Code, however, indicate that full retroactivity may be the preferred
approach. While questions do arise about application to preexisting
documents, once the transition period is over, practitioners much prefer
having to keep track of only one set of rules.

3. Modifications in Enacting Jurisdictions. Wyoming generally provides that
the Code is prospective only, applicable only to trusts created after the
effective date. But the Code does apply to a preexisting trust to the extent
that: (1) the settlor, if living, and all qualified beneficiaries consent, or
(2) the court determines that the interests of a nonconsenting qualified
beneficiary will be adequately protected.

The other states make the Code retroactive, but Missouri makes its
nonuniform provision on trust termination and modification prospective
only.

VII. THE LIMITS OF LEGISLATION

This paper has reviewed the organization of the UTC and the significant policy
issues that enacting states have encountered through state bar study groups and
the legislative process. The drafters desire and hope that the Code will be enacted
in all fifty states, but recognize that some enactments will be more uniform than
others. Even with changes made by states to the above sections of the UTC, the result, for the first time, is a substantially uniform approach to trust law in the United States.

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 a model for trust statutes for decades to come.
Creditors’ Rights under the Uniform Trust Code

Alan Newman
The University of Akron School of Law
Akron, Ohio

TABLE OF CONTENTS

I. INTRODUCTION 1

II. SPENDTHrift: PROTECTION AND EXCEPTIONS 1

A. What is the effect of a valid spendthrift provision? 1
B. What constitutes a valid spendthrift provision? 3
C. What creditor’s claims are not barred by a spendthrift provision? 3
D. Is the exception for claims of a child, spouse, or former spouse consistent with common law? 3
E. What kind of creditor might assert a claim against a spendthrift trust under the exception for the claim of a judgment creditor who has provided services for the protection of a beneficiary’s interest in the trust? 4
F. Does the exception for claims of the state or the United States allow the list of exception creditors to be expanded? 4
G. Are claims of those have provided necessities (e.g., support) to the beneficiary barred by a spendthrift provision? 4
H. May a tort claimant reach a beneficiary’s interest in a spendthrift trust? 5
I. What rights does an exception creditor have? 5
J. May a trustee withhold distributions from a beneficiary of a spendthrift trust to prevent the beneficiary’s creditor from reaching them in the hands of the beneficiary? 6
K. Is spendthrift protection affected by whether the trust would, at common law, be characterized as a discretionary trust, a support trust, or a hybrid of the two? 7

III. IN THE ABSENCE OF A SPENDTHrift PROVISION 8

A. Is §501 applicable only to trusts that do not include spendthrift provisions? 8
B. If the instrument does not include a spendthrift provision, what rights does a creditor of a trust beneficiary have? 8

© 2005 University of Miami School of Law. This outline was prepared for the 39th Annual Heckerling Institute on Estate Planning sponsored by the University of Miami School of Law. It is reprinted with the permission of the Heckerling Institute and the University of Miami. All rights reserved.
C. If the instrument does not include a spendthrift provision and a claim is properly asserted under UTC §501, would the beneficiary be able to benefit from the trust before the creditor is paid in full?

D. Do the creditor’s rights, in the absence of a spendthrift provision, depend on whether the beneficiary has a right to receive mandatory distributions or whether distributions are at the trustee’s discretion?

E. If the terms of the trust do not include a spendthrift provision, would a creditor be able to force a judicial sale of the beneficiary’s interest?

IV. THE [IN]ABILITY OF CREDITORS TO COMPEL DISCRETIONARY DISTRIBUTIONS THEY CAN REACH

A. May a creditor of a beneficiary force the trustee to make discretionary distributions the creditor can reach?

B. Is there an exception to the general rule (i.e., are there any creditors who can compel discretionary distributions they can reach)?

V. CREDITORS’ CLAIMS AGAINST A BENEFICIARY/SETTLOR

A. May the creditors of a settlor of a revocable trust reach the trust assets during the settlor’s lifetime?

B. May the creditors of a settlor of a revocable trust reach the trust assets after the settlor’s death?

C. May the creditors of a settlor of an irrevocable trust reach the settlor’s beneficial interest in the trust?

VI. DISCRETIONARY VERSUS SUPPORT TRUSTS

A. Does the UTC eliminate the distinction between discretionary and support trusts?

B. To the extent it has done so, why has the UTC eliminated the distinction between discretionary and support trusts?

C. Does the UTC’s elimination of the distinction between discretionary and support trusts expand the rights of beneficiaries’ creditors and thus harm asset protection planning with trusts?

VII. BENEFICIARY’S ABILITY TO COMPEL DISCRETIONARY DISTRIBUTIONS

A. Does the UTC increase the ability of the beneficiary of a discretionary trust to compel distributions? If so, does that increase the ability of creditors of the beneficiary to reach the beneficiary’s interest?

B. What effect does UTC §814(a) have on the two questions in A, above?
C. If the beneficiary has an enforceable right to compel distributions, may the beneficiary’s creditor reach the beneficiary’s interest? 19

VIII. THE UTC, SUPPLEMENTAL NEEDS TRUSTS, AND MEDICAID QUALIFICATION 21
   A. Will the UTC affect the ability of beneficiaries of SNTs to qualify for public benefits? 21
   B. If a state enacts a statute making it a spendthrift exception creditor, would a beneficiary of an SNT who also is receiving Medicaid benefits be able to continue receiving benefits from the SNT? 22
   C. Does UTC §410(a) pose risks to SNTs? 22
   D. Is the comment to UTC §501 problematic with respect to SNTs? 22

IX. BANKRUPTCY AND THE UTC 23
   A. Under the UTC, may the creditors of a beneficiary of a spendthrift trust reach the beneficiary’s interest in the trust through a bankruptcy proceeding? 23
   B. If the terms of the trust do not include a spendthrift provision, would a bankrupt beneficiary’s interest in trust become part of the bankruptcy estate? 23

X. DIVORCE LAW AND THE UTC 24
   A. Will the UTC affect whether a beneficiary’s trust interest will be divisible on divorce? 24
   B. May a beneficiary’s interest in a discretionary trust be taken into consideration by a divorce court in making an alimony or child support award? 26

Appendix A 27
Creditors’ Rights under the Uniform Trust Code

Alan Newman
The University of Akron School of Law
Akron, Ohio

I. INTRODUCTION. Among the provisions of the Uniform Trust Code (“UTC” or the “Code”) that have attracted the most attention are those of Article 5: Creditor’s Claims; Spendthrift and Discretionary Trusts, a copy of which is attached as Appendix A. Although much of the UTC is a codification of the common law of trusts, there are many differences among the states in their handling of creditors’ rights issues, and many jurisdictions have no law on some of those issues. As a result, there is no well accepted, established common law on some of the issues addressed by Article 5. Further, while the UTC’s approach to many creditors’ rights issues is consistent with the common law in many states, in other respects the UTC’s approach is innovative and differs from existing law in many states. In some ways, the UTC’s approach enhances the asset protection planning traditionally afforded by trusts, while at least in the context of the rights of the child, spouse, or former spouse of a beneficiary of a discretionary trust, the UTC enhances creditors’ rights. These materials address creditors’ rights issues under the UTC in a question and answer format. As they demonstrate, much of the criticism the UTC has received over this subject appears to be a result of misunderstandings of its provisions. Finally, while much of that criticism appears to be undeserved, these materials suggest that the National Conference of Commissioners on Uniform State Laws (NCCUSL) consider making several revisions to the Code or its comments to, among other things, make it clearer that the Code will not have the adverse effects on the protections trusts have traditionally provided that its critics predict.

II. SPENDTHRIFT: PROTECTION AND EXCEPTIONS. UTC §§502 and 503, which address spendthrift provisions and the exceptions to the protection they provide, are the best places to start to understand the UTC’s creditors’ rights provisions.

A. What is the effect of a valid spendthrift provision? Under UTC §502(c), “except as otherwise provided in this [article], a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.” Thus, if the trust terms include a valid spendthrift provision, neither the beneficiary’s interest, nor the assets of the trust, may be reached by most creditors of the beneficiary (unless and until trust assets are distributed to the beneficiary and then reached by the creditor in the beneficiary’s hands).

1. May the trustee make protected distributions from a spendthrift trust to third parties for the beneficiary’s benefit? While the UTC does not
explicitly address this question, presumably the answer is yes. Trust instruments commonly authorize the trustee to make distributions to third parties for the benefit of the beneficiary, as well as directly to the beneficiary. UTC §502(c) prohibits a beneficiary’s creditor from reaching a distribution “before its receipt by the beneficiary.” Because a distribution for the benefit of a beneficiary that is made to a third party would never be received by the beneficiary, the beneficiary’s creditor presumably would be unable to reach it. Thus, for example, it appears that “distributions” from a spendthrift trust in the form of payments to certain creditors of the beneficiary (e.g., a credit card company or the lessor of an automobile to the beneficiary) would not be reachable by most creditors of the beneficiary. (Note that UTC §503(b) contemplates distributions for the benefit of the beneficiary, instead of directly to the beneficiary, by providing that in specified circumstances, discussed in II.C, below, the claim of a beneficiary’s child, spouse, or former spouse is not barred by a spendthrift provision and may reach distributions “to or for the benefit of the beneficiary.”) Finally, while UTC §501 provides that a beneficiary’s creditors may attach distributions “to or for the benefit of the beneficiary,” it explicitly applies only “[t]o the extent a beneficiary’s interest is not protected by a spendthrift provision.”

a. **What if the instrument does not expressly authorize the trustee to make distributions for the benefit of the beneficiary?** They probably are nevertheless allowable. In such a case, presumably the beneficiary would have acquiesced in the indirect distributions (see UTC §1009 on the effect of a beneficiary’s consent, release, or ratification of trustee conduct that otherwise would constitute a breach), and most creditors of a beneficiary of a spendthrift trust have no claim against the trustee, the trust assets, or the beneficiary’s interest in the trust. The Restatement (Third) contemplates that such distributions may be made by the trustee, although not in the context of creditor avoidance. See comment c to § 49 (“[a] trustee who improperly applies or distributes income in good faith for the support, care, or other needs of the beneficiary (whether or not under a legal disability) is entitled to credit in the trust accounts to the extent the beneficiary would otherwise be unjustly enriched.”). Note, however, that the UTC’s explicit authorization of a trustee to make distributions for the benefit of a beneficiary, instead of directly to the beneficiary, applies only “to a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated . . . .” UTC § 816(21).

2. **Are there limits on the size of a trust that may be protected by a spendthrift provision, or on the amount of distributions that may be made to or for the benefit of a beneficiary of a spendthrift trust?** No. Unlike the law in some states, the UTC does not limit the amount of protected distributions that may be made from a spendthrift trust to or for
the benefit of its beneficiary (e.g., to amounts necessary to provide for the beneficiary’s support), and spendthrift protection is not limited by the size of the trust. See UTC §502.

B. **What constitutes a valid spendthrift provision?** A spendthrift provision is valid under the UTC “only if it restrains both voluntary and involuntary transfer of a beneficiary’s interest.” UTC §502(a). Thus, a settlor may not provide spendthrift protection from the beneficiary’s creditors, while authorizing the beneficiary to voluntarily transfer his or her interest. If the beneficiary may sell, encumber, or otherwise transfer his or her interest, his or her creditors may reach it. The UTC does not address the question of whether a trust provision allowing the beneficiary to voluntarily transfer his or her interest, but only with the consent of a third party, sufficiently restrains the transfer to make the spendthrift provision valid.

1. **Must the instrument expressly restrain the voluntary and involuntary transfer of the beneficiary’s interest for the trust to receive spendthrift protection?** No magic words are required, but if the instrument is silent on the alienability of the beneficiary’s interest, the trust will not be a spendthrift trust. Rather, the intent that transfers of the beneficiary’s interest are restrained must be expressed in the instrument. UTC §§501 and 502. It is not necessary, however, to explicitly state that voluntary and involuntary transfers of the beneficiary’s interest are prohibited. Rather, for example, simply providing that the beneficiary’s interest is held subject to a “spendthrift trust” is sufficient. UTC §502(b).

C. **What creditors’ claims are not barred by a spendthrift provision?** UTC §503 lists three creditors (“exception creditors”) who may reach a beneficiary’s interest in a spendthrift trust:

1. The beneficiary’s child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance. §503(b).

2. A judgment creditor who has provided services for the protection of a beneficiary’s interest in the trust. §503(b).

3. The state or the United States to the extent a statute of the state or federal law so provides. §503(c).

D. **Is the exception for claims of a child, spouse, or former spouse consistent with common law?** Yes. See, e.g., Restatement (Second), §157(a). As the comment to §503 notes, this exception has been codified in numerous state statutes and “[i]t is also consistent with federal bankruptcy law, which exempts such support orders from discharge.”
E. **What kind of creditor might assert a claim against a spendthrift trust under the exception for the claim of a judgment creditor who has provided services for the protection of a beneficiary’s interest in the trust?** An attorney. The comment to §503 notes: “This exception allows a beneficiary of modest means to overcome an obstacle preventing the beneficiary’s obtaining services essential to the protection or enforcement of the beneficiary’s rights under the trust.”

1. **Is this exception consistent with common law?** While it is consistent with the Restatements (see, e.g., §157(c) of Restatement (Second)), there is little case law on it.

2. **Would this exception apply to another exception creditor of a beneficiary (e.g., a child support or alimony claimant) who successfully asserts a claim against the beneficiary’s interest in a spendthrift trust?** It should not. By its terms, this exception is for “a judgment creditor who has provided services for the protection of a beneficiary’s interest in the trust.” Note, though, that under UTC §1004, “[i]n a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonably attorney’s fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.” The comment in §1004 provides that it “codifies the court’s historic authority to award costs and fees, including reasonable attorney’s fees, in judicial proceedings grounded in equity.”

F. **Does the exception for claims of the state or the United States allow the list of exception creditors to be expanded?** If existing or new federal law allows the United States to reach the interests of beneficiaries in spendthrift trusts (e.g., to satisfy a beneficiary’s income tax obligations), it will preempt a state’s version of the UTC (or any other state law). A state always has the prerogative of enacting new legislation, including legislation with respect to the enforceability of a spendthrift provision against a claim of the state, regardless of whether it has enacted the UTC.

G. **Are claims of those who have provided necessities (e.g., support) to the beneficiary barred by a spendthrift provision?** Yes. Unlike under the Restatement (Third) (see §59(b)) and the Restatement (Second) (see §157(b)), the UTC provides that a spendthrift provision will bar the claims of those who provided necessities to the beneficiary. See UTC §§502 and 503.

1. **Does that mean that a public benefits provider’s reimbursement claim against a trust of which the recipient is a beneficiary would be barred by a spendthrift provision?** Yes. While a state’s reimbursement claim with respect to Medicaid benefits should be a part of its estate recovery program that will not arise until after the beneficiary’s death, reimbursement claims for other state provided public benefits should be barred by a spendthrift
provision. The UTC does not include a necessities provider’s spendthrift exception to avoid making law that would give the state a right to reimbursement from spendthrift trusts. See David M. English, Is There a Uniform Trust Act in Your Future?, Prob. & Prop. Jan.-Feb. 2000, at 25, 31. If, however, there is another state statute that gives the state such a right, the UTC will not affect the state’s right to reimbursement from the trust under that other statute. UTC §503(c).

H. May a tort claimant reach a beneficiary’s interest in a spendthrift trust?

No. In another departure from the Restatement (Third) (see comment a to §59) and the Restatement (Second) (see comment a to §157), the UTC bars a tort claimant from reaching the interest of a beneficiary/tortfeasor in a spendthrift trust, regardless of the nature of the beneficiary’s conduct that gave rise to the tort claim. Under UTC §502(c), creditors may not reach a beneficiary’s interest in a spendthrift trust, “except as otherwise provided in this [article],” and there is no provision in Article 5 for a tort claimant exception (or for the court to recognize additional spendthrift exceptions on policy grounds). (Further, the comment to §503 specifically notes that the UTC drafters “declined to create an exception for tort claimants.”) Rather, the list of spendthrift exceptions in §503 is expressly made exclusive by §502(c).

I. What rights does an exception creditor have? Clarification is needed in the Code or its comments on this question. Section 503(b) provides that a child, spouse, or former spouse with a judgment or court order for support, and a creditor who has provided services for the protection of a beneficiary’s interest in the trust, “may obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary.” Section 503(c), however, which provides that spendthrift provisions are not enforceable against a claim of the state or the United States to the extent a statute of the state or federal law so provides, does not address the rights the government would have to reach trust assets if there is such a state statute or federal law. Broader creditors’ remedies are provided by UTC §501, discussed in III, below: it allows creditors “to reach the beneficiary’s interest by attachment of present or future distributions to or for the benefit of the beneficiary.” Section 503(c), however, which provides that spendthrift provisions are not enforceable against a claim of the state or the United States to the extent a statute of the state or federal law so provides, does not address the rights the government would have to reach trust assets if there is such a state statute or federal law. Broader creditors’ remedies are provided by UTC §501, discussed in III, below: it allows creditors “to reach the beneficiary’s interest by attachment of present or future distributions to or for the benefit of the beneficiary.” Section 501 applies “to the extent a beneficiary’s interest is not protected by a spendthrift provision.” The question raised is whether §501 applies only to creditors of beneficiaries of trusts that do not include spendthrift provisions, or also to exception creditors of beneficiaries of trusts that do include spendthrift provisions. While the language in §501 with respect to its applicability – “[t]o the extent a beneficiary’s interest is not protected by a spendthrift provision” – would seem to apply to exception creditors (because, with respect to their claims, the beneficiary’s interest is not protected by a spendthrift provision), the fact that §503(b) specifically provides more limited rights to two of the three classes of exception creditors than does §501 indicates that §501 is not applicable to them. Note also that the comment to §501 refers to it being applicable “[a]bsent a valid spendthrift provision,” and the term “spendthrift provision” is defined in §103(16) to refer to a term of a
trust. Thus, it appears that the rights of an exception creditor of a trust that includes a spendthrift provision are not addressed by §501. If that is correct, however, the Code does not specify the rights of the state or the United States, if a state statute or federal law makes their claims not barred by a spendthrift provision. If the state statute or federal law provided for their rights, it would govern. See, for example, the discussion of United States v. Cohn, 855 F. Supp. 572 (D. Conn. 1994) in VI.C.1.c, below. If not, their rights would be determined under the common law of trusts and principles of equity. UTC §106. Whether those rights would include the ability to attach discretionary distributions is not clear. See III.D.2.a, below.

1. **Would an exception creditor be able to attach discretionary as well as mandatory distributions?** As discussed in the immediately preceding paragraph, the rights of the state or federal government as an exception creditor under the UTC are not clear. The other two classes of exception creditors – listed in §503(b) – would be able to attach discretionary distributions. The comment to §503 expressly so provides.

2. **Is allowing an exception creditor to attach discretionary distributions a change in the common law?** In some states, yes; in others, no; in others, there likely is no law on this issue. See III.D.2.a, below.

J. **May a trustee withhold distributions from a beneficiary of a spendthrift trust to prevent the beneficiary’s creditor from reaching them in the hands of the beneficiary?** Discretionary distributions may be withheld. (See the discussion in IV, below, on the inability of most creditors of a beneficiary to compel discretionary distributions.) As discussed in II.A.1, above, distributions presumably may be made from spendthrift trusts to third parties for the beneficiary’s benefit to prevent creditors from reaching them. If a “mandatory” distribution (whether of income or principal, including a terminating distribution), however, is not made “within a reasonable time after the designated distribution date,” the creditor may reach it. UTC §506.

1. **What is a “mandatory distribution”?** The UTC does not define “mandatory distribution.” The comment to UTC §506 refers to such distributions as ones that are “required to be made by the express terms of the trust.” Thus, if the trust terms require current distributions of all income, or a unitrust amount, or all or part of the principal at specified times, those amounts clearly would constitute mandatory distributions. In light of UTC §504(b) (discussed in IV, below), which prohibits most creditors from compelling discretionary distributions without regard to whether the trust terms include a support or other standard, “mandatory distributions” should not include discretionary distributions, regardless of whether one or more standards (e.g., support) are provided to guide the trustee in the exercise of its discretion. Section 504(b), however, by its express terms applies to “a distribution that is subject to the trustee’s discretion…” As a result, trust
terms such as: “The trustee shall make distributions of income and/or principal to or for the benefit of the beneficiary to provide for his or her health, education, support, or maintenance” arguably could be construed as describing “mandatory distributions” within the meaning of §506 that are not covered by §504(b). As noted by the comment to §504, however, it “eliminates the distinction between discretionary and support trusts, unifying the rules for all trusts fitting within either of the former categories.” Thus, it would appear that such an argument would be unsuccessful, that §504(b) would apply to trusts that require distributions for the beneficiary’s support, and that such distributions would not be “mandatory distributions” within the meaning of §506. That is not clear, however. If instead required distributions for support are “mandatory distributions,” a creditor of the beneficiary would be able to reach them, but only if the trustee did not make them within a reasonable time of the dates they should have been made. To eliminate this uncertainty, NCCUSL may want to consider amending the Code to include a definition of “mandatory distribution.” See also IV.A.1, below.

2. **What is a “reasonable time” for the trustee to make a mandatory distribution?** The UTC does not address this question.

3. **May a creditor of a beneficiary reach discretionary distributions the trustee could, in the exercise of its discretion, make to or for the benefit of the beneficiary by arguing that the beneficiary could compel the distribution, and thus that the distribution is a mandatory one that is subject to the creditor’s claim if not made within a reasonable time?**

   Highly unlikely. Such an argument would be to compel a discretionary distribution the creditor could reach. UTC §504(b), discussed in IV, below, expressly prohibits most creditors from doing so.

K. **Is spendthrift protection affected by whether the trust would, at common law, be characterized as a discretionary trust, a support trust, or a hybrid of the two?** No. If the terms of the trust include a valid spendthrift provision, and the creditor is not an exception creditor under UTC §503, spendthrift protection is not affected by whether the trust is (i) purely discretionary (e.g., “the trustee, in its sole discretion, may make distributions of income or principal to or for the benefit of the beneficiary”), (ii) mandatory for the beneficiary’s support (e.g., “the trustee shall make distributions of trust income, principal, or both to provide for the beneficiary’s support”), or (iii) a hybrid of the two (e.g., “the trustee may, in its sole discretion, make distributions to provide for the beneficiary’s support”). The traditional distinction between a discretionary and a support trust is irrelevant with respect to spendthrift protection.
III. IN THE ABSENCE OF A SPENDTHRIFT PROVISION. The rights of creditors of trust beneficiaries if the instrument does not include a spendthrift provision are addressed in UTC §501.

A. Is §501 applicable only to trusts that do not include spendthrift provisions? Section 501 applies “[t]o the extent a beneficiary’s interest is not protected by a spendthrift provision.” While that language would seem to make §501 applicable to the claims of exception creditors of beneficiaries of trusts that include spendthrift provisions (because, with respect to their claims, “the beneficiary’s interest is not protected by a spendthrift provision”), the rights of two of the three classes of exception creditors are specifically set forth in the exception creditor statute (§503(b)), and the comment to §501 indicates that it applies to trusts that do not include spendthrift provisions. Thus, as discussed in II.I, above, it appears that §501 is applicable only to trusts that do not include spendthrift provisions.

B. If the instrument does not include a spendthrift provision, what rights does a creditor of a trust beneficiary have? In such a case, “the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary’s interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means.” UTC §501.

C. If the instrument does not include a spendthrift provision and a claim is properly asserted under UTC §501, would the beneficiary be able to benefit from the trust before the creditor is paid in full? Perhaps. This is one of the innovations of the UTC. Under §501, “[t]he court may limit the [creditor’s] award to such relief as is appropriate under the circumstances.” The comment to §501 explains: “In exercising its discretion to limit relief, the court may appropriately consider the support needs of a beneficiary and the beneficiary’s family.” For a discussion of this comment in the context of supplemental needs trusts, see VIII.D, below.

D. Do the creditor’s rights, in the absence of a spendthrift provision, depend on whether the beneficiary has a right to receive mandatory distributions or whether distributions are at the trustee’s discretion? Yes.

1. What if the beneficiary’s right is mandatory? If the beneficiary is entitled to receive mandatory distributions, or to have them made for his or her benefit (e.g., all income, a unitrust amount, or one-third of the trust assets upon reaching age 25), the creditor may attach those distribution rights. In such a case, the trustee must pay the creditor instead of the beneficiary part or all (see III.C, above) of the amount distributable to or for the benefit of the beneficiary.

2. What if distributions may be made at the trustee’s discretion? If the trustee is authorized to make discretionary distributions to or for the benefit
of the beneficiary, most creditors of the beneficiary may not compel the trustee to exercise its discretion to make distributions they can reach (see IV, below). If, however, the trustee decides to make a discretionary distribution to or for the benefit of the beneficiary (and the terms of the trust do not include a spendthrift provision), part or all (see III.C, above) of the distribution must be paid to the creditor.

a. **Is the ability of a creditor to attach future discretionary distributions (in the absence of a spendthrift provision) a change from the common law?** According to the Reporter’s Notes to comments b and c to §60 of the Restatement (Third), existing law in a number of states allows creditors of discretionary trust beneficiaries to attach distributions the trustee chooses to make in the exercise of its discretion. (See also Restatement (Second) §155(2), under which a trustee of a discretionary trust who has notice of a creditor’s claim and who makes a discretionary distribution to the beneficiary is liable to the creditor for the amount of the distribution.) There also are states in which the creditor may not do so (see, e.g., Shelley v. Shelley, 354 P.2d 282, 289 (Or. 1960)), and there likely are states in which this issue has not been addressed. (This is an example of the kind of issue addressed by the UTC as to which there is not well defined common law.)

E. **If the terms of the trust do not include a spendthrift provision, would a creditor be able to force a judicial sale of the beneficiary’s interest?** Maybe. Creditors’ remedies under UTC §501 are not automatic. Rather, UTC §501 provides that “the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary’s interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means … (emphasis added).” The comment to UTC §501 states that “[t]he creditor may also, in theory, force a judicial sale of a beneficiary’s interest.” The remedy that a court would authorize in a given situation likely would depend on the circumstances.

1. **What would guide a court in deciding whether to order a judicial sale of a beneficiary’s interest?** While the UTC does not address this question directly, UTC §106 provides that: “The common law of trusts and principles of equity supplement this [Code], except to the extent modified by this [Code] or another statute of this State.” Thus, if an enacting state had case law on this subject, a court presumably would follow it. A court might also look to the Restatements. Under Restatement (Third), §60, comment c, a beneficiary’s discretionary trust interest is not subject to execution sale. Under Restatement (Second), §162: “If the interest of the beneficiary of a trust is so indefinite or contingent that it cannot be sold with fairness to both the creditors and the beneficiary, it cannot be reached by his creditors.”
IV. THE [IN]ABILITY OF CREDITORS TO COMPEL DISCRETIONARY DISTRIBUTIONS THEY CAN REACH. This subject is addressed in UTC §504, which applies regardless of whether the trust instrument includes a valid spendthrift provision.

A. **May a creditor of a beneficiary force the trustee to make discretionary distributions the creditor can reach?** Generally, no. In another departure from the Restatement (Third) ( see comment e to §60), UTC §504(b) provides the general rule: “[W]hether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee’s discretion, even if: (1) the discretion is expressed in the form of a standard of distribution; or (2) the trustee has abused the discretion.”

1. **What if the trust terms require the trustee to make distributions for the beneficiary’s support?** Section 504(b) prohibits most creditors from compelling a distribution “that is subject to the trustee’s discretion.” If the terms of the trust require distributions for support (e.g., “the trustee shall make distributions of income and principal for the beneficiary’s support”), an argument can be made that the prohibition of §504(b) is not applicable. Rather, the required support distributions arguably would be “mandatory distributions” that creditors could reach under §501, if the instrument did not include a spendthrift provision, or under §506, if the instrument included a spendthrift provision, but the distributions were not made within a reasonable time of when they were required to be made. See II.J, above. Such an argument, however, should fail because the basis for the UTC’s elimination of the distinction between discretionary and support trusts is that support trusts are a form of discretionary trust. See VI, below. Nevertheless, as suggested in II.J.1, above, NCCUSL may want to clear this up in the Code or its comments.

2. **If the creditor’s claim is based on having provided support to the beneficiary, and the trust terms include a support standard for distributions, may the creditor compel distributions it can reach to reimburse it for the support it provided to the beneficiary?** No. UTC §504(b). In this regard, the UTC provides greater protection against creditors’ claims than does the law in some states. See, e.g., *Bureau of Support v. Kreitzer*, 243 N.E.2d 83 (Ohio 1968).

B. **Is there an exception to the general rule (i.e., are there any creditors who can compel discretionary distributions they can reach)?** Yes and yes. Under UTC §504(c)(1), “a distribution may be ordered by the court to satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary’s child, spouse, or former spouse.” (Note that because these creditors also are exception creditors with respect to spendthrift protection under UTC §503(b), they may compel distributions from discretionary spendthrift trusts.)
1. **Is such a creditor automatically entitled to compel distributions he or she can reach?** No. First, UTC §504(c)(1) does not require the court to order such a distribution; it authorizes the court to do so. Second, under UTC §504(c), such an order may be entered only “[t]o the extent a trustee has not complied with a standard of distribution or has abused a discretion.” Presumably, the burden will be on the creditor to establish the trustee’s failure to comply with a standard of distribution or abuse of a discretion.

2. **Would the court order the trustee to satisfy the entire amount of the unpaid child or spousal support or alimony?** In many cases, yes, but not necessarily. It would depend on the circumstances. Under UTC §504(c)(2), the court is to order payment to the child, spouse, or former spouse of “such amount as is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion.” According to the comment to UTC §504, however, “[b]efore fixing this amount, the court … should consider that in setting the respective support award, the family court has already considered the respective needs and assets of the family.”

3. **Under non-UTC trust law, may a beneficiary’s child, spouse, or former spouse, with a court order or judgment for support or maintenance, compel discretionary distributions they can reach?** According to the Reporter’s Notes to comment e to §60 of the Restatement (Third), there is some support, in the context of a trust for the support of the beneficiary, for this policy oriented rule of the UTC, but it likely would make new law in many jurisdictions, particularly as to trusts that do not include support standards for discretionary distributions. See Carolyn L. Dessin, *Feed a Trust and Starve a Child: The Effectiveness of Trust Protective Techniques Against Claims for Support and Alimony*, 10 Georgia State University Law Review 691 (1994); Annotation, *Trust Income or Assets as Subject to Claim Against Beneficiary for Alimony, Maintenance, or Child Support*, 91 ALR2d 262.

4. **Does the inability of creditors (other than a child, spouse, or former spouse with a judgment or court order for support or maintenance) to compel discretionary distributions affect the beneficiary’s ability to do so?** No. “This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.” UTC §504(d).

V. **Creditors’ Claims Against a Beneficiary/Settlor.** If a beneficiary also is a settlor of a trust, the rights of his or her creditors are governed by UTC §505.
A. May the creditors of a settlor of a revocable trust reach the trust assets during the settlor’s lifetime? Yes (regardless of whether the terms of the trust include a spendthrift provision). UTC §505(a)(1).

1. Is the holder of a power of withdrawal from a third-party created trust treated as the settlor of a revocable trust for creditors’ rights purposes? Yes, but only during the period the power may be exercised, and only to the extent of the property subject to the power. UTC §505(b)(1).

2. Does that mean that the creditor of a Crummey power holder may reach the property subject to the Crummey withdrawal right? Yes, but again, only during the period the power may be exercised. According to the comment to UTC §505, to reach the property subject to the withdrawal power, the creditor would have “to take action prior to the expiration of the [withdrawal] period.” The question of what action the creditor would have to take during the withdrawal period is not addressed.

3. If the power holder allows the power to lapse, or releases or waives it, will the power holder thereafter be treated as the settlor of a revocable trust as to a portion of the trust determined by reference to the amounts the power holder could have, but did not, withdraw? Not if the amount subject to withdrawal was limited to the greater of the annual exclusion amount under IRC §2503(b) (determined without regard to gift splitting) or the five or five amount under IRC §§2041(b)(2) or 2514(e). UTC §505(b)(2). With respect to any excess, such as would exist when a hanging power is used and is outstanding, the power holder will be treated as the settlor of a revocable trust for creditors’ rights purposes. UTC §505(b)(2).

4. May a beneficiary serve as a trustee of a third-party created trust (e.g., a surviving spouse as trustee of a credit shelter trust) without being treated as the settlor of the trust for creditors’ rights purposes? Under a 2004 amendment to the UTC, yes, so long as the beneficiary/trustee’s power to make distributions for his or her own benefit is limited by an ascertainable standard relating to his or her health, education, support, or maintenance. See UTC §§103(11) and 505(b)(1). The UTC’s treatment of this issue is another difference between it and the Restatement (Third) (see comment g to §60).

B. May the creditors of a settlor of a revocable trust reach the trust assets after the settlor’s death? Yes, as may creditors with respect to (i) costs of administration of the settlor’s estate, (ii) the expenses of the settlor’s funeral and disposal of remains, and (iii) statutory allowances to a surviving spouse and children. UTC §505(a)(3). These creditors’ rights, however, are subject to two limitations. First, the settlor may direct the source from which such liabilities will be paid. Second, the revocable trust assets are subject to those liabilities.
only to the extent the settlor’s probate estate is inadequate to satisfy them. UTC §505(a)(3).

C. **May the creditors of a settlor of an irrevocable trust reach the settlor’s beneficial interest in the trust?** Yes (regardless of whether the terms of the trust include a spendthrift provision). The UTC rejects the approach taken in recent years in a few states under which a settlor may retain a beneficial interest in a trust that is immune from claims of his or her creditors. Rather, following the traditional common law rule, UTC §505(a)(2) allows creditors of the settlor to “reach the maximum amount that can be distributed to or for the settlor’s benefit.”

VI. **DISCRETIONARY VERSUS SUPPORT TRUSTS.** The UTC’s creditors’ rights provisions in Article 5 do not distinguish between trusts that traditionally would have been characterized as “discretionary trusts” and those that traditionally would have been characterized as “support trusts.” This has been the source of much of its criticism.

A. **Does the UTC eliminate the distinction between discretionary and support trusts?** Yes and no. The formal distinction between the two is eliminated for creditors’ rights purposes. The comment to UTC §504 provides: “This section, similar to the Restatement, eliminates the distinction between discretionary and support trusts, unifying the rules for all trusts fitting within either of the former categories.” The UTC does not, however, change the traditional rules that govern the trustee’s exercise of discretion with respect to making distributions to or for the benefit of the beneficiary. (For a discussion of the issue of whether UTC §814(a) does so, see VII.B and X.A.1.c, below.) Under those rules, whether the trustee has a duty in a given situation to make a distribution depends on, among other factors, the extent of discretion the settlor granted the trustee and whether the terms of the trust include a support standard. See Restatement (Third) §50. Thus, the duties and rights of the trustee and the beneficiary with respect to distributions will continue to differ significantly if the trust is one that traditionally would have been characterized as a discretionary trust or one that traditionally would have been characterized as a support trust.

1. **Does the UTC treat a trust for the beneficiary’s support as a discretionary trust?** Yes. See UTC §504, under which most creditors may not compel discretionary distributions they can reach regardless of whether the terms of the trust include a support or other standard for distributions. The comment to §504 cites the Reporter’s Notes to comment a to §60 of the Restatement (Third), which provide that “[t]he so-called support trust is viewed here as a discretionary trust with a support standard.”
2. **Does the UTC treat a discretionary trust without a support standard as a trust for the beneficiary’s support?** No. Although UTC §504 (forbidding most creditors of the beneficiary from compelling discretionary distributions they can reach) and UTC §501 (providing creditors’ remedies when the terms of the trust do not include a spendthrift provision) do not distinguish between discretionary trusts with and without support standards, the UTC does not address the rights of beneficiaries, and the duties of trustees, with respect to distributions to be made from such trusts (except to the limited extent set forth in UTC §814(a), discussed in VII.B and X.A.1.c, below). Because the UTC does not address those subjects, they would be governed by common law and principles of equity. UTC §106. Thus, a beneficiary’s right, if any, to receive a distribution from a discretionary trust, with or without a support standard, should be determined under the same rules under the UTC as it would be without the UTC. Under those rules, discretionary trusts without support standards are not treated as trusts for the beneficiaries’ support. See Restatement (Third) §50.

B. **To the extent it has done so, why has the UTC eliminated the distinction between discretionary and support trusts?** The comment to UTC §504 cites the Reporter’s Notes to comment a to §60 of the Restatement (Third), under which support trusts are treated as discretionary trusts with a support standard. The traditional formal distinction between discretionary and support trusts is described as “arbitrary and artificial,” and rejected in part because so many trusts both give the trustee discretion and include a support standard. Note also that even trusts that mandate distributions for the beneficiary’s support, and do not allow distributions for other purposes or expressly provide the trustee with discretion, nevertheless will require the trustee to exercise some discretion in deciding how to provide for the beneficiary’s support. For these and other reasons, the Reporter’s Notes to comment a to §60 of the Restatement (Third) conclude “that there is a continuum of discretionary trusts, with the terms of distributive powers ranging from the most objective...of standards (pure ‘support’) to the most open ended (e.g., ‘happiness’) or vague (‘benefit’) of standards, or even with no standards manifested at all…”

C. **Does the UTC’s elimination of the distinction between discretionary and support trusts expand the rights of beneficiaries’ creditors and thus harm asset protection planning with trusts?** Generally, no, but in limited circumstances, yes.

1. **How does the elimination of the distinction not expand creditors’ rights?** The UTC provides substantial protection against the claims of creditors of beneficiaries of spendthrift trusts – and of trusts as to which the trustee may make discretionary distributions, with or without spendthrift provisions – regardless of whether the trust would have been classified as a discretionary trust or a support trust at common law.
a. **Spendthrift trusts.** For trusts that include valid spendthrift provisions (see II, above), most creditors may not reach the beneficiary’s interest, or distributions to or for the benefit of the beneficiary before their receipt by the beneficiary, regardless of whether the trust would have been a discretionary trust or a support trust at common law. UTC §502(c).

b. **Discretionary trusts.** For trusts that provide for distributions at the trustee’s discretion, including those with a support or other standard, most creditors may not compel distributions they may reach, regardless of whether the trustee has abused its discretion or failed to comply with a standard for distributions. UTC §504(b). That is the case regardless of whether the trust would have been a discretionary trust or a support trust at common law. In other words, §504(b) extends this creditor protection traditionally afforded to discretionary trusts to support trusts. Thus, in this regard the UTC enhances asset protection planning with trusts.

c. **How would a claim of the United States for unpaid income taxes against a beneficiary of a purely discretionary trust be affected, if at all, by enactment of the UTC?** The United States would be a spendthrift trust exception creditor. UTC §503; *First Northwestern Trust Co. v. Internal Revenue Service*, 622 F.2d 387, 390 (8th Cir.1980). Under federal law, the United States could attach future distributions from the trust. *United States v. Cohn*, 855 F. Supp. 572 (D. Conn. 1994). Thus, the uncertainty discussed in II.I, above, of whether, under the UTC, a government creditor can attach future discretionary distributions should have no effect on the federal government’s ability to do so. See also *United States v. O’Shaughnessy*, 517 N.W.2d 574 (Minn. 1994) (holding that a beneficiary’s interest in a purely discretionary trust is not “property” or “any right to property,” within the meaning of the federal tax lien statute, before the trustee has exercised its discretionary power of distribution under the trust agreement). In Internal Revenue Service Office of Chief Counsel Release 200036045, the Chief Counsel’s office opined that the federal tax lien would attach to a beneficiary’s interest in a discretionary support trust. In doing so, the memorandum states: “Where a trust gives the trustee uncontrolled, absolute discretion with respect to the distributions, if any, made to a beneficiary, the beneficiary has no basis to compel the trustee to make a distribution. Therefore, he does not have any interest which is subject to the federal tax lien.” However, presumably the IRS would agree with the holding of the court in *Cohn* that the lien would attach to distributions the trustee decides to make in the exercise of its discretion. See Richard W. Nenno, Delaware Asset Protection Trusts, in Chapter 14A of *ASSET PROTECTION: DOMESTIC AND*
2. How does the UTC’s elimination of the distinction between discretionary and support trusts expand creditors’ rights? If the instrument does not include a valid spendthrift provision, UTC §501 provides a beneficiary’s creditor with the right “to reach the beneficiary’s interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means.” Thus, unlike at common law, under the UTC, at least theoretically, a creditor could force a judicial sale of a beneficiary’s interest in a discretionary trust. See III.E., above. Further, in some states, under existing law a creditor may not attach distributions from a discretionary trust. See III.D.2.a, above.

a. Does the UTC’s allowing a beneficiary’s child, spouse, or former spouse with a judgment or court order for support or maintenance to reach the beneficiary’s interest in a discretionary trust change the law? Non-UTC law on the enforceability of such claims against discretionary trust interests is not well settled, varies among the states, and may depend, for example, on whether the trust is a pure discretionary trust or a discretionary support trust, whether the settlor expressed an intent to exclude the beneficiary’s family from benefiting from the trust, whether the claimant is a child or current spouse on the one hand or a former spouse asserting an alimony claim on the other, or whether there is an applicable statute in the jurisdiction. Thus, it is likely that the UTC’s provisions on different aspects of this question would codify the law in some jurisdictions, change it in others, and make law where there currently is none in others. See Carolyn L. Dessin, Feed a Trust and Starve a Child: The Effectiveness of Trust Protective Techniques Against Claims for Support and Alimony, 10 Georgia State University Law Review 691 (1994); Annotation, Trust Income or Assets as Subject to Claim Against Beneficiary for Alimony, Maintenance, or Child Support, 91 ALR2d 262.

VII. BENEFICIARY’S ABILITY TO COMPEL DISCRETIONARY DISTRIBUTIONS.

A. Does the UTC increase the ability of the beneficiary of a discretionary trust to compel distributions? If so, does that increase the ability of creditors of the beneficiary to reach the beneficiary’s interest? Three initial points. First, as discussed in IV.B.4, above, UTC §504(d) provides (arguably, unnecessarily) that UTC §504 (which, generally, prohibits a beneficiary’s creditors from compelling discretionary distributions) does not limit the beneficiary’s right to
maintain an action against the trustee for abuse of discretion or failure to comply with a standard of distribution. Section 504(d) does not grant the beneficiary a new right to compel distributions; it affirms that whatever rights a beneficiary already has to do so are not affected by the inability of his or her creditors to do so. Second, as discussed in IV.A, above, UTC §504(b) explicitly prohibits most creditors from compelling discretionary distributions they can reach. Thus, whatever rights a beneficiary has to compel discretionary distributions would have no effect on most creditors’ ability to do so. Third, if the terms of the trust include a valid spendthrift provision, most creditors may not reach the beneficiary’s interest, or the trust assets before their receipt by the beneficiary from a distribution by the trustee, regardless of the beneficiary’s rights to compel distributions. See II, above.

B. **What effect does UTC §814(a) have on the two questions in A, above?**

Section 814(a) provides:

“Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as ‘absolute,’ ‘sole,’ or ‘uncontrolled,’ the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.”

1. **At common law, could a settlor literally give the trustee unlimited discretion?** No. As stated in §187 of the Restatement (Second) of Trusts, comment k: “It is against public policy to permit the settlor to relieve the trustee of all accountability…It is true that the powers conferred upon the transferee of property may be so extensive as to indicate an intention not to create a trust but to give the beneficial interest in the property to the transferee…If, however, a trust is created, it is required by public policy that the trustee should be answerable to the courts, so far at least as the honesty of his conduct is concerned.” See also *Stix v. Commissioner*, 152 F.2d 562, 563 (2d Cir. 1945).

2. **Under non-UTC law, if the settlor purports to give the trustee unlimited discretion, what limits on that discretion are nevertheless imposed?** There is no single, universally accepted common law statement of the minimum standard of conduct required of the trustee, regardless of the breadth of discretion granted in the instrument. Rather, different language is used in cases, treatises, restatements, and commentators’ analyses to describe the standard the trustee will be held to regardless of the extent of discretion the settlor grants the trustee. The extent to which, if any, such different language reflects substantively different standards is not clear. For example, the same subsection (§187.2) of SCOTT ON TRUSTS describes the limits on the discretion of a trustee, who is relieved by the settlor of the otherwise applicable requirement to exercise its discretion reasonably, in different ways. First, it provides that the trustee may act
“beyond the bounds of a reasonable judgment, if he acts in good faith and does not act capriciously” (emphasis added).” Second, §187.2 also provides that if “by the terms of the trust [the trustee] is not required to act reasonably, the court will interfere where he acts dishonestly or in bad faith, or where he acts from an improper motive [footnotes omitted; emphasis added].” There is no mention of these standards being substantively different. Furthermore, Section 187 of the same treatise notes that the trustee’s discretion can be enlarged by the use of such terms as “absolute,” but that even then “the court will control his action where he acts in bad faith” (emphasis added). The real question is whether it appears that the trustee is acting in that state of mind in which it was contemplated by the settlor that he should act” (emphasis added).” (The immediately preceding quoted language from §187 is described in Practical Drafting’s analysis of the UTC (October 2003, page 7439) as “preserving the requirement of good faith [emphasis added].” As a final illustration, the Restatement (Third), in comment c to §50, provides that “[e]ven under the broadest grant of fiduciary discretion, a trustee must act honestly and in a state of mind contemplated by the settlor. Thus, the court will not permit the trustee to act in bad faith or for some purpose or motive other than to accomplish the purposes of the discretionary power (emphasis added).” (For further discussion of this subject, see X.A.1.c, below.)

3. **What is the significance of the language in UTC §814(a) that requires the trustee not only to act in good faith, but also to exercise its discretion “in accordance with the terms and purposes of the trust and the interests of the beneficiaries”?** First, note that “interests of the beneficiaries” is a defined term under the UTC. It does not mean whatever the beneficiaries or court determines to be in their best interests. Rather, it means “the beneficial interests provided in the terms of the trust.” UTC §103(8). Even so, the effect of this part of the UTC §814(a) codification of the minimum standard of conduct required of a trustee has raised the question of whether those words “create a stricter limit on the discretion that may be conferred upon a trustee than the common law test set forth in [§187 from Scott, quoted and discussed near the end of the immediately preceding paragraph]… It seems likely that courts will use them to do so in particular cases, yet their application to particular facts remains as hard to predict as that of the common law.” Practical Drafting, October 2003, p. 7440.

4. **Does UTC §814(a) impose a reasonableness requirement on the trustee’s exercise of discretion?** Section 814(a) does not expressly provide that a trustee’s exercise of discretion will be reviewed under a reasonableness standard. While it requires that the trustee act in good faith, there clearly is a difference between a trustee having to act in good faith and having to act in an objectively reasonable manner. Further, it is not likely that §814(a)’s requirement that the trustee act “in accordance with the terms and purposes of the trust and the interests of the beneficiaries,” discussed in
the immediately preceding paragraph, means that the trustee must act reasonably. The comment to UTC §814(a) does not expressly address the issue, but it cites §187 of Restatement (Second) and §50 of Restatement (Third), both of which dispense with the otherwise applicable obligation of the trustee to act reasonably if the settlor uses extended discretion language such as “absolute” or “uncontrolled.” (Note also that comment j to §187 of Restatement (Second) describes the trustee’s minimum standard of conduct in a similar fashion to UTC §814(a). It provides that when a trustee is relieved of the duty to act reasonably, the trustee nevertheless must act “in a state of mind in which it was contemplated by the settlor that he would act…Thus, the trustee will not be permitted to act dishonestly, or from some motive other than the accomplishment of the purposes of the trust, or ordinarily to act arbitrarily without an exercise of his judgment.”)

Accordingly, it is not likely that UTC §814(a) will be interpreted to impose a reasonableness standard on the exercise of discretion by a trustee of a trust the terms of which use extended discretion language. (Note, however, that, according to the Reporter’s Notes to comment c to §50 of the Restatement (Third), while many cases state that reasonableness is not required if extended discretion language is used, “[c]ases…are difficult to find in which an extended discretion relating to distribution of income or principal [has resulted in the approval of] what actually appears to be unreasonable conduct.”)

a. **May the settlor relieve the trustee of the requirement to act in accordance with the standard of UTC §814(a)?** By its express terms, UTC §814(a) applies “[n]otwithstanding the breadth of discretion granted to a trustee in the terms of the trust.” Under UTC §105(a), however, the Code applies unless the settlor provides otherwise in the terms of the trust, except that the settlor may not override the Code with respect to the fourteen matters listed in UTC §105(b). Under UTC §105(b)(2), the settlor may not override “the duty of a trustee to act in good faith and in accordance with the purposes of the trust.” From the literal language of UTC §§105(a) and 105(b)(2), it thus appears that the settlor may relieve the trustee of the otherwise applicable requirement of UTC §814(a) that the trustee act in accordance with “the terms of the trust” and “the interests of the beneficiaries.” That would be inconsistent with §814(a), however, and it would seem that the required minimum standard of conduct under §§814(a) and 105(b)(2) should be the same. NCCUSL may want to consider amending the Code to make them so.

C. **If the beneficiary has an enforceable right to compel distributions, may the beneficiary’s creditor reach the beneficiary’s interest?** No. Again, UTC §504(b) expressly prohibits creditors of the beneficiary (other than a child, spouse, or former spouse with a judgment or court order for support or maintenance, when there has been an abuse of discretion or a failure to comply
with a standard of distribution) from compelling distributions they can reach. (That is the case even if the creditor’s claim is based on having provided support to the beneficiary and the trust is for the beneficiary’s support. Thus, as mentioned above, in some states the UTC’s treatment of support trusts as discretionary trusts with support standards increases the asset protection benefits of trusts.) Furthermore, if the instrument includes a valid spendthrift provision and the creditor is not an exception creditor, then in addition to the creditor being unable to reach the beneficiary’s interest, the trustee may make distributions to or, presumably, for the benefit of the beneficiary. See II., above.

1. **Under non-UTC law, if a beneficiary has an enforceable right to compel distributions, may the beneficiary’s creditors reach his or her interest?**

   Generally, no, but in limited circumstances, yes. Spendthrift trusts (which are valid in most, if not all, states) prevent creditors from reaching a beneficiary’s interest without regard to whether the beneficiary has an enforceable right to receive distributions. With respect to trusts as to which spendthrift protection is not available, if the trustee is obligated to make mandatory distributions to or for the benefit of the beneficiary, the beneficiary’s creditors may reach them. If the trustee is authorized, in its discretion, to make distributions to or for the benefit of the beneficiary, a creditor of the beneficiary generally will not be able to compel distributions, even if the beneficiary could do so. In that regard, the Restatement (Third) (in what is, in most respects, a departure from common law that UTC §504 generally rejects) provides that creditors of a beneficiary of a discretionary trust may be able to compel distributions they can reach. But even under its rule, that generally will not be the case. See Restatement (Third), comment e to §60, which provides:

   The rights of a discretionary beneficiary’s assignee or creditor are also entitled to judicial protection from abuse of discretion by the trustee. On the other hand, a trustee's refusal to make distributions might not constitute an abuse as against an assignee or creditor even when, under the standards applicable to the power, a decision to refuse distributions to the beneficiary might have constituted an abuse in the absence of the assignment or attachment. This is because the extent to which the designated beneficiary might actually benefit from a distribution is relevant to the justification and reasonableness of the trustee's decision in relation to the settlor's purposes and the effects on other beneficiaries. See § 50, Comments d-d(4), e-e(3), and g. Thus, the balancing process typical of discretionary issues becomes, in this context, significantly weighted against creditors, and sometimes against a beneficiary's voluntary assignees.

See also *Corcoran v. Department of Social Services*, WL 2434976 (Conn. 2004) ("The right of a creditor to reach the trust is not determinative of the
right of the beneficiary to do so. It is possible for a trustee to be ordered to make payment to the beneficiary even when the creditor cannot similarly force payment from the trust.”

VIII. THE UTC, SUPPLEMENTAL NEEDS TRUSTS, AND MEDICAID QUALIFICATION. Some UTC critics have argued that it will have a negative impact on a beneficiary of a supplemental needs trust (SNT) being able to qualify for Medicaid. That should not be the case. For a more detailed analysis of the UTC and SNTs, see Stanley C. Kent’s and Richard E. Davis’ upcoming article on the UTC and SNTs to be published in the January/February 2004 issue of The Probate Law Journal of Ohio.

A. Will the UTC affect the ability of beneficiaries of SNTs to qualify for public benefits? Those benefits typically include Medicaid, supplemental security income (SSI), and Section 8 housing. While the basic requirements for these programs are governed by federal law, each state administers its own Medicaid program. If a potential public benefits recipient is a beneficiary of a third-party created trust, the qualification question is whether the trust assets are available resources of the beneficiary. If so, the beneficiary generally will not qualify. The determination of whether such trust assets are available resources often depends on whether the terms of the trust provide for its assets to be used for the beneficiary’s support, or whether distributions are to be made at the trustee’s discretion. Difficult qualification issues arise when the terms of a trust grant the trustee the discretion to provide for the beneficiary’s support. The cases involving such trusts are not consistent; often, the inquiry is whether the settlor intended the trust to provide for the beneficiary’s support. See generally, Clifton B. Kruse, Jr., Third Party and Self-Created Trusts - Planning for the Elderly and Disabled Client (3rd ed. 2002). For a recent case applying this kind of an analysis, see Corcoran v. Department of Social Services, WL 2434976 (Conn. 2004). Because the UTC does not address the issue of the settlor’s intent in creating a discretionary support trust, or treat discretionary trusts as support trusts, or otherwise provide for the assets of trusts without support standards to be available for the beneficiary’s support, but instead treats support trusts as discretionary trusts with support standards, it should not adversely affect, and may even help with, qualification for public benefits. (For a discussion of whether the UTC increases a trust beneficiary’s ability to compel discretionary distributions, which arguably would affect the determination of whether trust assets are disqualifying available resources, see VII, above, and X.A.1.c, below.) Furthermore, if the terms of an SNT expressly state that the trust is not for the beneficiary’s support, but is for his or her supplemental needs, the qualification of the beneficiary for public benefits clearly should not be affected by the UTC.
1. **How does the Restatement (Third), which, like the UTC, eliminates the distinction between discretionary and support trusts, address the subject of whether the assets of discretionary trusts are available for the support of beneficiaries who otherwise would qualify for public assistance?** Comment e to §50 of the Restatement (Third) provides:

   Public benefits. If a discretionary beneficiary is or may be eligible to receive public benefits, this factor, like the availability of other resources generally, is to be taken into account by the trustee under the usual rule of construction. Thus, to the extent consistent with the terms and purposes of the trust, and allowable by applicable benefits statutes (see Reporter's Notes), the presumption is that the trustee's discretion should be exercised in a manner that will avoid either disqualifying the beneficiary for other benefits or expending trust funds for purposes for which public funds would otherwise be available.

B. **If a state enacts a statute making it a spendthrift exception creditor, would a beneficiary of an SNT who also is receiving Medicaid benefits be able to continue receiving benefits from the SNT?** Yes. The state’s claim for Medicaid reimbursement takes the form of an estate recovery claim. Accordingly, the state would not be a creditor of the Medicaid recipient during his or her life, and would thus not be able to attach distributions from the SNT, or otherwise reach it, regardless of whether (i) the trust terms include a spendthrift provision, (ii) the state is an exception creditor, or (iii) creditors of the beneficiary may attach discretionary distributions.

C. **Does UTC §410(a) pose risks to SNTs?** Under UTC §410(a), “a trust terminates to the extent…the purposes of the trust have become…contrary to public policy.” If supplemental needs trusts are determined to violate public policy in a given jurisdiction, UTC §410(a) arguably would result in the termination of existing SNTs. For a case in which a dissenting judge opined that supplemental needs trusts violate public policy, see *Young v. Ohio Department of Human Services*, 668 N.E.2d 908 (Ohio 1996).

D. **Is the comment to UTC §501 problematic with respect to SNTs?** UTC §501 provides that the court may limit the award of a creditor of a beneficiary “to such relief as is appropriate under the circumstances.” The comment to §501 provides that in exercising its discretion to do so, “the court may appropriately consider the support needs of a beneficiary and the beneficiary’s family.” If an SNT that does not include a spendthrift provision (so that §501 is applicable; see II.I, above) is created for a beneficiary and a creditor of the beneficiary seeks to reach the beneficiary’s interest in the trust, the comment to §501 suggests that an SNT that was designed not to be available for the beneficiary’s support nevertheless could be made available for his or her support, which could jeopardize the beneficiary’s continued qualification for public assistance.
See VIII.A, above. NCCUSL may want to consider revising the comment to §501 to include a reference to the supplemental needs of a beneficiary of a trust that was intended to provide not for the beneficiary’s support, but for his or her supplemental needs.

IX. BANKRUPTCY AND THE UTC. Because (i) most trust instruments include spendthrift provisions, (ii) bankruptcy law respects spendthrift trusts that are effective under state law, and (iii) spendthrift trusts are effective under the UTC, it should have little or no effect on creditors’ rights in the bankruptcy context.

A. Under the UTC, may creditors of a beneficiary of a spendthrift trust reach the beneficiary’s interest in the trust through a bankruptcy proceeding? No. Under the Bankruptcy Code, a trust interest that is not alienable under applicable state law does not become a part of the bankruptcy estate. 11 U.S.C. §541(c)(2). Under UTC §502(c), a beneficiary’s interest in a spendthrift trust is not alienable.

B. If the terms of the trust do not include a spendthrift provision, would a bankrupt beneficiary’s interest in trust become part of the bankruptcy estate? Generally, a debtor’s bankruptcy estate includes all interests in property, including equitable interests in trusts, owned by the debtor at the time of bankruptcy filing. 11 U.S.C. § 541(a)(1). The spendthrift trust exception of §541(c)(2) would not protect a debtor’s interest in a trust that does not include a valid spendthrift provision. If, however, the trust is for the debtor’s support, according to the Eleventh Circuit it is excluded from the bankruptcy estate to the extent it is protected from creditors under applicable state law. In re Brown, 303 F.3d 1261 (11th Cir. 2002). While UTC §504(b) would prevent a debtor’s support creditor from compelling distributions, such a creditor could, if the terms of the trust do not include a valid spendthrift provision, attach future distributions under UTC §501. Such an attachment, however, would be subject to the court’s ability to limit the creditor’s award to provide for the support needs of the beneficiary and the beneficiary’s family. UTC §501. Accordingly, it is doubtful that a beneficiary’s interest in a non-spendthrift trust for his or her support would, under the UTC, become a part of his or her bankruptcy estate. See also In re Katz, 203 B.R. 227 (E.D. Pa. 1996); In re Dias, 37 B.R. 584 (Idaho 1984); In re Knight, 164 B.R. 372 (S.D. Fla. 1994). Arguably, if the trustee has the discretion to make distributions to or for the benefit of the beneficiary/debtor beyond what is needed for support, and the trust does not include a valid spendthrift provision, the bankruptcy estate could reach at least part of the beneficiary’s interest in the trust. (For a discussion of whether the UTC increases the beneficiary’s ability to compel discretionary distributions, which arguably would increase the risk of the bankruptcy estate being able to reach the trust, see VII, above, and X.A.1.c, below.)
X. DIVORCE LAW AND THE UTC.

A. Will the UTC affect whether a beneficiary’s trust interest will be divisible on divorce? There is nothing in the UTC that addresses the division of property on divorce. In most states, generally only “marital property” is subject to division at divorce. See Brett R. Turner, EQUITABLE DISTRIBUTION OF PROPERTY §2.08 (2d ed. 1994). Because a divorcing spouse’s interest in a third-party created trust generally will be separate property, in most states it will not be divisible, without regard to the extent or nature of the beneficiary’s interest in the trust. In states in which separate property is divisible, or in which the income from, or appreciation in, separate property is marital property, part or all of a beneficiary’s trust interest may be divisible in a divorce under existing non-UTC law in many states. Whether that will be the case in a given situation will depend on the applicable state law and on a multitude of factors, including, for example, whether the beneficiary’s interest may be defeated by the trust being revoked by its settlor or by exercise of a power of appointment. Whether the interest is discretionary, or subject to reduction or elimination by distributions to other beneficiaries, may not be determinative. See, e.g., In re Marriage of Balanson, 25 P.3d 28 (Colo. 2001). For a thorough analysis of the divisibility of trust interests in divorce under the developing law of Colorado, see Marc A. Chorney, INTERESTS IN TRUSTS AS PROPERTY: IDENTIFICATION AND VALUATION (posted on the website of the American College of Trust and Estate Counsel).

As discussed further below, the UTC’s treatment of support trusts as a form of discretionary trust for purposes of UTC §§501 and 504, and the minimum standard of conduct it imposes on a trustee under UTC §814(a), should have little or no effect on this issue.

1. Would a beneficiary’s separate property interest in a trust governed by the UTC be considered in determining how to divide marital property in a divorce? Some states consider spouses’ separate property, including beneficial interests in discretionary trusts, as a factor in deciding how to divide their marital property in a divorce. See, e.g., In re Marriage of Jones, 812 P.2d 1152 (Colo. 1991). Some UTC critics argue that the UTC increases the possibility that a beneficiary’s interest in a trust from which distributions are at the trustee’s discretion, will be so treated. The basis for the argument is that under the UTC, the beneficiary has an enforceable right to compel discretionary distributions (that may constitute an interest in property).

a. Do beneficiaries of trusts from which distributions are at the trustee’s discretion have enforceable rights in them under the UTC? Do they under common law? Yes and yes. Trust beneficiaries hold equitable or beneficial interests in trust assets that they may enforce against, for example, mismanagement by the trustee.
b. **Do such beneficiaries have enforceable rights with respect to distributions?** As discussed in VII.B, above, the trustee’s exercise of even the broadest discretion, including with respect to distributions, is subject to judicial control under a minimum standard of conduct.

c. **Has the UTC raised that minimum standard of conduct, and thus provided the beneficiary with greater rights to compel discretionary distributions?** Also as discussed in VII.B, above, the minimum standard of conduct required of a trustee in the exercise of its discretion has been described in many different ways. Whether the UTC’s formulation – “in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries” – is a change in the standard is subject to debate, and the answer may not be the same for all states. For many, the UTC standard simply states the common law, as the fiduciary nature of the trust relationship necessarily means that a trustee must act in good faith towards the beneficiary. Here is how the leading law school wills, trusts, and estates casebook addresses the trustee’s minimum standard of conduct:

What, then, are the limitations on the trustee’s freedom when the trustee has “absolute and uncontrolled discretion?” Professor Scott argued for a subjective standard, emphasizing the trustee’s “good faith” and proper motives and dispensing with the requirement of reasonableness. He suggested, and the Restatement for which he was the chief reporter adopted, a standard of whether the trustee has acted “in that state of mind in which it was contemplated by the settlor that he should act.” [Cite to Restatement (Second), §187, comment j.] Some courts, relying on the Restatement good faith standard, declare that the trustee must not act arbitrarily or capriciously, seemingly bringing in a reasonableness test under the guise of other words. Other courts apply a reasonableness test even when the discretion is “absolute.” In the final analysis, it appears that the difference between simple discretion and “absolute” discretion is one of degree and that the trustee’s action must not only be in good faith but also to some extent reasonable, with more elasticity in the concept of reasonableness the greater the discretion given. See Restatement (Third) of Trusts §50, General Comment and Reporter’s Notes (T.D. No. 2, 1999), for an extended discussion of judicial control over a trustee’s discretion.


d. **Does the UTC’s elimination of the distinction between discretionary and support trusts enhance a beneficiary’s ability to**
compel distributions and thus the likelihood that the beneficiary’s interest will be considered in dividing marital property? As discussed in VI, above, the UTC has eliminated the distinction between discretionary and support trusts for purposes of determining the rights of a beneficiary’s creditors under Article 5. Except with respect to requiring a minimum standard of conduct of a trustee in the exercise of its discretion under §814(a), the Code does not address the issue of the duties of the trustee, and the rights of the beneficiary, with respect to distributions. The comment to §814, however, acknowledges the traditional common law doctrine that the broader the discretion granted the trustee, the more deferential the court will be to its exercise: “A grant of discretion establishes a range within which the trustee may act. The greater the grant of discretion, the broader the range.” Further, UTC §106 provides that the Code is supplemented by the common law of trusts, under which great deference is given to the trustee’s exercise of discretion, particularly when the terms of the trust do not include a standard, such as support, for its exercise, and when the settlor uses such extended discretion language as “absolute and uncontrolled.” Thus, the UTC’s treatment of support trusts as a form of discretionary trust for creditors’ rights purposes likely will have little or no effect on the issue of the extent to which, if any, a beneficiary may compel discretionary distributions in a given situation. Because many of the criticisms the UTC’s creditors’ rights provisions have received are based, to a significant extent, on the argument that beneficiaries of discretionary trusts have enforceable rights under the UTC that are greater than they have under existing law, if the conclusion stated above is correct and intended, NCCUSL may want to consider amending the Code or revising its comments to make that clearer.

B. May a beneficiary’s interest in a discretionary trust be taken into consideration by a divorce court in making an alimony or child support award? For a non-UTC case so holding, see Athorne v. Athorne, 128 A.2d 910 (N.H. 1959). See also Scott on Trusts, §157.1. For a recent case involving this issue, but in the peculiar context of a separation agreement that authorized the beneficiary’s wife to file a complaint for alimony if he received a substantial inheritance, see Dwight v. Dwight, 756 N.E.2d 17 (Mass. App. Ct. 2001).
Because, as discussed in VII and X.A.1.c and d, above, a beneficiary’s ability to compel distributions from discretionary trusts with or without support standards likely is not materially enhanced, if at all, by the UTC, it should have little or no bearing on this question.
SECTION 501. RIGHTS OF BENEFICIARY'S CREDITOR OR ASSIGNEE.

To the extent a beneficiary's interest is not protected by a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means. The court may limit the award to such relief as is appropriate under the circumstances.

SECTION 502. SPENDTHRIFT PROVISION.

(a) A spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest.

(b) A term of a trust providing that the interest of a beneficiary is held subject to a "spendthrift trust," or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest.

(c) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this [article], a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.

SECTION 503. EXCEPTIONS TO SPENDTHRIFT PROVISION.

(a) In this section, "child" includes any person for whom an order or judgment for child support has been entered in this or another State.

(b) Even if a trust contains a spendthrift provision, a beneficiary's child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance, or a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust, may obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary.

(c) A spendthrift provision is unenforceable against a claim of this State or the United States to the extent a statute of this State or federal law so provides.
SECTION 504. DISCRETIONARY TRUSTS; EFFECT OF STANDARD.

(a) In this section, “child” includes any person for whom an order or judgment for child support has been entered in this or another State.

(b) Except as otherwise provided in subsection (c), whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee’s discretion, even if:

(1) the discretion is expressed in the form of a standard of distribution; or

(2) the trustee has abused the discretion.

(c) To the extent a trustee has not complied with a standard of distribution or has abused a discretion:

(1) a distribution may be ordered by the court to satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary’s child, spouse, or former spouse; and

(2) the court shall direct the trustee to pay to the child, spouse, or former spouse such amount as is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion.

(d) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.

(e) A creditor may not reach the interest of a beneficiary who is also a trustee or co-trustee, or otherwise compel a distribution, if the trustee’s discretion to make distributions for the trustee’s own benefit is limited by an ascertainable standard.

SECTION 505. CREDITOR'S CLAIM AGAINST SETTLOR.

(a) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

(1) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.

(2) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor
may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.

(3) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and [statutory allowances] to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and [allowances].

(b) For purposes of this section:

(1) during the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and

(2) upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in Section 2041(b)(2) or 2514(e) of the Internal Revenue Code of 1986, or Section 2503(b) of the Internal Revenue Code of 1986, in each case as in effect on [the effective date of this [Code]] [, or as later amended].

SECTION 506. OVERDUE DISTRIBUTION.

Whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal, including a distribution upon termination of the trust, if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date.

SECTION 507. PERSONAL OBLIGATIONS OF TRUSTEE.

Trust property is not subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt.
The Uniform Trust Code and Supplemental Needs Trusts

By Stanley C. Kent, Esq.
Stanley C. Kent, P.C.
Colorado Springs, Colorado
Co-Chair for the Colorado Uniform Trust Code Committee

By Richard E. Davis, Esq.
Krugliak, Wilkins, Griffiths & Dougherty Co., L.P.A.
Canton, Ohio
Member, Joint Committee on Uniform Trust Code of Ohio State Bar Association and Ohio Bankers League, author of its reports on creditor matters.
Member, PLJO Editorial Advisory Board

Much has been written recently about the Uniform Trust Code (“UTC”) and its alleged negative impact on the common law of trusts in general and its impact on Special Needs Trusts and Supplemental Needs Trusts (both referred to as “SNTs”) in particular. UTC critics sometimes single out SNTs in an attempt to make their point. For example, Mark Merric and Douglas W. Stein, blaming the UTC, have written, “On the horizon is nothing less than the demise of all SNTs, even those drafted with supplemental needs language.” These critics generally offer little legal authority in support of their arguments. Moreover, their rhetoric suggests either a misunderstanding of the common law of trusts or of the plain meaning of the UTC as both relate to supplemental needs trust planning.

PLJO is printed on paper containing 50% recycled materials and meeting the U.S. EPA Guidelines for printing and writing papers under 40 C.F.R. Part 250.
Your authors assert that the UTC: (i) will have no adverse impact on SNTs generally, and (ii) not only does not expand creditor remedies, but actually better protects third-party settled supplemental needs trusts because of its nearly complete ban on the ability of creditors to compel distributions. Furthermore, to the extent valid issues are pointed out by these opponents with respect to self-settled supplemental needs trusts, such issues do not arise because of the UTC. They arise under the common law. Discussion of the UTC has merely brought them into focus.

**Concerns About the UTC’s Impact on SNTs**

Many arguments have been made by a small number of vocal critics, and many of those arguments have singled out SNTs as being particularly adversely affected by the UTC. While the following list is not exhaustive, it comprises the primary arguments that have been raised against SNTs. For the reasons set forth in this article, it is the opinion of the authors that all of these arguments lack merit.

1) The abolishment of the discretionary-support trust dichotomy is the first step in a two-step process that will result in the complete elimination of SNTs, the second step being the enactment of legislation by the federal and state governments allowing them to bypass spendthrift provisions to reach the assets held within SNTs.

**False.** The UTC’s elimination of this distinction is only in the context of creditors’ rights. If the trust is a “wholly discretionary trust” under the Ohio Uniform Trust Code (“OUTC”) or contains a spendthrift provision, no creditor of the beneficiary will be able to compel a discretionary distribution even if the creditor has provided support and the trust has been created for the beneficiary’s support. With one exception, discussed herein, this will be the rule even if the trustee has abused discretion or failed to honor a standard for distribution. The “second step” is not a UTC-caused issue. There is no rule that prevents Congress or the Ohio Legislature from enacting a spendthrift-avoiding statute.

2) Creditors will have an increased ability to compel distributions from SNTs.

**False.** As stated above, the UTC will have the opposite effect.

3) Increased rights that the UTC gives to trust beneficiaries to compel distributions will result in SNTs being treated as countable resources for eligibility determinations, thereby disqualifying disabled individuals from being able to receive governmental benefits to which they would otherwise be entitled.

**False.** The UTC does not increase rights that beneficiaries may already have to compel distributions, so its impact on qualification for public benefits is neutral.

4) Under the UTC, trustees of SNTs will no longer be able to make distributions to third parties for the benefit of the SNT beneficiary.

**False.** The UTC does not prohibit a trustee from making such distributions. The Code makes it clear that with certain exceptions discussed herein, if the trust contains a spendthrift provision, creditors may not reach any distributions until received by the beneficiary, hence payments made to third parties on behalf of an SNT beneficiary are protected.

5) The UTC permits individual judges to terminate SNTs on the basis that they are against public policy.

**False.** While the UTC provides that a trust will terminate if its continuance would be against public policy, the OUTC has removed this provision.

6) The UTC not only allows governmental exception creditors to attach distributions intended for SNT beneficiaries but also to force the judicial sale of the beneficiary’s interest in the SNT.

**False.** The UTC makes it clear that if a trust contains a spendthrift provision, the beneficiary’s creditors generally may not attach the beneficial interest. Even the few spendthrift exception creditors (discussed herein) are restricted to attaching only present or future distributions the trustee must or decides to make. Under the UTC, a spendthrift trust interest is never subject to judicial sale.

7) The UTC imposes a new mandatory good faith standard upon the trustee’s exercise of discretion that undermines the basis of the common law discretionary trust, leaving as the viable protection the spendthrift provision.

**False.** Common law principles generally recognize that trustees must act in good faith. The UTC codifies this rule as a minimum standard for trustee conduct, so no new standard is created.

All of these arguments are fallacious, however their refutation requires knowledge of the various types of SNTs and creditor remedies available at common law and under the UTC, eligibility
requirements for public benefits, and Medicaid estate recovery and payback requirements.

In order to lay out this material as succinctly as possible, it is helpful to address the impact of the UTC on SNTs by analyzing the issues from three different perspectives: (1) by the type of trust (i.e. third party SNTs as opposed to self-settled SNTs), (2) by the type of governmental action (i.e. attempts to recover amounts paid out as public benefits as opposed to attempts to deny eligibility), and (3) by the type of governmental benefit (i.e. Supplemental Security Income, “SSI,” for which there is no liability for repayment at all; Medicaid, for which states are barred from seeking reimbursement during the lifetime of the recipient but for which states are required to seek reimbursement following the death of the recipient or the recipient's surviving spouse; and other types of public benefits with respect to which there may or may not exist a right of recovery during the recipient's lifetime.)

Classes of Special Needs Trusts

For purposes of this article, SNTs are understood to be trusts written with the intent of holding property in a way that will not disqualify the beneficiary from government benefits, typically Medicaid, SSI, and similar “government welfare benefits.” While there is no uniformity in the terminology used, the generic term “SNT” encompasses the three types of trusts:

- **Special Needs Trusts.** This type of trust limits the discretion of the trustee to making in-kind distributions of things other than food, clothing, or shelter.

- **Supplemental Needs Trusts.** A supplemental needs trust generally gives the trustee unlimited discretionary authority to make distributions.

- **Supplemental Services Trusts.** Ohio’s statutory R.C. § 1339.51 trust, while not authorized by federal law, is an exempt trust under the Ohio Medicaid trust rule. This trust can only be funded with a statutorily prescribed maximum amount, can only be established for an individual that meets one of two conditions, and must provide that, upon the death of the trust beneficiary, at least 50% of the remaining trust assets must be deposited to the credit of the services fund for individuals with mental illness created by R.C. § 5119.17 or the services fund for individuals with mental retardation and developmental disabilities created R.C. § 5123.40. This type of trust is statutorily exempt from the claims of all creditors of the beneficiary.

SNTs are generally broken down into two categories: (i) third-party settled trusts, and (ii) self-settled trusts. Of the three types of SNTs listed immediately above, only the “Special Needs Trust” can be self-settled, whereas all three types can be third-party settled.

Self-Settled SNTs

This class of SNTs has its legal underpinning in the Omnibus Budget Reconciliation Act of 1993 (OBRA). Such trusts are established to hold and administer the beneficiary’s own property, typically a personal injury settlement to, or an inheritance or gift of property received by, the beneficiary who is otherwise eligible for government welfare benefits. The most common of these is the so-called “(d)(4)(A) trust,” which requires that, upon the death of the beneficiary, the trustee is to use the remaining trust principal to reimburse the state to the extent that it has provided medical benefits (i.e. Medicaid) to the beneficiary. While these trusts generally must be established by a parent, grandparent, or guardian of the beneficiary or by a court, they are required to be funded with the assets of the beneficiary, thereby making the beneficiary the actual “grantor.” If such a trust is drafted in strict accordance with OBRA, the trust property may be applied to supplement, but not supplant, government welfare benefits for which the beneficiary is otherwise qualified. These self-settled trusts, and the third-party settled R.C. § 1339.51 trust, are “exempt” trusts under R.C. § 5111.151 and cannot be considered to be resources of Medicaid recipients for eligibility purposes, and the OBRA trusts cannot be treated as resources for SSI purposes.

Third-Party Settled SNTs

Third-party SNTs are typically created in the context of gifts to or on behalf of disabled persons. For example, a parent with a disabled child currently receiving, or in the future likely to receive, government welfare benefits will want to give property to or for the benefit of the child in a way that will not disqualify her or him from such benefits. One (and perhaps the best) way to effect such a donative plan is to devise the disabled child’s gift to a supplemental needs trust designed to supplement, but not supplant, support provided by government welfare programs. Some writers have suggested that a purely discretionary trust, such as the “wholly discretionary trust” that is created as a part of the Ohio UTC, works just as well. One particular type of
third-party SNT that has special statutory protection in Ohio is the R.C. § 1339.51 trust.

UTC and Self-Settled SNTs

Because self-settled SNTs are funded with the beneficiary’s assets, they are not asset protection trusts. There is no common law rule that permits settlors to place their property in trust for their benefit and beyond the reach of their creditors. These common law principles are codified in the UTC at § 505, which provides in relevant part:

(a) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

(1) During the lifetime of the settlor, the property of a revocable trust is subject to the claims of the settlor’s creditors.

(2) With respect to an irrevocable trust, a creditor or assignee of the beneficiary may reach the maximum amount that can be distributed to or for the settlor’s benefit....

Accordingly, whether or not a self-settled SNT contains a spendthrift provision or the trustee has purely discretionary power to distribute principal and income, the creditors of the incapacitated settlor/beneficiary may reach the maximum amount that can be distributed to or for the settlor’s benefit....

UTC and Third-Party Settled SNTs

Third-party SNTs have been effective for two primary reasons. First, most SNTs contain spendthrift provisions, which present an impenetrable barrier to virtually all creditors. Second, SNTs by their nature are not support trusts, but rather are discretionary trusts which usually, but not always, contain distribution standards aimed at providing for the disabled beneficiary’s supplemental needs of the type that are not provided by the governmental payments received by the beneficiary. The trustees of SNTs typically are given broad discretion in interpreting the distribution standard.

A purely discretionary beneficial interest will not disqualify the beneficiary because the beneficiary cannot compel the trustee to make any distributions to or for her or his benefit. A trust that restricts the trustee to distribute principal and income only for needs not otherwise provided by or available from the government will, likewise, not disqualify the beneficiary from government welfare benefits.

Ohio, however, has significantly tightened the parameters around third-party settled SNTs that will not be counted as resources for Medicaid purposes. In November 2002, the Ohio Department of Jobs and Family Services promulgated a new trust rule, O.A.C. 5101:1-39-27.1, which rule was subsequently codified as R.C. § 5111.151. This issue is discussed in greater detail below.

The Discretionary Trust Continuum

Historically, discretionary trusts were classified by categories ranging from “support trusts” on one extreme to “discretionary trusts subject to a standard” in the middle and “purely discretionary trusts” on the other extreme. This classification of discretionary trusts has resulted in a good measure of litigation as courts have endeavored to define terms of trusts in the context of government benefit qualification. A line of Ohio cases beginning with Bureau of Support in the Dept. of Mental Hygiene and Correction v. Kreitzer is illustrative of the legal gymnastics courts have gone through in this process.

UTC § 504 eliminates the distinction between these different classes of discretionary trusts. Some critics fear that this change in common law will have an adverse impact upon SNTs. It should be noted that the distinction between discretionary trusts and support trusts was made only for creditor rights purposes, and not with respect to the rights and duties of the beneficiary and the trustee concerning distributions. Common law principles regarding discretionary trusts will continue to apply in
determining trustee duties and the rights of beneficiaries. However, the elimination of the distinction between discretionary and support trusts will assure that no creditor, including one who has supplied support for the beneficiary (with the exception of the state and possibly certain other creditors under extremely limited circumstances, per Krietzer, discussed later in this article) will be able to force discretionary distributions. Thus, the claim made by UTC critics that the elimination of this distinction leaves all SNTs vulnerable to governmental claims is simply not true.

**Spendthrift Protection**

According to general common law principles, a discretionary interest held in trust can be attached by the beneficiary’s creditors. To be sure, attachment is a fruitless effort because, as we know, no one, not even the beneficiary, can force exercise of discretion by the trustee (absent fraud, abuse, or bad faith). Accordingly, attachment yields little benefit to the creditor. However, such creditor is in a position to receive any distributions the trustee decides to make.

Under common law principles, the inclusion of a spendthrift provision in the trust prevents such attachment. The UTC codifies spendthrift protection in § 502(c), which provides:

A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this article, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.

Under the UTC, third-party settlors of SNTs who include spendthrift protection in the terms of their trusts will find solace in the “black letter” UTC principles. Their disabled beneficiaries will qualify for government welfare benefits and, with long standing common law exceptions, their creditors will be unable to attach their discretionary interests held in trust. Even where a beneficiary might be able to compel the trustee to make a distribution from a spendthrift trust, as might be the case where the trustee has abused its discretion, the right to compel the distribution would be personal to the beneficiary and would not extend to the beneficiary’s creditors. Even exception creditors would only be able to obtain an order attaching future distributions—they could not compel the distribution itself.

**Distributions to Third Parties on Behalf of SNT Beneficiaries**

Critics have charged that, under the UTC, courts will be able to permit creditors to reach distributions that trustees of SNTs make directly to third parties in payment of the expenses of the beneficiary. This argument is based upon a misreading of UTC § 501, which states:

To the extent a beneficiary’s interest is not protected by a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary’s interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means. The court may limit the award to such relief as is appropriate under the circumstances (emphasis added).

The first phrase of that section explicitly states that § 501 only applies to trusts that do not have spendthrift provisions. In actuality, nothing in the UTC prevents a trustee from making distributions directly to third parties. UTC § 502(c) explicitly states, “...except as otherwise provided in this [article], a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary....”

**Creditors’ Ability to Compel Distributions**

Whether or not the trust contains a spendthrift provision, the creditors of a beneficiary may not force distributions from a discretionary trust. UTC § 504 specifically bars creditors, including governmental creditors, from being able to compel distributions. Under the UTC, the only creditors who have this right are spouses, former spouses, and children who have judgments or support orders, and even then this small group of creditors can only compel a distribution to the extent a trustee has not complied with a standard of distribution or has abused a discretion. The UTC has dropped former spouses from this list, and has also permitted grantors to deny the remedy to current spouses and children by specifically so providing.

The Uniform Trust Code in § 504 provides, in relevant part, as follows:

(b) Except as otherwise provided in subsection (c), whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee’s discretion, even if:

(1) The discretion is expressed in the form of a standard of distribution; or

(2) The trustee has abused discretion.

Those who claim that the UTC gives creditors the right to compel distributions simply do not understand either the virtually bulletproof nature of
spendthrift protection under the UTC or the equally strong bar put up by § 504(b).

Unfortunately, § 504(b) was not included in the OUTC, because that section would have the effect of overturning the Ohio Supreme Court decision in Bureau of Support v. Kreitzer. On the other hand, the protections afforded by UTC § 504(b) are only necessary with respect to trusts that lack spendthrift provisions, and even then the ability to compel distributions is limited to creditors who have provided support. Kreitzer is discussed in more detail below. Even without § 504(b), exception creditors of trusts that have spendthrift provisions are limited to attaching distributions that the trustee, in the exercise of its discretion, decides to make, as illustrated in the following section.

UTC critics have also charged that, if a beneficiary has the right to compel a distribution from a trust, so do the creditors of the beneficiary. With just two limited exceptions, this is simply not the case. Only in situations where (1) the trust lacks a spendthrift provision, or (2) the trustee fails to make a “mandatory distribution” which it is required to make may the creditor compel a distribution. With respect to discretionary distributions from trusts that include spendthrift provisions, creditors simply lack the power under the UTC to compel distributions. Even if a creditor were to have the same power to compel distributions that the beneficiary has, nothing in the UTC expands the ability of beneficiaries to compel distributions (unless the mandatory good faith standard of UTC § 814(a) is misinterpreted as imposing a higher duty upon trustees. See discussion on this point, below.)

Federal and State Exception Creditor Status

An “exception creditor” is one whose claim is not barred by a spendthrift provision. UTC § 503, which lists these classes of creditors, merely codifies the common law principles relating to exception creditors. UTC critics are concerned that governmental creditors will be able to use their status as exception creditors to reclaim from SNTs benefits previously paid to the beneficiaries of the trusts. This fear is based upon a misreading of UTC § 501 and UTC § 503 as well as a misunderstanding of federal law governing SSI and Medicaid.

The Concern Regarding Governmental Exception Creditors

UTC § 503(c) states, “A spendthrift provision is unenforceable against a claim of this State or the United States to the extent a statute of this State or federal law so provides (emphasis added).” UTC § 501 is the provision which lists the remedies available to creditors, and its first phrase reads, “to the extent a beneficiary’s interest is not protected by a spendthrift provision....” An argument can easily be made that since a spendthrift provision is unenforceable against governmental exception creditors by virtue of UTC § 503(c), then the beneficiary’s interest in the trust “is not protected by a spendthrift provision.” If this interpretation (which is clearly not the intended meaning of § 501) were to be applied, governmental exception creditors would then have all of the remedies available under UTC § 501, including the ominous and all-inclusive words “or [by] other means.” Compounding matters is the fact that UTC § 503(b), which contains the non-governmental exception creditor provisions, specifies that remedies available to non-governmental creditors are limited to “obtain[ing] from a court an order attaching present or future distributions to or for the benefit of the beneficiary,” while § 503(c), which contains the governmental exception creditor provisions, fails to list any remedies. One could easily speculate that remedies were omitted from § 503(c) because the remedies available to governmental exception creditors are all of those listed in § 501.

While the opening phrase of § 501 is hardly a model of clarity, the official comment to that section more clearly states the intent that the section does in fact only apply to trusts that lack spendthrift provisions. OUTC § 5805.05, which is Ohio's counterpart to UTC § 501, makes the listed remedies only available with respect to mandatory distributions, so this is less of a concern in Ohio. OUTC § 5805.02(C) matches UTC § 503(c) and similarly fails to specify which remedies might be available to governmental exception creditors. The logical assumption is that since the federal government or state legislature must first enact legislation making spendthrift provisions inapplicable to certain of their claims, such legislation would also specify the available remedy.

More importantly, however, is the virtual insignificance of being a governmental exception creditor as against most SNTs (whether self-settled or third-party settled), since neither the federal nor state government has any claim for the repayment of SSI, and the right of the states to seek reimbursement for Medicaid benefits paid does not come into existence until after the death of the survivor of the Medicaid recipient and his/her spouse.

The Reality of the Legislative Power

The effect of UTC § 501 and UTC § 503(c) is similar to the Restatement positions regarding
attachment by the federal and state governments.\textsuperscript{23} Federal preemption guarantees that legislation piercing spendthrift will be successful notwithstanding state law such as the UTC. Moreover, there is nothing in the law today to prevent a state from enacting legislation that would avoid the spendthrift bar. UTC critics have objected to the UTC because, they claim, it will allow governments to enact such legislation.\textsuperscript{24} Attempting to “pin” this result on the UTC is wrong. The UTC does not create the possibility; it exists in applicable law today, just as it always has.

The assertion that governmental exception creditors can force judicial sales of discretionary trusts interests is also false. The UTC does not enable the judicial sale of an interest if the trust terms contain a spendthrift provision. The critics misunderstand § 501, and attempt to apply it in the context of governmental exception creditors where there is a spendthrift provision. Section 502(c) makes it clear that creditors may not reach an interest until the trustee has distributed to the beneficiary. State and federal law controls the extent to which the interest can be reached by government creditors. This is not a UTC issue. Moreover, as pointed out above, governments generally are not creditors with respect most welfare benefits, including SSI and Medicaid.

Common law recognizes that the United States may be a spendthrift trust exception creditor in some contexts, e.g. collection of unpaid income taxes.\textsuperscript{25} While a federal tax lien may not reach the assets of a purely discretionary trust,\textsuperscript{26} this common law rule (recognizing the U.S. as an exception creditor for spendthrift purposes) does allow the United States to attach future distributions the trustee decides to make including those from a purely discretionary trust.\textsuperscript{27} UTC § 501 and UTC § 503 codify this rule.

**UTC and Denial of Eligibility**

UTC critics charge that, under the UTC, it will be easier for states to deny public benefits to SNT beneficiaries for two reasons. First, the argument is made that the UTC gives beneficiaries greater rights to compel distributions, thereby making the trusts from which distributions can be compelled countable resources. As pointed out above, nothing in the UTC either expressly or impliedly expands the rights of beneficiaries to compel distributions. Secondly, UTC critics claim that the good faith standard that is set for in UTC § 814(a) expands the abilities of courts to oversee trustees in the exercise of their discretion.

**The UTC’s Good Faith Standard\textsuperscript{28}**

UTC § 814(a) requires that a trustee must always act in good faith and exercise its discretion in accordance with the terms and purposes of the trust and the interests of the beneficiaries. While this standard is mandatory and cannot be lowered by the grantor, this section merely codifies existing common law principles. An action by a trustee is either made in good faith or in bad faith. There is not a “neutral zone” between good faith and bad faith. Even where the grantor has given the trustee “sole” or “uncontrolled” discretion, no court will permit bad faith conduct by the trustee, and courts have held repeatedly that those words do not dispense with the requirement that the trustee act in good faith. It is significant that UTC § 814(a) does not impose the Restatement (Third)’s reasonableness standard upon the trustee, as UTC critics charge. Even the Restatement (Third), at Section 50, specifically dispenses with the reasonableness requirement where the discretion of the trustee is described by words such as “absolute” or “uncontrolled.”

Also cited as a concern that the UTC will make it easier for states to deny public benefits to SNT beneficiaries is the assertion that the UTC gives SNT beneficiaries an enforceable right to sue the trustee pursuant to the distribution standard. First, the UTC creates no such right. Section 504, which denies creditors the ability to compel distributions, states: “(d) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.” That sentence in no way creates such a right or expands the rights that beneficiaries currently have under the common law. Under the common law (and under the UTC, which follows common law principles in this regard), in order for a beneficiary to be able to compel a distribution, there must be a distribution standard that the trustee has failed to follow. A beneficiary would be unsuccessful in attempting to compel a distribution from a purely discretionary type of SNT, as it has no distribution standard. With respect to an SNT that provides for the beneficiary’s supplemental needs, any distribution that the beneficiary could compel would not be of the type provided by the public benefits and in most jurisdictions would have no effect upon eligibility for public benefits.

**Impact of R.C. § 5111.151**

R.C. § 5111.151 determines which trusts will be treated as countable resources of a Medicaid applicant. As disabled SNT beneficiaries who receive SSI (1) are almost always also covered by Medicaid,
and (2) tend to have unusually high medical expenses, Medicaid qualification is extremely important. Division (G) of that section treats as a countable resource of a trust beneficiary assets of a third party settled SNT “if the trust permits the trustee to expend principal, corpus, or assets of the trust for the applicant’s or recipient’s medical care, care, comfort, maintenance, health, welfare, general well being, or any combination of these purposes.” It is one thing if “permits” refers only to affirmative standards that provide for the proscribed distributions, but it is quite a different matter if “permits” is interpreted as “not prohibiting.” The latter interpretation would effectively treat all third-party settled SNTs as resources. Fortunately, even under the latter interpretation, such a trust will not be treated as a resource if the trust either contains the so-called mandatory “poison pill” described in § 5111.151(G)(4)(d) or if the Medicaid applicant obtains “a final judgment from a court demonstrating that the applicant or recipient was unsuccessful in a civil action against the trustee to compel payments from the trust.” Because the UTC does not give beneficiaries increased rights to compel distributions, the impact that § 5111.151 might have on Medicaid eligibility is not a UTC issue. Moreover, under current Ohio law as well as under the UTC, the beneficiary of a properly drafted SNT would not be able to obtain such a court order so, by the explicit terms of the statute, the SNT could not be counted as a resource. In order to avoid the costs and delay in obtaining such an order, if the Medicaid applicant can demonstrate that the cost of a civil action to compel payments from the trust would be prohibitive, the trust cannot be treated as a resource. Thus, under the UTC, trust assets are not more likely to be available resources for Medicaid qualification purposes.

Ohio’s Wholly Discretionary Trust

The OUTC deviates from the UTC by including a statutory safe harbor pure discretionary trust, which it refers to as a “wholly discretionary trust” (WDT). The WDT was discussed at length in the November/December 2004 issue of Probate Law Journal of Ohio. This trust, which is defined in OUTC § 5801.03(24), must, among other things, provide for discretionary payments in the trustee’s sole, absolute, or uncontrolled discretion, without providing a distribution standard. The benefit of having the status of a WDT is that none of the remedies in Chapter 5805 of the OUTC are available to creditors of the WDT’s beneficiary.

The WDT should work well as an SNT, and is, in fact, a type of SNT that is commonly used. The distribution standard for a WDT-SNT could be as follows: “My trustee may distribute to or for the benefit of the beneficiary those amounts of income or principal which my trustee may determine, in my trustee’s sole, absolute and unfettered discretion, to be appropriate, and my trustee may choose to make no distributions whatsoever.” In using this type of language for purposes of an SNT, it would be helpful to be able to state the non-support nature of the trust’s purpose, however doing so would be contrary to the entire purpose of the WDT, which is to give the trustee total and complete discretion. Extreme care must be taken in this area, because a trust will not qualify as a WDT if its terms provide any standards to guide the trustee in exercising its discretion. Because a prohibition is a negative standard designed to help guide the trustee, its inclusion would seemingly violate the requirements of a WDT. Is a recitation of the non-support nature of a trust a standard to guide the trustee in exercising its discretion? Would the distribution language of the type quoted above, but with the addition of the following language, constitute a prohibited standard? “No part of the principal or income of this trust maybe distributed for food, shelter or clothing, or to replace any public assistance benefits for which the beneficiary may be eligible through any county, State, Federal or other governmental agency.” This would likely not fit within the definition of the WDT, as it is placing limits upon the trustee’s exercise of discretion. Will a trust qualify as a WDT if it contains the pure discretionary language of the type first quoted above, but with precatory language regarding the beneficiary’s disability, as in the following:

My trustee may distribute to or for the benefit of the beneficiary those amounts of income or principal which my trustee may determine, in my trustee’s sole, absolute and unfettered discretion, to be appropriate, and my trustee may choose to make no distributions whatsoever. My son is disabled, and will rely on public programs for much of his life. I will not always be there to help him and oversee his care. I know that he will have supplemental and special requirements, including a need for advocacy, which will not be provided by the publicly funded programs. I urge my trustee to, in the exercise of his unfettered discretion, make distributions which permit my son dignity and grace, enhance my son’s day to day existence, and allow him the highest possible development of his abilities.

The inclusion of precatory language has been the source of much litigation, and the more prudent course would be to avoid its use if the intent is for the
SNT to qualify as a WDT. While it would be nice to see a modification to the definition of the WDT very narrowly targeted at facilitating its use as an SNT, such additional protection simply is not needed, so strong is the protection afforded by spendthrift provisions under the UTC.

**Bureau of Support v. Kreitzer**

In support of their claim that the UTC will be used to deny SNT beneficiaries eligibility for public benefits, critics assert that the UTC will codify the results in cases such as *Bureau of Support v. Kreitzer*.

In that case, and in just a small handful of similar cases from around the country, creditors who have provided support have been permitted to compel distributions from trusts that contained a support standard, where the courts found that the beneficiary would have had the right to compel a distribution in satisfaction of that standard. A clear reading of UTC § 504 demonstrates that this section actually overrules these cases by providing that creditors, with just three exceptions (two exceptions under the OUTC), cannot compel distributions from trusts, even where there has been an abuse of discretion. Because of the relative paucity of cases that permit this type of creditor remedy, it is questionable whether UTC § 504 actually adds any asset protection not already provided by the common law of most states. Because Ohio is one of the few states that has permitted this remedy, albeit only in situations in which the trust has lacked a spendthrift provision, the obvious question is whether or not this potentially important protection should be restored to the OUTC. In *Kreitzer*, the Court held that the State could recover its costs of supporting a beneficiary of a discretionary support trust from the trust. The actual holding of the Court in *Kreitzer* limits its scope to situations in which it is the state of Ohio that has provided the support, as shown in official headnote 3:

By discharging its qualified duty to advance support to a destitute patient in a mental institution under the jurisdiction of the Department of Mental Hygiene and Correction, the state of Ohio is entitled under the equitable doctrine of subrogation, to seek reimbursement for the support advanced by pursuing whatever right of action might be available to the patient, including such rights as the patient may have as a destitute cestui que trust.

A decade after deciding *Kreitzer*, the Court, in *dictum in Martin v. Martin*, indicated that the rationale of *Kreitzer* could be applied to situations involving non-governmental creditors; however, the Court in that case actually ruled against the creditor, who was a discretionary support trust beneficiary's former spouse who sought to reach the trust assets for unpaid alimony, for the reason that her alimony claim was not within the standard for distributions to the beneficiary. The dictum from that case is as follows:

Application of the rationale of the *Kreitzer* case here leads to the conclusion that the trustees can be required, after attempted alienation or attachment, to distribute income or principal for purposes of "education, care, comfort or support of such beneficiary..." and that debts incurred for the enumerated purposes are obligations which the trustees are required to discharge.

In actuality, it appears that *Kreitzer* has only been followed five times in Ohio. In four of those decisions, the state was the creditor, in accordance with the actual holding in *Kreitzer*. The fifth case, *Matthews v. Matthews*, involved a claim for unpaid child support that was successfully made against a discretionary support trust established for the support of the child's father. While this appellate case cited *Kreitzer* as the basis for its decision, the result would almost certainly have been the same under the UTC, as children with judgments for unpaid support are both exception creditors as well as one of two types of creditors who have the ability to compel distributions from discretionary trusts where there has been an abuse of discretion.

While *Kreitzer* has been cited favorably in appellate decisions involving creditors other than the state, recovery in those cases was denied for various reasons. The simple fact remains that *Kreitzer*, by its terms, applies just to situations in which the state of Ohio is the creditor, and in the thirty-six years since the *Kreitzer* decision, only one case, a lower court decision, has ever extended *Kreitzer* to a non-governmental creditor. Is that a good basis for removing from the OUTC the potentially important protection found in UTC § 504(b), or can a better way be found? A major argument in support of the UTC is that it codifies existing trust law, so that practitioners will readily be able to find answers to issues involving the law of trusts. The approach currently found in the OUTC of dodging the issue of whether or not creditors can compel distributions hardly furthers this important purpose. A better approach would be to codify *Kreitzer* in order to allow the State, but no other creditor, to recover from a non-spendthrift discretionary support trust (perhaps with language allowing the court to limit the creditor’s award to provide for the support or supplemental needs of the beneficiary and the beneficiary’s family).
Public Policy

UTC § 410 provides that “a trust terminates to the extent the trust is revoked or expires pursuant to its terms, no purpose of the trust remains to be achieved, or the purposes of the trust have become unlawful, contrary to public policy, or impossible to achieve (emphasis added).” The reference to the possibility that an SNT could terminate upon the finding by any judge of a court of competent jurisdiction that it (or SNTs in general) is against public policy is a matter of concern to many practitioners. In Young v. Ohio Dept. of Human Services, Justice Stratton, in dissent, basically stated that SNTs are against the public policy of the state of Ohio:

Where a child has reached the age of majority and the obligation to support has ceased, I strongly believe it would be against public policy to allow a parent to create a trust where the trust income or trust corpus can go to the child at the discretion of the trustee, except when such distributions would render the child ineligible for medical assistance from the government.

Because of that infamous dissent, the reference to public policy as a reason for which a trust could be terminated has been eliminated from OUTC § 5804.10. The simple removal of that provision, however, does not restrict the jurisdiction that courts may inherently already have in this regard.

Conclusion

Neither the UTC nor the OUTC will have a negative impact on either third-party settled SNTs or self-settled SNTs. Self-settled SNTs will continue to be exposed to beneficiaries’ creditors, not because of the UTC, but because of general common law principles that exist irrespective of enactment of the UTC. The UTC will not permit state governments to recover from SNTs benefits paid to their beneficiaries, and the UTC will not assist states in their efforts to deny public benefits to SNT beneficiaries. The UTC will actually enhance SNT planning because of the § 504(b) prohibition against the ability of creditors to compel distributions, which provision was unfortunately removed from the OUTC and should be restored. The need for a codification of trust law is obvious. The UTC has been endorsed by the ABA and by a large and growing number of state bar associations. A critical analysis shows that the UTC is not a threat to SNTs.

2 “A Threat to All SNTs” by Mark Merric and Douglas W. Stein, Trusts & Estates, November 2004.
3 Supra, footnote 2, at page 41.
4 R.C. § 5111.151.
5 The maximum amount with which an R.C. § 1339.51 Supplemental Services Trust can be funded in 2005 is $222,000 (the permissible starting amount increases at the rate of $2000 per year).
6 Those conditions are: (1) the individual has a physical or mental disability and is eligible to receive services through the department of mental retardation and developmental disabilities or a county board of mental retardation and developmental disabilities; or (2) the individual has a mental disability and is eligible to receive services through the department of mental health or a board of alcohol, drug addiction, and mental health services.
9 For a discussion on creating self-settled SNTs under the laws of asset protection jurisdictions such as Alaska or Delaware, see Robert Collins, “The Greater Asset Protection Self Settled Special Needs Trust (GAPSNT),” 2004 National Academy of Elder Law Attorneys Symposium.
10 Restatement (Second) of Trusts, § 156; Restatement (Third) of Trusts, § 58(2) and § 60, comment f. Some states, notably Alaska, Nevada, Utah, Delaware and Rhode Island, have enacted asset protection statutes that are contrary to the common law rule.
11 Provided that the requirements of R.C. § 1339.51 are met, division (D) of that section provides the following protection from the claims of creditors: “(D) To the extent permitted by federal law and subject to the provisions of division (C)(2) of this section pertaining to the enforcement of specific instructions or conditions governing a trustee's discretion, a trust authorized by division (B) of this section that confers discretion upon the trustee shall not be considered an asset or resource of the beneficiary, the beneficiary's estate, the settlor, or the settlor's estate and shall be exempt from the claims of creditors, political subdivisions, the state, other governmental entities, and other claimants against the beneficiary, the beneficiary's estate, the settlor, or the settlor's estate, including claims based on provisions of Chapters 5111, 5121, or 5123 of the Revised Code and claims sought to be satisfied by way of a civil action, subrogation, execution, garnishment, attachment, judicial sale, or other legal process….”
14 Restatement (Third) of Trusts, § 60, Reporter's Notes to comment a.
15 Bureau of Support in Dept. of Mental Hygiene and Correction v. Kreitzer, 243 N.E.2d 83 (Ohio 1968), where the Ohio Supreme Court held that a discretionary support trust that presumably lacked a spendthrift provision was available to provide for the beneficiary's care, comfort maintenance and general well being thereby making the trust liable to the state of Ohio for amounts paid by the state towards the beneficiary's support in a state institution.
16 Restatement (Third) of Trusts, § 60, comment c and Reporter’s Notes to comment e. See also State of Colorado for the use of Colorado State Hospital v. First Interstate Bank of Denver, 743 P.2d 449 (Colo. App. 1987) (recognizing that the creditors of a beneficiary of a discretionary trust can reach his interest in the trust by levying directly upon the subject matter of the trust or by garnishing the trustee), citing Restatement (Second) of Trusts, § 147. See also In Re Marriage of Jones, 812 P.2d 1152 (Colo. 1991) (recognizing that a beneficiary of a discretionary trust has an equitable interest in the subject matter of the trust).

17 UTC § 503(b) provides “even if a trust contains a spendthrift provision, a beneficiary’s child, spouse or former spouse who has a judgment or court order against the beneficiary for support or maintenance, or a judgment creditor who has provided services for the protection of the beneficiary’s interest in the trust, may obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary.” UTC § 503(c) provides “a spendthrift provision is unenforceable against a claim of this [state] or the United States to the extent a statute of this [state] or federal law so provides.” These UTC exception creditor classes are similar to the holdings in Restatement (Second) of Trusts, § 157 and Restatement (Third) of Trusts, § 59. The UTC removed from the list of exception creditors those who provided support for the protection of the beneficiary’s interest and former spouses.

18 Restatement (Second) of Trusts, § 155(1); Restatement (Third) of Trusts, § 60, Reporter’s Notes to comment e. To be sure, the Restatement (Third) position may be more liberal in suggesting that beneficiaries and their creditors have the right in some circumstances to compel trustees to make discretionary distributions. Restatement (Third) of Trusts, § 60, comment e provides: “...A transferee or creditor of a trust beneficiary cannot compel the trustee to make discretionary distributions if the beneficiary personally could not do so. It is rare, however, that the beneficiary’s circumstances, the terms of the discretionary power, and the purposes of the trust leave the beneficiary so powerless. The exercise or non-exercise of fiduciary discretion is always subject to judicial review to prevent abuse.” In the words of Judge Learned Hand, “No language, however strong, will entirely remove any power held in trust from the reach of a court of equity.” Stix v. Commissioner, 152 F.2d 562, 563 (2d Cir. 1945). The UTC rule deviates from and is more restrictive than the Restatement (Third) position by providing absolutely that no creditor of a beneficiary may compel a discretionary distribution. The only exceptions to this rule are children, spouses and former spouses with judgments or orders for support, provided that they can demonstrate that the trustee has abused discretion.

19 See supra, at footnote 15.

20 See also Corcoran v. Department of Social Services, 271 Conn. 679, 859 A.2d 533 (2004.) (“The right of a creditor to reach the trust is not determinative of the right of the beneficiary to do so. It is possible for a trustee to be ordered to make payment to the beneficiary even when the creditor cannot similarly force payment from the trust.”)

21 See footnote 17.

22 42 U.S.C.A. § 1396p(b)(1)

23 Restatement (Second) of Trusts, § 157(d); Restatement (Third) of Trusts, § 59, comment a.

24 See supra, footnote 1, at pg. 486.

25 Restatement (Second) of Trusts, § 157(d); Restatement (Third) of Trusts, § 59, comment a; First Northwestern Trust Company v. Internal Revenue Service, 622 F.2d 387 (8th Cir. 1980).


27 United States v. Cohn, 855 F. Supp. 572 (D. Conn. 1994); see also United States v. O’Shaughnessy, 517 N.W.2d 574 (Minn. 1994) (holding that, under state law, a beneficiary’s interest in a purely discretionary trust is not “property” or “any right to property” within the meaning of the federal tax lien statute before the trustee has exercised its discretionary power to distribute under the trust agreement. See also, First Northwestern Trust Company v. Internal Revenue Service, 622 F.2d 387 (8th Cir. 1980).

28 For a comprehensive analysis of the UTC good faith standard, see Alan Newman’s outline from the 2005 University of Miami Heckerling Estate Planning Institute, entitled “Creditors’ Rights under the Uniform Trust Code.”

29 That section provides, “If a trust contains a clear statement that requires the trustee to terminate the trust if it is counted as an available resource, the trust shall not be counted as an available resource.”

30 R.C. § 5111.151(G)(4)(g).

31 R.C. § 5111.151(G)(4)(i).

32 See footnote 8, supra.


34 Referred to by Ms. Barrett as the "fully discretionary standard," supra, footnote 33.

35 This standard is referred to as the "strict SSI standard by Ms. Barrett, supra, footnote 33.

36 This standard is referred to as "Fully discretionary, precatory language mentioning special needs" by Ms. Barrett, supra, footnote 33.

37 See supra, at footnote 15.

38 See State v. Rubion, 308 S.W.2d 4 (Tex. 1957). See also Reporter's Notes to § 60, comment e of the Restatement (Third) of Trusts.


42 Young v. Ohio Dept. of Human Services, 76 Ohio St.3d 547, 668 N.E.2d 908 (1996).
EDITORIAL ADVISORY BOARD

Editor-in-Chief
Robert M. Brucken
Baker & Hostetler LLP, Cleveland

Advisory Board
David F. Allen
Allen, Yurasek & Merklin, Marysville

Angela G. Carlin
Weston, Hurd, Fallon, Paisley & Howley, LLP, Cleveland

Richard E. Davis II
Krugliak, Wilkins, Griffiths & Dougherty Co., LPA, Canton

Robert G. Dykes
Vorys, Sater, Seymour & Pease LLP, Columbus

Andrew L. Fabens
Thompson, Hine LLP, Cleveland

Craig F. Frederickson
Frederickson, Heintschel & King Co., LPA, Toledo

Daniel J. Hoffheimer
Taft, Stettinius & Hollister LLP, Cincinnati

C. Terry Johnson
Porter, Wright, Morris & Arthur, Dayton

William J. McGraw, III
Dungan & Lefevere LPA, Troy

William B. McNeil
McCulloch, Felger, Fite & Gutmann Co., L.P.A., Piqua

Karen M. Moore
Bricker & Eckler, Columbus

Kevin G. Robertson
Baker & Hostetler LLP, Cleveland

David J. Simmons
Simmons & Cleaver, Canton

Richard V. Wellman
Professor of Law, University of Georgia, Athens, GA

Classified Ad Information

Probate Law Journal of Ohio accepts classified advertisements for positions available, services offered, and other items of interest to subscribers. Ads are limited to 75 words and will be edited to fit (if necessary) and printed within the last three pages of the issue.

Cost of the service is $45 per insertion (prepaid) for PLJO subscribers and $75 per insertion (prepaid) for nonsubscribers. Other rates apply for space advertising.

To place a classified ad, send your copy and a check payable to West, Cleveland Office, 6111 Oak Tree Boulevard, P.O. Box 318063, Cleveland, Ohio 44131, Attn: Heather Day DiFranco, Esq. All ads are subject to acceptance by West, Cleveland Office, and we reserve the right to refuse ads at our sole discretion.

Deadline for the March/April 2005 Issue is March 10, 2005.
UNIFORM TRUST CODE

TABLE OF CONTENTS

PREFATORY NOTE ....................................................................................................................

ARTICLE 1
GENERAL PROVISIONS AND DEFINITIONS
SECTION 101. SHORT TITLE.................................................................................................
SECTION 102. SCOPE.............................................................................................................
SECTION 103. DEFINITIONS......................................................................................................
SECTION 104. KNOWLEDGE.................................................................................................
SECTION 105. DEFAULT AND MANDATORY RULES..............................................................
SECTION 106. COMMON LAW OF TRUSTS; PRINCIPLES OF EQUITY.................................
SECTION 107. GOVERNING LAW............................................................................................
SECTION 108. PRINCIPAL PLACE OF ADMINISTRATION.......................................................[
SECTION 109. METHODS AND WAIVER OF NOTICE..........................................................
SECTION 110. OTHERS TREATED AS QUALIFIED BENEFICIARIES....................................[
SECTION 111. NONJUDICIAL SETTLEMENT AGREEMENTS................................................[
[SECTION 112. RULES OF CONSTRUCTION.................................................................

ARTICLE 2
JUDICIAL PROCEEDINGS
SECTION 201. ROLE OF COURT IN ADMINISTRATION OF TRUST...........................................
SECTION 202. JURISDICTION OVER TRUSTEE AND BENEFICIARY...........................................
[SECTION 203. SUBJECT-MATTER JURISDICTION............................................................[
[SECTION 204. VENUE...........................................................................................................

ARTICLE 3
REPRESENTATION
SECTION 301. REPRESENTATION: BASIC EFFECT.................................................................
SECTION 302. REPRESENTATION BY HOLDER OF GENERAL TESTAMENTARY POWER OF
APPOINTMENT...................................................................................................................
SECTION 303. REPRESENTATION BY FIDUCIARIES AND PARENTS.........................................
SECTION 304. REPRESENTATION BY PERSON HAVING SUBSTANTIALLY IDENTICAL
INTEREST..........................................................................................................................
SECTION 305. APPOINTMENT OF REPRESENTATIVE..............................................................

ARTICLE 4
CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUST
SECTION 401. METHODS OF CREATING TRUST.................................................................
SECTION 402. REQUIREMENTS FOR CREATION.................................................................
SECTION 403. TRUSTS CREATED IN OTHER JURISDICTIONS...............................................
SECTION 404. TRUST PURPOSES..........................................................................................
SECTION 405. CHARITABLE PURPOSES; ENFORCEMENT....................................................
SECTION 406. CREATION OF TRUST INDUCED BY FRAUD, DURESS, OR
UNDUE INFLUENCE..............................................................................................................
SECTION 407. EVIDENCE OF ORAL TRUST............................................................................
SECTION 408. TRUST FOR CARE OF ANIMAL.......................................................................[
SECTION 409. NONCHARITABLE TRUST WITHOUT ASCERTAINABLE BENEFICIARY........[
SECTION 410. MODIFICATION OR TERMINATION OF TRUST; PROCEEDINGS FOR APPROVAL
OR DISAPPROVAL...............................................................................................................
SECTION 411. MODIFICATION OR TERMINATION OF NONCHARITABLE IRREVOCABLE
SECTION 816. SPECIFIC POWERS OF TRUSTEE .................................................................
SECTION 817. DISTRIBUTION UPON TERMINATION ....................................................

ARTICLE 9
UNIFORM PRUDENT INVESTOR ACT

ARTICLE 10
LIABILITY OF TRUSTEES AND RIGHTS OF PERSONS DEALING WITH TRUSTEE
SECTION 1001. REMEDIES FOR BREACH OF TRUST ......................................................
SECTION 1002. DAMAGES FOR BREACH OF TRUST ....................................................... 
SECTION 1003. DAMAGES IN ABSENCE OF BREACH .....................................................
SECTION 1004. ATTORNEY’S FEES AND COSTS ............................................................
SECTION 1005. LIMITATION OF ACTION AGAINST TRUSTEE ......................................
SECTION 1006. RELIANCE ON TRUST INSTRUMENT ....................................................
SECTION 1007. EVENT AFFECTING ADMINISTRATION OR DISTRIBUTION ....................
SECTION 1008. EXCULPATION OF TRUSTEE ............................................................... 
SECTION 1009. BENEFICIARY’S CONSENT, RELEASE, OR RATIFICATION ........................
SECTION 1010. LIMITATION ON PERSONAL LIABILITY OF TRUSTEE ...........................
SECTION 1011. INTEREST AS GENERAL PARTNER ......................................................
SECTION 1012. PROTECTION OF PERSON DEALING WITH TRUSTEE ............................
SECTION 1013. CERTIFICATION OF TRUST ............................................................... 

ARTICLE 11
MISCELLANEOUS PROVISIONS
SECTION 1101. UNIFORMITY OF APPLICATION AND CONSTRUCTION .........................
SECTION 1102. ELECTRONIC RECORDS AND SIGNATURES .......................................
SECTION 1103. SEVERABILITY CLAUSE .................................................................
SECTION 1104. EFFECTIVE DATE ............................................................................. 
SECTION 1105. REPEALS .........................................................................................
SECTION 1106. APPLICATION TO EXISTING RELATIONSHIPS .................................
SECTION 101. SHORT TITLE. This [Act] may be cited as the Uniform Trust Code.

SECTION 102. SCOPE. This [Code] applies to express trusts, charitable or noncharitable, and trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust.

SECTION 103. DEFINITIONS. In this [Code]:
(1) “Action,” with respect to an act of a trustee, includes a failure to act.
(2) “Ascertained standard” means a standard relating to an individual’s health, education, support, or maintenance within the meaning of Section 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code of 1986, as in effect on [the effective date of this [Code] [amendment]] [, or as later amended].
(3) “Beneficiary” means a person that:
   (A) has a present or future beneficial interest in a trust, vested or contingent; or
   (B) in a capacity other than that of trustee, holds a power of appointment over trust property.
(4) “Charitable trust” means a trust, or portion of a trust, created for a charitable purpose described in Section 405(a).
(5) “[Conservator]” means a person appointed by the court to administer the estate of a minor or adult individual.
(6) “Environmental law” means a federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment.
(7) “[Guardian]” means a person appointed by the court [, a parent, or a spouse] to make decisions regarding the support, care, education, health, and welfare of a minor or adult individual. The term does not include a guardian ad litem.
(8) “Interests of the beneficiaries” means the beneficial interests provided in the terms of the trust.
(9) “Jurisdiction,” with respect to a geographic area, includes a State or country.
(10) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.
(11) “Power of withdrawal” means a presently exercisable general power of appointment other than a power: (A) exercisable by a trustee and limited by an ascertainable standard; or (B) exercisable by another person only upon consent of the trustee or a person holding an adverse interest.
(12) “Property” means anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein.
“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 without causing the trust to terminate.

(13) “Revocable,” as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest.

(14) “Settlor” means a person, including a testator, who creates, or contributes property to, a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person’s contribution except to the extent another person has the power to revoke or withdraw that portion.

(15) “Spendthrift provision” means a term of a trust which restrains both voluntary and involuntary transfer of a beneficiary’s interest.

(16) “State” means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band recognized by federal law or formally acknowledged by a State.

(17) “Terms of a trust” means the manifestation of the settlor’s intent regarding a trust’s provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.

(18) “Trust instrument” means an instrument executed by the settlor that contains terms of the trust, including any amendments thereto.

(19) “Trustee” includes an original, additional, and successor trustee, and a cotrustee.

SECTION 104. KNOWLEDGE.
(a) Subject to subsection (b), a person has knowledge of a fact if the person:
(1) has actual knowledge of it;
(2) has received a notice or notification of it; or
(3) from all the facts and circumstances known to the person at the time in question, has reason to know it.

(b) An organization that conducts activities through employees has notice or knowledge of a fact involving a trust only from the time the information was received by an employee having responsibility to act for the trust, or would have been brought to the employee’s attention if the organization had exercised reasonable diligence. An organization exercises reasonable diligence if it maintains reasonable routines for communicating significant information to the employee having responsibility to act for the trust and there is reasonable compliance with the routines. Reasonable diligence does not require an employee of the organization to communicate information unless the communication is part of the individual’s regular duties or the individual knows a matter involving the trust would be materially affected by the information.
having responsibility to act for the trust, or would have been brought to the employee’s attention had the organization exercised reasonable diligence.

SECTION 105. DEFAULT AND MANDATORY RULES.
(a) Except as otherwise provided in the terms of the trust, this [Code] governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.
(b) The terms of a trust prevail over any provision of this [Code] except:
   (1) the requirements for creating a trust;
   (2) the duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries;
   (3) the requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve;
   (4) the power of the court to modify or terminate a trust under Sections 410 through 416;
   (5) the effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in [Article] 5;
   (6) the power of the court under Section 702 to require, dispense with, or modify or terminate a bond;
   (7) the power of the court under Section 708(b) to adjust a trustee’s compensation specified in the terms of the trust which is unreasonably low or high;
   (8) the duty under Section 813(b)(2) and (3) to notify qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, of the identity of the trustee, and of their right to request trustee’s reports;
   (9) the duty under Section 813(a) to respond to the request of a beneficiary of an irrevocable trust for trustee’s reports and other information reasonably related to the administration of a trust;
   (10) the effect of an exculpatory term under Section 1008;
   (11) the rights under Sections 1010 through 1013 of a person other than a trustee or beneficiary;
   (12) periods of limitation for commencing a judicial proceeding; [and]
   (13) the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice [; and
   (14) the subject-matter jurisdiction of the court and venue for commencing a proceeding as provided in Sections 203 and 204].

SECTION 106. COMMON LAW OF TRUSTS; PRINCIPLES OF EQUITY. The common law of trusts and principles of equity supplement this [Code], except to the extent modified by this [Code] or another statute of this State.

SECTION 107. GOVERNING LAW. The meaning and effect of the terms of a trust are determined by:
(1) the law of the jurisdiction designated in the terms unless the designation of that jurisdiction’s law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue; or
(2) in the absence of a controlling designation in the terms of the trust, the law of the jurisdiction having the most significant relationship to the matter at issue.

SECTION 108. PRINCIPAL PLACE OF ADMINISTRATION.
(a) Without precluding other means for establishing a sufficient connection with the designated jurisdiction, terms of a trust designating the principal place of administration are valid and controlling if:
  (1) a trustee’s principal place of business is located in or a trustee is a resident of the designated jurisdiction; or
  (2) all or part of the administration occurs in the designated jurisdiction.
(b) A trustee is under a continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries. (c) Without precluding the right of the court to order, approve, or disapprove a transfer, the trustee, in furtherance of the duty prescribed by subsection (b), may transfer the trust’s principal place of administration to another State or to a jurisdiction outside of the United States.
(d) The trustee shall notify the qualified beneficiaries of a proposed transfer of a trust’s principal place of administration not less than 60 days before initiating the transfer. The notice of proposed transfer must include:
  (1) the name of the jurisdiction to which the principal place of administration is to be transferred;
  (2) the address and telephone number at the new location at which the trustee can be contacted;
  (3) an explanation of the reasons for the proposed transfer;
  (4) the date on which the proposed transfer is anticipated to occur; and
  (5) the date, not less than 60 days after the giving of the notice, by which the qualified beneficiary must notify the trustee of an objection to the proposed transfer.
(e) The authority of a trustee under this section to transfer a trust’s principal place of administration terminates if a qualified beneficiary notifies the trustee of an objection to the proposed transfer on or before the date specified in the notice.
(f) In connection with a transfer of the trust’s principal place of administration, the trustee may transfer some or all of the trust property to a successor trustee designated in the terms of the trust or appointed pursuant to Section 704.

SECTION 109. METHODS AND WAIVER OF NOTICE.
(a) Notice to a person under this [Code] or the sending of a document to a person under this [Code] must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document. Permissible methods of notice or for sending a document include first-class mail, personal delivery, delivery to the person’s last known place of residence or place of business, or a properly directed electronic message.
(b) Notice otherwise required under this [Code] or a document otherwise required to be sent under this [Code] need not be provided to a person whose identity or location is unknown to and not reasonably ascertainable by the trustee.

(c) Notice under this [Code] or the sending of a document under this [Code] may be waived by the person to be notified or sent the document.

(d) Notice of a judicial proceeding must be given as provided in the applicable rules of civil procedure.

SECTION 110. OTHERS TREATED AS QUALIFIED BENEFICIARIES.

(a) Whenever notice to qualified beneficiaries of a trust is required under this [Code], the trustee must also give notice to any other beneficiary who has sent the trustee a request for notice.

(b) A charitable organization expressly designated to receive distributions under the terms of a charitable trust has the rights of a qualified beneficiary under this [Code] if the charitable organization, on the date the charitable organization’s qualification is being 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 upon the termination of the interests of other distributees or permissible distributees then receiving or eligible to receive distributions; or
   (C) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

(c) A person appointed to enforce a trust created for the care of an animal or another noncharitable purpose as provided in Section 408 or 409 has the rights of a qualified beneficiary under this [Code].

[(d) The [attorney general of this State] has the rights of a qualified beneficiary with respect to a charitable trust having its principal place of administration in this State.]

SECTION 111. NONJUDICIAL SETTLEMENT AGREEMENTS.

(a) For purposes of this section, “interested persons” means persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court.

(b) Except as otherwise provided in subsection (c), interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust.

(c) A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this [Code] or other applicable law.

(d) Matters that may be resolved by a nonjudicial settlement agreement include:

   (1) the interpretation or construction of the terms of the trust;
   (2) the approval of a trustee’s report or accounting;
   (3) direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power;
(4) the resignation or appointment of a trustee and the determination of a trustee’s compensation;
(5) transfer of a trust’s principal place of administration; and
(6) liability of a trustee for an action relating to the trust.
(e) Any interested person may request the court to approve a nonjudicial settlement agreement, to determine whether the representation as provided in [Article] 3 was adequate, and to determine whether the agreement contains terms and conditions the court could have properly approved.

[SECTION 112. RULES OF CONSTRUCTION. The rules of construction that apply in this State to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property.]

ARTICLE 2
JUDICIAL PROCEEDINGS

SECTION 201. ROLE OF COURT IN ADMINISTRATION OF TRUST.
(a) The court may intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law.
(b) A trust is not subject to continuing judicial supervision unless ordered by the court.
(c) A judicial proceeding involving a trust may relate to any matter involving the trust’s administration, including a request for instructions and an action to declare rights.

SECTION 202. JURISDICTION OVER TRUSTEE AND BENEFICIARY.
(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 to this State, the trustee submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust.
(b) With respect to their interests in the trust, the beneficiaries of a trust having its principal place of administration in this State are subject to the jurisdiction of the courts of this State regarding any matter involving the trust. By accepting a distribution from such a trust, the recipient submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust.
(c) This section does not preclude other methods of obtaining jurisdiction over a trustee, beneficiary, or other person receiving property from the trust.

SECTION 203. SUBJECT-MATTER JURISDICTION.
(a) The [designate] court has exclusive jurisdiction of proceedings in this State brought by a trustee or beneficiary concerning the administration of a trust.
(b) The [designate] court has concurrent jurisdiction with other courts of this State of other proceedings involving a trust.

SECTION 204. VENUE.
(a) Except as otherwise provided in subsection (b), venue for a judicial proceeding involving a trust is in the [county] of this State in which the trust’s principal place of
administration is or will be located and, if the trust is created by will and the estate is not yet closed, in the [county] in which the decedent’s estate is being administered.

(b) If a trust has no trustee, venue for a judicial proceeding for the appointment of a trustee is in a [county] of this State in which a beneficiary resides, in a [county] in which any trust property is located, and if the trust is created by will, in the [county] in which the decedent’s estate was or is being administered.]

ARTICLE 3
REPRESENTATION

SECTION 301. REPRESENTATION: BASIC EFFECT.

(a) Notice to a person who may represent and bind another person under this [article] has the same effect as if notice were given directly to the other person.

(b) The consent of a person who may represent and bind another person under this [article] is binding on the person represented unless the person represented objects to the representation before the consent would otherwise have become effective.

(c) Except as otherwise provided in Sections [411 and] 602, a person who under this [article] may represent a settlor who lacks capacity may receive notice and give a binding consent on the settlor’s behalf.

(d) A settlor may not represent or bind a beneficiary under this [article] with respect to the termination or modification of a trust under Section 411(a).]

SECTION 302. REPRESENTATION BY HOLDER OF GENERAL TESTAMENTARY POWER OF APPOINTMENT. To the extent there is no conflict of interest between the holder of a general testamentary power of appointment and the persons represented with respect to the particular question or dispute, the holder may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power.

SECTION 303. REPRESENTATION BY FIDUCIARIES AND PARENTS. To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:

1. A [conservator] may represent and bind the estate that the [conservator] controls;
2. A [guardian] may represent and bind the ward if a [conservator] of the ward’s estate has not been appointed;
3. An agent having authority to act with respect to the particular question or dispute may represent and bind the principal;
4. A trustee may represent and bind the beneficiaries of the trust;
5. A personal representative of a decedent’s estate may represent and bind persons interested in the estate; and
6. A parent may represent and bind the parent’s minor or unborn child if a [conservator] or [guardian] for the child has not been appointed.
SECTION 304. REPRESENTATION BY PERSON HAVING SUBSTANTIALLY IDENTICAL INTEREST. Unless otherwise represented, a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person represented.

SECTION 305. APPOINTMENT OF REPRESENTATIVE.
   (a) If the court determines that an interest is not represented under this [article], or that the otherwise available representation might be inadequate, the court may appoint a [representative] to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown. A [representative] may be appointed to represent several persons or interests.
   (b) A [representative] may act on behalf of the individual represented with respect to any matter arising under this [Code], whether or not a judicial proceeding concerning the trust is pending.
   (c) In making decisions, a [representative] may consider general benefit accruing to the living members of the individual’s family.

ARTICLE 4
CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUST

SECTION 401. METHODS OF CREATING TRUST. A trust may be created by:
   (1) transfer of property to another person as trustee during the settlor’s lifetime or by will or other disposition taking effect upon the settlor’s death;
   (2) declaration by the owner of property that the owner holds identifiable property as trustee; or
   (3) exercise of a power of appointment in favor of a trustee.

SECTION 402. REQUIREMENTS FOR CREATION.
   (a) A trust is created only if:
      (1) the settlor has capacity to create a trust;
      (2) the settlor indicates an intention to create the trust;
      (3) the trust has a definite beneficiary or is:
         (A) a charitable trust;
         (B) a trust for the care of an animal, as provided in Section 408; or
         (C) a trust for a noncharitable purpose, as provided in Section 409;
      (4) the trustee has duties to perform; and
      (5) the same person is not the sole trustee and sole beneficiary.
   (b) A beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities.
(c) A power in a trustee to select a beneficiary from an indefinite class is valid. If the power is not exercised within a reasonable time, the power fails and the property subject to the power passes to the persons who would have taken the property had the power not been conferred.

**SECTION 403. TRUSTS CREATED IN OTHER JURISDICTIONS.** 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 executed, or the law of the jurisdiction in which, at the time of creation:

1. the settlor was domiciled, had a place of abode, or was a national;
2. a trustee was domiciled or had a place of business; or
3. any trust property was located.

**SECTION 404. TRUST PURPOSES.** A trust may be created only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve. A trust and its terms must be for the benefit of its beneficiaries.

**SECTION 405. CHARITABLE PURPOSES; ENFORCEMENT.**

(a) 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.

(b) If the terms of a charitable trust do not indicate a particular charitable purpose or beneficiary, the court may select one or more charitable purposes or beneficiaries. The selection must be consistent with the settlor’s intention to the extent it can be ascertained.

(c) The settlor of a charitable trust, among others, may maintain a proceeding to enforce the trust.

**SECTION 406. CREATION OF TRUST INDUCED BY FRAUD, DURESS, OR UNDUE INFLUENCE.** A trust is void to the extent its creation was induced by fraud, duress, or undue influence.

**SECTION 407. EVIDENCE OF ORAL TRUST.** Except as required by a statute other than this [Code], a trust need not be evidenced by a trust instrument, but the creation of an oral trust and its terms may be established only by clear and convincing evidence.

**SECTION 408. TRUST FOR CARE OF ANIMAL.**

(a) A trust may be created to provide for the care of an animal alive during the settlor’s lifetime. The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one animal alive during the settlor’s lifetime, upon the death of the last surviving animal.

(b) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court. A person having an interest in the welfare of the animal may request the court to appoint a person to enforce the trust or to remove a person appointed.
(c) Property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided 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.

SECTION 409. NONCHARITABLE TRUST WITHOUT ASCERTAINABLE BENEFICIARY. Except as otherwise provided in Section 408 or by another statute, the following rules apply:

(1) A trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the trustee. The trust may not be enforced for more than [21] years.

(2) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court.

(3) Property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided 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.

SECTION 410. MODIFICATION OR TERMINATION OF TRUST; PROCEEDINGS FOR APPROVAL OR DISAPPROVAL.

(a) In addition to the methods of termination prescribed by Sections 411 through 414, a trust terminates to the extent the trust is revoked or expires pursuant to its terms, no purpose of the trust remains to be achieved, or the purposes of the trust have become unlawful, contrary to public policy, or impossible to achieve.

(b) A proceeding to approve or disapprove a proposed modification or termination under Sections 411 through 416, or trust combination or division under Section 417, may be commenced by a trustee or beneficiary, and a proceeding to approve or disapprove a proposed modification or termination under Section 411 may be commenced by the settlor. The settlor of a charitable trust may maintain a proceeding to modify the trust under Section 413.

SECTION 411. MODIFICATION OR TERMINATION OF NONCHARITABLE IRREVOCABLE TRUST BY CONSENT.

[(a) [A noncharitable irrevocable trust may be modified or terminated upon consent of the settlor and all beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust.] [If, upon petition, the court finds that the settlor and all beneficiaries consent to the modification or termination of a noncharitable irrevocable trust, the court shall approve the modification or termination even if the modification or termination is inconsistent with a material purpose of the trust.] A settlor’s power to consent to a trust’s modification or termination may be exercised by an agent under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust; by the settlor’s [conservator] with the approval of the court supervising the [conservatorship] if an agent is not so authorized; or by

10
the settlor’s [guardian] with the approval of the court supervising the [guardianship] if an agent is not so authorized and a conservator has not been appointed. [This subsection does not apply to irrevocable trusts created before or to irrevocable trusts that become irrevocable before [the effective date of this [Code] [amendment]].

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

[(c) A spendthrift provision in the terms of the trust is not presumed to constitute a material purpose of the trust.]

(c) or (d) Upon termination of a trust under subsection (a) or (b), the trustee shall distribute the trust property as agreed by the beneficiaries.

(d) or (e) If not all of the beneficiaries consent to a proposed modification or termination of the trust under subsection (a) or (b), the modification or termination may be approved by the court if the court is satisfied that:

1) if all of the beneficiaries had consented, the trust could have been modified or terminated under this section; and

2) the interests of a beneficiary who does not consent will be adequately protected.

SECTION 412. MODIFICATION OR TERMINATION BECAUSE OF UNANTICIPATED CIRCUMSTANCES OR INABILITY TO ADMINISTER TRUST EFFECTIVELY.

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

(b) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust’s administration.

(c) Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.

SECTION 413. CY PRES.

(a) Except as otherwise provided in subsection (b), if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful:

1) the trust does not fail, in whole or in part;

2) the trust property does not revert to the settlor or the settlor’s successors in interest; and

3) the court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor’s charitable purposes.
(b) A provision in the terms of a charitable trust that would result in distribution of the trust property to a noncharitable beneficiary prevails over the power of the court under subsection (a) to apply cy pres to modify or terminate the trust only if, when the provision takes effect:
   (1) the trust property is to revert to the settlor and the settlor is still living; or
   (2) fewer than 21 years have elapsed since the date of the trust’s creation.

SECTION 414. MODIFICATION OR TERMINATION OF UNECONOMIC TRUST.
   (a) After notice to the qualified beneficiaries, the trustee of a trust consisting of trust property having a total value less than [$50,000] may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration.
   (b) The court may modify or terminate a trust or remove the trustee and appoint a different trustee if it determines that the value of the trust property is insufficient to justify the cost of administration.
   (c) Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.
   (d) This section does not apply to an easement for conservation or preservation.

SECTION 415. REFORMATION TO CORRECT MISTAKES. The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor’s intention if it is proved by clear and convincing evidence that both the settlor’s intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.

SECTION 416. MODIFICATION TO ACHIEVE SETTLOR’S TAX OBJECTIVES. To achieve the settlor’s tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor’s probable intention. The court may provide that the modification has retroactive effect.

SECTION 417. COMBINATION AND DIVISION OF TRUSTS. After notice to the qualified beneficiaries, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts, if the result does not impair rights of any beneficiary or adversely affect achievement of the purposes of the trust.

CREDITOR’S CLAIMS; SPENDTHRIFT AND DISCRETIONARY TRUSTS

SECTION 501. RIGHTS OF BENEFICIARY’S CREDITOR OR ASSIGNEE. To the extent a beneficiary’s interest is not subject to a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary’s interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means. The court may limit the award to such relief as is appropriate under the circumstances.

SECTION 502. SPENDTHRIFT PROVISION.
(a) A spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary’s interest.

(b) A term of a trust providing that the interest of a beneficiary is held subject to a “spendthrift trust,” or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary’s interest.

(c) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this [article], a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.

SECTION 503. EXCEPTIONS TO SPENDTHRIFT PROVISION.

(a) In this section, “child” includes any person for whom an order or judgment for child support has been entered in this or another State.

(b) A spendthrift provision is unenforceable against:
   (1) a beneficiary’s child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance;
   (2) a judgment creditor who has provided services for the protection of a beneficiary’s interest in the trust; and
   (3) a claim of this State or the United States to the extent a statute of this State or federal law so provides.

(c) A claimant against whom a spendthrift provision cannot be enforced may obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary. The court may limit the award to such relief as is appropriate under the circumstances.

SECTION 504. DISCRETIONARY TRUSTS; EFFECT OF STANDARD.

(a) In this section, “child” includes any person for whom an order or judgment for child support has been entered in this or another State.

(b) Except as otherwise provided in subsection (c), whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee’s discretion, even if:
   (1) the discretion is expressed in the form of a standard of distribution; or
   (2) the trustee has abused the discretion.

(c) To the extent a trustee has not complied with a standard of distribution or has abused a discretion:
   (1) a distribution may be ordered by the court to satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary’s child, spouse, or former spouse; and
   (2) the court shall direct the trustee to pay to the child, spouse, or former spouse such amount as is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion.

(d) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.
(e) A creditor may not reach the interest of a beneficiary who is also a trustee or cotrustee, or otherwise compel a distribution, if the trustee’s discretion to make distributions for the trustee’s own benefit is limited by an ascertainable standard.

SECTION 505. CREDITOR’S CLAIM AGAINST SETTLOR.
(a) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

(1) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor’s creditors.

(2) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor’s benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor’s interest in the portion of the trust attributable to that settlor’s contribution.

(3) After the death of a settlor, and subject to the settlor’s right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor’s death is subject to claims of the settlor’s creditors, costs of administration of the settlor’s estate, the expenses of the settlor’s funeral and disposal of remains, and [statutory allowances] to a surviving spouse and children to the extent the settlor’s probate estate is inadequate to satisfy those claims, costs, expenses, and [allowances].

(b) For purposes of this section:

(1) during the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and

(2) upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in Section 2041(b)(2) or 2514(e) of the Internal Revenue Code of 1986, or Section 2503(b) of the Internal Revenue Code of 1986, in each case as in effect on [the effective date of this [Code]] [, or as later amended].

SECTION 506. OVERDUE DISTRIBUTION.
(a) In this section, “mandatory distribution” means a distribution of income or principal which the trustee is required to make to a beneficiary under the terms of the trust, including a distribution upon termination of the trust. The term excludes a distribution subject to the exercise of the trustee’s discretion whether or not the terms of the trust (i) include a support or other standard to guide the trustee in making distribution decisions, or (ii) provide that the trustee “may” or “shall” make discretionary distributions, including distributions pursuant to a support or other standard.

(b) Whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal, including a distribution upon termination of the trust, if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date.
SECTION 507. PERSONAL OBLIGATIONS OF TRUSTEE. Trust property is not subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt.

ARTICLE 6
REVOCABLE TRUSTS

SECTION 601. CAPACITY OF SETTLOR OF REVOCABLE TRUST. The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will.

SECTION 602. REVOCATION OR AMENDMENT OF REVOCABLE TRUST.
(a) Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust. This subsection does not apply to a trust created under an instrument executed before [the effective date of this [Code]].
(b) If a revocable trust is created or funded by more than one settlor:
(1) to the extent the trust consists of community property, the trust may be revoked by either spouse acting alone but may be amended only by joint action of both spouses; and
(2) to the extent the trust consists of property other than community property, each settlor may revoke or amend the trust with regard to the portion of the trust property attributable to that settlor’s contribution, and
(3) upon the revocation or amendment of the trust by fewer than all of the settlors, the trustee shall promptly notify the other settlors of the revocation or amendment.
(c) The settlor may revoke or amend a revocable trust:
(1) by substantial compliance with a method provided in the terms of the trust; or
(2) if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by:
   (A) a later will or codicil that expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust; or
   (B) any other method manifesting clear and convincing evidence of the settlor’s intent.
(d) Upon revocation of a revocable trust, the trustee shall deliver the trust property as the settlor directs.
(e) A settlor’s powers with respect to revocation, amendment, or distribution of trust property may be exercised by an agent under a power of attorney only to the extent expressly authorized by the terms of the trust or the power.
(f) A [conservator] of the settlor or, if no [conservator] has been appointed, a [guardian] of the settlor may exercise a settlor’s powers with respect to revocation, amendment, or distribution of trust property only with the approval of the court supervising the [conservatorship] or [guardianship].
(g) 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.
SECTION 603. SETTLOR’S POWERS; POWERS OF WITHDRAWAL.
(a) While a trust is revocable [and the settlor has capacity to revoke the trust], rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.
(b) During the period the power may be exercised, the holder of a power of withdrawal has the rights of a settlor of a revocable trust under this section to the extent of the property subject to the power.

SECTION 604. LIMITATION ON ACTION CONTESTING VALIDITY OF REVOCABLE TRUST; DISTRIBUTION OF TRUST PROPERTY.
(a) A person may commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor’s death within the earlier of:
   (1) [three] years after the settlor’s death; or
   (2) [120] days after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust’s existence, of the trustee’s name and address, and of the time allowed for commencing a proceeding.
(b) Upon the death of the settlor of a trust that was revocable at the settlor’s death, the trustee may proceed to distribute the trust property in accordance with the terms of the trust. The trustee is not subject to liability for doing so unless:
   (1) the trustee knows of a pending judicial proceeding contesting the validity of the trust; or
   (2) a potential contestant has notified the trustee of a possible judicial proceeding to contest the trust and a judicial proceeding is commenced within 60 days after the contestant sent the notification.
(c) A beneficiary of a trust that is determined to have been invalid is liable to return any distribution received.

ARTICLE 7
OFFICE OF TRUSTEE

SECTION 701. ACCEPTING OR DECLINING TRUSTEESHIP.
(a) Except as otherwise provided in subsection (c), a person designated as trustee accepts the trusteeship:
   (1) by substantially complying with a method of acceptance provided in the terms of the trust; or
   (2) if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by accepting delivery of the trust property, exercising powers or performing duties as trustee, or otherwise indicating acceptance of the trusteeship.
(b) A person designated as trustee who has not yet accepted the trusteeship may reject the trusteeship. A designated trustee who does not accept the trusteeship within a reasonable time after knowing of the designation is deemed to have rejected the trusteeship.
(c) A person designated as trustee, without accepting the trusteeship, may:
(1) act to preserve the trust property if, within a reasonable time after acting, the person sends a rejection of the trusteeship to the settlor or, if the settlor is dead or lacks capacity, to a qualified beneficiary; and

(2) inspect or investigate trust property to determine potential liability under environmental or other law or for any other purpose.

SECTION 702. TRUSTEE’S BOND.

(a) A trustee shall give bond to secure performance of the trustee’s duties only if the court finds that a bond is needed to protect the interests of the beneficiaries or is required by the terms of the trust and the court has not dispensed with the requirement.

(b) The court may specify the amount of a bond, its liabilities, and whether sureties are necessary. The court may modify or terminate a bond at any time.

[(c) A regulated financial-service institution qualified to do trust business in this State need not give bond, even if required by the terms of the trust.]

SECTION 703. COTRUSTEES.

(a) Cotrustees who are unable to reach a unanimous decision may act by majority decision.

(b) If a vacancy occurs in a cotrusteeship, the remaining cotrustees may act for the trust.

(c) A cotrustee must participate in the performance of a trustee’s function unless the cotrustee is unavailable to perform the function because of absence, illness, disqualification under other law, or other temporary incapacity or the cotrustee has properly delegated the performance of the function to another trustee.

(d) If a cotrustee is unavailable to perform duties because of absence, illness, disqualification under other law, or other temporary incapacity, and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining cotrustee or a majority of the remaining cotrustees may act for the trust.

(e) A trustee may not delegate to a cotrustee the performance of a function the settlor reasonably expected the trustees to perform jointly. Unless a delegation was irrevocable, a trustee may revoke a delegation previously made.

(f) Except as otherwise provided in subsection (g), a trustee who does not join in an action of another trustee is not liable for the action.

(g) Each trustee shall 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.

(h) A dissenting trustee who joins in an action at the direction of the majority of the trustees and who notified any cotrustee of the dissent at or before the time of the action is not liable for the action unless the action is a serious breach of trust.

SECTION 704. VACANCY IN TRUSTEESHIP; APPOINTMENT OF SUCCESSOR.

(a) A vacancy in a trusteeship occurs if:

   (1) a person designated as trustee rejects the trusteeship;
   (2) a person designated as trustee cannot be identified or does not exist;
(3) a trustee resigns;
(4) a trustee is disqualified or removed;
(5) a trustee dies; or
(6) a [guardian] or [conservator] is appointed for an individual serving as trustee.
(b) If one or more cotrustees remain in office, a vacancy in a trusteeship need not be filled. A vacancy in a trusteeship must be filled if the trust has no remaining trustee.
(c) A vacancy in a trusteeship of a noncharitable trust that is required to be filled must be filled in the following order of priority:
   (1) by a person designated in the terms of the trust to act as successor trustee;
   (2) by a person appointed by unanimous agreement of the qualified beneficiaries; or
   (3) by a person appointed by the court.
(d) A vacancy in a trusteeship of a charitable trust that is required to be filled must be filled in the following order of priority:
   (1) by a person designated in the terms of the trust to act as successor trustee;
   (2) by a person selected by the charitable organizations expressly designated to receive distributions under the terms of the trust [if the [attorney general] concurs in the selection]; or
   (3) by a person appointed by the court.
(e) Whether or not a vacancy in a trusteeship exists or is required to be filled, the court may appoint an additional trustee or special fiduciary whenever the court considers the appointment necessary for the administration of the trust.

SECTION 705. RESIGNATION OF TRUSTEE.
(a) A trustee may resign:
   (1) upon at least 30 days’ notice to the qualified beneficiaries, the settlor, if living, and all cotrustees; or
   (2) with the approval of the court.
(b) In approving a resignation, the court may issue orders and impose conditions reasonably necessary for the protection of the trust property.
(c) Any liability of a resigning trustee or of any sureties on the trustee’s bond for acts or omissions of the trustee is not discharged or affected by the trustee’s resignation.

SECTION 706. REMOVAL OF TRUSTEE.
(a) The settlor, a cotrustee, or a beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.
(b) The court may remove a trustee if:
   (1) the trustee has committed a serious breach of trust;
   (2) lack of cooperation among cotrustees substantially impairs the administration of the trust;
   (3) because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or
(4) there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.

(c) Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order such appropriate relief under Section 1001(b) as may be necessary to protect the trust property or the interests of the beneficiaries.

SECTION 707. DELIVERY OF PROPERTY BY FORMER TRUSTEE.

(a) Unless a cotrustee remains in office or the court otherwise orders, and until the trust property is delivered to a successor trustee or other person entitled to it, a trustee who has resigned or been removed has the duties of a trustee and the powers necessary to protect the trust property.

(b) A trustee who has resigned or been removed shall proceed expeditiously to deliver the trust property within the trustee’s possession to the cotrustee, successor trustee, or other person entitled to it.

SECTION 708. COMPENSATION OF TRUSTEE.

(a) If the terms of a trust do not specify the trustee’s compensation, a trustee is entitled to compensation that is reasonable under the circumstances.

(b) If the terms of a trust specify the trustee’s compensation, the trustee is entitled to be compensated as specified, but the court may allow more or less compensation if:

(1) the duties of the trustee are substantially different from those contemplated when the trust was created; or

(2) the compensation specified by the terms of the trust would be unreasonably low or high.

SECTION 709. REIMBURSEMENT OF EXPENSES.

(a) A trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, for:

(1) expenses that were properly incurred in the administration of the trust; and

(2) to the extent necessary to prevent unjust enrichment of the trust, expenses that were not properly incurred in the administration of the trust.

(b) An advance by the trustee of money for the protection of the trust gives rise to a lien against trust property to secure reimbursement with reasonable interest.

ARTICLE 8
DUTIES AND POWERS OF TRUSTEE

SECTION 801. DUTY TO ADMINISTER TRUST. Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this [Code].
SECTION 802. DUTY OF LOYALTY.

(a) A trustee shall administer the trust solely in the interests of the beneficiaries.

(b) Subject to the rights of persons dealing with or assisting the trustee as provided in Section 1012, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee’s own personal account or which is otherwise affected by a conflict between the trustee’s fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless:
   (1) the transaction was authorized by the terms of the trust;
   (2) the transaction was approved by the court;
   (3) the beneficiary did not commence a judicial proceeding within the time allowed by Section 1005;
   (4) the beneficiary consented to the trustee’s conduct, ratified the transaction, or released the trustee in compliance with Section 1009; or
   (5) the transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming trustee.

(c) A sale, encumbrance, or other transaction involving the investment or management of trust property is presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with:
   (1) the trustee’s spouse;
   (2) the trustee’s descendants, siblings, parents, or their spouses;
   (3) an agent or attorney of the trustee; or
   (4) a corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee’s best judgment.

(d) A transaction between a trustee and a beneficiary that does not concern trust property but that occurs during the existence of the trust or while the trustee retains significant influence over the beneficiary and from which the trustee obtains an advantage is voidable by the beneficiary unless the trustee establishes that the transaction was fair to the beneficiary.

(e) A transaction not concerning trust property in which the trustee engages in the trustee’s individual capacity involves a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust.

(f) An investment by a trustee in securities of an investment company or investment trust to which the trustee, or its affiliate, provides services in a capacity other than as trustee is not presumed to be affected by a conflict between personal and fiduciary interests if the investment otherwise complies with the prudent investor rule of [Article] 9. In addition to its compensation for acting as trustee, the trustee may be compensated by the investment company or investment trust for providing those services out of fees charged to the trust. If the trustee receives compensation from the investment company or investment trust for providing investment advisory or investment management services, the trustee shall at least annually notify the persons entitled under Section 813 to receive a copy of the trustee’s annual report of the rate and method by which that compensation was determined.

(g) In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, the trustee shall act in the best interests of the beneficiaries. If the trust
is the sole owner of a corporation or other form of enterprise, the trustee shall elect or appoint
directors or other managers who will manage the corporation or enterprise in the best interests of
the beneficiaries.

(h) This section does not preclude the following transactions, if fair to the beneficiaries:
   (1) an agreement between a trustee and a beneficiary relating to the appointment or
       compensation of the trustee;
   (2) payment of reasonable compensation to the trustee;
   (3) a transaction between a trust and another trust, decedent’s estate, or
       [conservatorship] of which the trustee is a fiduciary or in which a beneficiary has an interest;
   (4) a deposit of trust money in a regulated financial-service institution operated by the
       trustee; or
   (5) an advance by the trustee of money for the protection of the trust.

(i) The court may appoint a special fiduciary to make a decision with respect to any
proposed transaction that might violate this section if entered into by the trustee.

SECTION 803. IMPARTIALITY. If a trust has two or more beneficiaries, the trustee
shall act impartially in investing, managing, and distributing the trust property, giving due regard
to the beneficiaries’ respective interests.

SECTION 804. PRUDENT ADMINISTRATION. A trustee shall administer the trust as a
prudent person would, by considering the purposes, terms, distributional requirements, and other
circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care,
skill, and caution.

SECTION 805. COSTS OF ADMINISTRATION. In administering a trust, the trustee
may incur only costs that are reasonable in relation to the trust property, the purposes of the trust,
and the skills of the trustee.

SECTION 806. TRUSTEE’S SKILLS. A trustee who has special skills or expertise, or is
named trustee in reliance upon the trustee’s representation that the trustee has special skills or
expertise, shall use those special skills or expertise.

SECTION 807. DELEGATION BY TRUSTEE.
   (a) A trustee may delegate duties and powers that a prudent trustee of comparable skills
could properly delegate under the circumstances. The trustee shall exercise reasonable care,
skill, and caution in:
      (1) selecting an agent;
      (2) establishing the scope and terms of the delegation, consistent with the purposes
          and terms of the trust; and
      (3) periodically reviewing the agent’s actions in order to monitor the agent’s
          performance and compliance with the terms of the delegation.
   (b) In performing a delegated function, an agent owes a duty to the trust to exercise
       reasonable care to comply with the terms of the delegation.
(c) A trustee who complies with subsection (a) is not liable to the beneficiaries or to the trust for an action of the agent to whom the function was delegated.

(d) By accepting a delegation of powers or duties from the trustee of a trust that is subject to the law of this State, an agent submits to the jurisdiction of the courts of this State.

SECTION 808. POWERS TO DIRECT.

(a) While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.

(b) If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.

(c) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.

(d) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.

SECTION 809. CONTROL AND PROTECTION OF TRUST PROPERTY. A trustee shall take reasonable steps to take control of and protect the trust property.

SECTION 810. RECORDKEEPING AND IDENTIFICATION OF TRUST PROPERTY.

(a) A trustee shall keep adequate records of the administration of the trust.

(b) A trustee shall keep trust property separate from the trustee’s own property.

(c) Except as otherwise provided in subsection (d), a trustee shall cause the trust property to be designated so that the interest of the trust, to the extent feasible, appears in records maintained by a party other than a trustee or beneficiary.

(d) If the trustee maintains records clearly indicating the respective interests, a trustee may invest as a whole the property of two or more separate trusts.

SECTION 811. ENFORCEMENT AND DEFENSE OF CLAIMS. A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust.

SECTION 812. COLLECTING TRUST PROPERTY. A trustee shall take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee, and to redress a breach of trust known to the trustee to have been committed by a former trustee.

SECTION 813. DUTY TO INFORM AND REPORT.

(a) A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their
interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary’s request for information related to the administration of the trust.

(b) A trustee:

(1) upon request of a beneficiary, shall promptly furnish to the beneficiary a copy of the trust instrument;
(2) within 60 days after accepting a trusteeship, shall notify the qualified beneficiaries of the acceptance and of the trustee’s name, address, and telephone number;
(3) within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, shall notify the qualified beneficiaries of the trust’s existence, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument, and of the right to a trustee’s report as provided in subsection (c); and
(4) shall notify the qualified beneficiaries in advance of any change in the method or rate of the trustee’s compensation.

(c) A trustee shall send to the distributees or permissible distributees of trust income or principal, and to other qualified or nonqualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee’s compensation, a listing of the trust assets and, if feasible, their respective market values. Upon a vacancy in a trusteeship, unless a cotrustee remains in office, a report must be sent to the qualified beneficiaries by the former trustee. A personal representative, [conservator], or [guardian] may send the qualified beneficiaries a report on behalf of a deceased or incapacitated trustee.

(d) A beneficiary may waive the right to a trustee’s report or other information otherwise required to be furnished under this section. A beneficiary, with respect to future reports and other information, may withdraw a waiver previously given.

(e) Subsection (b)(2) and (3) do not apply to a trustee who accepts a trusteeship before [the effective date of this [Code], to an irrevocable trust created before [the effective date of this [Code], or to a revocable trust that becomes irrevocable before [the effective date of this [Code].

SECTION 814. DISCRETIONARY POWERS; TAX SAVINGS.

(a) Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as “absolute”, “sole”, or “uncontrolled”, the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

(b) Subject to subsection (d), and unless the terms of the trust expressly indicate that a rule in this subsection does not apply:

(1) a person other than a settlor who is a beneficiary and trustee of a trust that confers on the trustee a power to make discretionary distributions to or for the trustee’s personal benefit may exercise the power only in accordance with an ascertainable standard relating to the trustee’s individual health, education, support, or maintenance within the meaning of Section
2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code of 1986, as in effect on [the effective date of this [Code]] [, or as later amended]; and

(2) a trustee may not exercise a power to make discretionary distributions to satisfy a legal obligation of support that the trustee personally owes another person.

(c) A power whose exercise is limited or prohibited by subsection (b) may be exercised by a majority of the remaining trustees whose exercise of the power is not so limited or prohibited. If the power of all trustees is so limited or prohibited, the court may appoint a special fiduciary with authority to exercise the power.

(d) Subsection (b) does not apply to:

(1) a power held by the settlor’s spouse who is the trustee of a trust for which a marital deduction, as defined in Section 2056(b)(5) or 2523(e) of the Internal Revenue Code of 1986, as in effect on [the effective date of this [Code]] [, or as later amended], was previously allowed;

(2) any trust during any period that the trust may be revoked or amended by its settlor; or

(3) a trust if contributions to the trust qualify for the annual exclusion under Section 2503(c) of the Internal Revenue Code of 1986, as in effect on [the effective date of this [Code]] [, or as later amended].

SECTION 815. GENERAL POWERS OF TRUSTEE.

(a) A trustee, without authorization by the court, may exercise:

(1) powers conferred by the terms of the trust; and

(2) except as limited by the terms of the trust:

(A) all powers over the trust property which an unmarried competent owner has over individually owned property;

(B) any other powers appropriate to achieve the proper investment, management, and distribution of the trust property; and

(C) any other powers conferred by this [Code].

(b) The exercise of a power is subject to the fiduciary duties prescribed by this [article].

SECTION 816. SPECIFIC POWERS OF TRUSTEE. Without limiting the authority conferred by Section 815, a trustee may:

(1) collect trust property and accept or reject additions to the trust property from a settlor or any other person;

(2) acquire or sell property, for cash or on credit, at public or private sale;

(3) exchange, partition, or otherwise change the character of trust property;

(4) deposit trust money in an account in a regulated financial-service institution;

(5) borrow money, with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust;

(6) with respect to an interest in a proprietorship, partnership, limited liability company, business trust, corporation, or other form of business or enterprise, continue the business or other enterprise and take any action that may be taken by shareholders, members, or property owners,
including merging, dissolving, or otherwise changing the form of business organization or contributing additional capital;

(7) with respect to stocks or other securities, exercise the rights of an absolute owner, including the right to:
   (A) vote, or give proxies to vote, with or without power of substitution, or enter into or continue a voting trust agreement;
   (B) hold a security in the name of a nominee or in other form without disclosure of the trust so that title may pass by delivery;
   (C) pay calls, assessments, and other sums chargeable or accruing against the securities, and sell or exercise stock subscription or conversion rights; and
   (D) deposit the securities with a depository or other regulated financial-service institution;

(8) with respect to an interest in real property, construct, or make ordinary or extraordinary repairs to, alterations to, or improvements in, buildings or other structures, demolish improvements, raze existing or erect new party walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements, and make or vacate plats and adjust boundaries;

(9) enter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for exploration and removal of natural resources, with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust;

(10) grant an option involving a sale, lease, or other disposition of trust property or acquire an option for the acquisition of property, including an option exercisable beyond the duration of the trust, and exercise an option so acquired;

(11) insure the property of the trust against damage or loss and insure the trustee, the trustee’s agents, and beneficiaries against liability arising from the administration of the trust;

(12) abandon or decline to administer property of no value or of insufficient value to justify its collection or continued administration;

(13) with respect to possible liability for violation of environmental law:
   (A) inspect or investigate property the trustee holds or has been asked to hold, or property owned or operated by an organization in which the trustee holds or has been asked to hold an interest, for the purpose of determining the application of environmental law with respect to the property;
   (B) take action to prevent, abate, or otherwise remedy any actual or potential violation of any environmental law affecting property held directly or indirectly by the trustee, whether taken before or after the assertion of a claim or the initiation of governmental enforcement;
   (C) decline to accept property into trust or disclaim any power with respect to property that is or may be burdened with liability for violation of environmental law;
   (D) compromise claims against the trust which may be asserted for an alleged violation of environmental law; and
   (E) pay the expense of any inspection, review, abatement, or remedial action to comply with environmental law;

(14) pay or contest any claim, settle a claim by or against the trust, and release, in whole or in part, a claim belonging to the trust;
(15) pay taxes, assessments, compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the administration of the trust;
(16) exercise elections with respect to federal, state, and local taxes;
(17) select a mode of payment under any employee benefit or retirement plan, annuity, or life insurance payable to the trustee, exercise rights thereunder, including exercise of the right to indemnification for expenses and against liabilities, and take appropriate action to collect the proceeds;
(18) make loans out of trust property, including loans to a beneficiary on terms and conditions the trustee considers to be fair and reasonable under the circumstances, and the trustee has a lien on future distributions for repayment of those loans;
(19) pledge trust property to guarantee loans made by others to the beneficiary;
(20) appoint a trustee to act in another jurisdiction with respect to trust property located in the other jurisdiction, confer upon the appointed trustee all of the powers and duties of the appointing trustee, require that the appointed trustee furnish security, and remove any trustee so appointed;
(21) pay an amount distributable to a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated, by paying it directly to the beneficiary or applying it for the beneficiary’s benefit, or by:
  (A) paying it to the beneficiary’s [conservator] or, if the beneficiary does not have a [conservator], the beneficiary’s [guardian];
  (B) paying it to the beneficiary’s custodian under [the Uniform Transfers to Minors Act] or custodial trustee under [the Uniform Custodial Trust Act], and, for that purpose, creating a custodianship or custodial trust;
  (C) if the trustee does not know of a [conservator], [guardian], custodian, or custodial trustee, paying it to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary’s behalf; or
  (D) managing it as a separate fund on the beneficiary’s behalf, subject to the beneficiary’s continuing right to withdraw the distribution;
(22) on distribution of trust property or the division or termination of a trust, make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares, value the trust property for those purposes, and adjust for resulting differences in valuation;
(23) resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternative dispute resolution;
(24) prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee’s duties;
(25) sign and deliver contracts and other instruments that are useful to achieve or facilitate the exercise of the trustee’s powers; and
(26) on termination of the trust, exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to it.

SECTION 817. DISTRIBUTION UPON TERMINATION.
(a) Upon termination or partial termination of a trust, the trustee may send to the
beneficiaries a proposal for distribution. The right of any beneficiary to object to the proposed
distribution terminates if the beneficiary does not notify the trustee of an objection within 30
days after the proposal was sent but only if the proposal informed the beneficiary of the right to
object and of the time allowed for objection.

(b) Upon the occurrence of an event terminating or partially terminating a trust, the
trustee shall proceed expeditiously to distribute the trust property to the persons entitled to it,
subject to the right of the trustee to retain a reasonable reserve for the payment of debts,
expenses, and taxes.

(c) A release by a beneficiary of a trustee from liability for breach of trust is invalid to
the extent:

(1) it was induced by improper conduct of the trustee; or
(2) the beneficiary, at the time of the release, did not know of the beneficiary’s rights
or of the material facts relating to the breach.

ARTICLE 9

UNIFORM PRUDENT INVESTOR ACT

(Insert text of Uniform Prudent Investor Act here)

ARTICLE 10

LIABILITY OF TRUSTEES AND RIGHTS
OF PERSONS DEALING WITH TRUSTEE

SECTION 1001. REMEDIES FOR BREACH OF TRUST.

(a) A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust.

(b) To remedy a breach of trust that has occurred or may occur, the court may:

(1) compel the trustee to perform the trustee’s duties;
(2) enjoin the trustee from committing a breach of trust;
(3) compel the trustee to redress a breach of trust by paying money, restoring
property, or other means;
(4) order a trustee to account;
(5) appoint a special fiduciary to take possession of the trust property and administer
the trust;
(6) suspend the trustee;
(7) remove the trustee as provided in Section 706;
(8) reduce or deny compensation to the trustee;
(9) subject to Section 1012, 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; or
(10) order any other appropriate relief.

SECTION 1002. DAMAGES FOR BREACH OF TRUST.
(a) A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of:
   (1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or
   (2) the profit the trustee made by reason of the breach.
(b) Except as otherwise provided in this subsection, if more than one trustee is liable to the beneficiaries for a breach of trust, a trustee is entitled to contribution from the other trustee or trustees. A trustee is not entitled to contribution if the trustee was substantially more at fault than another trustee or if the trustee committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. A trustee who received a benefit from the breach of trust is not entitled to contribution from another trustee to the extent of the benefit received.

SECTION 1003. DAMAGES IN ABSENCE OF BREACH.
(a) A trustee is accountable to an affected beneficiary for any profit made by the trustee arising from the administration of the trust, even absent a breach of trust.
(b) Absent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit.

SECTION 1004. ATTORNEY’S FEES AND COSTS. In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney’s fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.

SECTION 1005. LIMITATION OF ACTION AGAINST TRUSTEE.
(a) A beneficiary may not commence a proceeding against a trustee for breach of trust more than one year after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding.
(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.
(c) If subsection (a) does not apply, a judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within five years after the first to occur of:
   (1) the removal, resignation, or death of the trustee;
   (2) the termination of the beneficiary’s interest in the trust; or
   (3) the termination of the trust.

SECTION 1006. RELIANCE ON TRUST INSTRUMENT. A trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.
SECTION 1007. EVENT AFFECTING ADMINISTRATION OR DISTRIBUTION. If the happening of an event, including marriage, divorce, performance of educational requirements, or death, affects the administration or distribution of a trust, a trustee who has exercised reasonable care to ascertain the happening of the event is not liable for a loss resulting from the trustee’s lack of knowledge.

SECTION 1008. EXCULPATION OF TRUSTEE.  
(1) A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it:
   (1) relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or
   (2) was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.
(2) An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor.

SECTION 1009. BENEFICIARY’S CONSENT, RELEASE, OR RATIFICATION. A trustee is not liable to a beneficiary for breach of trust if the beneficiary, consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless:
   (1) the consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or
   (2) 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.

SECTION 1010. LIMITATION ON PERSONAL LIABILITY OF TRUSTEE.  
(1) Except as otherwise provided in the contract, a trustee is not personally liable on a contract properly entered into in the trustee’s fiduciary capacity in the course of administering the trust if the trustee in the contract disclosed the fiduciary capacity.
(2) A trustee is personally liable for torts committed in the course of administering a trust, or for obligations arising from ownership or control of trust property, including liability for violation of environmental law, only if the trustee is personally at fault.
(3) A claim based on a contract entered into by a trustee in the trustee’s fiduciary capacity, on an obligation arising from ownership or control of trust property, or on a tort committed in the course of administering a trust, 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.

[SECTION 1011. INTEREST AS GENERAL PARTNER.  
(1) Except as otherwise provided in subsection (c) or unless personal liability is imposed in the contract, a trustee who holds an interest as a general partner in a general or limited]
partnership is not personally liable on a contract entered into by the partnership after the trust’s acquisition of the interest if the fiduciary capacity was disclosed in the contract or in a statement previously filed pursuant to the [Uniform Partnership Act or Uniform Limited Partnership Act].

(b) Except as otherwise provided in subsection (c), a trustee who holds an interest as a general partner is not personally liable for torts committed by the partnership or for obligations arising from ownership or control of the interest unless the trustee is personally at fault.

(c) The immunity provided by this section does not apply if an interest in the partnership is held by the trustee in a capacity other than that of trustee or is held by the trustee’s spouse or one or more of the trustee’s descendants, siblings, or parents, or the spouse of any of them.

(d) If the trustee of a revocable trust holds an interest as a general partner, the settlor is personally liable for contracts and other obligations of the partnership as if the settlor were a general partner.

SECTION 1012. PROTECTION OF PERSON DEALING WITH TRUSTEE.

(a) 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.

(b) A person other than a 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.

(c) A person who in good faith delivers assets to a trustee need not ensure their proper application.

(d) 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.

(e) Comparable protective provisions of other laws relating to commercial transactions or transfer of securities by fiduciaries prevail over the protection provided by this section.

SECTION 1013. CERTIFICATION OF TRUST.

(a) Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing the following information:

1. that the trust exists and the date the trust instrument was executed;
2. the identity of the settlor;
3. the identity and address of the currently acting trustee;
4. the powers of the trustee;
5. the revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;
6. the authority of cotrustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee;
7. the trust’s taxpayer identification number; and
8. the manner of taking title to trust property.

(b) A certification of trust may be signed or otherwise authenticated by any trustee.
(c) A certification of trust must state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.

(d) A certification of trust need not contain the dispositive terms of a trust.

(e) A recipient of a certification of trust may require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments which designate the trustee and confer upon the trustee the power to act in the pending transaction.

(f) A person who acts in reliance upon a certification of trust without knowledge that the representations contained therein are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification. Knowledge of the terms of the trust may not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying upon the certification.

(g) A person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.

(h) A person making a demand for the trust instrument in addition to a certification of trust or excerpts is liable for damages if the court determines that the person did not act in good faith in demanding the trust instrument.

(i) This section does not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust.

ARTICLE 11
MISCELLANEOUS PROVISIONS

SECTION 1101. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.

SECTION 1102. ELECTRONIC RECORDS AND SIGNATURES. The provisions of this [Code] governing the legal effect, validity, or enforceability of electronic records or electronic signatures, and of contracts formed or performed with the use of such records or signatures, conform to the requirements of Section 102 of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7002) and supersede, modify, and limit the requirements of the Electronic Signatures in Global and National Commerce Act.

SECTION 1103. SEVERABILITY CLAUSE. If any provision of this [Code] or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this [Code] which can be given effect without the invalid provision or application, and to this end the provisions of this [Code] are severable.

SECTION 1104. EFFECTIVE DATE. This [Code] takes effect on ______________.

SECTION 1105. REPEALS. The following Acts are repealed:
(1) Uniform Trustee Powers Act;
(2) Uniform Probate Code, Article VII;
(3) Uniform Trusts Act (1937); and
(4) Uniform Prudent Investor Act.

**SECTION 1106. APPLICATION TO EXISTING RELATIONSHIPS.**

(a) Except as otherwise provided in this [Code], on the effective date of this [Code]:

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

(b) If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before [the effective date of the [Code]], that statute continues to apply to the right even if it has been repealed or superseded.

**SECTION 506. OVERDUE DISTRIBUTION.**

(a) In this section, “mandatory distribution” means a distribution of income or principal which the trustee is required to make to a beneficiary under the terms of the trust, including a distribution upon termination of the trust. The term excludes a distribution subject to the exercise of the trustee’s discretion whether or not the terms of the trust (i) include a support or other standard to guide the trustee in making distribution decisions, or (ii) provide that the trustee
“may” or “shall” make discretionary distributions, including distributions pursuant to a support or other standard.

(b) Whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal, including a distribution upon termination of the trust, if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date.

Comment
The effect of a spendthrift provision is generally to insulate totally a beneficiary’s interest until a distribution is made and received by the beneficiary. See Section 502. But this section, along with several other sections in this article, recognizes exceptions to this general rule. 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. This section 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 designated 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.

This section is similar to Restatement (Third) of Trusts Section 58 cmt. d (Tentative Draft No. 2, approved 1999).

2001 Amendment. By amendment in 2001, “designated distribution date” was substituted for “required distribution date” in subsection (b). The amendment conforms the language of this section to terminology used elsewhere in the Code.

2005 Amendment. The amendment adds a definition of “mandatory distribution” in subsection (a). No change of substance is intended by this amendment. The amendment merely clarifies that a mandatory distribution is to be understood in its traditional sense such as provisions requiring that the beneficiary receive an income or receive principal upon termination of the trust.

SECTION 603. SETTLOR’S POWERS; POWERS OF WITHDRAWAL.
(a) While a trust is revocable [and the settlor has capacity to revoke the trust], rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.

(b) During the period the power may be exercised, the holder of a power of withdrawal has the rights of a settlor of a revocable trust under this section to the extent of the property subject to the power.

Comment
This section has the effect of postponing enforcement of the rights of the beneficiaries of a revocable trust until the death or incapacity of the settlor or other person holding the power to revoke the trust. This section thus recognizes that the settlor of a revocable trust is in control of the trust and should have the right to enforce the trust.

Pursuant to this section, the duty under Section 813 to inform and report to beneficiaries is owed to the settlor of a revocable trust as long as the settlor has capacity.

If the settlor loses capacity, subsection (a) no longer applies, with the consequence that the rights of the beneficiaries are no longer subject to the settlor’s control. 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. However, because this section 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 trust. Also, should an incapacitated settlor later regain capacity, the beneficiaries’ rights will again 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.

Typically, the settlor of a revocable trust will also be the sole or primary beneficiary of the trust. Upon the settlor’s incapacity, any right of action the settlor-trustee may have against the trustee for breach of fiduciary duty will pass to the settlor’s agent or conservator.

Subsection (c) makes clear that a holder of a power of withdrawal has the same powers over the trust as the settlor of a revocable trust. Equal treatment is warranted due to the holder’s equivalent power to control the trust. For the definition of power of withdrawal, see Section 103(10).

2001 Amendment. By a 2001 amendment, former subsection (b) was deleted. Former subsection (b) provided: “While a trust is revocable and the settlor does not have capacity to revoke the trust, rights of the beneficiaries are held by the beneficiaries.” No substantive change was intended by this amendment. Former subsection (b) was superfluous. Rights of the beneficiaries are always held by the beneficiaries unless taken away by some other provision. Subsection (a) grants these rights to the settlor of a revocable trust while the settlor has capacity. Upon a settlor’s loss of capacity, these rights are held by the beneficiaries with or without former subsection (b).

2003 Amendment. The purpose of former subsection (b), which was deleted in 2003, was to make certain that upon revocation of amendment of a joint trust by fewer than all of its settlors, that the trustee would notify the nonparticipating settlor or settlors. The subsection, which provided that “If a revocable trust has more than one settlor, the duties of the trustee are owed to all of the settlors having capacity to revoke the trust,” imposed additional duties upon a trustee and unnecessarily raised interpretative questions as to its scope. The drafter’s original intent is restored, and in a much clearer form, by repealing former subsection (b), and by amending Section 602 to add a subsection (b)(3) that states explicitly what former subsection (b) was trying
to achieve.

**2004 Amendment.** The amendment places in brackets and makes optional the language in subsection (a) dealing with the settlor’s capacity.

Section 603 generally provides that while a trust is revocable, all rights that the trust’s beneficiaries would otherwise possess are subject to the control of the settlor. This section, however, negates the settlor’s control if the settlor is incapacitated. In such case, the beneficiaries are entitled to assert all rights provided to them under the Code, including the right to information concerning the trust.

Two issues have arisen concerning this incapacity limitation. First, because determining when a settlor is incapacitated is not always clear, concern has been expressed that it will often be difficult in a particular case to determine whether the settlor has become incapacitated and the settlor's control of the beneficiary's rights have ceased. Second, concern has been expressed that this section prescribes a different rule for revocable trusts than for wills and that the rules for both should instead be the same. In the case of a will, the devisees have no right to know of the dispositions made in their favor until the testator's death, whether or not the testator is incapacitated. Under Section 603, however, the remainder beneficiary's right to know commences on the settlor's incapacity.

Concluding that uniformity among the states on this issue is not essential, the drafting committee has decided to place the reference to the settlor's incapacity in Section 603(a) in brackets. Enacting jurisdictions are free to strike the incapacity limitation or to provide a more precise definition of when a settlor is incapacitated, as has been done in the Missouri enactment (Mo. Stat. Ann. § 456.6-603).

**SECTION 704. VACANCY IN TRUSTEESHIP; APPOINTMENT OF SUCCESSOR.**

(a) A vacancy in a trusteeship occurs if:
   1. a person designated as trustee rejects the trusteeship;
   2. a person designated as trustee cannot be identified or does not exist;
   3. a trustee resigns;
   4. a trustee is disqualified or removed;
   5. a trustee dies; or
   6. a [guardian] or [conservator] is appointed for an individual serving as trustee.

(b) If one or more cotrustees remain in office, a vacancy in a trusteeship need not be filled. A vacancy in a trusteeship must be filled if the trust has no remaining trustee.

(c) A vacancy in a trusteeship of a noncharitable trust that is required to be filled must be filled in the following order of priority:
   1. by a person designated in the terms of the trust to act as successor trustee;
   2. by a person appointed by unanimous agreement of the qualified beneficiaries; or
   3. by a person appointed by the court.

(d) A vacancy in a trusteeship of a charitable trust that is required to be filled must be filled in the following order of priority:
(1) by a person designated in the terms of the trust to act as successor trustee;
(2) by a person selected by the charitable organizations expressly designated to receive distributions under the terms of the trust [if the attorney general concurs in the selection]; or
(3) by a person appointed by the court.

(e) Whether or not a vacancy in a trusteeship exists or is required to be filled, the court may appoint an additional trustee or special fiduciary whenever the court considers the appointment necessary for the administration of the trust.

Comment

This section lists the ways in which a trusteeship becomes vacant and the rules on filling the vacancy. See also Sections 701 (accepting or declining trusteeship), 705 (resignation), and 706 (removal). Good drafting practice suggests that the terms of the trust deal expressly with the problem of vacancies, naming successors and specifying the procedure for filling vacancies. This section applies only if the terms of the trust fail to specify a procedure.

The disqualification of a trustee referred to in subsection (a)(4) would include a financial institution whose right to engage in trust business has been revoked or removed. Such disqualification might also occur if the trust’s principal place of administration is transferred to a jurisdiction in which the trustee, whether an individual or institution, is not qualified to act.

Subsection (b) provides that a vacancy in the cotrusteeship must be filled only if the trust has no remaining trustee. If a vacancy in the cotrusteeship is not filled, Section 703 authorizes the remaining cotrustees to continue to administer the trust. However, as provided in subsection (e), the court, exercising its inherent equity authority, may always appoint additional trustees if the appointment would promote better administration of the trust. See Restatement (Third) of Trusts Section 34 cmt. e (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 108 cmt. e (1959).

Subsection (c) provides a 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. An effective provision in the terms of the trust for the designation of a successor trustee includes a procedure under which the successor trustee is selected by a person designated in those terms. Pursuant to Section 705(a)(1), the qualified beneficiaries may also receive the trustee’s resignation. If a trustee resigns following notice as provided in Section 705, the trust may be transferred to a successor appointed pursuant to subsection (c)(2) of this section, all without court involvement. A nonqualified beneficiary who is displeased with the choice of the qualified beneficiaries may petition the court for removal of the trustee under Section 706.

If the qualified beneficiaries fail to make an appointment, subsection (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 Section 34 cmt. f
Subsection (d) specifies a 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, however, or if the trust does not designate a charitable organization to receive distributions, the vacancy may be filled only by the court. For the reason why the reference to the Attorney General is placed in brackets, see 2004 Amendment below.

In the case of a revocable trust, the appointment of a successor will normally be made directly by the settlor. As to the duties of a successor trustee with respect to the actions of a predecessor, see Section 812.

2001 Amendment. Subsection (d), which creates a procedure for the filling of a vacancy in the trusteeship of a charitable trust, was added by a 2001 amendment.

2004 Amendment. The amendment to Section 704(d)(2) is a conforming amendment to the amendment to Section 110(d). Section 110(d) provides that the attorney general has the rights of a qualified beneficiary with respect to charitable trusts having a principal place of administration in the state. If the enacting jurisdiction elects to delete or modify Section 110(d), then the enacting jurisdiction may wish to also modify subsection Section 704(d)(2) of this Section, which requires that the attorney general concur in the selection of a successor trustee nominated by a designated charitable organization.

SECTION 802. DUTY OF LOYALTY.
(a) A trustee shall administer the trust solely in the interests of the beneficiaries.
(b) Subject to the rights of persons dealing with or assisting the trustee as provided in Section 1012, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee’s own personal account or which is otherwise affected by a conflict between the trustee’s fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless:
   (1) the transaction was authorized by the terms of the trust;
   (2) the transaction was approved by the court;
   (3) the beneficiary did not commence a judicial proceeding within the time allowed by Section 1005;
   (4) the beneficiary consented to the trustee’s conduct, ratified the transaction, or released the trustee in compliance with Section 1009; or
   (5) the transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming trustee.
(c) A sale, encumbrance, or other transaction involving the investment or management of trust property is presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with:
(1) the trustee’s spouse;
(2) the trustee’s descendants, siblings, parents, or their spouses;
(3) an agent or attorney of the trustee; or
(4) a corporation or other person or enterprise in which the trustee, or a person that
owns a significant interest in the trustee, has an interest that might affect the trustee’s best
judgment.

(d) A transaction between a trustee and a beneficiary that does not concern trust property
but that occurs during the existence of the trust or while the trustee retains significant influence
over the beneficiary and from which the trustee obtains an advantage is voidable by the
beneficiary unless the trustee establishes that the transaction was fair to the beneficiary.

(e) A transaction not concerning trust property in which the trustee engages in the
trustee’s individual capacity involves a conflict between personal and fiduciary interests if the
transaction concerns an opportunity properly belonging to the trust.

(f) An investment by a trustee in securities of an investment company or investment trust
to which the trustee, or its affiliate, provides services in a capacity other than as trustee is not
presumed to be affected by a conflict between personal and fiduciary interests if the investment
otherwise complies with the prudent investor rule of [Article] 9. In addition to its compensation
for acting as trustee, the trustee may be compensated by the investment company or investment
trust for providing those services out of fees charged to the trust. If the trustee receives
compensation from the investment company or investment trust for providing investment
advisory or investment management services, the trustee must at least annually notify the persons
entitled under Section 813 to receive a copy of the trustee’s annual report of the rate and method
by which that compensation was determined.

(g) In voting shares of stock or in exercising powers of control over similar interests in
other forms of enterprise, the trustee shall act in the best interests of the beneficiaries. If the
trust is the sole owner of a corporation or other form of enterprise, the trustee shall elect or
appoint directors or other managers who will manage the corporation or enterprise in the best
interests of the beneficiaries.

(h) This section does not preclude the following transactions, if fair to the beneficiaries:

(1) an agreement between a trustee and a beneficiary relating to the appointment or
compensation of the trustee;

(2) payment of reasonable compensation to the trustee;

(3) a transaction between a trust and another trust, decedent’s estate, or
[conservatorship] of which the trustee is a fiduciary or in which a beneficiary has an interest;

(4) a deposit of trust money in a regulated financial-service institution operated by the
trustee; or

(5) an advance by the trustee of money for the protection of the trust.

(i) The court may appoint a special fiduciary to make a decision with respect to any
proposed transaction that might violate this section if entered into by the trustee.

Comment

This section addresses the duty of loyalty, perhaps the most fundamental duty of the trustee.
Subsection (a) states the general principle, which is copied from Restatement (Second) of Trusts
Section 170(1) (1959). A trustee owes a duty of loyalty to the beneficiaries, a principle which is
sometimes expressed as the obligation of the trustee not to place the trustee’s own interests over those of the beneficiaries. Most but not all violations of the duty of loyalty concern transactions involving the trust property, but breaches of the duty can take other forms. For a discussion of the different types of violations, see George G. Bogert & George T. Bogert, The Law of Trusts and Trustees Section 543 (Rev. 2d ed. 1993); and 2A Austin W. Scott & William F. Fratcher, The Law of Trusts Sections 170-170.24 (4th ed. 1987). The “interests of the beneficiaries” to which the trustee must be loyal are the beneficial interests as provided in the terms of the trust. See Section 103(7).

The duty of loyalty applies to both charitable and noncharitable trusts, even though the beneficiaries of charitable trusts are indefinite. In the case of a charitable trust, the trustee must administer the trust solely in the interests of effectuating the trust’s charitable purposes. See Restatement (Second) of Trusts Section 379 cmt. a (1959).

Duty of loyalty issues often arise in connection with the settlor’s designation of the trustee. For example, it is not uncommon that the trustee will also be a beneficiary. Or the settlor will name a friend or family member who is an officer of a company in which the settlor owns stock. In such cases, settlors should be advised to consider addressing in the terms of the trust how such conflicts are to be handled. Section 105 authorizes a settlor to override an otherwise applicable duty of loyalty in the terms of the trust. Sometimes the override is implied. The grant to a trustee of authority to make a discretionary distribution to a class of beneficiaries that includes the trustee implicitly authorizes the trustee to make distributions for the trustee’s own benefit.

Subsection (b) states the general rule with respect to transactions involving trust property that are affected by a conflict of interest. A transaction affected by a conflict between the trustee’s fiduciary and personal interests is voidable by a beneficiary who is affected by the transaction. Subsection (b) carries out the “no further inquiry” rule by making transactions involving trust property entered into by a trustee for the trustee’s own personal account voidable without further proof. Such transactions are irrebuttable presumed to be affected by a conflict between personal and fiduciary interests. It is immaterial whether the trustee acts in good faith or pays a fair consideration. See Restatement (Second) of Trusts Section 170 cmt. b (1959).

The rule is less severe with respect to transactions involving trust property entered into with persons who have close business or personal ties with the trustee. Under subsection (c), a transaction between a trustee and certain relatives and business associates is presumptively voidable, not void. Also presumptively voidable are transactions with corporations or other enterprises in which the trustee, or a person who owns a significant interest in the trustee, has an interest that might affect the trustee’s best judgment. The presumption is rebutted if the trustee establishes that the transaction was not affected by a conflict between personal and fiduciary interests. Among the factors tending to rebut the presumption are whether the consideration was fair and whether the other terms of the transaction are similar to those that would be transacted with an independent party.

Even where the presumption under subsection (c) does not apply, a transaction may still be voided by a beneficiary if the beneficiary proves that a conflict between personal and fiduciary
interests existed and that the transaction was affected by the conflict. The right of a beneficiary to void a transaction affected by a conflict of interest is optional. If the transaction proves profitable to the trust and unprofitable to the trustee, the beneficiary will likely allow the transaction to stand. For a comparable provision regulating fiduciary investments by national banks, see 12 C.F.R. Section 9.12(a).

As provided in subsection (b), no breach of the duty of loyalty occurs if the transaction was authorized by the terms of the trust or approved by the court, or if the beneficiary failed to commence a judicial proceeding within the time allowed or chose to ratify the transaction, either prior to or subsequent to its occurrence. In determining whether a beneficiary has consented to a transaction, the principles of representation from Article 3 may be applied.

Subsection (b)(5), which is derived from Section 3-713(1) of the Uniform Probate Code, allows a trustee to implement a contract or pursue a claim that the trustee entered into or acquired before the person became or contemplated becoming trustee. While this subsection allows the transaction to proceed without automatically being voidable by a beneficiary, the transaction is not necessarily free from scrutiny. In implementing the contract or pursuing the claim, the trustee must still complete the transaction in a way that avoids a conflict between the trustee’s fiduciary and personal interests. Because avoiding such a conflict will frequently be difficult, the trustee should consider petitioning the court to appoint a special fiduciary, as authorized by subsection (i), to work out the details and complete the transaction.

Subsection (d) creates a presumption that a transaction between a trustee and a beneficiary not involving trust property is an abuse by the trustee of a confidential relationship with the beneficiary. This subsection has limited scope. If the trust has terminated, there must be proof that the trustee’s influence with the beneficiary remained. Furthermore, whether or not the trust has terminated, there must be proof that the trustee obtained an advantage from the relationship. The fact the trustee profited is insufficient to show an abuse if a third party would have similarly profited in an arm’s length transaction. Subsection (d) is based on Cal. Prob. Code Section16004(c). See also 2A Austin W. Scott & William F. Fratcher Section 170.25 (4th ed. 1987), which states the same principle in a slightly different form: “Where he deals directly with the beneficiaries, the transaction may stand, but only if the trustee makes full disclosure and takes no advantage of his position and the transaction is in all respects fair and reasonable.”

Subsection (e), which allows a beneficiary to void a transaction entered into by the trustee that involved an opportunity belonging to the trust, is based on Restatement (Second) of Trusts Section 170 cmt. k (1959). While normally associated with corporations and with their directors and officers, what is usually referred to as the corporate opportunity doctrine also applies to other types of fiduciary. The doctrine prohibits the trustee’s pursuit of certain business activities, such as entering into a business in direct competition with a business owned by the trust, or the purchasing of an investment that the facts suggest the trustee was expected to purchase for the trust. For discussion of the corporate opportunity doctrine, see Kenneth B. Davis, Jr., Corporate Opportunity and Comparative Advantage, 84 Iowa L. Rev. 211 (1999); and Richard A. Epstein, Contract and Trust in Corporate Law: The Case of Corporate Opportunity, 21 Del. J. Corp. L. 5

Subsection (f) creates an exception to the no further inquiry rule for trustee investment in mutual funds. This exception applies even though the mutual fund company pays the financial-service institution trustee a fee for providing investment advice and other services, such as custody, transfer agent, and distribution, that would otherwise be provided by agents of the fund. Mutual funds offer several advantages for fiduciary investing. By comparison with common trust funds, mutual fund shares may be distributed in-kind when trust interests terminate, avoiding liquidation and the associated recognition of gain for tax purposes. Mutual funds commonly offer daily pricing, which gives trustees and beneficiaries better information about performance. Because mutual funds can combine fiduciary and nonfiduciary accounts, they can achieve larger size, which can enhance diversification and produce economies of scale that can lower investment costs.

Mutual fund investment also has a number of potential disadvantages. It adds another layer of expense to the trust, and it causes the trustee to lose control over the nature and timing of transactions in the fund. Trustee investment in mutual funds sponsored by the trustee, its affiliate, or from which the trustee receives extra fees has given rise to litigation implicating the trustee’s duty of loyalty, the duty to invest with prudence, and the right to receive only reasonable compensation. Because financial institution trustees ordinarily provide advisory services to and receive compensation from the very funds in which they invest trust assets, the contention is made that investing the assets of individual trusts in these funds is imprudent and motivated by the effort to generate additional fee income. Because the financial institution trustee often will also charge its regular fee for administering the trust, the contention is made that the financial institution trustee’s total compensation, both direct and indirect, is excessive.

Subsection (f) attempts to retain the advantages of mutual funds while at the same time making clear that such investments are subject to traditional fiduciary responsibilities. Nearly all of the States have enacted statutes authorizing trustees to invest in funds from which the trustee might derive additional compensation. Portions of subsection (f) are based on these statutes. Subsection (f) makes clear that such dual investment-fee arrangements are not automatically presumed to involve a conflict between the trustee’s personal and fiduciary interests, but subsection (f) does not otherwise waive or lessen a trustee’s fiduciary obligations. The trustee, in deciding whether to invest in a mutual fund, must not place its own interests ahead of those of the beneficiaries. The investment decision must also comply with the enacting jurisdiction’s prudent investor rule. To obtain the protection afforded by subsection (f), the trustee must disclose at least annually to the beneficiaries entitled to receive a copy of the trustee’s annual report the rate and method by which the additional compensation was determined. Furthermore, the selection of a mutual fund, and the resulting delegation of certain of the trustee’s functions, may be taken into account under Section 708 in setting the trustee’s regular compensation. See also Uniform Prudent Investor Act Sections 7 and 9 and Comments; Restatement (Third) of Trusts: Prudent Investor Rule Section 227 cmt. m (1992).
Subsection (f) applies whether the services to the fund are provided directly by the trustee or by an affiliate. While the term “affiliate” is not used in subsection (c), the individuals and entities listed there are examples of affiliates. The term is also used in the regulations under ERISA. An “affiliate” of a fiduciary includes (1) any person who directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with the fiduciary; (2) any officer, director, partner, employee, or relative of the fiduciary, and any corporation or partnership of which the fiduciary is an officer, director or partner. See 29 C.F.R. Section 2510.3-21(e).

Subsection (g) addresses an overlap between trust and corporate law. It is based on Restatement of Trusts (Second) Section 193 cmt. a (1959), which provides that "[i]t is the duty of the trustee in voting shares of stock to use proper care to promote the interest of the beneficiary," and that the fiduciary responsibility of a trustee in voting a control block "is heavier than where he holds only a small fraction of the shares." Similarly, the Department of Labor construes ERISA's duty of loyalty to make share voting a fiduciary function. See 29 C.F.R. Section2509.94-2. When the trust owns the entirety of the shares of a corporation, the corporate assets are in effect trust assets that the trustee determines to hold in corporate form. The trustee may not use the corporate form to escape the fiduciary duties of trust law. Thus, for example, a trustee whose duty of impartiality would require the trustee to make current distributions for the support of current beneficiaries may not evade that duty by holding assets in corporate form and pleading the discretion of corporate directors to determine dividend policy. Rather, the trustee must vote for corporate directors who will follow a dividend policy consistent with the trustee's trust-law duty of impartiality.

Subsection (h) contains several exceptions to the general duty of loyalty, which apply if the transaction was fair to the beneficiaries. Subsection (h)(1)-(2) clarify that a trustee is free to contract about the terms of appointment and rate of compensation. Consistent with Restatement (Second) of Trusts Section 170 cmt. r (1959), subsection (h)(3) authorizes a trustee to engage in a transaction involving another trust of which the trustee is also trustee, a transaction with a decedent’s estate or a conservatorship estate of which the trustee is personal representative or conservator, or a transaction with another trust or other fiduciary relationship in which a beneficiary of the trust has an interest. The authority of a trustee to deposit funds in a financial institution operated by the trustee, as provided in subsection (h)(4), is recognized as an exception to the duty of loyalty in a number of state statutes although deemed to be a breach of trust in Restatement (Second) of Trusts Section 170 cmt. m (1959). The power to deposit funds in its own institution does not negate the trustee’s responsibility to invest prudently, including the obligation to earn a reasonable rate of interest on deposits. Subsection (h)(5) authorizes a trustee to advance money for the protection of the trust. Such advances usually are of small amounts and are made in emergencies or as a matter of convenience. Pursuant to Section 709(b), the trustee has a lien against the trust property for any advances made.

**2003 Amendment.** The amendment revises subsection (f) to clarify that compensation received from a mutual fund for providing services to the fund is in addition to the trustee’s regular compensation. It also clarifies that the trustee obligation to notify certain of the beneficiaries of
compensation received from the fund applies only to compensation received for providing investment management or advisory services. The amendment conforms subsection (f) to the drafters’ original intent.

Subsection (f) formerly provided:

(f) An investment by a trustee in securities of an investment company or investment trust to which the trustee, or its affiliate, provides services in a capacity other than as trustee is not presumed to be affected by a conflict between personal and fiduciary interests if the investment complies with the prudent investor rule of [Article] 9. The trustee may be compensated by the investment company or investment trust for providing those services out of fees charged to the trust if the trustee at least annually notifies the persons entitled under Section 813 to receive a copy of the trustee’s annual report of the rate and method by which the compensation was determined.

2004 Amendment. Section 802(f) creates an exception to the prohibition on self-dealing for certain investments in mutual funds in which the trustee, or its affiliate, provides services in a capacity other than as trustee. As originally drafted, Section 802(f) provided that the exception applied only if the investment complied with the Uniform Prudent Investor Act and the trustee notified the qualified beneficiaries of the additional compensation received for providing the services. However, the Uniform Prudent Investor Act itself contains its own duty of loyalty provision (Section 5), thereby arguably limiting or undoing this exception to the UTC's loyalty provision. The amendment, by providing that the investment does not violate the duty of loyalty under the UTC if it "otherwise" complies with the Uniform Prudent Investor Act, is intended to negate the implication that the investment must also comply with the Uniform Prudent Investor Act's own duty of loyalty provision.

SECTION 813. DUTY TO INFORM AND REPORT.

(a) A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary’s request for information related to the administration of the trust.

(b) A trustee:

1) upon request of a beneficiary, shall promptly furnish to the beneficiary a copy of the trust instrument;

2) within 60 days after accepting a trusteeship, shall notify the qualified beneficiaries of the acceptance and of the trustee’s name, address, and telephone number;

3) within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, shall notify the qualified beneficiaries of the trust’s existence, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument, and of the right to a trustee’s report as provided in subsection (c); and
(4) shall notify the qualified beneficiaries in advance of any change in the method or rate of the trustee’s compensation.

(c) A trustee shall send to the distributees or permissible distributees of trust income or principal, and to other qualified or nonqualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee’s compensation, a listing of the trust assets and, if feasible, their respective market values. Upon a vacancy in a trusteeship, unless a cotrustee remains in office, a report must be sent to the qualified beneficiaries by the former trustee. A personal representative, [conservator], or [guardian] may send the qualified beneficiaries a report on behalf of a deceased or incapacitated trustee.

(d) A beneficiary may waive the right to a trustee’s report or other information otherwise required to be furnished under this section. A beneficiary, with respect to future reports and other information, may withdraw a waiver previously given.

(e) Subsections (b)(2) and (3) do not apply to a trustee who accepts a trusteeship before [the effective date of this [Code]], to an irrevocable trust created before [the effective date of this [Code]], or to a revocable trust that becomes irrevocable before [the effective date of this [Code]].

Comment

The duty to keep the beneficiaries reasonably informed of the administration of the trust is a fundamental duty of a trustee. For the common law duty to keep the beneficiaries informed, see Restatement (Second) of Trusts Section 173 (1959). This section makes the duty to keep the beneficiaries informed more precise by limiting it to the qualified beneficiaries. For the definition of qualified beneficiary, see Section 103(12). The result of this limitation is that the information need not be furnished to beneficiaries with remote remainder interests unless they have filed a specific request with the trustee. See Section 110(a) (request for notice).

For the extent to which a settlor may waive the requirements of this section in the terms of the trust, see Section 105(b)(8)-(9).

The trustee is under a duty to 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. See Restatement (Second) of Trusts Section 173 cmt. c (1959). Ordinarily, the trustee is not under a duty to furnish information to a beneficiary in the absence of a specific request for the information. See Restatement (Second) of Trusts Section 173 cmt. d (1959). Thus, the duty articulated in subsection (a) is ordinarily satisfied by providing the beneficiary with a copy of the annual report mandated by subsection (c). However, special circumstances may require 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 Section 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 (Mich. Ct. App. 1988); Allard v. Pacific National Bank, 663 P.2d 104 (Wash. 1983). The trustee is justified in not providing such advance disclosure if disclosure is forbidden by other law, as under federal securities laws, or if disclosure would be seriously detrimental to the interests of the beneficiaries, for example, when disclosure would cause the loss of the only serious buyer.

Subsection (a) provides a different standard if a beneficiary, whether qualified or not, makes a request for information. In that event, the trustee must promptly comply with the beneficiary’s request unless unreasonable under the circumstances. Further supporting the principle that a beneficiary should be allowed to make an independent assessment of what information is relevant to protecting the beneficiary’s interest, subsection (b)(1) requires the trustee on request to furnish a beneficiary with a complete copy of the trust instrument and not merely with those portions the trustee deems relevant to the beneficiary’s interest. For a case reaching the same result, see Fletcher v. Fletcher, 480 S.E. 2d 488 (Va. Ct. App. 1997). Subsection (b)(1) is contrary to Section 7-303(b) of the Uniform Probate Code, which provides that “[u]pon reasonable request, the trustee shall provide the beneficiary with a copy of the terms of the trust which describe or affect his interest . . . .”

The drafters of this Code decided to leave open for further consideration by the courts the extent to which a trustee may claim attorney-client privilege against a beneficiary seeking discovery of attorney-client communications between the trustee and the trustee’s attorney. The courts are split because of the important values that are in tension on this question. “The [attorney-client] privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.” Upjohn Co. v. United States, 449 U.S. 383 (1981). On the other hand, subsection (a) of this section requires that a trustee keep the qualified beneficiaries reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests, which could include facts that the trustee has revealed only to the trustee’s attorney. There is authority for the view that the trustee is estopped from pleading attorney-client privilege in such circumstances. In the leading case, Riggs National Bank v. Zimmer, 355 A.2d 709, 713 (Del. Ch. 1976), the court reasoned that the beneficiary, not the trustee, is the attorney’s client: “As a representative for the beneficiaries of the trust which he is administering, the trustee is not the real client . . . .” This beneficiary-as-client theory has been criticized on the ground that it conflicts with the trustee’s fiduciary duty to implement the intentions of the settlor, which are sometimes in tension with the wishes of one or more beneficiaries. See Louis H. Hamel, Jr., Trustee’s Privileged Counsel: A Rebuttal, 21 ACTEC Notes 156 (1995); Charles F. Gibbs & Cindy D. Hanson, The Fiduciary Exception to a Trustee’s Attorney/Client Privilege, 21 ACTEC Notes 236 (1995). Prominent decisions in California and Texas have refused to follow Delaware in recognizing an exception for the beneficiary against the trustee’s attorney-client privilege. Wells Fargo Bank v. Superior Court (Boltwood), 990 P.2d 591 (Cal. 2000); Huie v. De Shazo, 922 S.W. 2d 920 (Tex. 1996). The beneficiary-as-client theory continues to be applied to ERISA trusts. See, e.g., United States v. Mett, 178 F.3d 1058, 1062-64 (9th Cir. 1999). However, in a pension trust the beneficiaries are the settlors of their own trust because the trust is funded with their own earnings. Accordingly, in
ERISA attorney-client cases “[t]here are no competing interests such as other stockholders or the intentions of the Settlor.” Gibbs & Hanson, 21 ACTEC Notes at 238. For further discussion of the attorney-client privilege and whether there is a duty to disclose to the beneficiaries, see ACTEC Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.2 (3d ed. 1999); Rust E. Reid et al., Privilege and Confidentiality Issues When a Lawyer Represents a Fiduciary, 30 Real Prop. Prob. & Tr. J. 541 (1996).

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 60 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 60 days after the settlor’s death. These two duties can overlap. If the death of the settlor happens also 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.

Subsection (b)(4) deals with the sensitive issue of changes, usually increases, in trustee compensation. Changes can include changes in a periodic base fee, rate of percentage compensation, hourly rate, termination fee, or transaction charge. Regarding the standard for setting trustee compensation, see Section 708 and Comment.

Subsection (c) requires the trustee to furnish the current beneficiaries and other beneficiaries who request it with a copy of a trustee’s report at least annually and upon termination of the trust. Unless a cotrustee remains in office, the former trustee also must provide a report to all of the qualified beneficiaries upon the 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.

The Uniform Trust 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. The reporting requirement might even be satisfied by providing the beneficiaries with copies of the trust’s income tax returns and monthly brokerage account statements if the information on those returns and statements is complete and sufficiently clear. The key factor is not the format chosen but whether the report provides the beneficiaries with the information necessary to protect their interests. For model account forms, together with practical advice on how to prepare reports, see Robert Whitman, Fiduciary Accounting Guide (2d ed. 1998).

Subsection (d) allows trustee reports and other required information to be waived by a beneficiary. A beneficiary may also withdraw a consent. However, a waiver of a trustee’s report or other information does not relieve the trustee from accountability and potential liability for matters that the report or other information would have disclosed.

Subsection (e), which was added to the Code in 2004, is discussed in 2004 Amendment below.
2004 Amendment. Subsection (b)(2) and (b)(3) require that certain notices be sent by the trustee to the qualified beneficiaries within 60 days of the trustee's acceptance of office, or within 60 days after the creation of an irrevocable trust or the date a revocable trust becomes irrevocable. Subsection (e) is added to make clear the drafting committee's intent that these requirements are not to be retroactively applied to trustee acceptances of office occurring prior to the effective date of the Code and to trusts which have become irrevocable prior to the effective date.

SECTION 814. DISCRETIONARY POWERS; TAX SAVINGS.

(a) Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as “absolute”, “sole”, or “uncontrolled”, the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

(b) Subject to subsection (d), and unless the terms of the trust expressly indicate that a rule in this subsection does not apply:

(1) a person other than a settlor who is a beneficiary and trustee of a trust that confers on the trustee a power to make discretionary distributions to or for the trustee’s personal benefit may exercise the power only in accordance with an ascertainable standard relating to the trustee’s individual health, education, support, or maintenance within the meaning of Section 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code of 1986, as in effect on [the effective date of this [Code]] [or as later amended]; and

(2) a trustee may not exercise a power to make discretionary distributions to satisfy a legal obligation of support that the trustee personally owes another person.

(c) A power whose exercise is limited or prohibited by subsection (b) may be exercised by a majority of the remaining trustees whose exercise of the power is not so limited or prohibited. If the power of all trustees is so limited or prohibited, the court may appoint a special fiduciary with authority to exercise the power.

(d) Subsection (b) does not apply to:

(1) a power held by the settlor’s spouse who is the trustee of a trust for which a marital deduction, as defined in Section 2056(b)(5) or 2523(e) of the Internal Revenue Code of 1986, as in effect on [the effective date of this [Code]] [or as later amended], was previously allowed;

(2) any trust during any period that the trust may be revoked or amended by its settlor; or

(3) a trust if contributions to the trust qualify for the annual exclusion under Section 2503(c) of the Internal Revenue Code of 1986, as in effect on [the effective date of this [Code]] [or as later amended].

Comment

Despite the breadth of discretion purportedly granted by the wording of a trust, no grant of discretion to a trustee, whether with respect to management or distribution, is ever absolute. A grant of discretion establishes a range within which the trustee may act. The greater the grant of discretion, the broader the range. Pursuant to subsection (a), a trustee’s action must always be in good faith, with regard to the purposes of the trust, and in accordance with the trustee’s other
duties, including the obligation to exercise reasonable skill, care and caution. See Sections 801 (duty to administer trust) and 804 (duty to act with prudence). The standard stated in subsection (a) applies only to powers which are to be exercised in a fiduciary as opposed to a nonfiduciary capacity. Regarding the standards for exercising discretion and construing particular language of discretion, see Restatement (Third) of Trusts Section 50 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 187 (1959). See also Edward C. Halbach, Jr., Problems of Discretion in Discretionary Trusts, 61 Colum. L. Rev. 1425 (1961). An abuse by the trustee of the discretion granted in the terms of the trust is a breach of trust that can result in surcharge. See Section 1001(b) (remedies for breach of trust).

Subsections (b) through (d) rewrite the terms of a trust that might otherwise result in adverse estate and gift tax consequences to a beneficiary-trustee. This Code does not generally address the subject of tax curative provisions. These are provisions that automatically rewrite the terms of trusts that might otherwise fail to qualify for probable intended tax benefits. Such provisions, because they apply to all trusts using or failing to use specified language, are often overbroad, applying not only to trusts intended to qualify for tax benefits but also to smaller trust situations where taxes are not a concern. Enacting tax-curative provisions also requires special diligence by state legislatures to make certain that these provisions are periodically amended to account for the frequent changes in federal tax law. Furthermore, many failures to draft with sufficient care may be correctable by including a tax savings clause in the terms of the trust or by seeking modification of the trust using one or more of the methods authorized by Sections 411-417. Notwithstanding these reasons, the unintended inclusion of the trust in the beneficiary-trustee’s gross estate is a frequent enough occurrence that the drafters concluded that it is a topic that this Code should address. It is also a topic on which numerous States have enacted corrective statutes.

A tax curative provision differs from a statute such as Section 416 of this Code, which allows a court to modify a trust to achieve an intended tax benefit. Absent Congressional or regulatory authority authorizing the specific modification, a lower court decree in state court modifying a trust is controlling for federal estate tax purposes only if the decree was issued before the taxing event, which in the case of the estate tax would be the decedent’s death. See Rev. Rul. 73-142, 1973-1 C.B. 405. There is specific federal authority authorizing modification of trusts for a number of reasons (see Comment to Section 416) but not on the specific issues addressed in this section. Subsections (b) through (d), by interpreting the original language of the trust instrument in a way that qualifies for intended tax benefits, obviates the need to seek a later modification of the trust.

Subsection (b)(1) states the main rule. Unless the terms of the trust expressly indicate that the rule in this subsection is not to apply, the power to make discretionary distributions to a beneficiary-trustee is automatically limited by the requisite ascertainable standard necessary to avoid inclusion of the trust in the beneficiary’s gross estate or result in a taxable gift upon the trustee’s release or exercise of the power. Trusts of which the trustee-beneficiary is also a settlor are not subject to this subsection. In such a case, limiting the discretion of a settlor-trustee to an ascertainable standard would not be sufficient to avoid inclusion of the trust in the settlor’s gross estate. See generally John J. Regan, Rebecca C. Morgan & David M. English, Tax, Estate and
Financial Planning for the Elderly Section 17.07[2][h]. Furthermore, the inadvertent inclusion of a trust in a settlor-trustee’s gross estate is a far less frequent and better understood occurrence than is the inadvertent inclusion of the trust in the estate of a nonsettlor trustee-beneficiary.

Subsection (b)(2) addresses a common trap, the trustee who is not a beneficiary but who has power to make discretionary distributions to those to whom the trustee owes a legal obligation of support. Discretion to make distributions to those to whom the trustee owes a legal obligation of support, such as to the trustee’s minor children, results in inclusion of the trust in the trustee’s gross estate even if the power is limited by an ascertainable standard. The applicable regulation provides that the ascertainable standard exception applies only to distributions for the benefit of the decedent, not to distributions to those to whom the decedent owes a legal obligation of support. See Treas. Reg. Section 20.2041-1(c)(2).

Subsection (c) deals with cotrustees and adopts the common planning technique of granting the broader discretion only to the independent trustee. Cotrustees who are beneficiaries of the trust or who have a legal obligation to support a beneficiary may exercise the power only as limited by subsection (b). If all trustees are so limited, the court may appoint a special fiduciary to make a decision as to whether a broader exercise is appropriate.

Subsection (d) excludes certain trusts from the operation of this section. Trusts qualifying for the marital deduction will be includable in the surviving spouse’s gross estate regardless of whether this section applies. Consequently, if the spouse is acting as trustee, there is no need to limit the power of the spouse-trustee to make discretionary distributions for the spouse’s benefit. Similar reasoning applies to the revocable trust, which, because of the settlor’s power to revoke, is automatically includable in the settlor’s gross estate even if the settlor is not named as a beneficiary.

QTIP marital trusts are subject to this section, however. QTIP trusts qualify for the marital deduction only if so elected on the federal estate tax return. Excluding a QTIP for which an election has been made from the operation of this section would allow the terms of the trust to be modified after the settlor’s death. By not making the QTIP election, an otherwise unascertainable standard would be limited. By making the QTIP election, the trustee’s discretion would not be curtailed. This ability to modify a trust depending on elections made on the federal estate tax return could itself constitute a taxable power of appointment resulting in inclusion of the trust in the surviving spouse’s gross estate.

The exclusion of the Section 2503(c) minors trust is necessary to avoid loss of gift tax benefits. While preventing a trustee from distributing trust funds in discharge of a legal obligation of support would keep the trust out of the trustee’s gross estate, such a restriction might result in loss of the gift tax annual exclusion for contributions to the trust, even if the trustee were otherwise granted unlimited discretion. See Rev. Rul. 69-345, 1969-1 C.B. 226.

2004 Amendment. The amendment substitutes “ascertainable standard” which is now a defined term in Section 103(2), for the former and identical definition in this section. No substantive change is intended.