

MINUTES OF THE HOUSE JUDICIARY COMMITTEE.

The meeting was called to order by Chairperson Michael R. O'Neal at 3:30 p.m. on April 1, 2002 in Room 313-S of the Capitol.

All members were present except:

Representative Judy Morrison - Excused

Committee staff present:

Jerry Ann Donaldson, Department of Legislative Research

Jill Wolters, Department of Revisor of Statutes

Sherman Parks, Department of Revisor of Statutes

Cindy O'Neal, Committee Secretary

Conferees appearing before the committee:

Randy Hearrell, Kansas Judicial Council

Michelle Clayton, Legal Counsel, Uniform Law Commission

Bill Martin, Kansas Bar Association

Daryl Craft, Kansas Bankers Association, Trust Division

Hearing on **SB 297 - Enacting the Uniform Trust Code**, was opened.

Randy Hearrell, Kansas Judicial Council, introduced Michelle Clayton, Legal Counsel, Uniform Law Commission, who provided the members with a copy of a balloon with agreed upon changes to the bill (Attachment 1), summary of amendment by the Senate (Attachment 2), and her written testimony (Attachment 3). She touched on several articles of the Code but was concerned with the deletion of protection for spouses and children, i.e., spend thrift provisions, which would allow child support orders to be attached to trusts.

Bill Martin, Kansas Bar Association, had concerns about the bill but worked out agreements with the Judicial Counsel and now supports the bill. (Attachment 4)

Daryl Craft, Kansas Bankers Association, Trust Division, proposed more specific language n Section 2, paragraph 12. (see balloon Attachment 5).

SB 236 - Garnishment procedure under code of civil procedure

Representative Patterson made the motion to substitute the balloon amendment language into SB 236. So that a bona fide trade, merchant or professional association who represents the interests of such can bring an action. (Attachment 6) Representative DiVita seconded the motion.

After lengthy committee discussion Representative Patterson decided that the proposed language did not do what he had hoped it would and with permission of the second he withdrew his motion.

The committee meeting adjourned at 5:00 p.m.

3
4 **SENATE BILL No. 297**

5
6 By Committee on Judiciary

7
8 2-8
9

10 AN ACT enacting the Kansas uniform trust code; repealing K.S.A. 58-
11 1201, 58-1202, 58-1203, 58-1205, 58-1206, 58-1207, 58-1208, 58-1209,
12 58-1210, 58-1211, 58-2404, 58-2405, 58-2409, 58-2410, 58-2411, 58-
13 2412, 58-2413, 58-2415, 58-2417, 58-2420, 59-2295 and 59-2296 and
14 K.S.A. ~~2000~~ 2001 Supp. 58-1204, *58-12a01, 58-12a02, 58-12a03,*
15 *58-12a04, 58-12a05 and 58-12a06.*

16
17 *Be it enacted by the Legislature of the State of Kansas:*

18 Section 1. **(UTC 101) SHORT TITLE.** This act may be cited as the
19 Kansas uniform trust code.

20 Sec. 2. **(UTC 102) SCOPE.** This code applies to express trusts,
21 charitable or noncharitable, and trusts created pursuant to a statute, judg-
22 ment, or decree that requires the trust to be administered in the manner
23 of an express trust.

24 Sec. 3. **(UTC 103) DEFINITIONS.** As used in this code:

25 (1) "Action," with respect to an act of a trustee, includes a failure to
26 act.

27 (2) "Beneficiary" means a person that:

28 (A) Has a present or future beneficial interest in a trust, vested or
29 contingent; or

30 (B) in a capacity other than that of trustee, holds a power of appoint-
31 ment over trust property.

32 (3) "Charitable trust" means a trust, or portion of a trust, created for
33 a charitable purpose described in subsection (a) of section 26, and amend-
34 ments thereto.

35 (4) "Conservator" means a person appointed by the court pursuant
36 to K.S.A. 59-3001 *et seq.*, and amendments thereto, to administer the
37 estate of a minor or adult individual.

38 (5) "Environmental law" means a federal, state, or local law, rule,
39 regulation, or ordinance relating to protection of the environment.

40 (6) "Guardian" means a person appointed by the court pursuant to
K.S.A. 59-3001 *et seq.*, and amendments thereto, to make decisions re-
garding the support, care, education, health, and welfare of a minor or
adult individual. The term does not include a guardian ad litem.

1 (7) "Interests of the beneficiaries" means the beneficial interests pro-
2 vided in the terms of the trust.

3 (8) "Jurisdiction," with respect to a geographic area, includes a state
4 or country.

5 (9) "Person" means an individual, corporation, business trust, estate,
6 trust, partnership, limited liability company, association, joint venture,
7 government; governmental subdivision, agency, or instrumentality; public
8 corporation, or any other legal or commercial entity.

9 (10) "Power of withdrawal" means a presently exercisable general
10 power of appointment other than a power exercisable only upon consent
11 of the trustee or a person holding an adverse interest.

12 (11) "Property" means anything that may be the subject of owner-
13 ship, whether real or personal, legal or equitable, or any interest therein.

14 (12) "Qualified beneficiary" means a beneficiary who, on the date of
15 the beneficiary's qualification is determined, **possesses a vested income
16 interest or vested remainder interest in a trust.**

17 ~~(A) Is a distributee or permissible distributee of trust income or
18 principal;~~

19 ~~(B) would be a distributee or permissible distributee of trust income
20 or principal if the interests of the distributees described in subparagraph
21 (A) terminated on that date; or~~

22 ~~(C) would be a distributee or permissible distributee of trust income
23 or principal if the trust terminated on that date.~~

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

26 (14) "Settlor" means a person, including a testator, who creates, or
27 contributes property to, a trust. If more than one person creates or con-
28 tributes property to a trust, each person is a settlor of the portion of the
29 trust property attributable to that person's contribution except to the ex-
30 tent another person has the power to revoke or withdraw that portion.

31 (15) "Spendthrift provision" means a term of a trust which restrains
32 both voluntary and involuntary transfer of a beneficiary's interest.

33 (16) "State" means a state of the United States, the District of Co-
34 lumbia, Puerto Rico, the United States Virgin Islands, or any territory or
35 insular possession subject to the jurisdiction of the United States. The
36 term includes an Indian tribe or band recognized by federal law or for-
37 mally acknowledged by a state.

38 (17) "Terms of a trust" means the manifestation of the settlor's intent
39 regarding a trust's provisions as expressed in the trust instrument or as
40 may be established by other evidence that would be admissible in a ju-
41 dicial proceeding.

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

The current definition creates a broad class of beneficiaries, including anyone who might potentially be a beneficiary, even in the remotest of possibilities. The change defines a class that has a vested interest in current income or future remainder of the trust. It is believed this is more in keeping with the settlor's intent.

1 (19) "Trustee" includes an original, additional, and successor trustee,
2 and a cotrustee.

3 Sec. 4. (UTC 104) KNOWLEDGE. (a) Subject to subsection (b),
4 a person has knowledge of a fact if the person:

- 5 (1) Has actual knowledge of it;
- 6 (2) has received a notice or notification of it; or
- 7 (3) from all the facts and circumstances known to the person at the
8 time in question, has reason to know it.

9 (b) An organization that conducts activities through employees has
10 notice or knowledge of a fact involving a trust only from the time the
11 information was received by an employee having responsibility to act for
12 the trust, or would have been brought to the employee's attention if the
13 organization had exercised reasonable diligence. An organization exer-
14 cises reasonable diligence if it maintains reasonable routines for com-
15 municating significant information to the employee having responsibility
16 to act for the trust and there is reasonable compliance with the routines.
17 Reasonable diligence does not require an employee of the organization
18 to communicate information unless the communication is part of the in-
19 dividual's regular duties or the individual knows a matter involving the
20 trust would be materially affected by the information

21 Sec. 5. (UTC 105) DEFAULT AND MANDATORY RULES. (a)
22 Except as otherwise provided in the terms of the trust, this code governs
23 the duties and powers of a trustee, relations among trustees and the rights
24 and interests of a beneficiary.

25 (b) The terms of a trust prevail over any provision of this code except:
26 (1) The requirements for creating a trust;
27 (2) the duty of a trustee to act in good faith and in accordance with
28 the purposes of the trust;

29 (3) the requirement that a trust and its terms be for the benefit of its
30 beneficiaries, *and that the trust have a purpose that is lawful, not*
31 *contrary to public policy and possible to achieve;*

32 (4) the power of the court to modify or terminate a trust under sec-
33 tions 31 through 37, and amendments thereto;

34 ~~(5) the effect of a spendthrift provision and the rights of certain cred-~~
35 ~~itors and assignees to reach a trust as provided in article 5 of this code;~~

36 ~~—(6) the power of the court under section 52 50, and amendments~~
37 ~~thereto, to require, dispense with, or modify or terminate a bond;~~

38 ~~(7) (6) the power of the court under subsection (b) of section 58 56,~~
39 ~~and amendments thereto, to adjust a trustee's compensation specified in~~
40 ~~the terms of the trust which is unreasonably low or high;~~

~~(8) the duty to notify the qualified beneficiaries of an irrevocable trust~~
~~of the existence of the trust and of their right to request trustee's reports~~
~~and other information reasonably related to the administration of the trust~~

This change was included in the 2001 amendments to the 2000 Uniform Trust Code by the Uniform Law Commissioners.

The Kansas Bar Association proposed this amendment because: "This provision is bad public policy because it places limitations on the power of a spendthrift clause, which is currently recognized by Kansas law."

By striking subsection (8) and (9) from the list of mandatory rules the settlor may determine who is entitled to receive notice and other documents from the trustee. This is consistent with current law.

1 and to furnish upon request of a qualified beneficiary a copy of the trust
2 instrument;

3 ~~(9) the duty to respond to the request of a beneficiary of an irrevocable trust for trustee's reports and other information reasonably related~~
4 ~~to the administration of a trust;~~

5 ~~(10) (7) the effect of an exculpatory term under section 85 83, and~~
6 ~~amendments thereto;~~

7 ~~(11) (8) the rights under sections 87 85 through 90 88, and amend-~~
8 ~~ments thereto, of a person other than a trustee or beneficiary;~~

9 ~~(12) (9) periods of limitation for commencing a judicial proceeding~~
10 ~~under section 48, and amendments thereto; and;~~

11 ~~(13) (10) the power of the court to take such action and exercise such~~
12 ~~jurisdiction as may be necessary in the interests of justice; and~~

13 ~~(14) the subject-matter jurisdiction of the court and venue for com-~~
14 ~~mencing a proceeding as provided in sections 15 and 16, and amendments~~
15 ~~thereto.~~

16
17 (c) Notwithstanding any provisions of the Kansas uniform trust code
18 to the contrary, any trust created by will and admitted to probate shall be
19 subject to the requirements of chapter 59 of the Kansas Statutes
20 Annotated.

21 Sec. 6. (UTC 106) COMMON LAW OF TRUSTS; PRINCIPLES
22 OF EQUITY. The common law of trusts and principles of equity sup-
23 plement this code, except to the extent modified by this code or another
24 statute of this state.

25 Sec. 7. (UTC 107) GOVERNING LAW. The meaning and effect
26 of the terms of a trust are determined by:

27 (1) The law of the jurisdiction designated in the terms unless the
28 designation of that jurisdiction's law is contrary to a strong public policy
29 *the law* of the jurisdiction having the most significant relationship to the
30 matter at issue; or

31 (2) in the absence of a controlling designation in the terms of the
32 trust, the law of the jurisdiction having the most significant relationship
33 to the matter at issue.

34 Sec. 8. (UTC 108) PRINCIPAL PLACE OF ADMINISTRA-
35 TION. (a) Without precluding other means for establishing a sufficient
36 connection with the designated jurisdiction, terms of a trust designating
37 the principal place of administration are valid and controlling if:

38 (1) A trustee's principal place of business is located in or a trustee is
39 a resident of the designated jurisdiction; or

40 (2) all or part of the administration occurs in the designated
jurisdiction.

41 (b) A trustee is under a continuing duty to administer the trust at a
42 place appropriate to its purposes, its administration, and the interests of
43

The Kansas Bar Association proposed this amendment because: "This is a technical amendment that is intended to add clarification to what section of the Code is being referenced."

The Kansas Bar Association proposed this amendment because: "Currently, the jurisdiction of a trust instrument is dictated by the language of the instrument. This would substantially alter this doctrine by not allowing the instrument to determine subject matter jurisdiction and venue. We see no rationale for this departure from current Kansas law. Section 15 states that the district court has exclusive jurisdiction of proceedings in Kansas dealing with administration of a trust while Section 16 outlines the permissible counties in Kansas where venue may be allowed. This change is due to concerns that the bill limits the ability of a trust grantor to place the situs of a trust in another jurisdiction."

The Kansas Bar Association proposed this language because they believe the phrase "a strong public policy" is vague.

1 the beneficiaries.

2 (c) Without precluding the right of the court to order, approve, or
3 disapprove a transfer, the trustee, in furtherance of the duty prescribed
4 by subsection (b), may transfer the trust's principal place of administration
5 to another state or to a jurisdiction outside of the United States.

6 (d) The trustee shall notify the qualified beneficiaries of a proposed
7 transfer of a trust's principal place of administration not less than 60 days
8 before initiating the transfer. The notice of proposed transfer must
9 include:

10 (1) The name of the jurisdiction to which the principal place of ad-
11 ministration is to be transferred;

12 (2) the address and telephone number at the new location at which
13 the trustee can be contacted;

14 (3) an explanation of the reasons for the proposed transfer;

15 (4) the date on which the proposed transfer is anticipated to occur;
16 and

17 (5) the date, not less than 60 days after the giving of the notice, by
18 which the qualified beneficiary must notify the trustee of an objection to
19 the proposed transfer.

20 (e) The authority of a trustee under this section to transfer a trust's
21 principal place of administration terminates if a qualified beneficiary no-
22 tifies the trustee of an objection to the proposed transfer on or before
23 the date specified in the notice.

24 (f) In connection with a transfer of the trust's principal place of ad-
25 ministration, the trustee may transfer some or all of the trust property to
26 a successor trustee designated in the terms of the trust or appointed
27 pursuant to section 54 52, and amendments thereto.

28 **Sec. 9. (UTC 109) METHODS AND WAIVER OF NOTICE.** (a)
29 Notice to a person under this code or the sending of a document to a
30 person under this code must be accomplished in a manner reasonably
31 suitable under the circumstances and likely to result in receipt of the
32 notice or document. Permissible methods of notice or for sending a doc-
33 ument include first-class mail, personal delivery, delivery to the person's
34 last known place of residence or place of business, or a properly directed
35 electronic message.

36 (b) Notice otherwise required under this code or a document oth-
37 erwise required to be sent under this code need not be provided to a
38 person whose identity or location is unknown to and not reasonably as-
39 certainable by the trustee.

40 (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.

41 (d) Notice of a judicial proceeding must be given as provided in the
42 code of civil procedure.
43

1 Sec. 10. (UTC 110) OTHERS TREATED AS QUALIFIED

2 **BENEFICIARIES.** (a) ~~Whenever notice to qualified beneficiaries of a~~
 3 ~~trust is required under this code, the trustee must also give notice to any~~
 4 ~~other beneficiary who has sent the trustee a request for notice.~~

5 ~~(b)~~ A charitable organization expressly entitled *mandated* to receive
 6 benefits *distributions* under the terms of a trust or a person appointed
 7 to enforce a trust created for the care of an animal or another nonchar-
 8 itable purpose as provided in section 29 or 30, and amendments thereto,
 9 has the rights of a qualified beneficiary under this code.

10 ~~(c)~~ (b) The attorney general of this state has the rights of a qualified
 11 beneficiary with respect to a charitable trust having its principal place of
 12 administration in this state.

13 Sec. 11. (UTC 111) NONJUDICIAL SETTLEMENT AGREE-
 14 **MENTS.** (a) For purposes of this section, "interested persons" means
 15 persons whose consent would be required in order to achieve a binding
 16 settlement were the settlement to be approved by the court.

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

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

24 (d) Matters that may be resolved by a nonjudicial settlement agree-
 25 ment include:

- 26 (1) ~~The interpretation or construction of the terms of the trust,~~
- 27 ~~(2) the~~ *The* approval of a trustee's report or accounting;
- 28 ~~(3) direction to a trustee to refrain from performing a particular act~~
 29 ~~or the grant to a trustee of any necessary or desirable power;~~
- 30 (4) (2) the resignation or appointment of a trustee and the determi-
 31 nation of a trustee's compensation;
- 32 ~~(5)~~ (3) transfer of a trust's principal place of administration; and
- 33 ~~(6)~~ (4) liability of a trustee for an action relating to the trust.

34 (e) Any interested person may request the court to approve a non-
 35 judicial settlement agreement, to determine whether the representation
 36 as provided in article 3 of this code was adequate, and to determine
 37 whether the agreement contains terms and conditions the court could
 38 have properly approved.

39 Sec. 12. (UTC 112) RULES OF CONSTRUCTION. The rules of
 40 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.

43 Sec. 13. (UTC 201) ROLE OF COURT IN ADMINISTRATION

With the striking of subsection 105 (8) and (9), this subsection is no longer necessary.

These two amendments were included in the 2001 amendments to the 2000 Uniform Trust Code by the Uniform Law Commissioners.

The Kansas Bar Association proposed these amendments because: "Section 11 allows a trust beneficiary to resolve a variety of matters without the need for court approval. While this may appear innocuous at first blush, the KBA is very concerned that the existence of this section will undermine the intent of the settlors.

The section states that any such agreement is only valid to the extent it does not violate a material purpose of the trust. In subsection (d)(1), matters that may be resolved by a nonjudicial settlement agreement include "the interpretation or construction of a trust". The KBA believes this is such a broad standard that almost any term or provision of a trust could be altered by the trust beneficiaries without the approval of any court. Subsection (d)(3) goes much deeper than mere administrative changes, it could go into substantive changes that affect the rights of beneficiaries and trustees, and therefore should not be determined without the review of a judge.

The very existence of the need for court approval to modify an irrevocable trust serves as a braking device for potential mischief by beneficiaries. An emotionally strong group of beneficiaries could suggest trust changes that may impair the interests of weaker beneficiaries (such as parents as a class versus their own children) and completely alter the intention of the trust settlor. Further, as a practical matter, the lack of a need for court approval means that any term or provision of a trust can be changed even if it does indeed violate a material purpose of the trust. Without a court to make such determination, the change will be made as a matter of course."

1 **OF TRUST.** (a) The court may intervene in the administration of a trust
2 to the extent its jurisdiction is invoked by an interested person or as
3 provided by law.

4 (b) A trust is not subject to continuing judicial supervision unless
5 ordered by the court.

6 (c) A judicial proceeding involving a trust may relate to any matter
7 involving the trust's administration, including an action for declaratory
8 judgement pursuant to K.S.A. 60-1701 *et seq.*, and amendments thereto.

9 **Sec. 14. (UTC 202) JURISDICTION OVER TRUSTEE AND**
10 **BENEFICIARY.** (a) By accepting the trusteeship of a trust having its
11 principal place of administration in this state or by moving the principal
12 place of administration to this state, the trustee submits personally to the
13 jurisdiction of the courts of this state regarding any matter involving the
14 trust.

15 (b) With respect to their interests in the trust, the beneficiaries of a
16 trust having its principal place of administration in this state are subject
17 to the jurisdiction of the courts of this state regarding any matter involving
18 the trust. By accepting a distribution from such a trust, the recipient
19 submits personally to the jurisdiction of the courts of this state regarding
20 any matter involving the trust.

21 (c) This section does not preclude other methods of obtaining juris-
22 diction over a trustee, beneficiary, or other person receiving property
23 from the trust.

24 **Sec. 15. (UTC 203) SUBJECT-MATTER JURISDICTION.** The
25 district court has exclusive jurisdiction of proceedings in this state brought
26 by a trustee or beneficiary concerning the administration of a trust.

27 **Sec. 16. (UTC 204) VENUE.** (a) Except as otherwise provided in
28 subsection (b), venue for a judicial proceeding involving a trust is in the
29 county of this state in which the trust's principal place of administration
30 *has been*, is or will be located or in the county in which any real property
31 in which the trust has an interest is located and, if the trust is created by
32 will and the estate is not yet closed, in the county in which the decedent's
33 estate is being administered.

34 (b) If a trust has no trustee, venue for a judicial proceeding for the
35 appointment of a trustee is in a county of this state in which a beneficiary
36 resides, in a county in which any trust property is located, and if the trust
37 is created by will, in the county in which the decedent's estate was or is
38 being administered.

39 **Sec. 17. (UTC 301) REPRESENTATION: BASIC EFFECT.** (a)
40 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.

43 (b) The consent of a person who may represent and bind another

The addition of the phrase "has been," allows venue to remain in a county, even if there is no real estate and the trustee has moved to another jurisdiction.

1 person under this article is binding on the person represented unless the
2 person represented objects to the representation before the consent
3 would otherwise have become effective.

4 (c) Except as otherwise provided in sections 32 and 48 46, and
5 amendments thereto, a person who under this article may represent a
6 settlor who lacks capacity may receive notice and give a binding consent
7 on the settlor's behalf.

8 **Sec. 18. (UTC 302) REPRESENTATION BY HOLDER OF**
9 **GENERAL TESTAMENTARY POWER OF APPOINTMENT.** To
10 the extent there is no conflict of interest between the holder of a general
11 testamentary power of appointment and the persons represented with
12 respect to the particular question or dispute, the holder may represent
13 and bind persons whose interests, as permissible appointees, takers in
14 default, or otherwise, are subject to the power.

15 **Sec. 19. (UTC 303) REPRESENTATION BY FIDUCIARIES**
16 **AND PARENTS.** To the extent there is no conflict of interest between
17 the representative and the person represented or among those being rep-
18 resented with respect to a particular question or dispute:

19 (1) A conservator may represent and bind the estate that the conser-
20 vator controls;

21 (2) a guardian may represent and bind the ward within the scope of
22 the guardian's powers and duties;

23 (3) an agent having authority to act with respect to the particular
24 question or dispute may represent and bind the principal;

25 (4) a trustee may represent and bind the beneficiaries of the trust;

26 (5) a personal representative of a decedent's estate may represent and
27 bind persons interested in the estate; and

28 (6) a parent may represent and bind the parent's minor or unborn
29 child if a conservator or guardian for the child has not been appointed.

30 **Sec. 20. (UTC 304) REPRESENTATION BY PERSON HAV-**
31 **ING SUBSTANTIALLY IDENTICAL INTEREST.** Unless otherwise
32 represented, a minor, incapacitated, or unborn individual, or a person
33 whose identity or location is unknown and not reasonably ascertainable,
34 may be represented by and bound by another having a substantially iden-
35 tical interest with respect to the particular question or dispute, but only
36 to the extent there is no conflict of interest between the representative
37 and the person represented.

38 **Sec. 21. (UTC 305) APPOINTMENT OF REPRESENTATIVE.**

39 (a) If the court or trustee determines that an interest is not represented
40 under this article, or that the otherwise available representation might be
inadequate, the court may appoint or the trustee may retain a represen-
41 tative to receive notice, give consent, and otherwise represent, bind, and
42 act on behalf of a minor, incapacitated, or unborn individual, or a person
43

1 whose identity or location is unknown. A representative may be appointed
2 to represent several persons or interests.

3 (b) A representative may act on behalf of the individual represented
4 with respect to any matter arising under this code, whether or not a
5 judicial proceeding concerning the trust is pending.

6 (c) In making decisions, a representative may consider general ben-
7 efit accruing to the living members of the individual's family.

8 Sec. 22. (UTC 401) METHODS OF CREATING TRUST. A trust
9 may be created by:

10 (1) Transfer of property to another person as trustee during the set-
11 tlor's lifetime or by will or other disposition taking effect upon the settlor's
12 death;

13 (2) declaration by the owner of property that the owner holds iden-
14 tifiable property as trustee, *so long as such property would not oth-*
15 *erwise pass at the owner's death by a beneficiary designation to a*
16 *party other than the trust;* or

17 (3) exercise of a power of appointment in favor of a trustee.

18 Sec. 23. (UTC 402) REQUIREMENTS FOR CREATION. (a) A
19 trust is created only if:

20 (1) The settlor has capacity to create a trust;

21 (2) the settlor indicates an intention to create the trust;

22 (3) the trust has a definite beneficiary or is:

23 (A) A charitable trust;

24 (B) a trust for the care of an animal, as provided in section 29, and
25 amendments thereto; or

26 (C) a trust for a noncharitable purpose, as provided in section 30, and
27 amendments thereto;

28 (4) the trustee has duties to perform; and

29 (5) the same person is not the sole trustee and sole beneficiary.

30 (b) A beneficiary is definite if the beneficiary can be ascertained now
31 or in the future, subject to any applicable rule against perpetuities.

32 (c) A power in a trustee to select a beneficiary from an indefinite class
33 is valid. If the power is not exercised within a reasonable time, the power
34 fails and the property subject to the power passes to the persons who
35 would have taken the property had the power not been conferred.

36 Sec. 24. (UTC 403) TRUSTS CREATED IN OTHER JURIS-
37 DICTIONS. A trust not created by will is validly created if its creation
38 complies with the law of the jurisdiction in which the trust instrument
39 was executed, or the law of the jurisdiction in which, at the time of
40 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

43 (3) any trust property was located.

The Trust Division of the Kansas Bankers Association requested this change to resolve conflicts between inconsistent beneficiary designations for property that was not titled in the name of the trust. If the property has a named beneficiary other than the trust, such property will pass to that beneficiary. If the property names no other beneficiary, it will be deemed to be an asset of the trust and will pass to the beneficiaries of the trust.

1 Sec. 25. **(UTC 404) TRUST PURPOSES.** A trust may be created
2 only to the extent its purposes are lawful, not contrary to public policy,
3 and possible to achieve. A trust and its terms must be for the benefit of
4 its beneficiaries.

5 Sec. 26. **(UTC 405) CHARITABLE PURPOSES; ENFORCE-**
6 **MENT.** (a) A charitable trust may be created for the relief of poverty,
7 the advancement of education or religion, the promotion of health, gov-
8 ernmental or municipal purposes, or other purposes the achievement of
9 which is beneficial to the community.

10 (b) If the terms of a charitable trust do not indicate a particular char-
11 itable purpose or beneficiary, the court may select one or more charitable
12 purposes or beneficiaries. The selection must be consistent with the set-
13 tlor's intention to the extent it can be ascertained.

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

16 Sec. 27. **(UTC 406) CREATION OF TRUST INDUCED BY**
17 **FRAUD, DURESS, OR UNDUE INFLUENCE.** (a) A trust is void to
18 the extent its creation was induced by fraud, duress, or undue influence.

19 (b) Any provision in a trust, written or prepared for another person,
20 that transfers property and that gives the scrivener or the scrivener's par-
21 ent, children, issue, sibling or spouse any direct or indirect gift is invalid
22 unless: (1) The scrivener is related to the settlor by blood or marriage; or
23 (2) it affirmatively appears that the settlor had read and knew the contents
24 of the trust and had independent legal advice with reference thereto. The
25 words "children" and "issue" as used in this section, are defined in K.S.A.
26 59-501, and amendments thereto.

27 Sec. 28. **(UTC 407) EVIDENCE OF ORAL TRUST.** Except as
28 required by K.S.A. 59-606, and amendments thereto, with respect to tes-
29 tamentary trusts or K.S.A. 33-105, 33-106 and 58-2401, and amendments
30 thereto, a trust need not be evidenced by a trust instrument, but the
31 creation of an oral trust and its terms may be established only by clear
32 and convincing evidence.

33 Sec. 29. **(UTC 408) TRUST FOR CARE OF ANIMAL.** (a) A trust
34 may be created to provide for the care of an animal alive during the
35 settlor's lifetime. The trust terminates upon the death of the animal or,
36 if the trust was created to provide for the care of more than one animal
37 alive during the settlor's lifetime, upon the death of the last surviving
38 animal.

39 (b) A trust authorized by this section may be enforced by a person
40 appointed in the terms of the trust or, if no person is so appointed, by a
41 person appointed by the court. A person having an interest in the welfare
42 of the animal may request the court to appoint a person to enforce the
43 trust or to remove a person appointed.

1 (c) Property of a trust authorized by this section may be applied only
2 to its intended use, except to the extent the court determines that the
3 value of the trust property exceeds the amount required for the intended
4 use. Except as otherwise provided in the terms of the trust, property not
5 required for the intended use may be distributed to the settlor, if then
6 living, otherwise to the settlor's successors in interest.

7 **Sec. 30. (UTC 409) NONCHARITABLE TRUST WITHOUT**
8 **ASCERTAINABLE BENEFICIARY.** Except as otherwise provided in
9 section 29, and amendments thereto, or by another statute, the following
10 rules apply:

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

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

18 (3) Property of a trust authorized by this section may be applied only
19 to its intended use, except to the extent the court determines that the
20 value of the trust property exceeds the amount required for the intended
21 use. Except as otherwise provided in the terms of the trust, property not
22 required for the intended use may be distributed to the settlor, if then
23 living, otherwise to the settlor's successors in interest.

24 **Sec. 31. (UTC 410) MODIFICATION OR TERMINATION OF**
25 **TRUST; PROCEEDINGS FOR APPROVAL OR DISAPPROVAL.**

26 (a) In addition to the methods of termination prescribed by sections 32
27 through 35, and amendments thereto, a trust terminates to the extent the
28 trust is revoked or expires pursuant to its terms, no purpose of the trust
29 remains to be achieved, or the purposes of the trust have become unlaw-
30 ful, contrary to public policy, or impossible to achieve.

31 (b) A proceeding to approve or disapprove a proposed modification
32 or termination under sections 32 through 37, and amendments thereto,
33 or trust combination or division under section 38, and amendments
34 thereto, may be commenced by a trustee or *qualified* beneficiary, and a
35 proceeding to approve or disapprove a proposed modification or termi-
36 nation under section 32, and amendments thereto, may be commenced
37 by the settlor. The settlor of a charitable trust may maintain a proceeding
38 to modify the trust under section 34, and amendments thereto.

39 **Sec. 32. (UTC 411) MODIFICATION OR TERMINATION OF**
40 **NONCHARITABLE IRREVOCABLE TRUST BY CONSENT.** (a) A
41 noncharitable irrevocable trust may be modified or terminated upon con-
42 sent of the settlor and all *qualified* beneficiaries, even if the modification
43 or termination is inconsistent with a material purpose of the trust. A

1 settlor's power to consent to a trust's termination may be exercised by an
2 agent under a power of attorney only to the extent expressly authorized
3 by the power of attorney or the terms of the trust; by the settlor's con-
4 servator with the approval of the court supervising the conservatorship if
5 an agent is not so authorized; or by the settlor's guardian with the approval
6 of the court supervising the guardianship if an agent is not so authorized
7 and a conservator has not been appointed.

8 (b) A noncharitable irrevocable trust may be terminated upon con-
9 sent of all of the *qualified* beneficiaries if the court concludes that con-
10 tinuance of the trust is not necessary to achieve any material purpose of
11 the trust. A noncharitable irrevocable trust may be modified upon consent
12 of all of the *qualified* beneficiaries if the court concludes that modifi-
13 cation is not inconsistent with a material purpose of the trust.

14 (c) A spendthrift provision in the terms of the trust is presumed to
15 constitute a material purpose of the trust.

16 (d) Upon termination of a trust under subsection (a) or (b), the trust-
17 tee shall distribute the trust property as agreed by the *qualified*
18 beneficiaries.

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

23 (1) If all of the *qualified* beneficiaries had consented, the trust could
24 have been modified or terminated under this section; and

25 (2) the interests of a *qualified* beneficiary who does not consent will
26 be adequately protected.

27 **Sec. 33. (UTC 412) MODIFICATION OR TERMINATION BE-**
28 **CAUSE OF UNANTICIPATED CIRCUMSTANCES OR INABIL-**
29 **ITY TO ADMINISTER TRUST EFFECTIVELY.** (a) The court may
30 modify the administrative or dispositive terms of a trust or terminate the
31 trust if, because of circumstances not anticipated by the settlor, modifi-
32 cation or termination will further the purposes of the trust. To the extent
33 practicable, the modification must be made in accordance with the set-
34 tlor's probable intention.

35 (b) The court may modify the administrative terms of a trust if con-
36 tinuation of the trust on its existing terms would be impracticable or
37 wasteful or impair the trust's administration.

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

41 **Sec. 34. (UTC 413) CY PRES.** If a charitable trust is or becomes
42 illegal or impossible or impracticable of fulfillment or if a devise or be-
43 quest for charity, at the time it was intended to become effective is illegal

1 or impossible or impracticable of fulfillment, and if the settlor, manifested
2 a general intention to devote the property to charity, any judge, on ap-
3 plication of any trustee, any interested party or the attorney general, may
4 order an administration of the trust, as nearly as possible to fulfill the
5 manifested general charitable intention of the settlor. In every such pro-
6 ceeding, the attorney general, as representative of the public interest,
7 shall be notified and given an opportunity to be heard. The provisions of
8 this act shall not be applicable if the settlor has provided, either directly
9 or indirectly, for an alternative plan in the event the charitable trust is or
10 becomes illegal or impossible or impracticable of fulfillment. If the alter-
11 native plan is also a charitable trust, the intention shown in the original
12 plan shall prevail in the application of this act.

13 (b) If a federal estate tax deduction is not allowable at the time of a
14 decedent's death because of the failure of an interest in property which
15 passes from the decedent to a person, or for a use, described in section
16 2055(a) of the federal internal revenue code of 1986, as in effect on
17 December 31, 2000, to meet the requirements of section 170(f)(3)(B) or
18 2055(e)(2) of the federal internal revenue code of 1986, as in effect on
19 December 31, 2000, then in order that such deduction shall nevertheless
20 be allowable under section 2055(a) of the federal internal revenue code
21 of 1986, as in effect on December 31, 2000, any judge, on application of
22 any trustee, or any interested party may:

23 (1) With the written consent of the charitable beneficiaries, the non-
24 charitable beneficiaries not under any legal disability and duly appointed
25 guardians or guardians ad litem acting on behalf of any beneficiaries un-
26 der legal disability or conservator; or

27 (2) upon a finding that the interest of such beneficiaries is substan-
28 tially preserved, order a change to the trust by reformation, amendment,
29 construction or otherwise, which changes a reformable interest into a
30 qualified interest within the meaning of section 2055(e)(3) of the federal
31 internal revenue code of 1986, as in effect on December 31, 2000. In
32 every such proceeding, the attorney general, as representative of the pub-
33 lic interest, shall be notified and given an opportunity to be heard.

34 (c) As used in this act "impracticable of fulfillment" includes, but is
35 not limited to, the failure of any charitable trust, testamentary or inter
36 vivos, including, without limitation, trusts described in section 509 of the
37 federal internal revenue code of 1986, as in effect on December 31, 2000,
38 and charitable remainder trusts described in section 664 of the federal
39 internal revenue code of 1986, as in effect on December 31, 2000, to
40 include, if required to do so by section 508(e) or section 4947(a) of the
41 federal internal revenue code of 1986, as in effect on December 31, 2000,
42 the provisions relating to governing instruments set forth in section 508(e)
43 of the federal internal revenue code of 1986, as in effect on December

1 31, 2000.

2 (d) The provisions of this section shall be effective as to all trusts not
3 construed prior to the effective date of this act.

4 **Sec. 35. (UTC 414) TERMINATION OF UNECONOMIC**
5 **TRUST.** (a) After notice to the qualified beneficiaries, the trustee of a
6 trust consisting of trust property having a total value less than \$100,000
7 may terminate the trust if the trustee concludes that the value of the trust
8 property is insufficient to justify the cost of administration.

9 (b) The court may modify or terminate a trust or remove the trustee
10 and appoint a different trustee if it determines that the value of the trust
11 property is insufficient to justify the cost of administration.

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

15 (d) This section does not apply to an easement for conservation or
16 preservation.

17 **Sec. 36. (UTC 415) REFORMATION TO CORRECT MIS-**
18 **TAKES.** The court may reform the terms of a trust, even if unambiguous,
19 to conform the terms to the settlor's intention if it is proved by clear and
20 convincing evidence that both the settlor's intent and the terms of the
21 trust were affected by a mistake of fact or law, whether in expression or
22 inducement.

23 **Sec. 37. (UTC 416) MODIFICATION TO ACHIEVE SET-**
24 **TTLOR'S TAX OBJECTIVES.** To achieve the settlor's tax objectives, the
25 court may modify the terms of a trust in a manner that is not contrary to
26 the settlor's probable intention. The court may provide that the modifi-
27 cation has retroactive effect.

28 **Sec. 38. (UTC 417) COMBINATION AND DIVISION OF**
29 **TRUSTS.** (a) After notice to the qualified beneficiaries, a trustee may
30 combine two or more trusts into a single trust or divide a trust into two
31 or more separate trusts, if the result does not impair rights of any bene-
32 ficiary or adversely affect achievement of the purposes of the trust. The
33 trustee may make a division under this section by:

34 (1) Giving written notice of the division, not later than the 30th day
35 before the date of a division under this subsection, to each qualified ben-
36 eficiary; and

37 (2) executing a written instrument, acknowledged before a notary
38 public or other person authorized to take acknowledgments of convey-
39 ances of real estate stating that the trust has been divided pursuant to
40 this section and that the notice requirements of this subsection have been
satisfied.

41 (b) A trustee, in the written instrument dividing a trust, shall allocate
42 trust property among the separate trusts on a fractional basis by identi-
43

1 fying the assets and liabilities passing to each separate trust, or on any
 2 other reasonable basis. The trustee shall allocate undesignated trust prop-
 3 erty received after the trustee has divided the trust into separate trusts
 4 in the manner provided by the written instrument dividing the trust, or,
 5 in the absence of a provision in the written instrument, in a manner
 6 determined by the trustee.

7 (c) The trustee may combine two or more trusts under this section
 8 by:

9 (1) Giving a written notice of the combination, not later than the 30th
 10 day before the effective date of the combination, to each qualified ben-
 11 eficiary; and

12 (2) executing a written instrument, acknowledged before a notary
 13 public or other person authorized to take acknowledgments of convey-
 14 ances of real estate stating that the trust has been combined pursuant to
 15 this section and that the notice requirements of this subsection have been
 16 satisfied.

17 (d) The trustee may divide or combine a testamentary trust after the
 18 will establishing the trust has been admitted to probate, even if the trust
 19 will not be funded until a later date. The trustee may divide or combine
 20 any other trust before it is funded if the instrument establishing the trust
 21 is not revocable at the time of the division or combination.

22 Sec. 39. ~~(UTC 418)~~ **REFERENCE TO WRITTEN STATE-**
 23 **MENT OR LIST.** A trust instrument which establishes an inter vivos
 24 trust and which directs the trustee to distribute trust assets ~~upon the death~~
 25 ~~of the settlor~~ may refer to a separate written statement or list of items of
 26 personal property, other than money, evidences of debt, documents of
 27 title, securities, and properties used in trade or business, which are assets
 28 of the trust estate, and may direct the trustee to make distribution of such
 29 items as indicated in the written statement or list. The trustee may dis-
 30 tribute such items ~~upon death of the settlor~~ in accordance with the written
 31 statement or list. Such written statement or list either must be in the
 32 handwriting of the settlor or be signed by the settlor, and must describe
 33 the items with reasonable certainty. The writing may be referred to in
 34 the trust instrument as one to be in existence at the time of the settlor's
 35 death, prepared before or after execution of the trust instrument, and
 36 altered by the settlor after its preparation. Transfer of items of personal
 37 property pursuant to this section shall not be considered testamentary or
 38 be invalidated due to nonconformity with the provisions of chapter 59 of
 39 the Kansas Statutes Annotated, and amendments thereto.

40 Sec. 40. **(UTC 501) RIGHTS OF BENEFICIARY'S CREDITOR**
 41 **OR ASSIGNEE.** To the extent a beneficiary's interest is not protected
 42 by a spendthrift provision, the court may authorize a creditor or assignee
 43 of the beneficiary to reach the beneficiary's interest by attachment of

This section was not a part of the Uniform Trust Code but is modeled after K.S.A. 59-2296. The references to "death of settlor" should not have been included.

1 present or future distributions to or for the benefit of the beneficiary or
 2 other means. The court may limit the award to such relief as is appropriate
 3 under the circumstances.

4 **Sec. 41. (UTC 502) SPENDTHRIFT PROVISION.** (a) A spend-
 5 thrift provision is valid ~~only if it restrains both voluntary and involuntary~~
 6 ~~transfer of a beneficiary's interest.~~

7 (b) A term of a trust providing that the interest of a beneficiary is
 8 held subject to a "spendthrift trust," or words of similar import, is suffi-
 9 cient to restrain both voluntary and involuntary transfer of the benefi-
 10 ciary's interest.

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

15 ~~Sec. 42. (UTC 503) EXCEPTIONS TO SPENDTHRIFT PRO-~~
 16 ~~VISION. (a) As used in this section, "child" includes any person for whom~~
 17 ~~an order or judgment for child support has been entered in this or another~~
 18 ~~state.~~

19 ~~—(b) Even if a trust contains a spendthrift provision, a beneficiary's~~
 20 ~~child, spouse, or former spouse who has a judgment or court order against~~
 21 ~~the beneficiary for support or maintenance, or a judgment creditor who~~
 22 ~~has provided services for the protection of a beneficiary's interest in the~~
 23 ~~trust, may obtain from a court an order attaching present or future dis-~~
 24 ~~tributions to or for the benefit of the beneficiary.~~

25 ~~—(c) A spendthrift provision is unenforceable against a claim of this~~
 26 ~~state, subdivisions thereof, or the United States to the extent a statute of~~
 27 ~~this state or federal law so provides.~~

28 ~~Sec. 43. (UTC 504) DISCRETIONARY TRUSTS; EFFECT OF~~
 29 ~~STANDARD. (a) As used in this section, "child" includes any person~~
 30 ~~for whom an order or judgment for child support has been entered in~~
 31 ~~this or another state.~~

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

35 ~~—(1) The discretion is expressed in the form of a standard of distri-~~
 36 ~~bution; or~~

37 ~~—(2) the trustee has abused the discretion.~~

38 ~~—(c) To the extent a trustee has not complied with a standard of dis-~~
 39 ~~tribution or has abused a discretion:~~

40 ~~—(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

41 ~~—(2) the court shall direct the trustee to pay to the child, spouse, or~~

1-1
 The Kansas Bar Association proposed that subsection (a) be amended to provide that a spendthrift provision is valid if it restrains either voluntary or involuntary transfer of a beneficiary's interest. The Judicial Council is of the opinion that the effect of the KBA proposal would be to allow a settlor to provide that a beneficiary may gift his or her trust interest while at the same time avoiding creditor claims. The compromise was to strike all after the word "valid."

The Kansas Bar Association proposed that sections 42 and 43 be stricken because: "These proposed provisions seriously weakens Kansas spendthrift law as it voids such provisions to the extent the provisions are attempted to be enforced against 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, and is also void against governmental claims.

The KBA has grave concerns about his proposed erosion of the current law in this regard. Settlers often incorporate spendthrift provisions for the very purpose of cutting off any possible claims of creditors of a child or other beneficiary, especially against spouses and former spouses."

1 former spouse such amount as is equitable under the circumstances but
 2 not more than the amount the trustee would have been required to dis-
 3 tribute to or for the benefit of the beneficiary had the trustee complied
 4 with the standard or not abused the discretion.

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

8 **Sec. 44. 42. (UTC 505) CREDITOR'S CLAIM AGAINST SET-**
 9 **TTLOR.** (a) Except as provided by K.S.A. 33-101 *et seq.* and 33-201 *et*
 10 *seq.*, and amendments thereto, whether or not the terms of a trust contain
 11 a spendthrift provision, the following rules apply:

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

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

20 (3) After the death of a settlor, and subject to the settlor's right to
 21 direct the source from which liabilities will be paid, the property of a trust
 22 that was revocable at the settlor's death is subject to claims of the settlor's
 23 creditors, costs of administration of the settlor's estate, the expenses of
 24 the settlor's funeral and disposal of remains, the homestead, homestead
 25 allowance, all elective share rights of the surviving spouse and statutory
 26 allowance to a surviving spouse and children to the extent the settlor's
 27 probate estate is inadequate to satisfy those claims, costs, expenses, and
 28 allowances.

29 (b) For purposes of this section:

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

33 (2) upon the lapse, release, or waiver of the power, the holder is
 34 treated as the settlor of the trust only to the extent the value of the
 35 property affected by the lapse, release, or waiver exceeds the greater of
 36 the amount specified in section 2041(b)(2) or 2514(e) of the federal in-
 37 ternal revenue code of 1986, as in effect on December 31, 2000, or section
 38 2503(b) of the federal internal revenue code of 1986, as in effect on
 39 December 31, 2000.

40 **Sec. 45. 43. (UTC 506) OVERDUE DISTRIBUTION.** Whether
 41 or not a trust contains a spendthrift provision, a creditor or assignee of a
 42 beneficiary may reach a mandatory distribution of income or principal,
 43 including a distribution upon termination of the trust, if the trustee has

This is a technical change. The phrase "*et. seq.*" should appear after the phrase "K.S.A. 33-101" as well as after "K.S.A. 33-201."

1 not made the distribution to the beneficiary within a reasonable time after
2 the required *mandated* distribution date.

3 Sec. 46:44. (UTC 507) **PERSONAL OBLIGATIONS OF TRUS-**
4 **TEE.** Trust property is not subject to personal obligations of the trustee,
5 even if the trustee becomes insolvent or bankrupt.

6 Sec. 47:45. (UTC 601) **CAPACITY OF SETTLOR OF REVO-**
7 **CABLE TRUST.** The capacity required to create, amend, revoke, or add
8 property to a revocable trust, or to direct the actions of the trustee of a
9 revocable trust, is the same as that required to make a will.

10 Sec. 48:46. (UTC 602) **REVOCAION OR AMENDMENT OF**
11 **REVOCABLE TRUST.** (a) Unless the terms of a trust expressly provide
12 that the trust is irrevocable, the settlor may revoke or amend the trust.
13 This subsection does not apply to a trust created under an instrument
14 executed before the effective date of this code.

15 (b) If a revocable trust is created or funded by more than one settlor:
16 (1) To the extent the trust consists of community property, the trust
17 may be revoked by either spouse acting alone but may be amended only
18 by joint action of both spouses; and

19 (2) to the extent the trust consists of property other than community
20 property, each settlor may revoke or amend the trust with regard to the
21 portion of the trust property attributable to that settlor's contribution.

22 (c) The settlor may revoke or amend a revocable trust:

23 (1) By ~~substantially complying~~ *substantial compliance* with a
24 method provided in the terms of the trust; or

25 (2) if the terms of the trust do not provide a method or the method
26 provided in the terms is not expressly made exclusive, by:

27 (A) ~~Executing a~~ later will or codicil that expressly refers to the trust
28 or specifically devises property that would otherwise have passed accord-
29 ing to the terms of the trust; or

30 (B) any other method manifesting clear and convincing evidence of
31 the settlor's intent.

32 (d) Upon revocation of a revocable trust, the trustee shall deliver the
33 trust property as the settlor directs.

34 (e) A settlor's powers with respect to revocation, amendment, or dis-
35 tribution of trust property may be exercised by an agent under a power
36 of attorney only to the extent expressly authorized by the terms of the
37 trust or the power.

38 (f) A conservator of the settlor may exercise a settlor's powers with
39 respect to revocation, amendment, or distribution of trust property only
40 with the approval of the court supervising the conservatorship.

41 (g) A trustee who does not know that a trust has been revoked or
42 amended is not liable to the settlor or settlor's successors in interest for
43 distributions made and other actions taken on the assumption that the

This language was included in the 2001 amendments to the 2000 Uniform Trust Code by the Uniform Law Commissioners.

These changes were included in the 2001 amendments to the 2000 Uniform Trust Code by the Uniform Law Commissioners.

1 trust had not been amended or revoked.

2 ~~Sec. 49:~~ **47. (UTC 603) SETTLOR'S POWERS; POWERS OF**
 3 **WITHDRAWAL.** (a) While a trust is revocable and the settlor has ca-
 4 pacity to revoke the trust, rights of the beneficiaries are subject to the
 5 control of, and the duties of the trustee are owed exclusively to, the
 6 settlor.

7 (b) ~~While a trust is revocable and the settlor does not have capacity~~
 8 ~~to revoke the trust, rights of the beneficiaries are held by the beneficiaries.~~

9 ~~—(e)~~ If a revocable trust has more than one settlor, the duties of the
 10 trustee are owed to all of the settlors having capacity to revoke the trust.

11 ~~(d)~~ (c) During the period the power may be exercised, the holder of
 12 a power of withdrawal has the rights of a settlor of a revocable trust under
 13 this section to the extent of the property subject to the power.

14 ~~Sec. 50:~~ **48. (UTC 604) LIMITATION ON ACTION CONTEST-**
 15 **ING VALIDITY OF REVOCABLE TRUST; DISTRIBUTION OF**
 16 **TRUST PROPERTY.** (a) A person may commence a judicial proceeding
 17 to contest the validity of a trust that was revocable at the settlor's death
 18 within the earlier of:

19 (1) One year after the settlor's death; or

20 (2) four months after the trustee sent the person a copy of the trust
 21 instrument and a notice informing the person of the trust's existence, of
 22 the trustee's name and address, and of the time allowed for commencing
 23 a proceeding.

24 (b) Upon the death of the settlor of a trust that was revocable at the
 25 settlor's death, the trustee may proceed to distribute the trust property
 26 in accordance with the terms of the trust. The trustee is not subject to
 27 liability for doing so unless:

28 (1) The trustee knows of a pending judicial proceeding contesting the
 29 validity of the trust; or

30 (2) a potential contestant has notified the trustee of a possible judicial
 31 proceeding to contest the trust and a judicial proceeding is commenced
 32 within 60 days after the contestant sent the notification.

33 (c) A beneficiary of a trust that is determined to have been invalid is
 34 liable to return any distribution received.

35 ~~Sec. 51:~~ **49. (UTC 701) ACCEPTING OR DECLINING TRUS-**
 36 **TEESHIP.** (a) Except as otherwise provided in subsection (c), a person
 37 designated as trustee accepts the trusteeship:

38 (1) By substantially complying with a method of acceptance provided
 39 in the terms of the trust; or

40 (2) if the terms of the trust do not provide a method or the method
 41 provided in the terms is not expressly made exclusive, by accepting de-
 42 livery of the trust property, exercising powers or performing duties as
 43 trustee, or otherwise indicating acceptance of the trusteeship.

These changes were included in the 2001
 amendments to the 2000 Uniform Trust Code
 by the Uniform Law Commissioners.

1 (b) A person designated as trustee who has not yet accepted the trust-
 2 teeship may reject the trusteeship. A designated trustee who does not
 3 accept the trusteeship within a reasonable time after knowing of the des-
 4 ignation is deemed to have rejected the trusteeship.

5 (c) A person designated as trustee, without accepting the trusteeship,
 6 may:

7 (1) Act to preserve the trust property if, within a reasonable time after
 8 acting, the person sends a rejection of the trusteeship to the settlor or, if
 9 the settlor is dead or lacks capacity, to a qualified beneficiary; and

10 (2) inspect or investigate trust property to determine potential liabil-
 11 ity under environmental or other law or for any other purpose.

12 ~~Sec. 52- 50. (UTC 702) TRUSTEE'S BOND.~~ (a) A trustee shall
 13 give bond to secure performance of the trustee's duties ~~only if the court~~
 14 ~~finds that a bond is needed to protect the interests of the beneficiaries~~
 15 ~~or is required by the terms of the trust and the court has not dispensed~~
 16 ~~with the requirement unless otherwise waived or modified by the~~
 17 ~~terms of the trust.~~

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

21 (c) A regulated financial-service institution qualified to do trust busi-
 22 ness in this state need not give bond, even if required by the terms of the
 23 trust.

24 ~~Sec. 53- 51. (UTC 703) COTRUSTEES.~~ (a) Cotrustees who are
 25 unable to reach a unanimous decision may act by majority decision.

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

28 (c) A cotrustee must participate in the performance of a trustee's
 29 function unless the cotrustee is unavailable to perform the function be-
 30 cause of absence, illness, disqualification under other law, or other tem-
 31 porary incapacity or the cotrustee has properly delegated the performance
 32 of the function to another trustee.

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

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

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

As drafted the Uniform Trust Code would change Kansas law. As amended, current Kansas law is not changed.

- 1 (g) Each trustee shall exercise reasonable care to:
- 2 (1) Prevent a cotrustee from committing a ~~serious~~ breach of trust;
- 3 and
- 4 (2) compel a cotrustee to redress a ~~serious~~ breach of trust.
- 5 (h) A dissenting trustee who joins in an action at the direction of the
- 6 majority of the trustees and who notified any cotrustee of the dissent, **in**
- 7 **writing**, at or before the time of the action is not liable for the action
- 8 ~~unless the action is a serious breach of trust.~~

The changes strike reference to "serious" and require the dissent of a cotrustee to be in writing to avoid liability for an action which he or she joined.

9 ~~Sec. 54.~~ **52. (UTC 704) VACANCY IN TRUSTEESHIP; APPOINTMENT OF SUCCESSOR.** (a) A vacancy in a trusteeship occurs

- 11 if:
- 12 (1) A person designated as trustee rejects the trusteeship;
 - 13 (2) a person designated as trustee cannot be identified or does not
 - 14 exist;
 - 15 (3) a trustee resigns;
 - 16 (4) a trustee is disqualified or removed;
 - 17 (5) a trustee dies; or
 - 18 (6) a guardian or conservator is appointed for an individual serving
 - 19 as trustee.

20 (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.

23 (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:

- 24 (1) By a person designated in the terms of the trust to act as successor trustee;
- 25 (2) by a person appointed by unanimous agreement of the qualified
- 26 beneficiaries; or
- 27 (3) by a person appointed by the court.

These changes were included in the 2001 amendments to the 2000 Uniform Trust Code by the Uniform Law Commissioners.

30 (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:*

- 31 (1) *By a person designated in the terms of the trust to act as successor trustee;*
- 32 (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*
- 33 (3) *by a person appointed by the court.*

These changes were included in the 2001 amendments to the 2000 Uniform Trust Code by the Uniform Law Commissioners.

38 (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.

42 ~~Sec. 55.~~ **53. (UTC 705) RESIGNATION OF TRUSTEE.** (a) A trustee may resign:

1 (1) Upon at least 30 days' notice to the qualified beneficiaries and all
2 cotrustees; or

3 (2) with the approval of the court.

4 (b) In approving a resignation, the court may issue orders and impose
5 conditions reasonably necessary for the protection of the trust property.

6 (c) Any liability of a resigning trustee or of any sureties on the trust-
7 tee's bond for acts or omissions of the trustee is not discharged or affected
8 by the trustee's resignation.

9 **Sec. 56: 54. (UTC 706) REMOVAL OF TRUSTEE.** (a) The set-
10 tlor, *if living*, a cotrustee, or a *qualified* beneficiary may request the
11 court to remove a trustee, or a trustee may be removed by the court on
12 its own initiative.

13 (b) The court may remove a trustee if:

14 (1) The trustee has committed a *serious* breach of trust;

15 (2) lack of cooperation among cotrustees substantially impairs the ad-
16 ministration of the trust;

17 (3) because of unfitness, unwillingness, or persistent failure of the
18 trustee to administer the trust effectively, the court determines that re-
19 moval of the trustee best serves the interests of the beneficiaries *and is*
20 *consistent with the terms of the trust*; or

21 (4) there has been a substantial change of circumstances ~~or removal~~
22 ~~is requested by all of the qualified beneficiaries~~; *and* the court finds that
23 removal of the trustee best serves the interests of all of the beneficiaries
24 *and, is consistent with the terms of the trust*, is not inconsistent with
25 a material purpose of the trust, and a suitable cotrustee or successor
26 trustee is available.

27 (c) Pending a final decision on a request to remove a trustee, or in
28 lieu of or in addition to removing a trustee, the court may order such
29 appropriate relief under subsection (b) of section 78 76, and amendments
30 thereto, as may be necessary to protect the trust property or the interests
31 of the beneficiaries.

32 **Sec. 57: 55. (UTC 707) DELIVERY OF PROPERTY BY FOR-**
33 **MER TRUSTEE.** (a) Unless a cotrustee remains in office or the court
34 otherwise orders, and until the trust property is delivered to a successor
35 trustee or other person entitled to it, a trustee who has resigned or been
36 removed has the duties of a trustee and the powers necessary to protect
37 the trust property.

38 (b) A trustee who has resigned or been removed shall proceed ex-
39 pediently to deliver the trust property within the trustee's possession to
40 the cotrustee, successor trustee, or other person entitled to it.

41 **Sec. 58: 56. (UTC 708) COMPENSATION OF TRUSTEE.** (a) If
42 the terms of a trust do not specify the trustee's compensation, a trustee
43 is entitled to compensation that is reasonable under the circumstances.

This change provides that a beneficiary must possess a vested income interest or vested remainder interest in a trust to have standing to request removal of a trustee.

The Kansas Bar Association proposed that the phrase "is consistent with the terms of the trust" be inserted at section 56 (b)(3), 56 (b)(4), 61 (a) and 61 (g) to emphasize that wishes of the settlor as expressed by the terms of the trust be given consideration."

The Kansas Bar Association objected to allowing a trustee to be removed by the court upon the request of all of the qualified beneficiaries.

The Kansas Bar Association proposed that the phrase "is consistent with the terms of the trust" be inserted at section 56 (b)(3), 56 (b)(4), 61 (a) and 61 (g) to emphasize that wishes of the settlor as expressed by the terms of the trust be given consideration."

1 (b) If the terms of a trust specify the trustee's compensation, the
 2 trustee is entitled to be compensated as provided, except as such com-
 3 pensation may be increased or decreased upon approval by the trustee
 4 and by unanimous consent of the qualified beneficiaries who do not have
 5 a conflict of interest.

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

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

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

13 ~~Sec. 59.~~ **57. (UTC 709) REIMBURSEMENT OF EXPENSES.**

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

16 (1) Expenses that were properly incurred in the administration of the
 17 trust; and

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

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

24 ~~Sec. 60.~~ **58. (UTC 801) DUTY TO ADMINISTER TRUST.** Upon
 25 acceptance of a trusteeship, the trustee shall administer the trust in good
 26 faith, in accordance with its terms and purposes and the interests of the
 27 beneficiaries, and in accordance with this code.

28 ~~Sec. 61.~~ **59. (UTC 802) DUTY OF LOYALTY.** (a) A trustee shall
 29 administer the trust *consistent with the terms of the trust and* solely
 30 in the interests of the beneficiaries.

31 (b) Subject to the rights of persons dealing with or assisting the trust-
 32 tee as provided in section 89 87, and amendments thereto, a sale, en-
 33 cumbrance, or other transaction involving the investment or management
 34 of trust property entered into by the trustee for the trustee's own personal
 35 account or which is otherwise affected by a conflict between the trustee's
 36 fiduciary and personal interests is voidable by a beneficiary affected by
 37 the transaction unless:

38 (1) The transaction was authorized by the terms of the trust;

39 (2) the transaction was approved by the court;

40 (3) the beneficiary did not commence a judicial proceeding within
 41 the time allowed by section 82 80, and amendments thereto;

42 (4) the beneficiary consented to the trustee's conduct, ratified the
 43 transaction, or released the trustee in compliance with section 86 84, and

The Kansas Bar Association proposed that the phrase "is consistent with the terms of the trust" be inserted at section 56 (b)(3), 56 (b)(4), 61 (a) and 61 (g) to emphasize that wishes of the settlor as expressed by the terms of the trust be given consideration."

1 amendments thereto; or

2 (5) the transaction involves a contract entered into or claim acquired
3 by the trustee before the person became or contemplated becoming
4 trustee.

5 (c) A sale, encumbrance, or other transaction involving the invest-
6 ment or management of trust property is presumed to be affected by a
7 conflict between personal and fiduciary interests if it is entered into by
8 the trustee with:

9 (1) The trustee's spouse;

10 (2) the trustee's descendants, siblings, parents, or their spouses;

11 (3) an agent or attorney of the trustee; or

12 (4) a corporation or other person or enterprise in which the trustee,
13 or a person that owns a significant interest in the trustee, has an interest
14 that might affect the trustee's best judgment.

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

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

25 (f) An investment by a trustee in securities of an investment company
26 or investment trust to which the trustee, or its affiliate, provides services
27 in a capacity other than as trustee is not presumed to be affected by a
28 conflict between personal and fiduciary interests if the investment com-
29 plies with the prudent investor rule of article 9 of this code. The trustee
30 may be compensated by the investment company or investment trust for
31 providing those services out of fees charged to the trust if the trustee at
32 least annually notifies the persons entitled under section 72 70, and
33 amendments thereto, to receive a copy of the trustee's annual report of
34 the rate ~~and~~, *formula or* method by which the compensation was
35 determined.

36 (g) In voting shares of stock or in exercising powers of control over
37 similar interests in other forms of enterprise, the trustee shall act in the
38 best interests of the beneficiaries *and consistent with the terms of the*
39 *trust*. If the trust is the sole owner of a corporation or other form of
40 enterprise, the trustee shall elect or appoint directors or other managers
41 who will manage the corporation or enterprise in the best interests of the
42 beneficiaries.

43 (h) This section does not preclude the following transactions, if fair

This change conforms this section to current Kansas law.

The Kansas Bar Association proposed that the phrase "is consistent with the terms of the trust" be inserted at section 56 (b)(3), 56 (b)(4), 61 (a) and 61 (g) to emphasize that wishes of the settlor as expressed by the terms of the trust be given consideration."

1 to the beneficiaries:

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

4 (2) payment of reasonable compensation to the trustee;

5 (3) a transaction between a trust and another trust, decedent's estate,
6 or conservatorship of which the trustee is a fiduciary or in which a ben-
7 eficiary has an interest;

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

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

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

14 ~~Sec. 62.~~ **60. (UTC 803) IMPARTIALITY.** If a trust has two or
15 more beneficiaries, the trustee shall act impartially in investing, managing,
16 and distributing the trust property, giving due regard to the beneficiaries'
17 respective interests.

18 ~~Sec. 63.~~ **61. (UTC 804) PRUDENT ADMINISTRATION.** A trust-
19 tee shall administer the trust as a prudent person would, by considering
20 the purposes, terms, distributional requirements, and other circum-
21 stances of the trust. In satisfying this standard, the trustee shall exercise
22 reasonable care, skill, and caution.

23 ~~Sec. 64.~~ **62. (UTC 805) COSTS OF ADMINISTRATION.** In ad-
24 ministering a trust, the trustee may incur only costs that are reasonable
25 in relation to the trust property, the purposes of the trust, and the skills
26 of the trustee.

27 ~~Sec. 65.~~ **63. (UTC 806) TRUSTEE'S SKILLS.** A trustee who has
28 special skills or expertise, or is named trustee in reliance upon the trust-
29 tee's representation that the trustee has special skills or expertise, shall
30 use those special skills or expertise.

31 ~~Sec. 66.~~ **64. (UTC 807) DELEGATION BY TRUSTEE.** (a) A
32 trustee may delegate duties and powers, other than investment and man-
33 agement functions, that a prudent trustee of comparable skills could prop-
34 erly delegate under the circumstances. The trustee shall exercise reason-
35 able care, skill, and caution in:

36 (1) Selecting an agent;

37 (2) establishing the scope and terms of the delegation, consistent with
38 the purposes and terms of the trust; and

39 (3) periodically reviewing the agent's actions in order to monitor the
40 agent's performance and compliance with the terms of the delegation.

41 (b) A trustee may delegate investment and management functions in
accord with K.S.A. 2000 Supp. 58-24a01 *et seq.*, and amendments thereto.

(c) In performing a delegated function, an agent owes a duty to the

1 trust to exercise reasonable care to comply with the terms of the
2 delegation.

3 (d) A trustee who complies with subsection (a) is not liable to the
4 beneficiaries or to the trust for an action of the agent to whom the func-
5 tion was delegated.

6 (e) By accepting a delegation of powers or duties from the trustee of
7 a trust that is subject to the law of this state, an agent submits to the
8 jurisdiction of the courts of this state.

9 ~~Sec. 67.~~ **65. (UTC 808) POWERS TO DIRECT.** (a) While a trust
10 is revocable, the trustee may follow a direction of the settlor that is con-
11 trary to the terms of the trust.

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

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

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

26 ~~Sec. 68.~~ **66. (UTC 809) CONTROL AND PROTECTION OF**
27 **TRUST PROPERTY.** A trustee shall take reasonable steps to take con-
28 trol of and protect the trust property.

29 ~~Sec. 69.~~ **67. (UTC 810) RECORDKEEPING AND IDENTIFI-**
30 **CATION OF TRUST PROPERTY.** (a) A trustee shall keep adequate
31 records of the administration of the trust.

32 (b) A trustee shall keep trust property separate from the trustee's own
33 property.

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

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

41 (e) *Any estate in real property may be acquired in the trust*
42 *name. Title acquired in the trust name may be conveyed only in the*
43 *trust name.*

This change was made at the request of the Title Standards Committee and Kansas Land Title Association to allow real estate to be taken in the name of the trust.

1 Sec. ~~70~~: 68. (UTC 811) **ENFORCEMENT AND DEFENSE OF**
 2 **CLAIMS.** A trustee shall take reasonable steps to enforce claims of the
 3 trust and to defend claims against the trust.

4 Sec. ~~71~~: 69. (UTC 812) **COLLECTING TRUST PROPERTY.** A
 5 trustee shall take reasonable steps to compel a former trustee or other
 6 person to deliver trust property to the trustee, and to redress a breach of
 7 trust known to the trustee to have been committed by a former trustee.

8 Sec ~~72~~: 70. (UTC 813) **DUTY TO INFORM AND REPORT.** (a)
 9 A trustee shall keep the qualified beneficiaries of the trust reasonably
 10 informed about the administration of the trust and of the material facts
 11 necessary for them to protect their interests. Unless unreasonable under
 12 the circumstances, a trustee shall promptly respond to a *qualified* ben-
 13 eficiary's request for information related to the administration of the trust.

14 (b) A trustee:

15 (1) Upon request of a *qualified* beneficiary, shall promptly furnish
 16 to the *qualified* beneficiary a copy of the trust instrument;

17 (2) within 60 days after accepting a trusteeship, shall notify the qual-
 18 ified beneficiaries of the acceptance and of the trustee's name, address,
 19 and telephone number;

20 (3) within 60 days after the date the trustee acquires knowledge of
 21 the creation of an irrevocable trust, or the date the trustee acquires knowl-
 22 edge that a formerly revocable trust has become irrevocable, whether by
 23 the death of the settlor or otherwise, shall notify the qualified benefici-
 24 aries of the trust's existence, of the identity of the settlor or settlors, of
 25 the right to request a copy of the trust instrument and of the right to a
 26 trustee's report as provided in subsection (c); and

27 (4) shall notify the qualified beneficiaries in advance of any change
 28 in the method or rate of the trustee's compensation.

29 (c) A trustee shall send to the distributees or permissible distributees
 30 of trust income or principal, and to other qualified ~~or nonqualified~~ ben-
 31 eficiaries who request it, at least annually and at the termination of the
 32 trust, a report of the trust property including ~~its rate of return~~, liabilities,
 33 receipts and disbursements, including the source and amount of the trust-
 34 ee's compensation, a listing of the trust assets and, if feasible, their re-
 35 spective market values, *and if requested, the trust's association of*
 36 *investment management and research compliant rate of return.*
 37 Upon a vacancy in a trusteeship, unless a cotrustee remains in office, a
 38 report must be sent to the qualified beneficiaries by the former trustee.
 39 A personal representative, conservator, or guardian may send the quali-
 40 fied beneficiaries a report on behalf of a deceased or incapacitated
 41 trustee.

42 (d) A *qualified* beneficiary may waive the right to a trustee's report
 43 or other information otherwise required to be furnished under this sec-

The addition of the word "qualified" several places in the section limits its application to persons who possess a vested income or remainder interest in a trust.

This section is amended to require the trustee to provide a rate of return only upon request. In addition, it makes reference to the Association of Investment Management and Research which sets the industry standard for reporting.

1 tion. A *qualified* beneficiary, with respect to future reports and other
2 information, may withdraw a waiver previously given.

3 (e) *The provisions of this section are inapplicable as to notice*
4 *to persons other than a surviving spouse so long as a surviving*
5 *spouse is or may be entitled to receive income or principal distri-*
6 *butions from a trust, or holds any power of appointment therein,*
7 *and where any or all qualified beneficiaries are the issue of the*
8 *surviving spouse.*

9 ~~Sec. 73.~~ **71. (UTC 814) DISCRETIONARY POWERS; TAX**
10 **SAVINGS.** Notwithstanding the breadth of discretion granted to a trustee
11 in the terms of the trust, including the use of such terms as "absolute,"
12 "sole," or "uncontrolled," the trustee shall exercise a discretionary power
13 in good faith and in accordance with the terms and purposes of the trust
14 and the interests of the beneficiaries.

15 ~~Sec 74.~~ **72. (UTC 815) GENERAL POWERS OF TRUSTEE.** (a)
16 A trustee, without authorization by the court, may exercise:

- 17 (1) Powers conferred by the terms of the trust; or
18 (2) except as limited by the terms of the trust:
19 (A) All powers over the trust property which an unmarried competent
20 owner has over individually owned property;
21 (B) any other powers appropriate to achieve the proper investment,
22 management, and distribution of the trust property; and
23 (C) any other powers conferred by this code.
24 (b) The exercise of a power is subject to the fiduciary duties pre-
25 scribed by this article.

26 ~~Sec. 75.~~ **73. (UTC 816) SPECIFIC POWERS OF TRUSTEE.**
27 Without limiting the authority conferred by section ~~74~~ 72, and amend-
28 ments thereto, a trustee may:

- 29 (1) Collect trust property and accept or reject additions to the trust
30 property from a settlor or any other person;
31 (2) acquire or sell property, for cash or on credit, at public or private
32 sale;
33 (3) exchange, partition, or otherwise change the character of trust
34 property;
35 (4) deposit trust money in an account in a regulated financial-service
36 institution;
37 (5) borrow money, with or without security, and mortgage or pledge
38 trust property for a period within or extending beyond the duration of
39 the trust;
40 (6) with respect to an interest in a proprietorship, partnership, limited
41 liability company, business trust, corporation, or other form of business
42 or enterprise, continue the business or other enterprise and take any
43 action that may be taken by shareholders, members, or property owners,

The Kansas Bar Association proposed that new subsection "(e)" be added because "...the KBA believes this section could easily cause practical problems and cause family tensions for trusts drafted by husband and wife as a unit. Traditional trust planning calls for the use of A/B trust drafting so that when the first spouse dies, those assets are held in trust for the benefit of the survivor in the marital and family trust plan. It is the usual intention of the husband and wife that the trust reports not be given to the children during the lifetime of the survivor for privacy reasons. However, under the requirements of this section, the trustee would be required to provide full notice to the children at the time of the death of the first spouse. The KBA believes this is bad policy for trusts drafted as a unit plan between spouses."

The headnote relating to tax savings has been stricken because the language to which it refers is not a part of the bill.

- 1 including merging, dissolving, or otherwise changing the form of business
2 organization or contributing additional capital;
- 3 (7) with respect to stocks or other securities, exercise the rights of an
4 absolute owner, including the right to:
- 5 (A) Vote, or give proxies to vote, with or without power of substitu-
6 tion, or enter into or continue a voting trust agreement;
- 7 (B) hold a security in the name of a nominee or in other form without
8 disclosure of the trust so that title may pass by delivery;
- 9 (C) pay calls, assessments, and other sums chargeable or accruing
10 against the securities, and sell or exercise stock subscription or conversion
11 rights; and
- 12 (D) deposit the securities with a depository or other regulated finan-
13 cial-service institution;
- 14 (8) with respect to an interest in real property, construct, or make
15 ordinary or extraordinary repairs to, alterations to, or improvements in,
16 buildings or other structures, demolish improvements, raze existing or
17 erect new party walls or buildings, subdivide or develop land, dedicate
18 land to public use or grant public or private easements and make or vacate
19 plats and adjust boundaries;
- 20 (9) enter into a lease for any purpose as lessor or lessee, including a
21 lease or other arrangement for exploration and removal of natural re-
22 sources, with or without the option to purchase or renew, for a period
23 within or extending beyond the duration of the trust;
- 24 (10) grant an option involving a sale, lease, or other disposition of
25 trust property or acquire an option for the acquisition of property, in-
26 cluding an option exercisable beyond the duration of the trust and exer-
27 cise an option so acquired;
- 28 (11) insure the property of the trust against damage or loss and insure
29 the trustee, the trustee's agents, and beneficiaries against liability arising
30 from the administration of the trust;
- 31 (12) abandon or decline to administer property of no value or of in-
32 sufficient value to justify its collection or continued administration;
- 33 (13) with respect to possible liability for violation of environmental
34 law:
- 35 (A) Inspect or investigate property the trustee holds or has been
36 asked to hold, or property owned or operated by an organization in which
37 the trustee holds or has been asked to hold an interest, for the purpose
38 of determining the application of environmental law with respect to the
39 property;
- 40 (B) take action to prevent, abate, or otherwise remedy any actual or
41 potential violation of any environmental law affecting property held di-
42 rectly or indirectly by the trustee, whether taken before or after the as-
43 sertion of a claim or the initiation of governmental enforcement;

1 (C) decline to accept property into trust or disclaim any power with
2 respect to property that is or may be burdened with liability for violation
3 of environmental law;

4 (D) compromise claims against the trust which may be asserted for
5 an alleged violation of environmental law; and

6 (E) pay the expense of any inspection, review, abatement, or remedial
7 action to comply with environmental law;

8 (14) pay or contest any claim, settle a claim by or against the trust,
9 and release, in whole or in part, a claim belonging to the trust;

10 (15) pay taxes, assessments, compensation of the trustee and of em-
11 ployees and agents of the trust and other expenses incurred in the ad-
12 ministration of the trust;

13 (16) exercise elections with respect to federal, state, and local taxes;

14 (17) select a mode of payment under any employee benefit or retire-
15 ment plan, annuity, or life insurance payable to the trustee, exercise rights
16 thereunder, including exercise of the right to indemnification for ex-
17 penses and against liabilities, and take appropriate action to collect the
18 proceeds;

19 (18) make loans out of trust property, including loans to a beneficiary
20 on terms and conditions the trustee considers to be fair and reasonable
21 under the circumstances, and the trustee has a lien on future distributions
22 for repayment of those loans;

23 (19) pledge trust property to guarantee loans made by others to the
24 beneficiary;

25 (20) appoint a trustee to act in another jurisdiction with respect to
26 trust property located in the other jurisdiction, confer upon the appointed
27 trustee all of the powers and duties of the appointing trustee, require that
28 the appointed trustee furnish security, and remove any trustee so
29 appointed;

30 (21) pay an amount distributable to a beneficiary who is under a legal
31 disability or who the trustee reasonably believes is incapacitated, by pay-
32 ing it directly to the beneficiary or applying it for the beneficiary's benefit,
33 or by:

34 (A) Paying it to the beneficiary's conservator or, if the beneficiary
35 does not have a conservator, the beneficiary's guardian;

36 (B) paying it to the beneficiary's custodian, attorney-in-fact, custodial
37 trustee or other person with legal authority to receive such funds for the
38 benefit of the beneficiary;

39 (C) if the trustee does not know of a conservator, guardian, custodian,
40 or custodial trustee, paying it to an adult relative or other person having
41 legal or physical care or custody of the beneficiary, to be expended on
42 the beneficiary's behalf; or

43 (D) managing it as a separate fund on the beneficiary's behalf, subject

1 to the beneficiary's continuing right to withdraw the distribution;

2 (22) on distribution of trust property or the division or termination
3 of a trust, make distributions in divided or undivided interests, allocate
4 particular assets in proportionate or disproportionate shares, value the
5 trust property for those purposes, and adjust for resulting differences in
6 valuation;

7 (23) resolve a dispute concerning the interpretation of the trust or its
8 administration by mediation, arbitration, or other procedure for alterna-
9 tive dispute resolution;

10 (24) prosecute or defend an action, claim or judicial proceeding in
11 any jurisdiction to protect trust property and the trustee in the perform-
12 ance of the trustee's duties;

13 (25) sign and deliver contracts and other instruments that are useful
14 to achieve or facilitate the exercise of the trustee's powers; and

15 (26) on termination of the trust, exercise the powers appropriate to
16 wind up the administration of the trust and distribute the trust property
17 to the persons entitled to it.

18 ~~Sec. 76:~~ **74. (UTC 817) DISTRIBUTION UPON TERMINA-**
19 **TION.** (a) Upon termination or partial termination of a trust, the trustee
20 may send to the *qualified* beneficiaries a proposal for distribution. The
21 right of any *qualified* beneficiary to object to the proposed distribution
22 terminates if the *qualified* beneficiary does not notify the trustee of an
23 objection within 30 days after the proposal was sent but only if the pro-
24 posal informed the *qualified* beneficiary of the right to object and of the
25 time allowed for objection.

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

31 (c) A release, upon termination or partial termination of a trust, by a
32 beneficiary of a trustee from liability for breach of trust is invalid to the
33 extent:

34 (1) It was induced by improper conduct of the trustee; or

35 (2) the beneficiary, at the time of the release, did not know of the
36 beneficiary's rights or of the material facts relating to the breach.

37 ~~Sec. 77:~~ **75. (UTC 901) APPLICATION OF UNIFORM PRU-**
38 **DENT INVESTOR ACT.** Notwithstanding any provisions of the Kansas
39 uniform trust act to the contrary, K.S.A. 2000 Supp. 59-24a01 *et seq.*, and
40 amendments thereto shall govern the investment and management of
41 trust assets.

42 ~~Sec. 78:~~ **76. (UTC 1001) REMEDIES FOR BREACH OF**
43 **TRUST.** (a) A violation by a trustee of a duty the trustee owes to a

1 beneficiary is a breach of trust.

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

4 (1) Compel the trustee to perform the trustee's duties;

5 (2) enjoin the trustee from committing a breach of trust;

6 (3) compel the trustee to redress a breach of trust by paying money,
7 restoring property, or other means;

8 (4) order a trustee to account;

9 (5) appoint a special fiduciary to take possession of the trust property
10 and administer the trust;

11 (6) suspend the trustee;

12 (7) remove the trustee as provided in section 56 54, and amendments
13 thereto;

14 (8) reduce or deny compensation to the trustee;

15 (9) subject to section 89 87, and amendments thereto, void an act of
16 the trustee, impose a lien or a constructive trust on trust property or trace
17 trust property wrongfully disposed of and recover the property or its pro-
18 ceeds; or

19 (10) order any other appropriate relief.

20 ~~Sec. 79:~~ **77. (UTC 1002) DAMAGES FOR BREACH OF**
21 **TRUST.** (a) A trustee who commits a breach of trust is liable to the
22 beneficiaries affected for the greater of:

23 (1) The amount required to restore the value of the trust property
24 and trust distributions to what they would have been had the breach not
25 occurred;

26 (2) the profit the trustee made by reason of the breach; or

27 (3) if the trustee embezzles or knowingly converts to the trustee's
28 own use any of the personal property of the trust, the trustee shall be
29 liable for double the value of the property so embezzled or converted.

30 (b) Except as otherwise provided in this subsection, if more than one
31 trustee is liable to the beneficiaries for a breach of trust, a trustee is
32 entitled to contribution from the other trustee or trustees. A trustee is
33 not entitled to contribution if the trustee was substantially more at fault
34 than another trustee or if the trustee committed the breach of trust in
35 bad faith or with reckless indifference to the purposes of the trust or the
36 interests of the beneficiaries. A trustee who received a benefit from the
37 breach of trust is not entitled to contribution from another trustee to the
38 extent of the benefit received.

39 (c) The provisions of this section shall not exclude an award of pu-
40 nitive damages.

41 ~~Sec. 80:~~ **78. (UTC 1003) DAMAGES IN ABSENCE OF**
42 **BREACH.** (a) A trustee is accountable to an affected beneficiary for any
43 profit made by the trustee, other than compensation earned, arising from

1 the administration of the trust, even absent a breach of trust.

2 (b) Absent a breach of trust, a trustee is not liable to a beneficiary
3 for a loss or depreciation in the value of trust property or for not having
4 made a profit.

5 ~~Sec. 79.~~ **(UTC 1004) ATTORNEY FEES AND COSTS.** In a
6 judicial proceeding involving the administration of a trust, the court, as
7 justice and equity may require, may award costs and expenses, including
8 reasonable attorney fees, to any party, to be paid by another party or from
9 the trust that is the subject of the controversy.

10 ~~Sec. 80.~~ **(UTC 1005) LIMITATION OF ACTION AGAINST**
11 **TRUSTEE.** (a) A beneficiary may not commence a proceeding against a
12 trustee for breach of trust more than ~~two years~~ **one year** after the date
13 the beneficiary or a representative of the beneficiary was sent a report
14 that adequately disclosed the existence of a potential claim for breach of
15 trust and informed the beneficiary of the time allowed for commencing
16 a proceeding.

17 (b) A report adequately discloses the existence of a potential claim
18 for breach of trust if it provides sufficient information so that the bene-
19 ficiary or representative knows of the potential claim or should have in-
20 quired into its existence.

21 (c) If subsection (a) does not apply, a judicial proceeding by a ben-
22 eficiary against a trustee for breach of trust must be commenced within
23 ~~five~~ **two** years after the first to occur of:

- 24 (1) The removal, resignation, or death of the trustee;
- 25 (2) the termination of the beneficiary's interest in the trust; or
- 26 (3) the termination of the trust.

27 ~~Sec. 81.~~ **(UTC 1006) RELIANCE ON TRUST INSTRU-**
28 **MENT.** A trustee who acts in reasonable reliance on the terms of the
29 trust as expressed in the trust instrument is not liable to a beneficiary for
30 a breach of trust to the extent the breach resulted from the reliance.

31 ~~Sec. 82.~~ **(UTC 1007) EVENT AFFECTING ADMINISTRA-**
32 **TION OR DISTRIBUTION.** If the happening of an event, including
33 marriage, divorce, performance of educational requirements, or death,
34 affects the administration or distribution of a trust, a trustee who has
35 exercised reasonable care to ascertain the happening of the event is not
36 liable for a loss resulting from the trustee's lack of knowledge.

37 ~~Sec. 83.~~ **(UTC 1008) EXCULPATION OF TRUSTEE.** (a) A
38 term of a trust relieving a trustee of liability for breach of trust is unen-
39 forceable to the extent that it:

40 (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

43 (2) was inserted as the result of an abuse by the trustee of a fiduciary

The change in subsection (a) reduces the statute of limitations to one year, which is consistent with the Uniform Trust Code recommendation. In subsection (c) the statute of Limitations is reduced from the five years recommended by the Uniform Trust Code to two years.

1 or confidential relationship to the settlor.

2 (b) An exculpatory term drafted or caused to be drafted by the trustee
3 is invalid as an abuse of a fiduciary or confidential relationship unless the
4 trustee proves that the exculpatory term is fair under the circumstances
5 and that its existence and contents were adequately communicated to the
6 settlor.

7 ~~Sec. 86.~~ **84. (UTC 1009) BENEFICIARY'S CONSENT, RE-**
8 **LEASE, OR RATIFICATION.** A trustee is not liable to a beneficiary
9 for breach of trust if the beneficiary, ~~while having capacity,~~ consented to
10 the conduct constituting the breach, released the trustee from liability for
11 the breach, or ratified the transaction constituting the breach, unless:

12 (1) The consent, release, or ratification of the beneficiary was induced
13 by improper conduct of the trustee; or

14 (2) at the time of the consent, release, or ratification, the beneficiary
15 did not know of the beneficiary's rights or of the material facts relating
16 to the breach.

17 ~~Sec. 87.~~ **85. (UTC 1010) LIMITATION ON PERSONAL LIA-**
18 **BILITY OF TRUSTEE.** (a) Except as otherwise provided in the con-
19 tract, a trustee is not personally liable on a contract properly entered into
20 in the trustee's fiduciary capacity in the course of administering the trust
21 if the trustee in the contract disclosed the fiduciary capacity.

22 (b) A trustee is personally liable for torts committed in the course of
23 administering a trust, or for obligations arising from ownership or control
24 of trust property, including liability for violation of environmental law,
25 only if the trustee is personally at fault.

26 (c) A claim based on a contract entered into by a trustee in the trust-
27 tee's fiduciary capacity, on an obligation arising from ownership or control
28 of trust property or on a tort committed in the course of administering a
29 trust, may be asserted in a judicial proceeding against the trustee in the
30 trustee's fiduciary capacity, whether or not the trustee is personally liable
31 for the claim.

32 ~~Sec. 88.~~ **86. (UTC 1011) INTEREST AS GENERAL PARTNER.**

33 (a) Except as otherwise provided in subsection (c) or unless personal
34 liability is imposed in the contract, a trustee who holds an interest as a
35 general partner in a general or limited partnership is not personally liable
36 on a contract entered into by the partnership after the trust's acquisition
37 of the interest if the fiduciary capacity was disclosed in the contract or in
38 a statement previously filed pursuant to the Kansas uniform partnership
39 act, K.S.A. 2000 Supp. 56a-101 *et seq.*, and amendments thereto, or the
40 revised uniform limited partnership act, K.S.A. 56-1a101 *et seq.*, and
41 amendments thereto.

42 (b) Except as otherwise provided in subsection (c), a trustee who
43 holds an interest as a general partner is not personally liable for torts

This change was included in the 2001 amendments to the 2000 Uniform Trust Code by the Uniform Law Commissioners.

1 committed by the partnership or for obligations arising from ownership
 2 or control of the interest unless the trustee is personally at fault.

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

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

10 ~~Sec. 89:~~ **87. (UTC 1012) PROTECTION OF PERSON DEAL-**
 11 **ING WITH TRUSTEE.** (a) A person other than a beneficiary who in
 12 good faith assists a trustee, or who in good faith and for value deals with
 13 a trustee, without knowledge that the trustee is exceeding or improperly
 14 exercising the trustee's powers is protected from liability as if the trustee
 15 properly exercised the power.

16 (b) A person other than a beneficiary who in good faith deals with a
 17 trustee is not required to inquire into the extent of the trustee's powers
 18 or the propriety of their exercise.

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

21 (d) A person other than a beneficiary who in good faith assists a former
 22 trustee, or who in good faith and for value deals with a former trustee,
 23 without knowledge that the trusteeship has terminated is protected from
 24 liability as if the former trustee were still a trustee.

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

28 ~~Sec. 90:~~ **88. (UTC 1013) CERTIFICATION OF TRUST.** (a) In-
 29 stead of furnishing a copy of the trust instrument to a person other than
 30 a *qualified* beneficiary, the trustee may furnish to the person a *an ac-*
 31 *knowledged* certification of trust containing the following information:

32 (1) That the trust exists and the date the trust instrument was
 33 executed;

34 (2) the identity of the settlor;

35 (3) the identity and address of the currently acting trustee;

36 (4) the powers of the trustee;

37 (5) the revocability or irrevocability of the trust and the identity of
 38 any person holding a power to revoke the trust;

39 (6) the authority of cotrustees to sign or otherwise authenticate and
 40 whether all or less than all are required in order to exercise powers of
 41 the trustee;

42 (7) the trust's taxpayer identification number; and

43 (8) the manner of taking title to trust property.

The addition of "qualified" allows the providing of a certification of trust to contingent beneficiaries and holders of powers of appointment.

Current Kansas Law requires the certification of trust to be acknowledged.

1 (b) A certification of trust may be signed or otherwise authenticated
2 by any trustee.

3 (c) A certification of trust must state that the trust has not been re-
4 voked, modified, or amended in any manner that would cause the rep-
5 resentations contained in the certification of trust to be incorrect.

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

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

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

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

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

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

29 **Sec. 91- 89. (UTC 1101) UNIFORMITY OF APPLICATION**
30 **AND CONSTRUCTION.** In applying and construing this uniform act,
31 consideration must be given to the need to promote uniformity of the law
32 with respect to its subject matter among states that enact it.

33 **Sec. 92- 90. (UTC 1102) ELECTRONIC RECORDS AND SIG-**
34 **NATURES.** The provisions of this code governing the legal effect, validity
35 or enforceability of electronic records or electronic signatures, and of
36 contracts formed or performed with the use of such records or signatures,
37 conform to the requirements of section 102 of the electronic signatures
38 in global and national commerce act (15 U.S.C. § 7002) and supersede,
39 modify, and limit the requirements of the electronic signatures in global
40 and national commerce act.

41 **Sec. 93- 91. (UTC 1103) SEVERABILITY CLAUSE.** If any pro-
42 vision of this code or its application to any person or circumstances is
43 held invalid, the invalidity does not affect other provisions or applications

1 of this code which can be given effect without the invalid provision or
2 application, and to this end the provisions of this code are severable.

3 **Sec. 94: 92. (UTC 1106) APPLICATION TO EXISTING RE-**
4 **LATIONSHIPS.** (a) Except as otherwise provided in this act, on the
5 effective date of this act:

6 (1) This act applies to all trusts created before, on, or after its effective
7 date;

8 (2) this act applies to all judicial proceedings concerning trusts com-
9 menced on or after its effective date;

10 (3) this act applies to judicial proceedings concerning trusts com-
11 menced before its effective date unless the court finds that application of
12 a particular provision of this act would substantially interfere with the
13 effective conduct of the judicial proceedings or prejudice the rights of
14 the parties, in which case the particular provision of this act does not
15 apply and the superseded law applies;

16 (4) any rule of construction or presumption provided in this act ap-
17 plies to trust instruments executed before the effective date of the act
18 unless there is a clear indication of a contrary intent in the terms of the
19 trust; and

20 (5) an act done before the effective date of the act is not affected by
21 this act.

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

26 ~~Sec. 95: 93.~~ K.S.A. 58-1201, 58-1202, 58-1203, 58-1205, 58-1206,
27 58-1207, 58-1208, 58-1209, 58-1210, 58-1211, 58-2404, 58-2405, 58-
28 2409, 58-2410, 58-2411, 58-2412, 58-2413, 58-2415, 58-2417, 58-2420,
29 59-2295 and 59-2296 and K.S.A. ~~2000~~ 2001 Supp. 58-1204, **58-12a01,**
30 **58-12a02, 58-12a03, 58-12a04, 58-12a05 and 58-12a06** are hereby
31 repealed.

32 ~~Sec. 96: 94.~~ This act shall take effect and be in force from and after
33 January 1, 2003, and its publication in the statute book.

34
35
36
37
38
39
40
41
42
43

Repeal of 58-12a01 through 58-12a06 repeals a certification of trust statute which was enacted in 2001 and is similar to Uniform Trust Code section 1013.

April 1, 2002

**SUMMARY OF AMENDMENTS TO 2001 SB 297
APPROVED BY SENATE**

Notice. The definition of "qualified beneficiary" and reference to it in subsection 3 (12) and sections 31, 32, 72 and 76 narrows the persons to whom notice is required to be given to persons with vested interests. In section 90 the notice requirement is broadened by reference to "other than a qualified beneficiary."

Section 105. Section 105 contains a list of mandatory provisions that cannot be changed by the language of a trust. The striking of subsection 5 relates to spendthrift provisions, the striking of subsections 8 and 9 relates to notice and the striking of section 14 relates to venue. This allows these subjects to be changed by a trust pursuant to the settlor's instructions.

Uniform Trust Code Changes. 2001 amendments to the 2000 Uniform Trust Code adopted by the Uniform Law Commissioners are found at subsection 5(b)(3), and sections 10, 45, 48, 49, 55, 56 and 86.

Venue. Section 16 allows venue to remain in the county even if there is not real estate in the county and the trustee has moved to another jurisdiction.

Method of Creating Trust. The Trust Division of the Kansas Bankers' Association requested this change in Section 22 to resolve conflicts between inconsistent beneficiary designations for property that was not titled in the name of the trust.

Spendthrift. The KBA proposals relating to spendthrift provisions are found in subsections 5, 41, 42 and 43.

Bond. Section 52 retains current Kansas law with regard to bond.

Section 69. Additional language was added at the request of the Title Standards Committee and the Kansas Land Title Association to allow real estate to be taken in the name of the trust.

Section 82. Section 82 reduces the statute of limitations to one year if notice is given (which is consistent with the Uniform Trust Code's original recommendation) and reduces the statute of limitation from the five years recommended by the Uniform Trust Code to two years in other circumstances.

Technical and Language Changes. These changes are found at sections 7, 10, 11, 22, 39, 44, 53, 56 and 61.

Section 95 - Repealer. The repealer is amended by adding "K.S.A. 58-12a01 through 58-12a06" which is a certification of trust statute enacted in 2001 and is similar to section 98 of the bill.

PROBATE LAW ADVISORY COMMITTEE

Gerald L. Goodell, Chair
515 S. Kansas Ave.
Topeka, KS 66603
(785) 233-0593
(785) 233-8870 FAX
ggoodell@goodellstrattonlaw.com

Cheryl C. Boushka
10851 Mastin Boulevard
Bldg. 82, Suite 1000
Overland Park, KS 66210
(913) 451-5151
(913) 451-0875 FAX
cboushka@lathropgage.com

Hon. Sam K. Bruner
Johnson County Courthouse
100 N. Kansas Ave.
Olathe, KS 66061
(913) 715-3761
(913) 715-3769 FAX
sam.bruner@jocoks.com

Tim Carmody
10955 Lowell #520
Overland Park, KS 66210
(913) 491-6332
(913) 451-9147 FAX
carmt@kcnet.com

Michael L. Clutter
2201 SW 29TH Street
Topeka, KS 66611-1908
(785) 266-5121
(785) 266-2116 FAX

Peter A. Cotorceanu
1700 SW College Avenue
Topeka, Kansas 66621
(785) 231-1010 ext. 1664

Martin B. Dickinson, Jr.
School of Law
University of Kansas
Lawrence, KS 66045
(785) 864-9246
(785) 843-8405 FAX
mbd@ku.edu

Jack R. Euler
P.O. Box 326
137 S. Main
Troy, KS 66087
(785) 985-3561
(785) 985-2322 FAX

Senator Greta Goodwin
420 E. 12th Ave.
Winfield, KS 67156
(316) 221-9058
ggoodwin@ink.org

Mark Knackendoffel
The Trust Company of Manhattan
330 Poyntz Avenue
Manhattan, KS 66502
(785) 537-7200
(785) 537-2030

Justice Edward Larson
301 S.W. 10th Street
Topeka, KS 66612
(785) 296-4898
(785) 296-7079 FAX

Philip D. Ridenour
P.O. Box 1028
107 S. Main Street
Cimarron, KS 67835
(620) 855-7051
(620) 855-3207 FAX

Willard B. Thompson
P.O. Box 997
125 N. Market, Ste. 1600
Wichita, KS 67202
(316) 267-7361
(316) 267-1754 FAX

Randy M. Hearrell
301 SW 10th, Ste. 262
Topeka, KS 66612
(785) 296-3930
(785) 296-1035 FAX

(Revised 10/01)

National Conference of Commissioners on Uniform State Laws

211 East Ontario, Suite 1300, Chicago, Illinois 60611•312/915-0195•Facsimile 312/915-0187

Michelle Clayton
Legislative Counsel

TO: House Judiciary Committee
FROM: Michelle Clayton, Legislative Counsel, NCCUSL
RE: *Testimony in Support of SB 297 - Kansas Uniform Trust Code*
DATE: April 1, 2002

The Uniform Trust Code, which was approved by the National Conference of Commissioners on Uniform State Laws in 2000, is a comprehensive and modern codification of the law of trusts. The primary stimulus for developing this uniform law was the greater use of trust in recent years, both in family estate planning and in commercial transactions, both 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, has led to a recognition that the trust law in many states is thin. It has also led to a recognition that the existing Uniform Acts relating to trusts, though numerous, are incomplete. The primary source of trust law in most states is the Restatement (Second) of Trusts and the multi-volume treatises by Scott and Bogert, sources that fail to address numerous practical issues and which on others provide insufficient guidance. While there are numerous Uniform Acts related to trusts, none is comprehensive. The Uniform Trust Code will provide states with precise guidance on trust law questions in an easily accessible place.

The Code is organized into eleven articles as follows:

1. General Provisions and Definitions
2. Judicial Proceedings
3. Representation
4. Creation, Validity, Modification and Termination of Trust
5. Creditor's Claims; Spendthrift and Discretionary Trusts
6. Revocable Trusts
7. Office of Trustee
8. Duties and Powers of Trustee
9. Uniform Prudent Investor Act
10. Liabilities of Trustees and Rights of Persons Dealing with Trustee
11. Miscellaneous Provisions

Article 1, General Provisions and Definitions. In addition to definitions, this article addresses the miscellaneous but important topics. The Code is primarily default law. A settlor, within specified limitations, is free to draft a trust without regard to the provisions of the Code. The settlor, if minimum contacts are present, may in addition designate the trust's principal place of administration, and the trustee, if certain standards are met, may transfer the principal place of administrations to another state or country. To encourage nonjudicial resolution of disputes, the Code provides more certainty for when such settlements are binding. While the Code does not prescribe the exact rules to be applied to the construction of trusts, it does extend to trusts whatever rule the enacting jurisdiction has on the construction of wills. The Code, while comprehensive, does not attempt to legislate on every issue. Its provisions are supplemented by the common law of trusts and principles of equity.

Article 2, Judicial Proceedings, deals with jurisdiction over a trust in any state. It asserts the important rule that a trust is not supervised by a court unless there is a proceeding by an interested person that invokes the jurisdiction of the appropriate court. The place of administration of the trust is the place with jurisdiction over the trustee and beneficiaries of that trust.

Article 3, Representation, deals with the rather complex issues of who may represent whom in transactions or proceedings relating to a trust. In part, this article sets out a series of specialized agency rules, answering the question of who may be the agent of whom. Some of it is fundamental, such as the clear rule that the trustee represents the beneficiaries of a trust. Some of it is common-sense, such as the rule that a guardian represents a ward or a conservator (if appointed) represents the estate of a ward. The most significant innovation is the provision for "virtual" representation. A minor, incapacitated person, unborn individual, or a person whose identity is not known, may be represented by and legally bound "by another having a substantially identical interest with respect to the particular question or dispute" to the extent there is no conflict of interest in that representation.

Article 4, Creation, Validity, Modification and Termination of a Trust, has a self-evident set of rules. A trust is created when property is transferred to a trustee with the intent to create a trust relationship. There must be a definite beneficiary or the trust must be a charitable trust, a trust for animals (specially provided for as a kind of honorary trust), or a trust for a noncharitable purpose (also a kind of honorary trust). These kinds of honorary trusts, which have a limited life, legitimize honorary trusts that are not generally allowed under the common law. They are, therefore, an innovation in the Uniform Trust Code.

It is not necessary to have a trust instrument to create a trust. Oral trusts are allowed, but the standard of proof for an oral trust is the higher "clear and convincing evidence" standard. By not requiring a writing, the Uniform Trust Code avoids issues of electronic record and signature adequacy.

There are clear (default) rules that apply upon consent of the parties to the trust or that govern a court in modifying or terminating a trust. A court may apply the doctrine of cy pres to charitable trusts, when the charitable purpose is no longer obtainable. A comparable charitable purpose may be selected.

Article 5, Creditor's Claim, Spendthrift and Discretionary Trusts deals with creditor claims against the interests of a beneficiary or a settlor. A spendthrift provision in a trust restricts a beneficiary's creditor from attaching the beneficiary's interest in the trust until there is a distribution to the beneficiary. If there is no spendthrift provision, a creditor of a beneficiary may attach a distribution interest before it is distributed. A spendthrift provision is created simply by general reference to "spendthrift trust" in the trust instrument. A creditor may not compel a trustee to make a distribution to a beneficiary that is discretionary.

Article 6, Revocable Trusts, expressly recognizes the most popular, modern trust form for estate planning. A revocable trust is one in which the settlor retains the power to control, amend, or revoke the trust. Property held in trust reverts back to the settlor if it is revoked. The revocable trust is viewed primarily as a will substitute, used to avoid probate. A trust is revocable unless a trust instrument expressly provides that it is irrevocable. While the settlor of a revocable trust yet lives and has capacity, the trustee owes its duties exclusively to the settlor. The settlor controls the rights of beneficiaries. If the settlor becomes incapacitated or dies, the beneficiaries control their rights under the trust and the duties of the trustee shift to the beneficiaries. The trust is no longer a revocable trust.

Article 7, Office of Trustee, deals with acceptance of the trust by the trustee, bond for the trustee, decision-making by co-trustees, and like matters. Perhaps the most important of the rules govern removal and compensation of the trustee. The settlor, a co-trustee, a beneficiary or the court on its own initiative may request that a trustee be removed. The grounds are breach of trust, lack of cooperation among co-trustees substantially impairing the administration of the trust, defects of the trustee that require removal in the best interests of the beneficiaries, or substantial change of circumstances. The trustee may be removed upon the request of all qualified beneficiaries if removal is in the best interests of the beneficiaries, is not inconsistent with trust purposes and a successor trustee is available. A trustee is entitled to reasonable compensation. A court may review and change a trustee's compensation.

Article 8, Duties and Powers of the Trustee, articulates the basic fiduciary obligations of a trustee, except for those articulated in the Uniform Prudent Investor Act. The basic duty is the duty of loyalty, which requires the trustee to manage the trust solely for the beneficiaries and to avoid conflicts of interest between trustee's interests and beneficiaries' interests. If a trustee provides services to an investment company or

investment trust in which the trust invests money pursuant to the Uniform Prudent Investor Act, conflict of interest is not presumed.

Other fiduciary obligations include the duty of impartiality, the obligation of prudent administration, the obligation to incur only reasonable costs, and the obligation to apply the trustee's special skills when there is reliance on those skills when the trustee is named. A trustee may delegate certain duties and powers, but is held to a prudent standard of appointment in so doing. An agent is held to the fiduciary standard of the trustee in accepting an appointment. Delegation has not generally been permitted under the common law, but is an important feature of the Uniform Prudent Investor Act. The Uniform Code provision is based on the one in the Uniform Prudent Investor Act. The delegation rules in both acts are an innovation in trust law.

Article 9, Uniform Prudent Investor Act. This Article provides a place for an enacting state to codify its versions of the Uniform Prudent Investor Act.

Article 10, Liability of Trustees and Rights of Persons Dealing with the Trustee provides for remedies when there is breach of an obligation by the trustee, who and under what circumstances there is a right of action by anybody, and a trustee's immunity from personal liability when doing business with others on behalf of the trust. A breach of duty to a beneficiary invokes a court's equity powers to compel performance, suspend or remove the trustee upon grounds noted earlier in this summary. Available damages restore a beneficiary's position as if breach had not occurred. The trustee's profit (if any) is also a measure of damage. A trust instrument may not waive or vary the obligation of good faith or exculpate the trustee for reckless indifference. An exculpatory term in a trust is not enforceable if the inclusion of the term abuses the settlor's confidential relationship with the trustee.

A trustee does not incur personal liability to third parties for contracts on behalf of the trust so long as the fiduciary status of the trustee is disclosed. A trustee is not liable for a tort action against the trust unless the trustee also has personal liability. A third party dealing with a trust, also, is not liable for any breach of the trustee's obligations to the beneficiaries resulting from the transaction, unless the third party has knowledge of the actual breach by the trustee.

The article on liability concludes the substantive parts of the Uniform Trust Code. The Uniform Trust Code provides a first effort at true codification of trust law. There is a serious need for certainty and clearly articulated rules as the use of trusts burgeons in the United States. The Uniform Trust Code will meet the needs of the citizens of the United States for decades to come.

THE 2000 UNIFORM TRUST CODE

DAVID M. ENGLISH*

(Prepared for presentation to Kansas Judiciary Committee,
Hearing on SB 297, January 22, 2002)

The Uniform Trust Code (“UTC”), which was approved by the Uniform Law Commissioners on August 3, 2000, is the first effort by the Uniform Law Commissioners to provide the states with a comprehensive model for codifying their law on trusts. This paper describes the reasons for the UTC and many of its provisions. A copy of the UTC, together with over 100 pages of official comments, can be accessed through the Commissioner’s website, www.nccusl.org. Enactment of the UTC by the states is expected to begin in 2002.

GENERAL BACKGROUND

Participants in Drafting Process

The UTC was officially drafted by a committee consisting of Uniform Law Commissioners, who are appointed by the governors or legislatures of their respective states. The function of the Reporter was to carry out the drafting committee's decisions on a day-to-day level and to prepare the various drafts. The committee was assisted by numerous advisors and observers, representing an array of organizations, who attended and fully participated at drafting sessions.

Drafting Models

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. Most influential in the drafting process was the 1986 California statute, found at Division 9 of the California Probate Code (Sections 15000 *et seq.*), which was used by the drafting committee as its initial model.

Reasons for Code

The drafting of the UTC was prompted by the much greater use of trusts in recent years. This greater use of the trust, and consequent rise in the number of day-to-day questions involving trusts, led to a recognition by the Commissioners that the trust law in most states is thin, with many gaps between

the often few statutes and reported cases. It also led to a recognition that previous uniform acts relating to trusts, while numerous, are fragmentary. Other than for specialized acts such as the Uniform Prudent Investor and Principal and Income Acts, the primary source of trust law in most states is the Restatement of Trusts and the multivolume treatises by Scott and Bogert, sources which fail to address numerous practical issues and which 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.

OVERVIEW AND SIGNIFICANT ISSUES

Scope of Coverage

The UTC 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.

Organization

The breadth of the UTC is indicated by its organization. The UTC is organized into 11 articles. Article 1, 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. Article 2 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. Article 3 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.

Article 4, which begins the heart of the Code, prescribes the requirements for creating,

modifying and terminating trusts. The provisions on the creation of trusts largely track traditional doctrine; those relating to modification and termination liberalize the prevailing law. Article 5 covers spendthrift provisions and rights of creditors, both of the settlor and beneficiaries. Article 6 collects the special rules relating to revocable trusts, including the standard of capacity, the procedure for revocation or modification, and the statute of limitations on contests.

Article 7 turns to the office of trustee, specifying numerous procedural rules that apply absent special provision in the trust. Included are the rules on trustee acceptance, the rights and obligations of cotrustees, the procedure for resignation, the grounds for removal, the methods for appointing successors, and trustee compensation.

Article 8, entitled “Duties and Powers of Trustee,” 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. Article 9 fits closely into the preceding article. It provides a place for the jurisdiction enacting the larger UTC to codify its version of the Uniform Prudent Investor Act.

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

- lists the remedies for breach of trust;
- specifies how money damages are to be determined;
- provides that the court, in judicial proceedings relating to the administration of the trust, may award attorney’s fees against the trustee, the trust, or even a beneficiary, as justice and equity may require; and
- specifies certain trustee defenses, including the addition of a statute of limitations for claims alleging breach of trust and a provision on enforcing exculpatory clauses.

With respect to transactions by trustees with third persons, the UTC encourages trustees and third persons to engage in commercial transactions to the same extent as if no trust was involved. To protect the privacy of the trust, Article 10 concludes with a provision authorizing 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.

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

Changing the Judge-Made Law

The UTC does not make sweeping changes in the common law of trusts, but neither does it woodenly copy the previous judge-made law. The UTC makes significant strides. The following sections of this article describe the more important changes made by the UTC in the rules prevailing in most states.

Default Rules (Section 105)

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

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

The limits on the settlor's ability to waive the duty to keep the beneficiaries informed, which is

described in detail below in connection with the discussion of UTC § 813, is the most discussed provision in the UTC.

Principal Place of Administration (Section 108)

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

As trust administration has become more complex, determining a trust's principal place of administration has become more difficult. Cotrustees may be located in different states, or a corporate trustee's personal trust officers may be located in one state, its investment division in another, and its operations facilities yet somewhere else. Also, a variety of nontrustees, such as advisors and trust protectors, may play a role in the trust's administration. Concluding that it was impossible to devise a rule that would address all of these situations, the drafters of the UTC did not attempt to define principal place of administration. However, UTC §108 otherwise facilitates the locating of a trust in a particular jurisdiction. First, a provision in the trust terms designating the principal place of administration is valid and controlling as long as a trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction, or all or part of the trust's administration occurs in the designated place. UTC §108(a). Second, for trust instruments failing to address the subject, the UTC specifies a procedure for transferring the principal place of administration. The transfer must facilitate the trust's administration, and the trustee must inform the qualified beneficiaries of the transfer at least sixty days in advance. The transfer may proceed as long as no qualified beneficiary objects by the date specified in the notice. If the transfer involves the appointment of a new trustee, the requirements for the appointment of a successor trustee, either under the trust instrument or otherwise, must first be satisfied before the transfer can be affected. UTC §108(b)-(f). "Qualified beneficiary," a term which is defined in UTC §103, excludes a beneficiary with a remote remainder interest.

Representation and Settlements (Section 111 and Article 3)

The UTC strives to keep administration of trusts outside of the courts. Numerous actions are

allowed solely upon notice to the beneficiaries. These actions include:

- transfer of a trust's principal place of administration to or from another country or American state (UTC §108);
- combination of separate trusts into one or the division of a single trust into two or more separate trusts (UTC §417);
- resignation of a trustee (UTC §705);
- submission of a trustee's report (UTC §813); and
- trustee's notice of proposed plans of distribution. UTC §817.

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

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

But achieving notice to or the consent of all of the beneficiaries is frequently difficult. Trusts commonly last for decades. In an increasing number of American jurisdictions trusts can in theory last in perpetuity. The current beneficiaries of the trust are frequently minors or adults who lack capacity. Future beneficiaries may not yet be born. To achieve notice to or the consent of beneficiaries incapable of representing themselves, others must be empowered to act on their behalf. This is the function of rules on representation. Concepts of representation are not new, but the UTC addresses the subject in more detail than previous efforts. The Code provides not only for representation by fiduciaries (guardians, conservators, personal representatives -see UTC §303), but also for what is known as virtual representation, under which an otherwise unrepresented person (such as a child who may not yet be born) may be represented by another beneficiary with a similar beneficial interest. UTC §304.

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. The nonjudicial settlement provision is broad. The parties may enter into a nonjudicial settlement agreement with respect to any matter involving a trust. UTC §111(b). The settlement agreement can contain any term or condition that a court could properly approve. UTC §111(c). Among the issues that can be resolved by a nonjudicial settlement agreement are the interpretation or

construction of the terms of the trust; approval of a trustee's report or accounting; direction to a trustee to refrain from performing a particular act or to grant a trustee any necessary or desirable power; resignation or appointment of a trustee and determination of a trustee's compensation; transfer of a trust's principal place of administration; and liability of a trustee for an action relating to the trust. UTC §111(d).

Although the representation provisions provide legal practitioners with an added tool that will solve many practical problems, they should not be used without thought. Notice to and the consent of a representative is not binding if there is a conflict of interest between the representative and those ostensibly represented. If conflict of interest is a possibility, the practitioner should consider requesting the court to appoint a guardian ad litem (termed a representative under the Code) to represent the otherwise unrepresented beneficiary. Under the Code, the appointment of a representative is available whether the matter to be resolved is in or out of court. UTC §305.

Trust Modification and Termination (Sections 410-417)

Due to the increasing use in recent years of long-term trusts, there is a need for greater flexibility in the restrictive rules that apply concerning when a trust may be terminated or modified other than as provided in the instrument. The UTC provides for this increased flexibility but without disturbing the principle that the primary objective of trust law is to carry out the settlor's intent. Among the provisions enhancing the ability to modify or terminate a trust:

- It is no longer automatically presumed that a spendthrift provision is a material purpose barring the beneficiaries from compelling termination of a trust (UTC §411(c));
- A court may not only modify a trust because of circumstances not anticipated by the settlor, but may also modify the trust's dispositive terms or even terminate the trust (UTC §412);
- 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 (UTC §415);
- 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 (UTC §416);

Not recognized at common law, but recognized in the UTC and in the statutes of numerous American states, is the power of a trustee to combine or divide a trust without court approval. UTC §417. The Code also authorizes the court to terminate an uneconomical trust, and allows a trustee, without approval of court, to terminate a trust with a value of \$50,000 or less. UTC §414.

Charitable Trusts (Section 413)

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

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

The UTC liberalizes the doctrine of *cy pres* in a way believed more likely to carry out the average settlor's intent. First, the Code expands the ability of the court to apply *cy pres*. UTC § 413(a)). 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 Code creates a presumption in favor of general charitable intent. In applying *cy pres*, the court cannot divert the trust property to a noncharity unless the terms of the trust expressly so provide.

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

revert to the settlor, fewer than 21 years have elapsed since the date of the trust's creation. UTC §413(b).

Because the UTC is a trust act, its provisions on charitable trusts do not control other forms of charitable giving. But it is expected that the Code's update of the doctrine of *cy pres* will heavily influence the courts in fashioning the rules to apply to other methods for making charitable gifts.

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

Spendthrift provisions, when effective, prohibit a creditor or assignee of a beneficiary from attaching the beneficiary's interest. Spendthrift provisions are not recognized in England, where trust law originated, and they are of limited utility in the United States. A spendthrift provision provides only limited protection to the beneficiary. The creditor or assignee may pounce upon the trust funds as soon as distribution is made. But even funds retained in trust are not always protected. Numerous exceptions to spendthrift protection are recognized, depending on the type of creditor, the category of beneficiary, or the time when the claim is made.

The provisions of the UTC relating to spendthrift provisions and the rights of a beneficiary's creditors was the most widely debated article of the Code. The result, however, largely tracks standard American doctrine. A trust is not spendthrift unless the instrument specifically so states, the drafters rejecting the approach that all trusts are spendthrift unless the instrument says otherwise. Also, a restraint against claims by the creditors of a beneficiary is effective only if the beneficiary is also restrained from assigning the beneficiary's interest. UTC §502(a). The drafting committee concluded that it was undesirable as a matter of policy for a beneficiary to be able to transfer the beneficiary's interest while at the same time denying the beneficiary's creditors the right to reach the trust in payment of their claims.

The drafting committee also concluded that it was undesirable as a matter of policy to allow a settlor to create a trust, retain a beneficial interest, but yet deny the settlor's creditors the right to reach the trust. Consequently, the Code rejects the approach taken in the legislation enacted in Alaska and Delaware and, more recently, Rhode Island and Nevada. A creditor of the settlor can fully reach the settlor's beneficial interest. UTC §505(a)(2).

A key policy issue in drafting the Code was determining which classes of creditors should be exempt from the spendthrift bar. In determining the exceptions, the drafting committee did not start from scratch but paid particular attention to the exceptions listed in Restatement (Second) of Trusts § 157, and Restatement (Third) of Trusts § 59. Both Restatements, the trust statutes in many states, as well as other relevant statutes such as Federal Bankruptcy Code § 523(a)(5) and ERISA § 206(d)(3) grant special deference to collection of court orders for support of a beneficiary's child, spouse, or former spouse. Given this background and the important public policy concerns in making certain that those to whom legal obligations of support are owed actually receive such payment, the Code allows a child, spouse, or former spouse to attach the trust to collect on a court order for support. UTC §503(b). 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. UTC §504. Other creditors are not allowed to collect from a discretionary trust, no matter how stingy the trustee has been in exercising the discretion.

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

Revocable Trusts (Article 6)

The revocable trust is the most common trust created today in the United States. This heavy use of the revocable trust is a recent phenomenon, beginning decades if not centuries after most traditional trust law was formulated. The provisions of the UTC on revocable trusts are among its most important and most innovative, dealing largely with issues unaddressed at common law. The biggest change is a reversal of the common law presumption that trusts are irrevocable. Reflecting the increasing if not predominant use of the revocable trust in the United States, the Code provides that a trust is revocable absent clarifying language in the terms of the trust. UTC §602(a).

The revocable trust is used today largely as a substitute for a will. The Code in general reflects

this usage, treating the revocable trust in most respects as the functional equivalent of a will, at least while the settlor is alive. The capacity requirement for creating a trust is the same as that for a will. UTC §601. Also, while the settlor has capacity, all of the rights of the beneficiaries are controlled exclusively by the settlor. UTC §603. 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.

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

Contest of a will is typically barred under one of two alternative statutes. Normally, a contest is barred following some period of time following notice of probate, ranging from two to six months. In addition, many states bar a contest after a specified period of time following the settlor's death, whether or not the will was probated or notice of probate given. The most commonly enacted time limit is three years following the testator's death. Most states currently have no limitation period on contest of a revocable trust. The UTC corrects this omission by providing that a potential contestant must file a contest within the earlier of 120 days following receipt of a notice or three years following the settlor's death. UTC § 604(a). 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, a trustee who has not been notified that a contest has or will be filed is absolved from liability for making distributions before the contest period has expired. UTC §604(b). Liability in such cases is solely on the distributees. UTC §604(c).

Change of Trustee (Article 7)

A vacancy in a trusteeship can occur for numerous reasons. The trustee may resign, be removed, or die. In the event of a vacancy, a procedure is needed for getting a successor into office. Most of these issues can and should be addressed in the trust instrument, but it is difficult to anticipate all questions. Even if the drafter does anticipate every issue, the drafter will frequently rely on the local

trust statute for guidance on the language to employ. On occasion, the drafter will choose to let the statute control. The UTC specifies numerous rules relating to a change in trustee.

Appointing successors: Absent a provision for the appointment of a successor in the terms of the trust, the UTC provides that a successor trustee may be appointed by unanimous agreement of the qualified beneficiaries or by the court, with the appointment by the beneficiaries given priority. UTC §704(c). Under UTC §703(b), a vacancy is not created by the resignation or removal of a cotrustee. The remaining trustee or cotrustees may continue to act for the trust without appointment of a successor.

Resignation of trustee. UTC §705(a) copies a provision commonly found in trust instruments that allow a trustee to resign by giving notice to the qualified beneficiaries.

Removal of trustee. Trustees in many states may be removed only for breach of trust or other untoward act. This standard gives great weight to the settlor's particular selection of trustee. Because trust instruments typically place weight on a trustee's judgment and exercise of discretion, the particular trustee selected becomes an important term of the trust, a term which should not easily be changed. UTC §706(b) follows traditional doctrine by authorizing a trustee to be removed for acts of misconduct or other disqualification. Acts of misconduct or other disqualification justifying removal of the trustee include serious breach of trust, unfitness, and unwillingness or persistent failure to effectively perform the function. A trustee may also be removed 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 requires an additional finding by the court that removal would best serve the interests of the beneficiaries. "Interests of the beneficiaries," which is defined in UTC §103, means the beneficial interests provided in the terms of the trust.

But the drafters of the UTC also concluded that in situations where the personal link between the settlor and trustee has been broken, the emphasis should turn to whether the particular trustee is appropriate to the trust, not whether the trustee has committed particular acts of misconduct or is totally unfit. Consequently, UTC §706(b) also allows the court to consider whether there has been a

substantial change of circumstances or if removal is unanimously requested by the qualified beneficiaries. However, in neither case may the trustee be removed unless the court also concludes that the selection of the particular trustee was not a material purpose of the trust, that removal of the trustee would best serve the interests of the beneficiaries, and that a suitable cotrustee or successor trustee is available.

Proprietary Mutual Funds (Section 802(f))

The common trust fund has in recent years been disappearing from the portfolios of financial institution trustees, to be replaced by what are known as proprietary mutual funds. An advantage of proprietary 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. Proprietary funds, on the other hand, can be distributed in kind.

Despite such seeming advantage, proprietary funds have 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.

Despite these concerns, nearly all states have passed statutes authorizing financial institution trustees to invest in proprietary mutual funds, regardless of whether this investment will generate additional fees for the trustee. Recognizing this political reality, the UTC does not prohibit investment in proprietary mutual funds but provides 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. UTC §802(f)).

Duty to Keep the Beneficiaries Informed (Section 813)

The UTC fills out and adds detail to the trustee's duty to keep the beneficiaries informed of administration. When in doubt, the UTC favors disclosure to beneficiaries as being the better policy. UTC §813 imposes both a general obligation on the trustee to keep the qualified beneficiaries reasonably informed of administration as well as several 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. UTC §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. UTC §813(c). The trustee must also promptly respond to any beneficiary's request for information, unless unreasonable under the circumstances. UTC §813(a). This includes a requirement that the trustee provide a beneficiary upon request with a copy of the trust instrument. UTC §813(b)(1). The drafting committee rejected the more limited approach of letting the trustee decide which provisions are material to the beneficiary's interest; the trustee's version of what is material may differ markedly from what the beneficiary might find relevant. Requiring disclosure of the entire instrument upon demand is consistent with recent case law. *See Taylor v. Nationsbank Corp.*, 481 S.E.2d 358 (N.C. Ct. App.1997); *Fletcher v. Fletcher* 480 S.E.2d 488 (Va. 1997).

The most discussed issue during the drafting of the UTC and subsequent to its approval is the extent to which a settlor may waive the above disclosure requirements. Most of the specific disclosure requirements are waivable. Not waivable is the trustee's obligation to notify the qualified beneficiaries age 25 or older of the existence of an irrevocable trust. UTC §105(b)(8). With respect to any beneficiary regardless of age, the trustee also may not waive the trustee's obligation to respond to a request for a trustee's report and other information reasonably related to the trust's administration. UTC §105(b)(9). In other words, if a beneficiary finds out about the trust and makes a request for information, the trustee must respond to the request even if the trustee was not obligated to inform the

beneficiary about the trust in the first instance.

Early indications are that some of the states that will enact the UTC will modify the waiver provision. One alternative being discussed is to eliminate or lower the age 25 limit, making the obligation to inform the beneficiaries of the trust's existence applicable to all beneficiaries or all adult beneficiaries. Another alternative is to allow a settlor to waive notice to remainder beneficiaries regardless of age. Yet another response is to permit a settlor to direct a trustee to keep silent about the trust even in the face of a specific request by a beneficiary for information.

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

Remedies for Breach of Trust (Article 10)

The UTC contains comprehensive remedies for breach of trust. The measure of damages for breach of trust is designed to restore the beneficiaries to the position they would have been in had the breach not occurred. But it also serves another purpose - to prevent the trustee from profiting from the breach. Consequently, the trustee is liable for the higher of the profit made by the trustee or harm caused to the beneficiaries. UTC §1002. Also provided are a series of non-monetary remedies, including such actions as recovery of trust assets misappropriated by a trustee. UTC §1001. Finally, the court, as justice and equity may require, may award attorney's fees to the prevailing party. UTC § 1004.

The UTC contains a series of provisions limiting a trustee's exposure to liability. Following the sending of a trustee's annual or other report, a beneficiary must commence an action for breach of trust within one year but only if the report adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time limit. UTC §1005. A beneficiary who has consented to a trustee's action is also precluded from suing for breach of trust. UTC §1009.

A settlor may absolve a trustee from potential liability, but such an exculpatory provision is not

enforceable in all circumstances. An exculpatory term cannot be used to immunize a trustee for breach of trust if the breach was committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. Even absent bad faith or reckless indifference, the term is unenforceable if it was inserted as a result of the abuse of a confidential or fiduciary relationship between the trustee and settlor . UTC §1008.

A trustee is entitled to rely on the trust instrument. While the entire terms of a trust are normally contained in the trust instrument, extrinsic evidence may be admissible to clarify ambiguities, many of which may not be apparent from a reading of the instrument. Also, grounds may exist, such as reformation due to a mistake of fact or law, resulting in the reformation of apparently unambiguous terms. To enable a trustee to administer a trust with some dispatch and without concern that reliance on the language of the trust instrument is misplaced, the Code provides that a trustee is not liable for a breach of trust to the extent the breach resulted from reasonable reliance on the trust instrument. UTC §1006.

A trustee is also entitled to rely on reasonable inferences as to a beneficiary's family or other status. Whenever the happening of an event (including marriage, divorce, performance of education requirements, or death) affects the administration or distribution of the trust, a trustee who exercised reasonable care to determine that the event occurred is not liable for any loss attributable to lack of knowledge. UTC §1007.

The Limits of Legislation

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

quickly become obsolete as conditions change.

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

* Reporter, Uniform Trust Code; W.F. Fratcher Missouri Endowed Professor of Law, University of Missouri-Columbia.

WHY STATES SHOULD ADOPT THE UNIFORM TRUST CODE (2000)

The law governing trusts is fundamentally American common law. A few states have attempted to codify the law of trusts. Drawing from common law sources and existing statutory law, the Uniform Trust Code (2000) is a national codification of the law of trusts. While it is a codification of existing law, the Uniform Trust Code also contains reforms to meet modern needs.

The Uniform Trust Code (UTC) contains a set of basic default rules that govern voluntary trusts. The code is divided into 11 articles containing important provisions every state should adopt, including the following:

- ⇒ **Representation in transactions or proceedings relating to a trust.** There are certain specialized agency rules. For example, a minor, incapacitated person, unborn individual, or person whose identity is not known may be represented by someone who has a substantially identical interest with respect to the particular question or dispute.
- ⇒ **Creation of a trust.** A trust instrument is not necessary to create a trust; oral trusts are allowed. Also, the UTC allows for the creation of honorary trusts with limited lives for pets or a non-charitable purpose, which are generally not allowed under the common law of trusts.
- ⇒ **Charitable trusts expressly recognized.** The UTC expressly recognizes that charitable trusts can be created.
- ⇒ **Creditor claims.** The UTC sets out rules and restrictions on the ways to deal with creditor's claims against the interests of a beneficiary or settlor.
- ⇒ **Spendthrift provision recognized.** A spendthrift provision is created by general reference to "spendthrift trust" in the trust instrument.
- ⇒ **Revocable trusts.** The UTC recognizes revocable trusts, a form of trust generally viewed as a will substitute. They are the most popular, modern trust form for estate planning. *While a settlor of a revocable trust lives and has capacity, the trustee owes his or her duties to the settlor.*
- ⇒ **Office of the trustee.** The acceptance of the trust by the trustee, bond for the trustee, decision-making by co-trustees, compensation of the trustee, and similar matters are governed by rules provided in the UTC.
- ⇒ **Removal of trustee.** Upon request to the court by the settlor, co-trustee, beneficiary, or on the court's own initiative, a trustee may be removed. The grounds for removal include breach of trust, lack of cooperation among co-trustees substantially impairing the administration of the trust, as well as other factors that make removal of the trustee in the best interests of the beneficiaries.

- ⇒ **Trustee's duties and powers.** The UTC articulates some of the basic fiduciary obligations of a trustee to a beneficiary, such as the trustee's duty of loyalty, duty of impartiality, and obligation of prudent administration. A trustee may delegate certain powers; this delegation generally has not been permitted under common law.

- ⇒ **Liability.** A breach of duty to a beneficiary may lead the court to compel performance by the trustee or to suspend or remove the trustee. The available damages put the beneficiary in the position he or she would have been if there had been no breach.

UNIFORMITY

The Uniform Trust Code provides uniformity of law, necessary in the area of trust law. The use of trusts continues to grow, and the Uniform Trust Code is the first effort at true national codification of trust law. It allows states to specify the various rules of trusts with precision and provides individuals with a readily available source on trust law in their state. The Uniform Trust Code provides the necessary provisions to meet modern needs of trusts. It is important for every state to adopt the Uniform Trust Code.



The New Uniform Trust Code

By Charles A. Collier, Jr.

How to Avoid Probate, by Norman F. Dacey, first published in the middle 1960s, has been followed by many subsequent books, such as *Loving Trust* by Robert A. Esperati and Renno L. Peterson (first published in 1989), and innumerable magazine articles on using the revocable trust as a basic estate planning document to transfer assets at death to avoid the perceived delays and additional expenses of a probate court proceeding.

The popularity of the revocable trust as an estate planning vehicle has varied from state to state depending on whether the probate law of that state involves court-supervised administration or informal probate where the court is not involved except as needed. Often, revocable trusts are also used even where there is simplified probate to place real property in other jurisdictions in a trust to avoid ancillary proceedings in those jurisdictions. While the will was long considered the basic estate planning document, in many jurisdictions the inter vivos trust is now the basic estate planning document with the will merely a supplemental document to add any assets to the trust that had not been transferred during lifetime.

In 1994 the National Conference of Commissioners on Uniform State Laws (NCCUSL) formed a committee to draft a uniform trust code that might be enacted by the various states to provide standardization of trust law. This Uniform Trust Code was approved by NCCUSL in 2000 and was approved by the Board of Governors of the American Bar Association in February 2001. This Trust Code is the first national codification of the law of trusts.

Only a few states have developed comprehensive trust statutes. The most notable examples include California, Georgia, Indiana, Texas, and Washington. The Trust Code codifies certain provisions from the Restatement (Second) of Trusts and was coordinated with the work presently being done on the Restatement (Third) of Trusts. While the Trust Code incorporates some provisions from earlier uniform acts dealing with certain aspects of trust law, none of those prior acts was comprehensive in nature. Many state courts have relied primarily on the common law in trust matters, as articulated in these restatements. The Trust Code provides statutory rules that in some situations depart from the common law.

Under the Trust Code, with few exceptions, the terms of the written trust document are those that control. The Trust Code is primarily a default law (section 105)—that is, it provides rules and procedures where the trust document itself does not set forth such rules and procedures. But section 105 lists a number of

principles that are not subject to the grantor's control, such as the requirements for creating a trust and court review. The Trust Code is intended to supplement the common law of trusts (section 106). This article will discuss only certain highlights from the Trust Code that might be of general interest.

The Trust Code and Revocable Trusts

The Trust Code treats the revocable trust as the functional equivalent of a will and applies various rules applicable to wills to trusts. For example, section 112 provides that the rules of construction applicable to wills should apply to both revocable and irrevocable trusts. The mental capacity needed to create, amend, or revoke a revocable trust is the same as that for creating a will, as described in section 601. That section also provides that a trust is revocable unless explicitly made irrevocable, which reverses the common law rule to recognize the role of a revocable trust as a will substitute and adopts what has been the minority provision on this issue among the states.

The Trust Code recognizes the concept of virtual representation. For example, a parent can represent the interests of his or her children if their interests do not conflict in settling trust matters. Fiduciaries (such as conservators, guardians, trustees, and personal representatives), unless there is a conflict of interest, can represent those persons for whom the fiduciary acts. The holder of a general testamentary power of appointment, absent a conflict of interest, can represent the permissible appointees and takers in default. The representation principles are applicable to judicial and nonjudicial settlements, to notices, and to consents (sections 301–305).

An honorary trust, such as a trust created for an animal (a favorite dog or horse), is recognized to continue for the animal's lifetime. A third party can be named to enforce that honorary trust, or it can be enforced through the courts (section 408).

The Trust Code recognizes the right of the settlor and all beneficiaries to modify or terminate a noncharitable irrevocable trust. It also expands the power of a court to modify the administrative or dispositive provisions of a trust or terminate the trust due to circumstances not anticipated by the settlor (sections 411–412). The

Trust Code provides for termination of a small or uneconomic trust (section 414), reformation to correct mistakes in the document (section 415), and modification to achieve a settlor's tax objectives (section 416). It also authorizes combination or division of trusts where that would be beneficial to the administration of the trusts and the beneficiaries (section 417).

Although the Trust Code in many respects treats a revocable trust as the functional equivalent of a will, there is a significant difference between a will and a funded revocable trust administered by a third-party trustee when the settlor lacks the capacity to revoke the trust. A will is ambulatory and is effective only on death. Consequently, any matters involving the testator's own assets during his or her lifetime are subject to management by conservators, holders of a durable power of attorney, spouses, or other agents. The beneficiaries under a will are given no rights during the lifetime of the testator to enforce that will.

If a settlor has capacity to revoke the trust, the Trust Code provides that all rights and duties belong to and are owed only to that settlor (section 603). However, if the settlor does not have capacity to revoke the trust, then the Trust Code contemplates that the rights of the settlor and duties owed to the settlor pass to his or her conservator or holder of a durable power of attorney that specifically authorized the holder to deal with trust matters. If neither of those was in place, the rights pass to the beneficiaries of the trust—that is, those who would have beneficial interests after the demise of the settlor (section 603, comment). In this context the revocable trust clearly departs from the provisions applicable to a will.

Aspects of Trusteeship

The Trust Code develops in some detail the various aspects of trusteeship, dealing with accepting or declining to act as trustee, bonds, rights between cotrustees, appointing successors, removal and resignation, compensation, reimbursement for expenses, and other matters. These are all included in sections 701–709. A nominated trustee is authorized to investigate trust property to determine potential environmental issues before consenting

Only a few states have developed comprehensive trust statutes.

The full text of the Trust Code with comments is available at www.nccusl.org.

**The Trust Code
develops in
some detail the
various aspects
of trusteeship.**

Collier is a vice-chair of the Senior Lawyers Division Wills, Probate, and Trusts Committee and the newly appointed Chair of the Editorial Board of Experience.

to act as trustee (see section 701). A trustee may qualify without court appointment (section 701). Cotrustees are able to act by majority decision rather than unanimous decision (section 703).

The trustee has a duty, under the Trust Code, to keep adult beneficiaries age 25 and over generally informed of matters relating to trust administration (section 813). The grantor cannot overrule the beneficiaries' right to information by a provision in the trust instrument (section 105(b)(8)(9)). Section 813(b)(11) provides that, on request from a beneficiary, the trustee shall provide a copy of the trust instrument, not just the portion relevant to that beneficiary's interest. Notice to beneficiaries is to be given of the trustee's acceptance of the trusteeship, when the trust becomes irrevocable, and any change in the trustee's compensation (section 813(b)(2)(3)(4)). The trustee is to furnish information at least annually about the trust property, receipts, disbursements, and fees to specific beneficiaries (section 813(c)), but a beneficiary can waive the right to such annual report (section 813(d)). These provisions on providing information about the trust, its administration, and its assets were among the most controversial issues considered by the drafting committee. These Trust Code provisions as finalized are intended to keep those beneficiaries who have a current interest fully informed. Additional provisions concerning trust administration, including the duties and powers of the trustee, are found in sections 800-817.

Applicability and Administration

The Trust Code is intended to have the widest possible application to the extent not inconsistent with constitutional limitations. Moreover, it is intended to apply not only to trusts created after the effective date of the enactment of the Trust Code in the particular jurisdiction but

also to trusts in existence on the date of such enactment (section 1106), subject to certain exceptions.

Judicial proceedings are available for resolution of particular trust issues (sections 201-204). Generally, however, courts will not be involved in trust administration absent a petition by an interested party. By accepting a trusteeship of a trust having its principal place of administration in a particular state, the trustee is deemed to submit to the jurisdiction of the courts in that state, as are the beneficiaries (see section 202). The Trust Code, additionally, provides for nonjudicial settlements of various trust matters, such as accountings and changing trustees (section 111). Remedies for breach of trust are found in article 10.

A basic concept of trust law is that a trustee shall administer the trust solely in the interest of the beneficiaries (section 802). The trustee is required to administer the trust in good faith, according to its terms and purposes and in the interest of the beneficiaries (section 801). The trustee is required to exercise reasonable care, skill, and caution (section 804). If a trustee has special skills or expertise, the trustee is required to utilize that special skill or expertise (section 806).

The Trust Code with all the official comments is approximately 150 pages in length. This article obviously highlights only certain provisions that might be of general interest. The Trust Code is being studied in many states, and enactment is anticipated in numerous states in the next several years. If your estate plan involves use of a trust or if you draft trust documents for others, you will find the Trust Code of interest. It codifies many aspects of the Restatement (Second) of Trusts and Restatement (Third) of Trusts and provides detailed guidance for trustees and beneficiaries as to all aspects of trust administration and distribution. ■

**Visit the SLD on the web at
www.abanet.org/srlawyers**

LEGISLATIVE TESTIMONYKANSAS BAR
ASSOCIATION

1200 SW Harrison St.
P.O. Box 1037
Topeka, Kansas 66601-1037
Telephone (785) 234-5696
FAX (785) 234-3813
www.ksbar.org

4/1/02

TO: CHAIRMAN MIKE O'NEAL AND MEMBERS OF THE
HOUSE JUDICIARY COMMITTEE

FROM: BILL MARTIN

RE: SENATE BILL 297 (UNIFORM TRUST CODE)

Chairman O'Neal and Members of the Committee:

I thank you for the opportunity to present this testimony today on behalf of the Kansas Bar Association. My name is Bill Martin and reside in Smith Center. I am a member of the KBA Real Estate, Probate & Trust Law Section and have served as a member of the special KBA committee that has reviewed the Uniform Trust Code (UTC).

Our special committee has spent many hours reviewing the UTC in detail. This committee is comprised of Mike Dwyer of Overland Park, Royce Nelson of Salina, Peter Johnston of Salina, Terry Fry of Wichita, Tim O'Sullivan of Wichita, Jim Bush of Hiawatha and Doug Pringle of Wichita. We originally had a number of concerns about the Code, but through discussions with the members of the Kansas Judicial Council Probate Advisory Committee, we have been able to resolve those concerns. The amendments to the bill that were offered in the Senate Judiciary Committee are representative of changes that the KBA recommended to the bill and were agreed upon by the Judicial Council.

We do have a few largely technical amendments to present to you today. We have discussed these amendments with the Judicial Council and we believe they are agreeable to the Council. As I mentioned, these amendments are technical in nature but I want to walk you through them briefly.

I appreciate your consideration of Senate Bill 297 and respectfully request adoption of the amendments that are presented in the attached balloon. I am happy to stand for any questions you have. Thank you!

1 (7) "Interests of the beneficiaries" means the beneficial interests pro-
2 vided in the terms of the trust.

3 (8) "Jurisdiction," with respect to a geographic area, includes a state
4 or country.

5 (9) "Person" means an individual, corporation, business trust, estate,
6 trust, partnership, limited liability company, association, joint venture,
7 government; governmental subdivision, agency, or instrumentality; public
8 corporation, or any other legal or commercial entity.

9 (10) "Power of withdrawal" means a presently exercisable general
10 power of appointment other than a power exercisable only upon consent
11 of the trustee or a person holding an adverse interest.

12 (11) "Property" means anything that may be the subject of owner-
13 ship, whether real or personal, legal or equitable, or any interest therein.

14 (12) "Qualified beneficiary" means a beneficiary who, on the date of
15 the beneficiary's qualification ~~is determined; possesses a vested income~~
16 ~~interest or vested remainder interest in a trust.~~

17 ~~(A) Is a distributee or permissible distributee of trust income or~~
18 ~~principal;~~

19 ~~—(B)— would be a distributee or permissible distributee of trust income~~
20 ~~or principal if the interests of the distributees described in subparagraph~~
21 ~~(A) terminated on that date; or~~

22 ~~—(C)— would be a distributee or permissible distributee of trust income~~
23 ~~or principal if the trust terminated on that date.~~

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

26 (14) "Settlor" means a person, including a testator, who creates, or
27 contributes property to, a trust. If more than one person creates or con-
28 tributes property to a trust, each person is a settlor of the portion of the
29 trust property attributable to that person's contribution except to the ex-
30 tent another person has the power to revoke or withdraw that portion.

31 (15) "Spendthrift provision" means a term of a trust which restrains
32 ~~both voluntary and involuntary transfer of a beneficiary's interest.~~

33 (16) "State" means a state of the United States, the District of Co-
34 lumbia, Puerto Rico, the United States Virgin Islands, or any territory or
35 insular possession subject to the jurisdiction of the United States. The
36 term includes an Indian tribe or band recognized by federal law or for-
37 mally acknowledged by a state.

38 (17) "Terms of a trust" means the manifestation of the settlor's intent
39 regarding a trust's provisions as expressed in the trust instrument or as
40 may be established by other evidence that would be admissible in a ju-
41 dicial proceeding.

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

is determined:

- (A) Is a distributee of trust income or principal; or
- (B) would be a distributee of trust income or principal if the trust terminated on that date.

either

or

1 Sec. 10. (UTC 110) OTHERS TREATED AS QUALIFIED
2 BENEFICIARIES. (a) Whenever notice to qualified beneficiaries of a
3 trust is required under this code, the trustee must also give notice to any
4 other beneficiary who has sent the trustee a request for notice.

5 (b) A charitable organization expressly entitled *mandated* to receive
6 benefits *distributions* under the terms of a trust or a person appointed
7 to enforce a trust created for the care of an animal or another nonchar-
8 itable purpose as provided in section 29 or 30, and amendments thereto,
9 has the rights of a qualified beneficiary under this code.

10 (c) (b) The attorney general of this state has the rights of a qualified
11 beneficiary with respect to a charitable trust having its principal place of
12 administration in this state.

13 Sec. 11. (UTC 111) NONJUDICIAL SETTLEMENT AGREE-
14 MENTS. (a) For purposes of this section, "interested persons" means
15 persons whose consent would be required in order to achieve a binding
16 settlement were the settlement to be approved by the court.

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

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

24 (d) Matters that may be resolved by a nonjudicial settlement agree-
25 ment include:

are limited to

- 26 (1) ~~The interpretation or construction of the terms of the trust;~~
- 27 ~~(2) the *The* approval of a trustee's report or accounting;~~
- 28 ~~(3) direction to a trustee to refrain from performing a particular act~~
29 ~~or the grant to a trustee of any necessary or desirable power;~~
- 30 (4) (2) the resignation or appointment of a trustee and the determi-
31 nation of a trustee's compensation;
- 32 (5) (3) transfer of a trust's principal place of administration; and
- 33 (6) (4) liability of a trustee for an action relating to the trust.

34 (e) Any interested person may request the court to approve a non-
35 judicial settlement agreement, to determine whether the representation
36 as provided in article 3 of this code was adequate, and to determine
37 whether the agreement contains terms and conditions the court could
38 have properly approved.

39 Sec. 12. (UTC 112) RULES OF CONSTRUCTION. The rules of
40 construction that apply in this state to the interpretation of and disposition
41 of property by will also apply as appropriate to the interpretation of the
42 terms of a trust and the disposition of the trust property.

43 Sec. 13. (UTC 201) ROLE OF COURT IN ADMINISTRATION

1 31, 2000.

2 (d) The provisions of this section shall be effective as to all trusts not
3 construed prior to the effective date of this act.

4 **Sec. 35. (UTC 414) TERMINATION OF UNECONOMIC**
5 **TRUST.** (a) After notice to the qualified beneficiaries, the trustee of a
6 trust consisting of trust property having a total value less than \$100,000
7 may terminate the trust if the trustee concludes that the value of the trust
8 property is insufficient to justify the cost of administration.

9 (b) The court may modify or terminate a trust or remove the trustee
10 and appoint a different trustee if it determines that the value of the trust
11 property is insufficient to justify the cost of administration.

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

15 (d) This section does not apply to an easement for conservation or
16 preservation.

17 **Sec. 36. (UTC 415) REFORMATION TO CORRECT MIS-**
18 **TAKES.** The court may reform the terms of a trust, even if unambiguous,
19 to conform the terms to the settlor's intention if it is proved by clear and
20 convincing evidence that both the settlor's intent and the terms of the
21 trust were affected by a mistake of fact or law, whether in expression or
22 inducement.

23 **Sec. 37. (UTC 416) MODIFICATION TO ACHIEVE SET-**
24 **TTLOR'S TAX OBJECTIVES.** To achieve the settlor's tax objectives, the
25 court may modify the terms of a trust in a manner that is not contrary to
26 the settlor's probable intention. The court may provide that the modifi-
27 cation has retroactive effect.

28 **Sec. 38. (UTC 417) COMBINATION AND DIVISION OF**
29 **TRUSTS.** (a) After notice to the qualified beneficiaries, a trustee may
30 combine two or more trusts into a single trust or divide a trust into two
31 or more separate trusts, if the result does not impair rights of any bene-
32 ficiary or adversely affect achievement of the purposes of the trust. The
33 trustee may make a division under this section by:

34 (1) Giving written notice of the division, not later than the 30th day
35 before the date of a division under this subsection, to each qualified ben-
36 efiary; and

37 (2) executing a written instrument, acknowledged before a notary
38 public or other person authorized to take acknowledgments of convey-
39 ances of real estate stating that the trust has been divided pursuant to
40 this section and that the notice requirements of this subsection have been
41 satisfied.

42 (b) A trustee, in the written instrument dividing a trust, shall allocate
43 trust property among the separate trusts on a fractional basis by identi-

(e) This section does not apply to any trust if its assets are distributable to the trustee or anyone the trustee is obligated to support.

1 present or future distributions to or for the benefit of the beneficiary or
2 other means. The court may limit the award to such relief as is appropriate
3 under the circumstances.

4 Sec. 41. (UTC 502) SPENDTHRIFT PROVISION. (a) A spend-
5 thrift provision is valid only if it restrains both voluntary and involuntary
6 transfer of a beneficiary's interest.

7 (b) A term of a trust providing that the interest of a beneficiary is
8 held subject to a "spendthrift trust," or words of similar import, is suffi-
9 cient to restrain both voluntary and involuntary transfer of the benefi-
10 cary's interest.

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

15 ~~Sec. 42. (UTC 503) EXCEPTIONS TO SPENDTHRIFT PRO-~~
16 ~~VISION. (a) As used in this section, "child" includes any person for whom~~
17 ~~an order or judgment for child support has been entered in this or another~~
18 ~~state.~~

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

25 ~~(c) A spendthrift provision is unenforceable against a claim of this~~
26 ~~state, subdivisions thereof, or the United States to the extent a statute of~~
27 ~~this state or federal law so provides.~~

28 ~~Sec. 43. (UTC 504) DISCRETIONARY TRUSTS; EFFECT OF~~
29 ~~STANDARD. (a) As used in this section, "child" includes any person~~
30 ~~for whom an order or judgment for child support has been entered in~~
31 ~~this or another state.~~

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

35 ~~(1) The discretion is expressed in the form of a standard of distri-~~
36 ~~bution; or~~

37 ~~(2) the trustee has abused the discretion.~~

38 ~~(c) To the extent a trustee has not complied with a standard of dis-~~
39 ~~tribution or has abused a discretion:~~

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

43 ~~(2) the court shall direct the trustee to pay to the child, spouse, or~~

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.

TESTIMONY ON SENATE BILL 297
HOUSE JUDICIARY COMMITTEE
APRIL 1, 2002

Daryl Craft, President - GTrust - Topeka
Representing the Kansas Bankers Association Trust Division

On behalf of the Trust Division, thank you for allowing me the opportunity to present this testimony today. This Bill would create a Kansas Uniform Trust Code. The Code would bring together in one place in the statute books most, if not all, statutes relating to the administration of trusts. It also makes some rather substantive changes to current Kansas trust law.

I suspect if you asked most Kansas trust professionals, they would suggest we should keep things pretty much as they are. The realities are that times change, and we must change with them. The Uniform act before you began as suggested legislation from the National Conference of Commissioners on Uniform State Laws. The Kansas Judicial Council worked on it for several years to bring it more in line with current Kansas law.

The Kansas Bankers Association Trust Division and the Kansas Bar Association have had significant input in the current Bill. This input has resulted from discussion, argument, conciliation and compromise. At the start of the process it seemed unlikely that the interested parties could come to an agreement on the language of the Bill, but we have.

After passage in the Senate, the Trust Division and the Bar Association reviewed the language in Section 3, paragraph (12) and determined the language needed to be more specific. We would propose the section be changed, as follows:

- (12) "Qualified beneficiary" means a beneficiary who on the date the beneficiary's qualification *is determined*
- (A) *Is a distributee of trust income or principal, or*
- (B) *Would be a distributee of trust income or principal if the trust terminated on that date.*

With the addition of the referenced change to Section 3, the Kansas Bankers Association Trust Division does support SB 297, and would urge you to do the same.

Thank you for allowing time in your schedule to hear testimony on this Bill.

For Further Information:

Daryl Craft
GTrust
1129 SW Wanamaker Road
Topeka KS 66604
785.273.9993
security@gtrust.com

Mark Knackendoffel
The Trust Company of Manhattan
330 Poyntz Ave
Manhattan KS 66505
785.285.7878
MarkK@TheTrustCo.com

Kathy Taylor Olsen
Kansas Bankers Assoc.
610 SW Corporate View
Topeka KS 66604
785.232.3444
kbako@ink.org

SENATE BILL No. 236

By Committee on Judiciary

2-5

10 AN ACT concerning the code of civil procedure; ~~relating to garnishment;~~
11 amending K.S.A. ~~2000~~ Supp. 60-205 and repealing the existing ~~Section;~~
12 also repealing K.S.A. 60-714, 60-715, 60-716 and 60-720 and K.S.A.
13 ~~2000~~ Supp. 60-717, 60-718, 60-726 and 60-728 and Forms No. 27 and
14 28 in the appendix of forms following K.S.A. 60-269.

K.S.A. 60-217 and
sections
2001

16 *Be it enacted by the Legislature of the State of Kansas:*

17 New Section 1. Garnishment is a procedure whereby the wages,
18 money or intangible property of a person can be seized or attached pur-
19 suant to an order of garnishment issued by the court under the conditions
20 set forth in the order.

21 New Sec. 2. An order of garnishment before judgment may be ob-
22 tained only upon order of a judge of the district court pursuant to the
23 procedure to obtain an order of attachment. No order of garnishment
24 may be obtained before judgment where the property sought to be at-
25 tached is wages earned by the person being garnished.

26 New Sec. 3. (a) As an aid to the collection of a judgment, an order
27 of garnishment may be obtained at any time after 10 days following judg-
28 ment. There is no requirement that an execution first be issued and re-
29 turned unsatisfied.

30 (b) The party requesting a garnishment shall file a request in an in-
31 dividual case or by a master request covering more than one case asking
32 the court to issue an order of garnishment. The request shall designate
33 whether the order of garnishment is to be issued to attach earnings or to
34 attach other property of the judgment debtor. If such party seeks to attach
35 earnings of the judgment debtor to enforce:

- 36 (1) An order of any court for the support of any person;
- 37 (2) an order of any court of bankruptcy under chapter 13 of the
- 38 United States bankruptcy code; or
- 39 (3) a debt due for any state or federal tax, the direction of the party
shall so indicate.

No bond is required for an order of garnishment issued after judgment.

42 New Sec. 4. This section shall apply if the garnishment is to attach
43 intangible property other than earnings of the judgment debtor.

6-2

1 defense contained therein shall be deemed to be denied or avoided by
2 all other parties and that the filing of any such pleading and service
3 thereof upon the plaintiff constitutes due notice of it to the parties. A
4 copy of every such order shall be served upon the parties in such manner
5 and form as the court directs.

6 (d) *Filing.* (1) Interrogatories, depositions other than those taken un-
7 der K.S.A. 60-227 and amendments thereto, disclosures of expert testi-
8 mony under K.S.A. 60-226 and amendments thereto and discovery re-
9 quests or responses under K.S.A. 60-234 or 60-236, and amendments
10 thereto, shall not be filed except on order of the court or until used in a
11 trial or hearing, at which time the documents shall be filed.

12 (2) A party serving discovery requests or responses under K.S.A. 60-
13 233, 60-234 or 60-236, and amendments thereto, or disclosures of expert
14 testimony under K.S.A. 60-226 and amendments thereto, shall file with
15 the court a certificate stating what document was served, when and upon
16 whom.

17 (3) All other papers filed after the petition and required to be served
18 upon a party, shall be filed with the court either before service or within
19 a reasonable time thereafter.

20 (e) *Filing with the court defined.* The filing of pleadings and other
21 papers with the court as required by this article shall be made by filing
22 them with the clerk of the court. In accordance with K.S.A. 60-271 and
23 amendments thereto and supreme court rules, pleadings and other papers
24 may be filed by telefacsimile communication. The judge may permit the
25 papers to be filed with the judge, in which event the judge shall note
26 thereon the filing date and forthwith transmit them to the office of the
27 clerk.

28 ~~Sec. 18. K.S.A. 60-714, 60-715, 60-716 and 60-720 and K.S.A. [6000]~~
29 ~~Supp. 60-205, 60-717, 60-718, 60-726 and 60-728 and Forms No. 27 and~~
30 ~~28 in the appendix of forms following K S A 60-269 are hereby repealed.~~

31 Sec. 19. This act shall take effect and be in force from and after its
32 publication in the statute book

Sec. 18. See attached
Renumber remaining sections accordingly.

2001

60-217

Sec. 18. K.S.A. 60-217 is hereby amended to read as follows: 60-217. (a) Real party in interest. Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, conservator, trustee of an express trust, receiver, a party with whom or in whose name a contract has been made for the benefit of another, a bona fide trade, merchant or professional association who represents the interests of such association, or a party authorized by statute may sue in the party's own name without joining the party for whose benefit the action is brought. When a statute so provides, an action for the use or benefit of another shall be brought in the name of the state of Kansas. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) Claim accruing under law of another state. Whenever a cause of action has accrued under or by virtue of the laws of any other state or territory, such cause of action may be sued upon in any of the courts of this state by the person or persons who are authorized to bring and maintain an action thereon in the state or territory where the same arose. When the law of the state or territory where a cause of action for death arose authorizes said action to be prosecuted by an administrator or executor, then said action may also be maintained in any of the courts of this state by an administrator or executor appointed under the laws of the state of Kansas.

(c) Minors or incapacitated persons. Whenever a minor or incapacitated person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the minor or incapacitated person. If a minor or incapacitated person does not have a duly appointed representative the minor or incapacitated person may sue by the minor or incapacitated person's next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for a minor or incapacitated person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the minor or incapacitated person.