

MINUTES OF THE SENATE JUDICIARY COMMITTEE.

The meeting was called to order by Chairperson Senator Vratil at 9:36 a.m. on January 22, 2002 in Room 123-S of the Capitol.

All members were present except: Senator Haley (excused)

Committee staff present:

Gordon Self, Revisor
Mike Heim, Research
Mary Blair, Secretary

Conferees appearing before the committee:

Randy Hearrell, Kansas Judicial Council (KJC)
Professor David English, Reporter, Uniform Trust Code Committee
Jerry Goodell, Chair, Probate Law Advisory Committee
Jim Bush, President, Kansas Bar Association (KBA)
Royce Nelson, Kansas Bar Association
Mark Knackendoffel, Kansas Banker's Association
Senator James Barnett

Others attending: see attached list

The minutes of the January 16, 2002 meeting were approved on a motion by Senator Donovan, seconded by Senator O'Connor, Carried.

The Chair referenced a handout of a list of bills assigned to each subcommittee and stated that regular meetings on January 30 and 31 would not be held so that subcommittees could meet at that time. (attachment 1) He also referenced a memo from the City of Overland Park which discusses the legal restrictions placed on convicted felons. (attachment 2)

SB 297—enacting the Uniform Trust Code

Conferee Hearrell testified in support of **SB 297**, a bill which embodies the Uniform Trust Code (UTC). He presented brief information regarding a handout of the UTC recommended by the National Conference of Commissioners on Uniform State Laws (attachment 3) He stated that the UTC will codify Kansas Trust Law. He briefly introduced Conferees English and Goodell.

Conferee English stated that the purpose of the UTC is to make trust law more accessible, fill gaps in current law, and codify restatement of trust. He reviewed the UTC enactment process and detailed several of the eleven Articles of the Code. (attachment 4)

Conferee Goodell testified in support of **SB 297** stating he was "proud of the bill and it's thoroughness." He lauded the multi-credentialed volunteer members of the Probate Law Advisory Committee who worked on drafting the bill. (attachment 5)

Conferee Bush testified in opposition to **SB 297** detailing certain provisions in the bill which he stated, "drastically change common law [on wills and trusts] and move the emphasis from determining the intent of Grantors to seeking the wishes of beneficiaries." (attachment 6)

Conferee Nelson testified in opposition to **SB 297** stating that certain sections and committees of the KBA feel that current Kansas trust law is preferable to this bill. He defined the purpose and function of a trust and discussed what type of trust law is desirable. He reviewed current trust law and briefly reviewed a KBA analysis of the **SB 297** version of the UTC. (attachment 7)

Conferee Knackendoffel testified in support of **SB 297**. He recommended Committee focus on the totality of the bill and alerted them to a small provision in the bill that is subject to debate regarding non-judicial settlement agreements. (attachment 8)

Conferee Barnett requested introduction of a bill relating to passenger safety for teen drivers. Senator Schmidt moved to introduce the bill, Senator Oleen seconded. Carried.

The Chair assigned to Senator Adkin's subcommittee, consideration of the post audit on meth labs for possible legislation.

The meeting adjourned at 10:29 a.m. The next meeting is January 23, 2002.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: January 22, 2002

NAME	REPRESENTING
SURAN Becharal	KFDAA
Judi Stork	OSBC - Office of the State Bank Comm.
Sonya Allen	"
Paul Nelson	KBA
Jim Bush	KBA
Paul Davis	KBA
Hillary Hayes	Federico Consulting
David English	Uniform Law Commission ^{KS}
Gerald Goodell	Judicial Council
Rudym. Maxwell	"
KEITH R LANDIS	CHRISTIAN SCIENCE COMMITTEE ON PUBLICATION FOR KANSAS
Troy Smith	InterN
MARK KNACKENDOFFEL	TRUST CO. OF MANHATTAN KS BANKERS ASSN TRUST DIVISION
Kathy Okea	Ks Bankers Assn.
Connie Burns	Whitney B. Tomron, PA
Barb Coxant	KTRA
Ami Hyfen	JUDICIAL BRANCH
Helen Pedigo	Governor's Office
Joe Herold	KSC

Senate Judiciary Committee
1/22/02

Bills Assigned to Sub-Committees

Senator Pugh:

- SB 16 - concerning CINC; temp. custody hrg.
- SB 26 - asset seizure and forfeiture; civil remedies
- SB 295 - aggravated escape from custody
- SB 300 - JJA; req. for employment
- SB 301 - JJA; trial home visits

Senator Adkins:

- SB 136 - wage garnishment; assignment of accounts
- SB 141 - insurance; fraudulent acts
- SB 174 - juvenile offender detention; payment of expenses
- SB 335 - parole board; qual. of members, pro-tem members

Senator Schmidt:

- SB 297 - Uniform Trust Code
- SB 262 - profits from crimes; civil action to recover
- SB 269 - confinement in county jail; reimbursement
- SB 339 - early medical release of prisoners

*SJW
1-22-02
att 1*

CITY OF OVERLAND PARK

INTRACITY COMMUNICATION

LAW DEPARTMENT

December 14, 2001

TO: Robert Watson, City Attorney
FROM: Michele Stackhouse, Law Clerk
RE: Convicted Felons

ISSUE

1. What is a person who has been convicted of a felony prohibited from doing under the laws of Kansas?

DISCUSSION

Essentially in Kansas, a person convicted of a felony cannot obtain a license or employment in the alcoholic beverage industry, racing or gaming industry, or tobacco industry. A convicted felon may not serve as a law enforcement officer. Under the Kansas Constitution a person is also stripped of his voting rights, unless his civil rights have been restored or he has been pardoned. Additionally, while serving his sentence, whether in prison or on parole, a person who has been convicted of a felony is ineligible to vote, hold public office, or serve as a juror.

A person who has been convicted of bribery is ineligible to hold public office or obtain public employment. Additionally, a license in the medical industry may be denied to a person convicted of a felony. However, this is typically discretionary.

Please note that this memo only addresses the laws of Kansas and does not address any additional federal restrictions on convicted felons. Attached to this memo is a list of restrictions handed to parolees by the Kansas Department of Corrections. This list has several additional restrictions for persons who have not fully completed their sentence under a conviction for any offense.

Here is a list of KSA's and the Kansas Constitution regarding persons convicted of a felony. Please note that many of these restrictions are discretionary.

1. KS Constitution Art. 5 sec. 2 - Cannot vote if convicted of a felony under the laws of the United States or any state, unless civil rights have been restored or has been pardoned
2. 8-2410 - may be denied a license to sell/manufacture vehicles if convicted of a felony or any crime involving moral turpitude or a conviction related to the sale or manufacture of

*Angela
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att 2*

vehicles

3. 12-3602 - will be denied a water-conditioning contract if convicted of a felony or any crime involving deception, fraud, or moral turpitude within 5 years of the application for a contract
4. 19-4475 - shall not serve as a law enforcement director
5. 21-3901 - if convicted of bribery, a person shall forfeit his public office and forever be barred from obtaining public office or public employment
6. 21-4204 - persons convicted of certain felonies within 5 years, and other felonies within 10 years cannot possess a firearm
7. 21-4209a - cannot possess explosives if convicted of felony within last 5 years
8. 21-4615 if convicted of a felony a person cannot hold public office, cannot vote or register to vote, cannot serve as a juror. These restrictions are released when the person has fully served his sentence under his conviction.
9. 38-1586 - if convicted of a felony involving sexual intercourse and a child is born, the court may terminate parental rights
10. 39-709 - loss of rights to social welfare if convicted of crimes involving theft or welfare fraud
11. 39-931a - may be denied an adult care home license
12. 41-204 - cannot be director or deputy of Division of Alcoholic Beverage Control
13. 41-308a - cannot be employed in a farm winery
14. 41-308b - cannot be employed in a micro brewery
15. 41-311 - cannot hold a liquor license
16. 41-334 - may be denied a permit for sales of alcoholic beverages
17. 41-2703 - cannot obtain a cereal malt beverage license if within the past two years a person has been convicted of a felony involving moral turpitude or any crime involving alcohol
18. 44-1505 - cannot obtain an athlete's agent certification if convicted of a felony or any

misdemeanor involving moral turpitude

19. 47-829 - application for a veterinarian's license must contain a statement that the applicant has not been convicted of a felony
20. 58-4211 - license for manufactured housing may be denied if the person within the past five years has been convicted of a felony, any crime involving moral turpitude, or any crime in connection with the manufactured housing
21. 65-1436 - may be denied a dentist or a dental hygienist license if convicted of a felony or any misdemeanor involving moral turpitude, and the applicant fails to show rehabilitation
22. 65-1517 - may be denied an optometrist's license
23. 65-1627 - may be denied a pharmacist's license if convicted of a felony and fails to show rehabilitation
24. 65-1751 - may be denied an embalmer's license or a funeral directors license if convicted of a felony and fails to show rehabilitation, or any crime involving moral turpitude
25. 65-2006 - may be denied a podiatrist license if convicted of a felony and fails to show rehabilitation
26. 65-2836 - may be denied a license in the healing arts, shall be revoked if convicted of a felony after July 1, 2000, unless 2/3 vote of the board is in favor that an applicant has shown rehabilitation
27. 65-28a05 - may be denied a physician's assistant license
28. 65-4118 - may be denied a license for the sale/manufacture/distribution of a controlled substance
29. 65-4209 - may be denied a mental health technician license if convicted of a felony or a misdemeanor involving an illegal substance, unless the applicant can show rehabilitation; license will be denied if convicted of a felony involving a crime against persons
30. 65-5410 - may be denied an occupational therapist's license if the conviction is found by the board to have a direct bearing on whether such person should be entrusted to serve the public
31. 65-5510 - may be denied a respiratory therapist's license if the conviction is found by the board to have a direct bearing on whether such person should be entrusted to serve the public

32. 65-5809 - may be denied a professional therapists license if convicted of a felony and does not show rehabilitation
33. 65-6133 - may be denied ability to teach or be in the emergency medical services if convicted of a felony and fails to show rehabilitation
34. 65-6311 - may be denied a social workers license if convicted of a felony and fails to show rehabilitation
35. 65-6911 - may be denied an athletic trainer's license if convicted of a felony and fails to show rehabilitation
36. 72-1397 - shall be denied a teacher's certificate if convicted of a felony listed under this statute
37. 74-1404 - cannot serve on the Kansas Dental Board if convicted of a felony or any crime involving the dental profession
38. 74-5324 - may be denied a psychologist license if convicted of a felony involving moral turpitude or any crime associated with the profession, and list of other offenses
39. 74-5369 - same as above, except for master psychologist license
40. 74-5610 - a law enforcement agency cannot permit auxiliary personnel who have been convicted of a felony access to police records or communications systems
41. 74-8708 - cannot obtain a license to sell lottery tickets if convicted of a felony within the last 10 years
42. 74-8803 - cannot serve on the Kansas Racing and Gaming Commission
43. 74-8805 - cannot be an executive director on the Kansas Racing and Gaming Commission
44. 74-8816 - may be denied a parimutuel occupational license if convicted of a felony or a juvenile offense that would be a felony within past 5 years
45. 74-8817 - may be denied a parimutuel concessionaire license if convicted of a felony or a juvenile offense that would be a felony within past 5 years
46. 74-8837 - may be denied a racing wagering services or equipment license if convicted of a felony or a juvenile offense that would be a felony within past 5 years
47. 74-9804 - may not be appointed executive director of the Kansas Gaming Agency that overseas tribal gaming

48. 75-711 - cannot serve on the KBI
49. 75-7b04 - may be denied a private investigator's or security operation's license if convicted of a felony or any crime within the last 10 years involving moral turpitude and/or other criteria
50. 75-7b21 - cannot obtain a license to train private investigators regarding firearms if convicted of a felony or a misdemeanor within the past 10 years
51. 76-1908 - cannot be admitted to a veteran's institution or soldiers home if convicted of a felony, unless the applicant can show rehabilitation
52. 79-3304 - may be denied a license to sell tobacco products if convicted of a felony or any crime involving moral turpitude or a crime associated with the sale of tobacco products and the applicant has failed to fulfill his obligations under the conviction
53. 79-3464b - may be denied a license under the motor vehicle fuel tax laws if convicted of a felony involving theft within the past 5 years or has ever been convicted of a felony involving fraud or tax evasion

Conditions of Post Release Supervision

1. **Reporting and Travel:** Upon release from the institution, I agree to report as directed to the assigned parole officer and follow his/her instructions in reporting on a regular basis and keep the officer continuously informed of my residence and employment. If it becomes necessary that I travel outside of my assigned parole district (as determined by the parole officer) or the State of Kansas, I will obtain advance permission from my parole officer.
2. **Laws:** I shall obey all federal and state laws, municipal or county ordinances, including the Kansas Violent Offender Registration Act. If the Kansas Offender Registration Act is applicable to me, I will register with the local Sheriff's Office within 10 days of arrival in the county of residence upon moving to any other county in Kansas. Changes in residence within the same county requires written notification to the Sheriff's Office. If I am arrested for any reason, I will notify my parole officer at the earliest allowable opportunity.
3. **Weapons:** I will not own, possess, purchase, receive, sell or transport any firearms, ammunition or explosive device, or any device designed to expel or hurl a projectile capable of causing injury to persons or property, **or any weapon prohibited by law.**
4. **Personal Conduct:** I will not engage in assaultive activities, violence, or threats of violence of any sort.
5. **Narcotics/Alcohol:** I will not illegally possess, use, or traffic in any controlled substance, narcotics or other drugs as defined by law except as prescribed by a licensed medical practitioner. I will not consume any mind-altering substances. I agree and consent to submit to a blood, Breathalyzer or urine test at the direction of the parole officer. At no time will I consume intoxicating liquor, including beer or wine, without written permission from my parole officer. At no time will I become intoxicated from the consumption of any substance, including, but not limited to, wine, beer, glue, or paint.
6. **Association:** I will not associate with persons engaged in illegal activity and will obtain written permission from the parole officer and institutional director to visit or correspond with inmates of any correctional institution.
7. **Employment:** I agree to secure and maintain reasonable, steady employment within 45 days of my release from prison or residential treatment unless excused for medical reasons or an extension of time is given by my parole officer. I agree to notify my employer of my current and prior (non-expunged) adult felony convictions and status as an offender.
8. **Education:** I agree to make progress toward or successfully complete the equivalent of a secondary education if I have not completed such by the time of my release and I am capable, as determined by my parole officer.
9. **Costs:** I agree to pay restitution, court costs, supervision fees, and other costs as directed by my parole officer.
10. **Treatment/Counseling:** I agree to comply with my relapse prevention plan and the recommendations of any treatment or counseling, or assessment program which I have completed during my incarceration or while under supervision. I agree to follow any directives given to me by my parole officer regarding evaluations, placement and/or referrals. I agree to submit to polygraph examinations as directed by my parole officer and/ or treatment provider.
11. **Victim:** I agree to have no contact with the victim(s) in my case(s) or the victim's family by any means including, but not limited to, in person, by phone, via computer, in writing, or through a third party without the advance permission of my parole officer.
12. **Search:** I agree to subject to a search by parole officer(s) of my person, residence, and any other property under my control.

Special Conditions: I agree to abide by the special conditions(s) set forth below, as well as to comply with instructions which may be given or conditions imposed by my parole officer from time to time as may be governed by the special requirements of my individual situation.

All special conditions previously imposed remain in effect.

I also agree that if I leave the state of Kansas without permission or am ordered to return from Kansas to another state, I will not contest any effort to be returned.

Inmate Signature _____

Number _____

WITNESS: _____

Date _____

11/1/01

UNIFORM TRUST CODE
Including 2001 Amendments to 2000 Version

**(With Kansas Amendments to the UTC
shown in strike-type and underscoring.)**

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1-22-02
att 3*

UNIFORM TRUST CODE

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-NINTH YEAR
IN ST. AUGUSTINE, FLORIDA
JULY 28 – AUGUST 4, 2000

WITH TENTATIVE PREFATORY NOTE AND COMMENTS

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

October 9, 2000

UNIFORM TRUST CODE

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UNIFORM TRUST CODE

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* Not part of Uniform Trust Code

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UNIFORM TRUST CODE

PREFATORY NOTE

The Uniform Trust Code (2000) is the first national codification of the law of trusts. The primary stimulus to the Commissioners' drafting of the Uniform Trust Code is the greater use of trusts 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, while numerous, are fragmentary. The Uniform Trust Code will provide States with precise, comprehensive, and easily accessible guidance on trust law questions. On issues on which States diverge or on which the law is unclear or unknown, the Code will for the first time provide a uniform rule. The Code also contains a number of innovative provisions.

Default Rule: Most of the Uniform Trust Code consists of default rules that apply only if the terms of the trust fail to address or insufficiently cover a particular issue. Pursuant to Section 105, a drafter is free to override a substantial majority of the Code's provisions. The exceptions are scheduled in Section 105(b).

Innovative Provisions: Much of the Uniform Trust Code is a codification of the common law of trusts. But the Code does contain a number of innovative provisions. Among the more significant are specification of the rules of trust law that are not subject to override in the trust's terms (Section 105), the inclusion of a comprehensive article on representation of beneficiaries (Article 3), rules on trust modification and termination that will enhance flexibility (Sections 410-417), and the inclusion of an article collecting the special rules pertaining to revocable trusts (Article 6).

Models for Drafting: While the Uniform Trust Code is the first comprehensive Uniform Act on the subject of trusts, comprehensive trust statutes are already in effect in several States. Notable examples include the statutes in California, Georgia, Indiana, Texas, and Washington, all of which were referred to in the drafting process. Most influential 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.

Existing Uniform Laws on Trust Law Subjects: Certain older Uniform Acts are incorporated into the Uniform Trust Code. Others, addressing more specialized topics, will continue to be available for enactment in free-standing form.

The following Uniform Acts are incorporated into or otherwise superseded by the Uniform Trust Code:

1 Uniform Probate Code Article VII – Originally approved in 1969, Article VII has been
2 enacted in about 15 jurisdictions. Article VII, although titled “Trust Administration,” is a modest
3 statute, addressing only a limited number of topics. Except for its provisions on trust registration,
4 Article VII is superseded by the Uniform Trust Code. Its provisions on jurisdiction are incorporated
5 into Article 2 of the Code, and its provision on trustee liability to persons other than beneficiaries
6 are replaced by Section 1010.

7 Uniform Prudent Investor Act (1994) – This Act has been enacted in 35 jurisdictions. This
8 Act, and variant forms enacted in a number of other States, has displaced the older “prudent man”
9 standard, bringing trust law into line with modern investment practice. States that have enacted the
10 Uniform Prudent Investor Act are encouraged to recodify it as part of their enactment of the Uniform
11 Trust Code. A place for this is provided in Article 9.

12 Uniform Trustee Powers Act (1964) – This Act has been enacted in 16 States. The Act
13 contains a list of specific trustee powers and deals with other selected issues, particularly relations
14 of a trustee with persons other than beneficiaries. The Uniform Trustee Powers Act is outdated and
15 is entirely superseded by the Uniform Trust Code, principally at Sections 815, 816, and 1012. States
16 enacting the Uniform Trust Code should repeal their existing trustee powers legislation.

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

23 The following Uniform Acts are not affected by enactment of the Uniform Trust Code and
24 do not need to be amended or repealed:

25 Uniform Common Trust Fund Act – Originally approved in 1938, this Act has been enacted
26 in 34 jurisdictions. The Uniform Trust Code does not address the subject of common trust funds.
27 In recent years, many banks have replaced their common trust funds with mutual funds that may also
28 be available to non-trust customers. The Code addresses investment in mutual funds at Section
29 802(f).

30 Uniform Custodial Trust Act (1987) – This Act has been enacted in 14 jurisdictions. This
31 Act allows standard trust provisions to be automatically incorporated into the terms of a trust simply
32 by referring to the Act. This Act is not displaced by the Uniform Trust Code but complements it.

33 Uniform Management of Institutional Funds Act (1972) – This Act has been enacted in 47
34 jurisdictions. It governs the administration of endowment funds held by charitable, religious, and
35 other eleemosynary institutions. The Uniform Management of Institutional Funds Act establishes
36 a standard of prudence for use of appreciation on assets, provides specific authority for the making

1 of investments, authorizes the delegation of this authority, and specifies a procedure, through either
2 donor consent or court approval, for removing restrictions on the use of donated funds.

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

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

21 Uniform Statutory Rule Against Perpetuities – Originally approved in 1986, this Act has
22 been enacted in 27 jurisdictions. The Act reforms the durational limit on when property interests,
23 including interests created under trusts, must vest or fail. The Uniform Trust Code does not limit
24 the duration of trusts or alter the time when interests must otherwise vest, but leaves this issue to
25 other state law. The Code may be enacted without change regardless of the status of the perpetuities
26 law in the enacting jurisdiction.

27 Uniform Supervision of Trustees for Charitable Purposes Act (1954) – This Act, which has
28 been enacted in four States, is limited to mechanisms for monitoring the actions of charitable
29 trustees. Unlike the Uniform Trust Code, the Supervision of Trustees for Charitable Purposes Act
30 does not address the substantive law of charitable trusts.

31 Uniform Testamentary Additions to Trusts Act – This Act is available in two versions: the
32 1960 Act, with 24 enactments; and the 1991 Act, with 20 enactments through 1999. As its name
33 suggests, this Act validates pourover devises to trusts. Because it validates provisions in wills, it is
34 incorporated into the Uniform Probate Code, not into the Uniform Trust Code.

35 **Role of Restatement of Trusts:** The Restatement (Second) of Trusts was approved by the
36 American Law Institute in 1957. Work on the Restatement Third began in the late 1980s. The
37 portion of Restatement Third relating to the prudent investor rule and other investment topics was

1 completed and approved in 1990. A tentative draft of the portion of Restatement Third relating to
2 the rules on the creation and validity of trusts was approved in 1996, and the portion relating to the
3 office of trustee, trust purposes, spendthrift provisions and the rights of creditors was approved in
4 1999. The Uniform Trust Code was drafted in close coordination with the writing of the
5 Restatement Third.

6 **Overview of Uniform Trust Code**

7 The Uniform Trust Code consists of 11 articles. The substance of the Code is focused in the
8 first 10 articles; Article 11 is primarily an effective date provision.

9 **Article 1 – General Provisions and Definitions** – In addition to definitions, this article
10 addresses miscellaneous but important topics. The Uniform Trust Code is primarily default law.
11 A settlor, subject to certain limitations, is free to draft trust terms departing from the provisions of
12 this Code. The settlor, if minimum contacts are present, may in addition designate the trust's
13 principal place of administration; the trustee, if certain standards are met, may transfer the principal
14 place of administration to another State or country. To encourage nonjudicial resolution of disputes,
15 the Uniform Trust Code provides more certainty for when such settlements are binding. While the
16 Code does not prescribe the exact rules to be applied to the construction of trusts, it does extend to
17 trusts whatever rules the enacting jurisdiction has on the construction of wills. The Uniform Trust
18 Code, although comprehensive, does not legislate on every issue. Its provisions are supplemented
19 by the common law of trusts and principles of equity.

20 **Article 2 – Judicial Proceedings** – This article addresses selected issues involving judicial
21 proceedings concerning trusts, particularly trusts having contacts with more than one State or
22 country. The courts in the trust's principal place of administration have jurisdiction over both the
23 trustee and the beneficiaries as to any matter relating to the trust. Optional provisions on subject-
24 matter jurisdiction and venue are provided. The minimal coverage of this article was deliberate. The
25 Drafting Committee concluded that most issues related to jurisdiction and procedure are not
26 appropriate to a Trust Code, but are best left to other bodies of law.

27 **Article 3 – Representation** – This article deals with the representation of beneficiaries and
28 other interested persons, both by fiduciaries (personal representatives, guardians and conservators),
29 and through what is known as virtual representation. The representation principles of the article
30 apply to settlement of disputes, whether by a court or nonjudicially. They apply for the giving of
31 required notices. They apply for the giving of consents to certain actions. The article also authorizes
32 a court to appoint a representative if the court concludes that representation of a person might
33 otherwise be inadequate. The court may appoint a representative to represent and approve a
34 settlement on behalf of a minor, incapacitated, or unborn person or person whose identity or location
35 is unknown and not reasonably ascertainable.

1 **Article 4 – Creation, Validity, Modification and Termination of Trust** – This article
2 specifies the requirements for creating, modifying and terminating trusts. Most of the requirements
3 relating to creation of trusts (Sections 401 through 409) track traditional doctrine, including
4 requirements of intent, capacity, property, and valid trust purpose. The Uniform Trust Code
5 articulates a three-part classification system for trusts: noncharitable, charitable, and honorary.
6 Noncharitable trusts, the most common type, require an ascertainable beneficiary and a valid
7 purpose. Charitable trusts, on the other hand, by their very nature are created to benefit the public
8 at large. The so called honorary or purposes trust, although unenforceable at common law, is valid
9 and enforceable under this Code despite the absence of an ascertainable beneficiary. The most
10 common example is a trust for the care of an animal.

11 Sections 410 through 417 provide a series of interrelated rules on when a trust may be
12 terminated or modified other than by its express terms. The overall objective of these sections is to
13 enhance flexibility consistent with the principle that preserving the settlor’s intent is paramount.
14 Termination or modification may be allowed upon beneficiary consent if the court concludes that
15 the trust or a particular provision no longer serves a material purpose or if the settlor concurs; by the
16 court in response to unanticipated circumstances or to remedy ineffective administrative terms; or
17 by the court or trustee if the trust is of insufficient size to justify continued administration under its
18 existing terms. Trusts may be reformed to correct a mistake of law or fact, or modified to achieve
19 the settlor’s tax objectives. Trusts may be combined or divided. Charitable trusts may be modified
20 or terminated under cy pres to better achieve the settlor’s charitable purposes.

21 **Article 5 – Creditor’s Claims; Spendthrift and Discretionary Trusts** – This article
22 addresses the validity of a spendthrift provision and other issues relating to the rights of creditors
23 to reach the trust to collect a debt. To the extent a trust is protected by a spendthrift provision, a
24 beneficiary’s creditor may not reach the beneficiary’s interest until distribution is made by the
25 trustee. To the extent not protected by a spendthrift provision, a creditor can reach the beneficiary’s
26 interest, subject to the court’s power to limit the award. Certain categories of claims are exempt
27 from a spendthrift restriction, including certain governmental claims and claims for child support
28 or alimony. Other issues addressed in this article include creditor claims against discretionary trusts;
29 creditor claims against a settlor, whether the trust is revocable or irrevocable; and the rights of
30 creditors when a trustee fails to make a required distribution within a reasonable time.

31 **Article 6 – Revocable Trusts** – This short article deals with issues of significance not totally
32 settled under current law. The basic policy of this article and of the Uniform Trust Code in general
33 is to treat the revocable trust as the functional equivalent of a will. The article specifies a standard
34 of capacity, provides that a trust is presumed revocable unless its terms provide otherwise, prescribes
35 the procedure for revocation or amendment of a revocable trust, addresses the rights of beneficiaries
36 during the settlor’s lifetime, and provides a statute of limitations on contests.

37 **Article 7 – Office of Trustee** – This article contains a series of default rules dealing with the
38 office of trustee, all of which may be modified in the terms of the trust. Rules are provided on
39 acceptance of office and bonding. The role of the cotrustee is addressed, including the extent that
40

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1 one cotrustee may delegate to another, and the extent to which one cotrustee can be held liable for
2 actions of another trustee. Also covered are changes in trusteeship, including the circumstances
3 when a vacancy must be filled, the procedure for resignation, the grounds for removal, and the
4 process for appointing a successor trustee. Finally, standards are provided for trustee compensation
5 and reimbursement for expenses.

6 **Article 8 – Duties and Powers of Trustee** – This article states the fundamental duties of a
7 trustee and enumerates the trustee’s powers. The duties listed are not new, although some of the
8 particulars have changed over the years. This article was drafted where possible to conform to the
9 Uniform Prudent Investor Act. The Uniform Prudent Investor Act prescribes a trustee’s
10 responsibilities with respect to the management and investment of trust property. This article also
11 addresses a trustee’s duties regarding distributions to beneficiaries.

12 **Article 9 – Uniform Prudent Investor Act** – This article provides a place for a jurisdiction
13 to enact, reenact or codify its version of the Uniform Prudent Investor Act. States adopting the
14 Uniform Trust Code which have previously enacted the Uniform Prudent Investor Act are
15 encouraged to reenact their version of the Prudent Investor Act in this article.

16 **Article 10 – Liability of Trustees and Rights of Persons Dealing With**
17 **Trustees** – Sections 1001 through 1009 list the remedies for breach of trust, describe how money
18 damages are to be determined, provide a statute of limitations on claims against a trustee, and specify
19 other defenses, including consent of a beneficiary and recognition of and limitations on the effect
20 of an exculpatory clause. Sections 1010 through 1013 address trustee relations with persons other
21 than beneficiaries. The objective is to encourage third parties to engage in commercial transactions
22 with trustees to the same extent as if the property were not held in trust.

23 **Article 11 – Miscellaneous Provisions** – The Uniform Trust Code is intended to have the
24 widest possible application, consistent with constitutional limitations. The Code applies not only
25 to trusts created on or after the effective date, but also to trusts in existence on the date of enactment.

26 The Drafting Committee was assisted by numerous officially designated advisors and
27 observers, representing an array of organizations. In addition to the American Bar Association
28 advisors listed above, advisors and observers who attended a majority of the Drafting Committee
29 meetings include Edward C. Halbach, Jr., Reporter, Restatement (Third) of Trust Law; Kent H.
30 McMahan, American College of Trust and Estate Counsel; Alex Misheff, American Bankers
31 Association; and Lawrence W. Waggoner, Reporter, Restatement (Third) of Property: Wills and
32 Other Donative Transfers. Significant input was also received from the Joint Editorial Board for
33 Uniform Trusts and Estates Acts and the Committee on State Laws of the American College of Trust
34 and Estate Counsel.

1 UNIFORM TRUST CODE

2 ARTICLE 1

3 GENERAL PROVISIONS AND DEFINITIONS

4 General Comment

5 The Uniform Trust Code is primarily a default statute. Most of the Code's provisions can
6 be overridden in the terms of the trust. The provisions not subject to override are scheduled in
7 Section 105(b). These include the duty of a trustee to act in good faith and with regard to the
8 purposes of the trust, public policy exceptions to enforcement of spendthrift provisions, the
9 requirements for creating a trust, and the authority of the court to modify or terminate a trust on
10 specified grounds.

11 The remainder of the article specifies the scope of the Code (Section 102), provides
12 definitions (Section 103), and collects provisions of importance not amenable to codification
13 elsewhere in the Uniform Trust Code. Sections 106 and 107 focus on the sources of law that will
14 govern a trust. Section 106 clarifies that despite the Code's comprehensive scope, not all aspects
15 of the law of trusts have been codified. The Uniform Trust Code is supplemented by the common
16 law of trusts and principles of equity. Section 107 addresses selection of the jurisdiction or
17 jurisdictions whose laws will govern the trust. A settlor, absent overriding public policy concerns,
18 is free to select the law that will determine the meaning and effect of a trust's terms.

19 Changing a trust's principal place of administration is sometimes desirable, particularly to
20 lower a trust's state income tax. Such transfers are authorized in Section 108. The trustee, following
21 notice to the "qualified beneficiaries," defined in Section 103(12), may without approval of court
22 transfer the principal place of administration to another State or country if a qualified beneficiary
23 does not object and if the transfer is consistent with the trustee's duty to administer the trust at a
24 place appropriate to its purposes, its administration, and the interests of the beneficiaries. The
25 settlor, if minimum contacts are present, may also designate the trust's principal place of
26 administration.

27 Sections 104 and 109 through 111 address procedural issues. Section 104 specifies when
28 persons, particularly persons who work in organizations, are deemed to have acquired knowledge
29 of a fact. Section 109 specifies the methods for giving notice and excludes from the Code's notice
30 requirements persons whose identity or location is unknown and not reasonably ascertainable.
31 Section 110 allows beneficiaries with remote interests to request notice of actions, such as notice
32 of a trustee resignation, which are normally given only to the qualified beneficiaries.

33 Section 111 ratifies the use of nonjudicial settlement agreements. While the judicial
34 settlement procedures may be used in all court proceedings relating to the trust, the nonjudicial

1 settlement procedures will not always be available. The terms of the trust may direct that the
2 procedures not be used, or settlors may negate or modify them by specifying their own methods for
3 obtaining consents. Also, a nonjudicial settlement may include only terms and conditions a court
4 could properly approve.

5 The Uniform Trust Code does not prescribe the rules of construction to be applied to trusts
6 created under the Code. The Code instead recognizes that enacting jurisdictions are likely to take
7 a diversity of approaches, just as they have with respect to the rules of construction applicable to
8 wills. Section 112 accommodates this variation by providing that the State's specific rules on
9 construction of wills, whatever they may be, also apply to the construction of trusts.

10 **SECTION 101. SHORT TITLE.** This [Act] may be cited as the Kansas Uniform Trust
11 Code.

12 **Kansas Comment**

13 This section is new.

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

17 **Kansas Comment**

18 This section is new.

19 **UTC Comment**

20 The Uniform Trust Code, while comprehensive, applies only to express trusts. Excluded
21 from the Code's coverage are resulting and constructive trusts, which are not express trusts but
22 remedial devices imposed by law. For the requirements for creating an express trust and the methods
23 by which express trusts are created, see Sections 401-402. The Code does not attempt to distinguish
24 express trusts from other legal relationships with respect to property, such as agencies and contracts
25 for the benefit of third parties. For the distinctions, see Restatement (Third) of Trusts §§ 2, 5
26 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts §§ 2, 5-16C (1959).

27 The Uniform Trust Code, while comprehensive, applies only to express trusts. Excluded
28 from the Code's coverage are resulting and constructive trusts, which are not express trusts but
29 remedial devices imposed by law. For the requirements for creating an express trust and the methods
30 by which express trusts are created, see Sections 401-402. The Code does not attempt to distinguish

1 express trusts from other legal relationships with respect to property, such as agencies and contracts
2 for the benefit of third parties. For the distinctions, see Restatement (Third) of Trusts §§ 2, 5
3 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts §§ 2, 5-16C (1959).

4 **SECTION 103. DEFINITIONS.** In this [Code]:

5 (1) “Action,” with respect to an act of a trustee, includes a failure to act.

6 (2) “Beneficiary” means a person that:

7 (A) has a present or future beneficial interest in a trust, vested or contingent; or

8 (B) in a capacity other than that of trustee, holds a power of appointment over trust
9 property.

10 (3) “Charitable trust” means a trust, or portion of a trust, created for a charitable purpose
11 described in Section 405(a).

12 (4) “[Conservator]” means a person appointed by the court pursuant to K.S.A. 59-3001 et
13 seq. to administer the estate of a minor or adult individual.

14 (5) “Environmental law” means a federal, state, or local law, rule, regulation, or ordinance
15 relating to protection of the environment.

16 (6) “[Guardian]” means a person appointed by the court ~~[, a parent, or a spouse]~~ pursuant
17 to K.S.A. 59-3001 et seq. to make decisions regarding the support, care, education, health, and
18 welfare of a minor or adult individual. The term does not include a guardian ad litem.

19 (7) “Interests of the beneficiaries” means the beneficial interests provided in the terms of the
20 trust.

21 (8) “Jurisdiction,” with respect to a geographic area, includes a State or country.

22 (9) “Person” means an individual, corporation, business trust, estate, trust, partnership,

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1 limited liability company, association, joint venture, government; governmental subdivision, agency,
2 or instrumentality; public corporation, or any other legal or commercial entity.

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

6 (11) "Property" means anything that may be the subject of ownership, whether real or
7 personal, legal or equitable, or any interest therein.

8 (12) "Qualified beneficiary" means a beneficiary who, on the date the beneficiary's
9 qualification is determined:

10 (A) is a distributee or permissible distributee of trust income or principal;

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

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

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

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

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

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

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

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

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

11 **Kansas Comment**

12 This section is new.

13 In subsections (4) and (6), the Kansas drafting committee changed the UTC by inserting the
14 phrase, "pursuant to K.S.A. 59-3001 *et seq.*"

15 **UTC Comment**

16 A definition of "action" (paragraph (1)) is included for drafting convenience, to avoid having
17 to clarify in the numerous places in the Uniform Trust Code where reference is made to an "action"
18 by the trustee that the term includes a failure to act.

19 "Beneficiary" (paragraph (2)) refers only to a beneficiary of a trust as defined in the Uniform
20 Trust Code. In addition to living and ascertained individuals, beneficiaries may be unborn or
21 unascertained. Pursuant to Section 402(b), a trust is valid only if a beneficiary can be ascertained
22 now or in the future. The term "beneficiary" includes not only beneficiaries who received their
23 interests under the terms of the trust but also beneficiaries who received their interests by other
24 means, including by assignment, exercise of a power of appointment, resulting trust upon the failure
25 of an interest, gap in a disposition, operation of an antilapse statute upon the predecease of a named
26 beneficiary, or upon termination of the trust. The fact that a person incidentally benefits from the
27 trust does not mean that the person is a beneficiary. For example, neither a trustee nor persons hired
28 by the trustee become beneficiaries merely because they receive compensation from the trust. *See*

1 Restatement (Third) of Trusts § 48 cmt. c (Tentative Draft No. 2, approved 1999); Restatement
2 (Second) of Trusts § 126 cmt. c (1959).

3 While the holder of a power of appointment is not considered a trust beneficiary under the
4 common law of trusts, holders of powers are classified as beneficiaries under the Uniform Trust
5 Code. Holders of powers are included on the assumption that their interests are significant enough
6 that they should be afforded the rights of beneficiaries. A power of appointment as used in state trust
7 law and this Code is as defined in state property law and not federal tax law although there is
8 considerable overlap between the two definitions.

9 A power of appointment is authority to designate the recipients of beneficial interests in
10 property. *See* Restatement (Second) of Property: Donative Transfers §11.1 (1986). A power is
11 either general or nongeneral and either presently exercisable or not presently exercisable. A general
12 power of appointment is a power exercisable in favor of the holder of the power, the power holder's
13 creditors, the power holder's estate, or the creditors of the power holder's estate. *See* Restatement
14 (Second) of Property: Donative Transfers §11.4 (1986). All other powers are nongeneral. A power
15 is presently exercisable if the power holder can currently create an interest, present or future, in an
16 object of the power. A power of appointment is not presently exercisable if exercisable only by the
17 power holder's will or if its exercise is not effective for a specified period of time or until occurrence
18 of some event. *See* Restatement (Second) of Property: Donative Transfers §11.5 (1986). Powers
19 of appointment may be held in either a fiduciary or nonfiduciary capacity. The definition of
20 "beneficiary" excludes powers held by a trustee but not powers held by others in a fiduciary
capacity.

22 While all categories of powers of appointment are included within the definition of
23 "beneficiary," the Uniform Trust Code elsewhere makes distinctions among types of powers. A
24 "power of withdrawal" (paragraph (10)) is defined as a presently exercisable general power of
25 appointment other than a power exercisable only upon consent of the trustee or a person holding an
26 adverse interest. Under Section 302, the holder of a testamentary general power of appointment may
27 represent and bind persons whose interests are subject to the power.

28 The definition of "beneficiary" includes only those who hold beneficial interests in the trust.
29 Because a charitable trust is not created to benefit ascertainable beneficiaries but to benefit the
30 community at large (*see* Section 405(a)), persons receiving distributions from a charitable trust are
31 not beneficiaries as that term is defined in this Code. However, pursuant to Section 110(b),
32 charitable organizations expressly designated to receive distributions under the terms of a charitable
33 trust, even though not beneficiaries as defined, are granted the rights of qualified beneficiaries under
34 the Code.

35 The Uniform Trust Code leaves certain issues concerning beneficiaries to the common law.
36 Any person with capacity to take and hold legal title to intended trust property has capacity to be a
37 beneficiary. *See* Restatement (Third) of Trusts § 43 (Tentative Draft No. 2, approved 1999);
38 Restatement (Second) of Trusts §§ 116-119 (1959). Except as limited by public policy, the extent

1 of a beneficiary's interest is determined solely by the settlor's intent. *See* Restatement (Third) of
2 Trusts § 49 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts §§ 127-128
3 (1959). While most beneficial interests terminate upon a beneficiary's death, the interest of a
4 beneficiary may devolve by will or intestate succession the same as a corresponding legal interest.
5 *See* Restatement (Third) of Trusts § 55(1) (Tentative Draft No. 2, approved 1999); Restatement
6 (Second) of Trusts §§ 140, 142 (1959).

7 Under the Uniform Trust Code, when a trust has both charitable and noncharitable
8 beneficiaries only the charitable portion qualifies as a "charitable trust" (paragraph (3)). The great
9 majority of the Code's provisions apply to both charitable and noncharitable trusts without
10 distinction. The distinctions between the two types of trusts are found in the requirements relating
11 to trust creation and modification. Pursuant to Sections 405 and 413, a charitable trust must have
12 a charitable purpose and charitable trusts may be modified or terminated under the doctrine of cy
13 pres. Also, Section 411 allows a noncharitable trust to in certain instances be terminated by its
14 beneficiaries while noncharitable trusts do not have beneficiaries in the usual sense. To the extent
15 of these distinctions, a split-interest trust is subject to two sets of provisions, one applicable to the
16 charitable interests, the other the noncharitable.

17 For discussion of the definition of "conservator" (paragraph (4)), see the definition of
18 "guardian" (paragraph (6)).

19 To encourage trustees to accept and administer trusts containing real property, the Uniform
20 Trust Code contains several provisions designed to limit exposure to possible liability for violation
21 of "environmental law" (paragraph (5)). Section 701(c)(2) authorizes a nominated trustee to
22 investigate trust property to determine potential liability for violation of environmental law or other
23 law without accepting the trusteeship. Section 816(13) grants a trustee comprehensive and detailed
24 powers to deal with property involving environmental risks. Section 1010(b) immunizes a trustee
25 from personal liability for violation of environmental law arising from the ownership and control
26 of trust property.

27 Under the Uniform Trust Code, a "guardian" (paragraph (6)) makes decisions with respect
28 to personal care; a "conservator" (paragraph (4)) manages property. The terminology used is that
29 employed in Article V of the Uniform Probate Code, and in its free-standing Uniform Guardianship
30 and Protective Proceedings Act. Enacting jurisdictions not using these terms in the defined sense
31 should substitute their own terminology. For this reason, both terms have been placed in brackets.
32 The definition of "guardian" accommodates those jurisdictions which allow appointment of a
33 guardian by a parent or spouse in addition to appointment by a court. Enacting jurisdictions which
34 allow appointment of a guardian solely by a court should delete the bracketed language "a parent,
35 or a spouse."

36 The phrase "interests of the beneficiaries" (paragraph (7)) is used with some frequency in the
37 Uniform Trust Code. The definition clarifies that the interests are as provided in the terms of the
38 trust and not as determined by the beneficiaries. Absent authority to do so in the terms of the trust,

1 Section 108 prohibits a trustee from changing a trust's principal place of administration if the
2 transfer would violate the trustee's duty to administer the trust at a place appropriate to the interests
3 of the beneficiaries. Section 706(b) conditions certain of the grounds for removing a trustee on the
4 court's finding that removal of the trustee will best serve the interests of the beneficiaries. Section
5 801 requires the trustee to administer the trust in the interests of the beneficiaries, and Section 802
6 makes clear that a trustee may not place its own interests above those of the beneficiaries. Section
7 808(d) requires the holder of a power to direct who is subject to a fiduciary obligation to act with
8 regard to the interests of the beneficiaries. Section 1002(b) may impose greater liability on a
9 cotrustee who commits a breach of trust with reckless indifference to the interests of the
10 beneficiaries. Section 1008 invalidates an exculpatory term to the extent it relieves a trustee of
11 liability for breach of trust committed with reckless indifference to the interests of the beneficiaries.

12 "Jurisdiction" (paragraph (8)), when used with reference to a geographic area, includes a
13 State or country but is not necessarily so limited. Its precise scope will depend on the context in
14 which it is used. "Jurisdiction" is used in Sections 107 and 403 to refer to the place whose law will
15 govern the trust. The term is used in Section 108 to refer to the trust's principal place of
16 administration. The term is used in Section 816 to refer to the place where the trustee may appoint
17 an ancillary trustee and to the place in whose courts the trustee can bring and defend legal
18 proceedings.

19 The definition of "property" (paragraph (11)) is intended to be as expansive as possible and
20 to encompass anything that may be the subject of ownership. Included are choses in action, claims,
21 and interests created by beneficiary designations under policies of insurance, financial instruments,
22 and deferred compensation and other retirement arrangements, whether revocable or irrevocable.
23 Any such property interest is sufficient to support creation of a trust. *See* Section 401 Comment.

24 Due to the difficulty of identifying beneficiaries whose interests are remote and contingent,
25 and because such beneficiaries are not likely to have much interest in the day-to-day affairs of the
26 trust, the Uniform Trust Code uses the concept of "qualified beneficiary" (paragraph (12)) to limit
27 the class of beneficiaries to whom certain notices must be given or consents received. The definition
28 of qualified beneficiaries is used in Section 705 to define the class to whom notice must be given
29 of a trustee resignation. The term is used in Section 813 to define the class to be kept informed of
30 the trust's administration. Section 417 requires that notice be given to the qualified beneficiaries
31 before a trust may be combined or divided. Actions which may be accomplished by the consent of
32 the qualified beneficiaries include the appointment of a successor trustee as provided in Section 704.
33 Prior to transferring a trust's principal place of administration, Section 108(d) requires that the
34 trustee give at least 60 days notice to the qualified beneficiaries.

35 The qualified beneficiaries consist of the beneficiaries currently eligible to receive a
36 distribution from the trust together with those who might be termed the first-line remaindermen.
37 These are the beneficiaries who would become eligible to receive distributions were the event
38 triggering the termination of a beneficiary's interest or of the trust itself to occur on the date in
39 question. Such a terminating event will typically be the death or deaths of the beneficiaries currently

1 eligible to receive the income. Should a qualified beneficiary be a minor, incapacitated, or unknown,
2 or a beneficiary whose identity or location is not reasonably ascertainable, the representation and
3 virtual representation principles of Article 3 may be employed, including the possible appointment
4 by the court of a representative to represent the beneficiary's interest.

5 The qualified beneficiaries who take upon termination of the beneficiary's interest or of the
6 trust can include takers in default of the exercise of a power of appointment. The term can also
7 include the persons entitled to receive the trust property pursuant to the exercise of a power of
8 appointment. Because the exercise of a testamentary power of appointment is not effective until the
9 testator's death and probate of the will, the qualified beneficiaries do not include appointees under
10 the will of a living person.

11 Charitable trusts and trusts for a valid noncharitable purpose do not have beneficiaries in the
12 usual sense. However, certain persons, while not technically beneficiaries, do have an interest in
13 seeing that the trust is enforced. Section 110 expands the definition of qualified beneficiaries to
14 encompass this wider group. It grants the rights of qualified beneficiaries to the attorney general of
15 the State and charitable organizations expressly entitled to receive benefits under the terms of a
16 charitable trust. It also grants the rights of qualified beneficiaries to persons appointed by the terms
17 of the trust or by the court to enforce a trust created for an animal or other noncharitable purpose.

18 The definition of "revocable" (paragraph (13)) clarifies that revocable trusts include only
19 trusts whose revocation is substantially within the settlor's control. The consequences of classifying
20 a trust as revocable are many. The Uniform Trust Code contains provisions relating to liability of
21 a revocable trust for payment of the settlor's debts (Section 505), the standard of capacity for
22 creating a revocable trust (Section 601), the procedure for revocation (Section 602), the subjecting
23 of the beneficiaries' rights to the settlor's control (Section 603), the period for contesting a revocable
24 trust (Section 604), the power of the settlor of a revocable trust to direct the actions of a trustee
25 (Section 808(a)), notice to the qualified beneficiaries upon the settlor's death (Section 813(b)), and
26 the liability of a trustee of a revocable trust for the obligations of a partnership of which the trustee
27 is a general partner (Section 1011(d)).

28 Because under Section 603(d) the holder of a power of withdrawal has the rights of a settlor
29 of a revocable trust, the definition of "power of withdrawal" (paragraph (10)), and "revocable"
30 (paragraph (13)) are similar. Both exclude individuals who can exercise their power only with the
31 consent of the trustee or person having an adverse interest.

32 The definition of "settlor" (paragraph (14)) refers to the person who creates, or contributes
33 property to, a trust, whether by will, self-declaration, transfer of property to another person as trustee,
34 or exercise of a power of appointment. For the requirements for creating a trust, see Section 401.
35 Determining the identity of the "settlor" is usually not an issue. The same person will both sign the
36 trust instrument and fund the trust. Ascertaining the identity of the settlor becomes more difficult
37 when more than one person signs the trust instrument or funds the trust. The fact that a person is
38 designated as the "settlor" by the terms of the trust is not necessarily determinative. For example,

1 the person who executes the trust instrument may be acting as the agent for the person who will be
2 funding the trust. In that case, the person funding the trust, and not the person signing the trust
3 instrument, will be the settlor. Should more than one person contribute to a trust, all of the
4 contributors will ordinarily be treated as settlors in proportion to their respective contributions,
5 regardless of which one signed the trust instrument. *See* Section 602(b).

6 In the case of a revocable trust employed as a will substitute, gifts to the trust's creator are
7 sometimes made by placing the gifted property directly into the trust. To recognize that such a donor
8 is not intended to be treated as a settlor, the definition of "settlor" excludes a contributor to a trust
9 that is revocable by another person or over which another person has a power of withdrawal. Thus,
10 a parent who contributes to a child's revocable trust would not be treated as one of the trust's
11 settlors. The definition of settlor would treat the child as the sole settlor of the trust to the extent of
12 the child's proportionate contribution. Pursuant to Section 603(d), the child's power of withdrawal
13 over the trust would also result in the child being treated as the settlor with respect to the portion of
14 the trust attributable to the parent's contribution.

15 Ascertaining the identity of the settlor is important for a variety of reasons. It is important
16 for determining rights in revocable trusts. *See* Sections 505(a)(1), (3) (creditor claims against settlor
17 of revocable trust), 602 (revocation or modification of revocable trust), and 604 (limitation on
18 contest of revocable trust). It is also important for determining rights of creditors in irrevocable
19 trusts. *See* Section 505(a)(2) (creditors of settlor can reach maximum amount trustee can distribute
20 to settlor). While the settlor of an irrevocable trust traditionally has no continuing rights over the
21 trust except for the right under Section 411 to terminate the trust with the beneficiaries' consent, the
22 Uniform Trust Code also authorizes the settlor of an irrevocable trust to petition for removal of the
23 trustee and to enforce or modify a charitable trust. *See* Sections 405(c) (standing to enforce
24 charitable trust), 413 (doctrine of cy pres), and 706 (removal of trustee).

25 "Spendthrift provision" (paragraph (15)) means a term of a trust which restrains the transfer
26 of a beneficiary's interest, whether by a voluntary act of the beneficiary or by an action of a
27 beneficiary's creditor or assignee, which at least as far as the beneficiary is concerned, would be
28 involuntary. A spendthrift provision is valid under the Uniform Trust Code only if it restrains both
29 voluntary and involuntary transfer. For a discussion of this requirement and the effect of a
30 spendthrift provision in general, see Section 502. The insertion of a spendthrift provision in the
31 terms of the trust may also constitute a material purpose sufficient to prevent termination of the trust
32 by agreement of the beneficiaries under Section 411, although the Code does not presume this result.

33 "Terms of a trust" (paragraph (17)) is a defined term used frequently in the Uniform Trust
34 Code. While the wording of a written trust instrument is almost always the most important
35 determinant of a trust's terms, the definition is not so limited. Oral statements, the situation of the
36 beneficiaries, the purposes of the trust, the circumstances under which the trust is to be administered,
37 and, to the extent the settlor was otherwise silent, rules of construction, all may have a bearing on
38 determining a trust's meaning. *See* Restatement (Third) of Trusts § 4 cmt. a (Tentative Draft No.
39 1, approved 1996); Restatement (Second) of Trusts § 4 cmt. a (1959). If a trust established by order

1 of court is to be administered as an express trust, the terms of the trust are determined from the court
2 order as interpreted in light of the general rules governing interpretation of judgments. *See*
3 Restatement (Third) of Trusts § 4 cmt. f (Tentative Draft No. 1, approved 1996).

4 A manifestation of a settlor's intention does not constitute evidence of a trust's terms if it
5 would be inadmissible in a judicial proceeding in which the trust's terms are in question. *See*
6 Restatement (Third) of Trusts § 4 cmt. b (Tentative Draft No. 1, approved 1996); Restatement
7 (Second) of Trusts § 4 cmt. b (1959). *See also* Restatement (Third) Property: Donative Transfers
8 §§ 10.2, 11.1-11.3 (Tentative Draft No. 1, approved 1995). For example, in many States a trust of
9 real property is unenforceable unless evidenced by a writing, although Section 407 of this Code does
10 not so require, leaving this issue to be covered by separate statute if the enacting jurisdiction so
11 elects. Evidence otherwise relevant to determining the terms of a trust may also be excluded under
12 other principles of law, such as the parol evidence rule.

13 "Trust instrument" (paragraph (18)) is a subset of the definition of "terms of a trust"
14 (paragraph (17)), referring to only such terms as are found in an instrument executed by the settlor.
15 Section 403 provides that a trust is validly created if created in compliance with the law of the place
16 where the trust instrument was executed. Pursuant to Section 604(a)(2), the contest period for a
17 revocable trust can be shortened by providing the potential contestant with a copy of the trust
18 instrument plus other information. Section 813(b)(1) requires that the trustee upon request furnish
19 a beneficiary with a copy of the trust instrument. To allow a trustee to administer a trust with some
20 dispatch without concern about liability if the terms of a trust instrument are contradicted by
21 evidence outside of the instrument, Section 1006 protects a trustee from liability to the extent a
22 breach of trust resulted from reasonable reliance on those terms. Section 1013 allows a trustee to
23 substitute a certification of trust in lieu of providing a third person with a copy of the trust
24 instrument. Section 1106(a)(4) provides that unless there is a clear indication of a contrary intent,
25 rules of construction and presumptions provided in the Uniform Trust Code apply to trust
26 instruments executed before the effective date of the Code.

27 The definition of "trustee" (paragraph (19)) includes not only the original trustee but also an
28 additional and successor trustee as well as a cotrustee. Because the definition of trustee includes
29 trustees of all types, any trustee, whether original or succeeding, single or cotrustee, has the powers
30 of a trustee and is subject to the duties imposed on trustees under the Uniform Trust Code. Any
31 natural person, including a settlor or beneficiary, has capacity to act as trustee if the person has
32 capacity to hold title to property free of trust. *See* Restatement (Third) of Trusts § 32 (Tentative
33 Draft No. 2, approved 1999); Restatement (Second) of Trusts § 89 (1959). State banking statutes
34 normally impose additional requirements before a corporation can act as trustee.

35 **SECTION 104. KNOWLEDGE.**

36 (a) Subject to subsection (b), a person has knowledge of a fact if the person:

37 (1) has actual knowledge of it;

1 (2) has received a notice or notification of it; or

2 (3) from all the facts and circumstances known to the person at the time in question,

3 has reason to know it.

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

13 **Kansas Comment**

14 This section is new. Similar provisions are contained in the Kansas Uniform Partnership Act
15 and the Kansas Uniform Commercial Code. See K.S.A. 56a-102; K.S.A. 84-1-201.

16 **UTC Comment**

17 This section specifies when a person is deemed to know a fact. Subsection (a) states the
18 general rule. Subsection (b) provides a special rule dealing with notice to organizations. Pursuant
19 to subsection (a), a fact is known to a person if the person had actual knowledge of the fact, received
20 notification of it, or had reason to know of the fact's existence based on all of the circumstances and
21 other facts known to the person at the time. Under subsection (b), notice to an organization is not
22 necessarily achieved by giving notice to a branch office. Nor does the organization necessarily
23 acquire knowledge at the moment the notice arrives in the organization's mailroom. Rather, the
24 organization has notice or knowledge of a fact only when the information is received by an employee
25 having responsibility to act for the trust, or would have been brought to the employee's attention had
26 the organization exercised reasonable diligence.

1 "Know" is used in its defined sense in Sections 109 (methods and waiver of notice), 305
2 (appointment of representative), 604(b) (limitation on contest of revocable trust), 812 (collecting
3 trust property), 1009 (nonliability of trustee upon beneficiary's consent, release, or ratification), and
4 1012 (protection of person dealing with trustee). But as to certain actions, a person is charged with
5 knowledge of facts the person would have discovered upon reasonable inquiry. See Section 1005
6 (limitation of action against trustee following report of trustee).

7 This section is based on Uniform Commercial Code § 1-202 (2000 Annual Meeting Draft).
8

9 **SECTION 105. DEFAULT AND MANDATORY RULES.**

10 (a) Except as otherwise provided in the terms of the trust, this [Code] governs the duties and
11 powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.

12 (b) The terms of a trust prevail over any provision of this [Code] except:

13 (1) the requirements for creating a trust;

14 (2) the duty of a trustee to act in good faith and in accordance with the purposes of
15 the trust;

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

18 (4) the power of the court to modify or terminate a trust under Sections 410 through
19 416;

20 (5) the effect of a spendthrift provision and the rights of certain creditors and
21 assignees to reach a trust as provided in [Article] 5;

22 (6) the power of the court under Section 702 to require, dispense with, or modify or
23 terminate a bond;

24 (7) the power of the court under Section 708(b) to adjust a trustee's compensation
25 specified in the terms of the trust which is unreasonably low or high;

1 (8) ~~with respect to the qualified beneficiaries of an irrevocable trust who have attained~~
2 ~~25 years of age~~, the duty under Section 813(b)(2)-(3) to notify ~~them~~ the qualified beneficiaries of an
3 irrevocable trust of the existence of the trust, ~~of the identity of the trustee~~, and of their right to
4 request trustee's reports and other information reasonably related to the administration of the trust
5 and to furnish upon request of a qualified beneficiary a copy of the trust instrument;

6 (9) the duty under section 813 (a) to respond to the request of a beneficiary of an
7 irrevocable trust for trustee's reports and other information reasonably related to the administration
8 of a trust;

9 (10) the effect of an exculpatory term under Section 1008;

10 (11) the rights under Sections 1010 through 1013 of a person other than a trustee or
11 beneficiary;

12 (12) periods of limitation for commencing a judicial proceeding; [and]

13 (13) the power of the court to take such action and exercise such jurisdiction as may
14 be necessary in the interests of justice [; and

15 (14) the subject-matter jurisdiction of the court and venue for commencing a
16 proceeding as provided in Sections 203 and 204].

17 (c) Notwithstanding any provisions of the Kansas Uniform Trust Code to the contrary, any
18 trust created by will and admitted to probate shall be subject to the requirements of K.S.A. Chapter
19 59.

20 Kansas Comment

21 This section is new.

22 In subsection (b)(8), the Kansas drafting committee changed the UTC as follows: "(8) with

1 respect to the qualified beneficiaries of an irrevocable trust who have attained 25 years of age, the
2 duty ~~under Section 813(b)(2)-(3) to notify them~~ the qualified beneficiaries of an irrevocable trust of
3 the existence of the trust, of the identity of the trustee, and of their right to request trustee's reports
4 and other information reasonably related to the administration of the trust and to furnish upon
5 request of a qualified beneficiary a copy of the trust instrument."

6 Subsection (c) was prepared by the Kansas drafting committee to clarify that testamentary
7 trusts are subject to the requirements of K.S.A. Chapter 59.

8 UTC Comment

9 Subsection (a) emphasizes that the Uniform Trust Code is primarily a default statute. While
10 this Code provides numerous procedural rules on which a settlor may wish to rely, the settlor is
11 generally free to override these rules and to prescribe the conditions under which the trust is to be
12 administered. With only limited exceptions, the duties and powers of a trustee, relations among
13 trustees, and the rights and interests of a beneficiary are as specified in the terms of the trust.

14 Subsection (b) lists the items not subject to override in the terms of the trust. Because
15 subsection (b) refers specifically to other sections of the Code, enacting jurisdictions modifying these
16 other sections may also need to modify subsection (b).

17 Subsection (b)(1) confirms that the requirements for a trust's creation, such as the necessary
18 level of capacity and the requirement that a trust have a legal purpose, are controlled by statute and
19 common law, not by the settlor. For the requirements for creating a trust, see Sections 401-409.
20 Subsection (b)(12) makes clear that the settlor may not reduce any otherwise applicable period of
21 limitations for commencing a judicial proceeding. *See* Sections 604 (period of limitations for
22 contesting validity of revocable trust) and 1005 (period of limitation on action for breach of trust).
23 Similarly, a settlor may not so negate the responsibilities of a trustee that the trustee would no longer
24 be acting in a fiduciary capacity. Subsection (b)(2) provides that the terms may not eliminate a
25 trustee's duty to act in good faith and in accordance with the purposes of the trust. Subsection (b)(3)
26 provides that the terms may not eliminate the requirement that a trust and its terms must be for the
27 benefit of the beneficiaries. Subsection (b)(2)-(3) are echoed in Sections 404 (trust and its terms
28 must be for benefit of beneficiaries), 801 (trustee must administer trust in good faith, in accordance
29 with its terms and purposes and the interests of the beneficiaries), 814 (trustee must exercise
30 discretionary power in good faith and in accordance with its terms and purposes and the interests of
31 the beneficiaries), and 1008 (exculpatory term unenforceable to extent it relieves trustee of liability
32 for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust
33 and the interests of the beneficiaries).

34 The terms of a trust may not deny a court authority to take such action as necessary in the
35 interests of justice, including requiring that a trustee furnish bond. Subsection (b)(6), (13).
36 Additionally, should the jurisdiction adopting this Code enact the optional provisions on subject-
37 matter jurisdiction and venue, subsection (b)(14) similarly provides that such provisions cannot be

1 altered in the terms of the trust. The power of the court to modify or terminate a trust under Sections
2 410 through 416 is not subject to variation in the terms of the trust. Subsection (b)(4). However,
3 all of these Code sections involve situations which the settlor could have addressed had the settlor
4 had sufficient foresight. These include situations where the purpose of the trust has been achieved,
5 a mistake was made in the trust's creation, or circumstances have arisen that were not anticipated
6 by the settlor.

7 Section 813 imposes a general obligation to keep the beneficiaries informed as well as
8 several specific notice requirements. Subsections (b)(8) and (b)(9) specify limits on the settlor's
9 ability to waive these information requirements. With respect to beneficiaries age 25 or older, a
10 settlor may dispense with all of the requirements of Section 813 except for the duties to inform the
11 beneficiaries of the existence of the trust, to provide a beneficiary upon request with such reports as
12 the trustee may have prepared, and to respond to a beneficiary's request for other information
13 reasonably related to the trust's administration. Among the specific requirements that a settlor may
14 waive include the duty to provide a beneficiary upon request with a copy of the trust instrument
15 (Section 813(b)(1)), and the requirement that the trustee provide annual reports to the qualified
16 beneficiaries (Section 813(c)). The furnishing of a copy of the entire trust instrument and
17 preparation of annual reports may be required in a particular case, however, if such information is
18 requested by a beneficiary and is reasonably related to the trust's administration.

19 Responding to the desire of some settlors that younger beneficiaries not know of the trust's
20 bounty until they have reached an age of maturity and self-sufficiency, subsection (b)(8) allows a
21 settlor to provide that the trustee need not even inform beneficiaries under age 25 of the existence
22 of the trust. However, pursuant to subsection (b)(9), if the younger beneficiary learns of the trust
23 and requests information, the trustee must respond.

24 During the drafting of the Uniform Trust Code, the Drafting Committee discussed and
25 rejected a proposal that the ability of the settlor to waive required notice be based on the nature of
26 the beneficiaries' interest and not on the beneficiaries' age. Advocates of this alternative approach
27 concluded that a settlor should be able to waive required notices to the remainder beneficiaries,
28 regardless of their age. Enacting jurisdictions preferring this alternative should substitute the
29 language "adult and current or permissible distributees of trust income or principal" for the reference
30 to "qualified beneficiaries" in subsection (b)(8). They should also delete the reference to
31 beneficiaries "who have attained the age of 25 years."

32 Waiver by a settlor of the trustee's duty to keep the beneficiaries informed of the trust's
33 administration does not otherwise affect the trustee's duties. The trustee remains accountable to the
34 beneficiaries for the trustee's actions.

35 Neither subsection (b)(8) nor (b)(9) apply to revocable trusts. The settlor of a revocable trust
36 may waive all reporting to the beneficiaries, even in the event the settlor loses capacity. If the settlor
37 is silent about the subject, reporting to the beneficiaries will be required upon the settlor's loss of
38 capacity. *See* Section 603.

1 In conformity with traditional doctrine, the Uniform Trust Code limits the ability of a settlor
2 to exculpate a trustee from liability for breach of trust. The limits are specified in Section 1008.
3 Subsection (b)(10) of this section provides a cross-reference. Similarly, subsection (b)(7) provides
4 a cross-reference to Section 708(b), which limits the binding effect of a provision specifying the
5 trustee's compensation.

6 Finally, subsection (b)(11) clarifies that a settlor is not free to limit the rights of third persons,
7 such as purchasers of trust property. Subsection (b)(5) clarifies that a settlor may not restrict the
8 rights of a beneficiary's creditors except to the extent a spendthrift restriction is allowed as provided
9 in Article 5.

10 2001 UTC Comment

11 This section includes the 2001 amendments to the 2000 Uniform Trust Code in subsections
12 (3) and (8). The changes are as follows:

13 "(3) the requirement that a trust and its terms be for the benefit of its
14 beneficiaries, and that the trust have a purpose that is lawful, not
15 contrary to public policy, and possible to achieve;"

16 "(8) with respect to the qualified beneficiaries of an irrevocable trust
17 who have attained 25 years of age, the duty under Section 813(b)(2)-
18 (3) to notify the qualified beneficiaries of an irrevocable trust who
19 have attained 25 years of age them of the existence of the trust, of the
20 identity of the trustee, and of their right to request trustee's reports
21 and other information reasonably related to the administration of the
22 trust;

23 "(9) the duty under Section 813(a) to respond to the request of a
24 beneficiary of an irrevocable trust for trustee's reports and other
25 information reasonably related to the administration of a trust;"

26 Subsection (b)(3) is revised to clarify that a settlor cannot override the requirement that a
27 trust must have a legal and valid purpose. Subsections (b)(8)-(9) are revised to make clear that the
28 requirements that may be waived under these two subsections are those imposed by Section 813.

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

1 **Kansas Comment**

2 This section is new.

3 **UTC Comment**

4 The Uniform Trust Code codifies those portions of the law of express trusts that are most
5 amenable to codification. The Code is supplemented by the common law of trusts, including
6 principles of equity, particularly as articulated in the Restatement of Trusts, Restatement (Third) of
7 Property: Wills and Other Donative Transfers, and the Restatement of Restitution. The common law
8 of trusts is not static but includes the contemporary and evolving rules of decision developed by the
9 courts in exercise of their power to adapt the law to new situations and changing conditions. It also
10 includes the traditional and broad equitable jurisdiction of the court, which the Code in no way
11 restricts.

12 The statutory text of the Uniform Trust Code is also supplemented by these Comments,
13 which, like the Comments to any Uniform Act, may be relied on as a guide for interpretation. *See*
14 *Acierno v. Worthy Bros. Pipeline Corp.*, 656 A.2d 1085, 1090 (Del. 1995) (interpreting Uniform
15 Commercial Code); *Yale University v. Blumenthal*, 621 A.2d 1304, 1307 (Conn. 1993) (interpreting
16 Uniform Management of Institutional Funds Act); 2 Norman Singer, *Statutory Construction* § 52.05
17 (6th ed. 2000); Jack Davies, *Legislative Law and Process in a Nutshell* § 55-4 (2d ed. 1986).

18 **SECTION 107. GOVERNING LAW.** The meaning and effect of the terms of a trust are
19 determined by:

20 (1) the law of the jurisdiction designated in the terms unless the designation of that
21 jurisdiction’s law is contrary to a strong public policy of the jurisdiction having the most significant
22 relationship to the matter at issue; or

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

25 **Kansas Comment**

26 Subsection (1) generally conforms to Kansas law. *See In re Estate of Sanders*, 261 Kan. 176,
27 Syl. 5, 929 P.2d 153 (1996) (specific provisions of trust document must be followed).
28

3-30

1 Subsection (2) generally conforms to Kansas law. See *In re Estate of Ingram*, 212 Kan. 218,
2 225, 510 P.2d 597 (1973) (choice of law determined by significant factors).

3 **UTC Comment**

4 This section provides rules for determining the law that will govern the meaning and effect
5 of particular trust terms. The law to apply to determine whether a trust has been validly created is
6 determined under Section 403.

7 Paragraph (1) allows a settlor to select the law that will govern the meaning and effect of the
8 terms of the trust. The jurisdiction selected need not have any other connection to the trust. The
9 settlor is free to select the governing law regardless of where the trust property may be physically
10 located, whether it consists of real or personal property, and whether the trust was created by will
11 or during the settlor's lifetime. This section does not attempt to specify the strong public policies
12 sufficient to invalidate a settlor's choice of governing law. These public policies will vary
13 depending upon the locale and may change over time.

14 Paragraph (2) provides a rule for trusts without governing law provisions – the meaning and
15 effect of the trust's terms are to be determined by the law of the jurisdiction having the most
16 significant relationship to the matter at issue. Factors to consider in determining the governing law
17 include the place of the trust's creation, the location of the trust property, and the domicile of the
18 settlor, the trustee, and the beneficiaries. See Restatement (Second) of Conflict of Laws §§ 270 cmt.
19 c and 272 cmt. d (1971). Other more general factors that may be pertinent in particular cases include
20 the relevant policies of the forum, the relevant policies of other interested jurisdictions and degree
21 of their interest, the protection of justified expectations and certainty, and predictability and
22 uniformity of result. See Restatement (Second) of Conflict of Laws § 6 (1971). Usually, the law
23 of the trust's principal place of administration will govern administrative matters and the law of the
24 place having the most significant relationship to the trust's creation will govern the dispositive
25 provisions.

26 This section is consistent with and was partially patterned on the Hague Convention on the
27 Law Applicable to Trusts and on their Recognition, signed on July 1, 1985. Like this section, the
28 Hague Convention allows the settlor to designate the governing law. Hague Convention art. 6.
29 Absent a designation, the Convention provides that the trust is to be governed by the law of the place
30 having the closest connection to the trust. Hague Convention art. 7. The Convention also lists
31 particular public policies for which the forum may decide to override the choice of law that would
32 otherwise apply. These policies are protection of minors and incapable parties, personal and
33 proprietary effects of marriage, succession rights, transfer of title and security interests in property,
34 protection of creditors in matters of insolvency, and, more generally, protection of third parties
35 acting in good faith. Hague Convention art. 15.

36 For the authority of a settlor to designate a trust's principal place of administration, see
37 Section 108(a).

3-31
3-40

1 **SECTION 108. PRINCIPAL PLACE OF ADMINISTRATION.**

2 (a) Without precluding other means for establishing a sufficient connection with the
3 designated jurisdiction, terms of a trust designating the principal place of administration are valid
4 and controlling if:

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

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

8 (b) A trustee is under a continuing duty to administer the trust at a place appropriate to its
9 purposes, its administration, and the interests of the beneficiaries.

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

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

16 (1) the name of the jurisdiction to which the principal place of administration is to
17 be transferred;

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

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

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

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

3 (e) The authority of a trustee under this section to transfer a trust's principal place of
4 administration terminates if a qualified beneficiary notifies the trustee of an objection to the
5 proposed transfer on or before the date specified in the notice.

6 (f) In connection with a transfer of the trust's principal place of administration, the trustee
7 may transfer some or all of the trust property to a successor trustee designated in the terms of the
8 trust or appointed pursuant to Section 704.

9 **Kansas Comment**

10 This section is new.

11 **UTC Comment**
12

13 This section prescribes rules relating to a trust's principal place of administration. Locating
14 a trust's principal place of administration will ordinarily determine which court has primary if not
15 exclusive jurisdiction over the trust. It may also be important for other matters, such as payment of
16 state income tax or determining the jurisdiction whose laws will govern the trust. *See* Section 107
17 Comment.

18 Because of the difficult and variable situations sometimes involved, the Uniform Trust Code
19 does not attempt to further define principal place of administration. A trust's principal place of
20 administration ordinarily will be the place where the trustee is located. Determining the principal
21 place of administration becomes more difficult, however, when cotrustees are located in different
22 States or when a single institutional trustee has trust operations in more than one State. In such
23 cases, other factors may become relevant, including the place where the trust records are kept or trust
24 assets held, or in the case of an institutional trustee, the place where the trust officer responsible for
25 supervising the account is located.

26 A concept akin to principal place of administration is used by the Office of the Comptroller
27 of the Currency. Reserves that national banks are required to deposit with state authorities is based
28 on the location of the office where trust assets are primarily administered. *See* 12 C.F.R. § 9.14(b).

29 Under the Uniform Trust Code, the fixing of a trust's principal place of administration will

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1 determine where the trustee and beneficiaries have consented to suit (Section 202), and the rules for
2 locating venue within a particular State (Section 204). It may also be considered by a court in
3 another jurisdiction in determining whether it has jurisdiction, and if so, whether it is a convenient
4 forum.

5 A settlor expecting to name a trustee or cotrustees with significant contacts in more than one
6 State may eliminate possible uncertainty about the location of the trust's principal place of
7 administration by specifying the jurisdiction in the terms of the trust. Under subsection (a), a
8 designation in the terms of the trust is controlling if (1) a trustee is a resident of or has its principal
9 place of business in the designated jurisdiction, or (2) all or part of the administration occurs in the
10 designated jurisdiction. Designating the principal place of administration should be distinguished
11 from designating the law to determine the meaning and effect of the trust's terms, as authorized by
12 Section 107. A settlor is free to designate one jurisdiction as the principal place of administration
13 and another to govern the meaning and effect of the trust's provisions.

14 Subsection (b) provides that a trustee is under a continuing duty to administer the trust at a
15 place appropriate to its purposes, its administration, and the interests of the beneficiaries. "Interests
16 of the beneficiaries," defined in Section 103(7), means the beneficial interests provided in the terms
17 of the trust. Ordinarily, absent a substantial change or circumstances, the trustee may assume that
18 the original place of administration is also the appropriate place of administration. The duty to
19 administer the trust at an appropriate place may also dictate that the trustee not move the trust.

20 Subsections (c)-(f) provide a procedure for changing the principal place of administration to
21 another State or country. Such changes are often beneficial. A change may be desirable to secure
22 a lower state income tax rate, or because of relocation of the trustee or beneficiaries, the appointment
23 of a new trustee, or a change in the location of the trust investments. The procedure for transfer
24 specified in this section applies only in the absence of a contrary provision in the terms of the trust.
25 See Section 105. To facilitate transfer in the typical case, where all concur that a transfer is either
26 desirable or is at least not harmful, a transfer can be accomplished without court approval unless a
27 qualified beneficiary objects. To allow the qualified beneficiaries sufficient time to review a
28 proposed transfer, the trustee must give the qualified beneficiaries at least 60 days prior notice of the
29 transfer. Notice must be given not only to qualified beneficiaries as defined in Section 103(12) but
30 also to those granted the rights of qualified beneficiaries under Section 110. To assure that those
31 receiving notice have sufficient information upon which to make a decision, minimum contents of
32 the notice are specified. If a qualified beneficiary objects, a trustee wishing to proceed with the
33 transfer must seek court approval.

34 In connection with a transfer of the principal place of administration, the trustee may transfer
35 some or all of the trust property to a new trustee located outside of the State. The appointment of
36 a new trustee may also be essential if the current trustee is ineligible to administer the trust in the
37 new place. Subsection (f) clarifies that the appointment of the new trustee must comply with the
38 provisions on appointment of successor trustees as provided in the terms of the trust or under Section
39 704. Absent an order of succession in the terms of the trust, Section 704(c) provides for an

1 appointment if approved by all of the qualified beneficiaries or by the court.

2 While transfer of the principal place of administration will normally change the governing
3 law with respect to administrative matters, a transfer does not normally alter the controlling law with
4 respect to the validity of the trust and the construction of its dispositive provisions. *See* 5A Austin
5 W. Scott & William F. Fratcher, *The Law of Trusts* § 615 (4th ed. 1989).

6 **SECTION 109. METHODS AND WAIVER OF NOTICE.**

7 (a) Notice to a person under this [Code] or the sending of a document to a person under this
8 [Code] must be accomplished in a manner reasonably suitable under the circumstances and likely
9 to result in receipt of the notice or document. Permissible methods of notice or for sending a
10 document include first-class mail, personal delivery, delivery to the person's last known place of
11 residence or place of business, or a properly directed electronic message.

12 (b) Notice otherwise required under this [Code] or a document otherwise required to be sent
13 under this [Code] need not be provided to a person whose identity or location is unknown to and not
14 reasonably ascertainable by the trustee.

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

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

19 **Kansas Comment**

20 This section is new.

21 In subsection (d), the Kansas drafting committee changed the UTC by striking "applicable
22 rules" and inserting in lieu thereof the word "code."

1 **UTC Comment**

2 Subsection (a) clarifies that notices under the Uniform Trust Code may be given by any
3 method likely to result in its receipt by the person to be notified. The specific methods listed in the
4 subsection are illustrative, not exhaustive. Subsection (b) relieves a trustee of responsibility for what
5 would otherwise be an impossible task, the giving of notice to a person whose identity or location
6 is unknown and not reasonably ascertainable by the trustee. The section does not define when a
7 notice is deemed to have been sent or delivered or person deemed to be unknown or not reasonably
8 ascertainable, the drafters preferring to leave this issue to the enacting jurisdiction's rules of civil
9 procedure.

10 Under the Uniform Trust Code, certain actions can be taken upon unanimous consent of the
11 beneficiaries or qualified beneficiaries. See Sections 411 (termination of noncharitable irrevocable
12 trust) and 704 (appointment of successor trustee). Subsection (b) of this section only authorizes
13 waiver of notice. A consent required from a beneficiary in order to achieve unanimity is not waived
14 because the beneficiary is missing. But the fact a beneficiary cannot be located may be a sufficient
15 basis for a substitute consent to be given by another person on the beneficiary's behalf under the
16 representation principles of Article 3.

17 To facilitate administration, subsection (c) allows waiver of notice by the person to be
18 notified or sent the document. Among the notices and documents to which this subsection can be
19 applied are notice of a proposed transfer of principal place of administration (Section 108(d)) or of
20 a trustee's report (Section 813(c)). This subsection also applies to notice to qualified beneficiaries
21 of a proposed trust combination or division (Section 417), of a temporary assumption of duties
22 without accepting trusteeship (Section 701(c)(1)), and of a trustee's resignation (Section 705(a)(1)).

23 Notices under the Uniform Trust Code are nonjudicial. Pursuant to subsection (d), notice
24 of a judicial proceeding must be given as provided in the applicable rules of civil procedure.

25 **SECTION 110. OTHERS TREATED AS QUALIFIED BENEFICIARIES.**

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

28 (b) A charitable organization expressly mandated to receive distributions under the terms
29 of a ~~charitable~~ trust or a person appointed to enforce a trust created for the care of an animal or
30 another noncharitable purpose as provided in Section 408 or 409 has the rights of a qualified
31 beneficiary under this [Code].

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

3 **Kansas Comment**

4 Subsections (a) and (b) are new.

5 In subsection (b), the Kansas drafting committee changed the UTC by striking the word
6 “charitable” where it appeared before the first reference to the word “trust.”

7 Subsection (c) is consistent with Kansas law. See K.S.A. 59-22a01 (attorney general may
8 initiate proceeding to determine charitable intent when charitable trust becomes illegal, impossible
9 or impractical; if such action is brought by another party, attorney general shall be given notice and
10 an opportunity to be heard).

11 **UTC Comment**

12 Under the Uniform Trust Code, certain notices need be given only to the “qualified”
13 beneficiaries. For the definition of “qualified beneficiary,” see Section 103(12). Among these
14 notices are notice of a transfer of the trust’s principal place of administration (Section 108(d)), notice
15 of a trust division or combination (Section 417), notice of a trustee resignation (Section 705(a)(1)),
16 and notice of a trustee’s annual report (Section 813(c)). Subsection (a) of this section authorizes
17 other beneficiaries to receive one or more of these notices by filing a request for notice with the
18 trustee.

19 Under the Code, certain actions, such as the appointment of a successor trustee, can be
20 accomplished by the consent of the qualified beneficiaries. *See, e.g.*, Section 704 (filling vacancy
21 in trusteeship). Subsection (a) only addresses notice, not required consent. A person who requests
22 notice under subsection (a) does not thereby acquire a right to participate in actions that can be taken
23 only upon consent of the qualified beneficiaries.

24 Charitable trusts do not have beneficiaries in the usual sense. However, certain persons,
25 while not technically beneficiaries, do have an interest in seeing that the trust is enforced. In the case
26 of a charitable trust, this includes the State’s attorney general and charitable organizations expressly
27 designated to receive distributions under the terms of the trust, who under subsections (b)-(c) are
28 granted the rights of qualified beneficiaries. Because the charitable organization must be named in
29 the terms of the trust, excluded are organizations who may receive distributions only in the trustee’s
30 discretion and organizations holding remainder interests subject to a contingency.

31 Subsection (b) similarly grants the rights of qualified beneficiaries to persons appointed by

1 the terms of the trust or by the court to enforce a trust created for an animal or other trust with a valid
3 purpose but no ascertainable beneficiary. For the requirements for creating such trusts, see Sections
408 and 409.

4 "Attorney general" is placed in brackets in subsection (c) to accommodate jurisdictions
5 which grant enforcement authority over charitable trusts to another designated official.

6 This section does not limit other means by which the attorney general or other designated
7 official can enforce a charitable trust.

8 **2001 UTC Comment**

9 This section includes the 2001 amendments to the 2000 Uniform Trust Code in subsection
10 (b) as follows:

11 "(b) A charitable organization expressly ~~entitled~~ mandated to receive
12 ~~benefits~~ distributions under the terms of a charitable trust or a person
13 appointed to enforce a trust created for the care of an animal or
14 another noncharitable purpose as provided in Section 408 or 409 has
15 the rights of a qualified beneficiary under this [Code]."
16

17 Subsection (b) is revised to avoid an implication that a charitable organization with a remote
interest in the trust has the rights of a qualified beneficiary.

19 **SECTION 111. NONJUDICIAL SETTLEMENT AGREEMENTS.**

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

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

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

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

- 1 (1) the interpretation or construction of the terms of the trust;
- 2 (2) the approval of a trustee's report or accounting;
- 3 (3) direction to a trustee to refrain from performing a particular act or the grant to a
- 4 trustee of any necessary or desirable power;
- 5 (4) the resignation or appointment of a trustee and the determination of a trustee's
- 6 compensation;
- 7 (5) transfer of a trust's principal place of administration; and
- 8 (6) liability of a trustee for an action relating to the trust.

9 (e) Any interested person may request the court to approve a nonjudicial settlement

10 agreement, to determine whether the representation as provided in [Article] 3 was adequate, and to

11 determine whether the agreement contains terms and conditions the court could have properly

12 approved.

13 **Kansas Comment**

14 This section is new. The Kansas Probate Code sets out requirements for family settlement

15 agreements at K.S.A. 59-102(8).

16 **UTC Comment**

17 While the Uniform Trust Code recognizes that a court may intervene in the administration

18 of a trust to the extent its jurisdiction is invoked by interested persons or otherwise provided by law

19 (*see* Section 201(a)), resolution of disputes by nonjudicial means is encouraged. This section

20 facilitates the making of such agreements by giving them the same effect as if approved by the court.

21 To achieve such certainty, however, subsection (c) requires that the nonjudicial settlement must

22 contain terms and conditions that a court could properly approve. Under this section, a nonjudicial

23 settlement cannot be used to produce a result not authorized by law, such as to terminate a trust in

24 an impermissible manner.

25 Trusts ordinarily have beneficiaries who are minors, incapacitated, unborn or unascertained.

26 Because such beneficiaries cannot signify their consent to an agreement, binding settlements can

27 ordinarily be achieved only through the application of doctrines such as virtual representation or

1 appointment of a guardian ad litem, doctrines traditionally available only in the case of judicial
2 settlements. The effect of this section and the Uniform Trust Code more generally is to allow for
3 such binding representation even if the agreement is not submitted for approval to a court. For the
4 rules on representation, including appointments of representatives by the court to approve particular
5 settlements, see Article 3.

6 Subsection (d) is a nonexclusive list of matters to which a nonjudicial settlement may pertain.
7 Other matters which may be made the subject of a nonjudicial settlement are listed in the Article 3
8 General Comment. The fact that the trustee and beneficiaries may resolve a matter nonjudicially
9 does not mean that beneficiary approval is required. For example, a trustee may resign pursuant to
10 Section 705 solely by giving notice to the qualified beneficiaries and any cotrustees. But a
11 nonjudicial settlement between the trustee and beneficiaries will frequently prove helpful in working
12 out the terms of the resignation.

13 Because of the great variety of matters to which a nonjudicial settlement may be applied, this
14 section does not attempt to precisely define the “interested persons” whose consent is required to
15 obtain a binding settlement as provided in subsection (a). However, the consent of the trustee would
16 ordinarily be required to obtain a binding settlement with respect to matters involving a trustee’s
17 administration, such as approval of a trustee’s report or resignation.

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

21 **Kansas Comment**

22 This section conforms to Kansas law. See *In re Estate of Sanders*, 261 Kan. 176, Syl. 2, 929
23 P.2d 153 (1996) (same rules that apply to construction of wills apply to construction of trusts).

24 **UTC Comment**

25 This section is patterned after Restatement (Third) of Trusts § 25(2) and comment e
26 (Tentative Draft No. 1, approved 1996), although this section, unlike the Restatement, also applies
27 to irrevocable trusts. The revocable trust is used primarily as a will substitute, with its key provision
28 being the determination of the persons to receive the trust property upon the settlor’s death. Given
29 this functional equivalence between the revocable trust and a will, the rules for interpreting the
30 disposition of property at death should be the same whether the individual has chosen a will or
31 revocable trust as the individual’s primary estate planning instrument. Over the years, the
32 legislatures of the States and the courts have developed a series of rules of construction reflecting

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1 the legislative or judicial understanding of how the average testator would wish to dispose of
2 property in cases where the will is silent or insufficiently clear. Few legislatures have yet to extend
3 these rules of construction to revocable trusts, and even fewer to irrevocable trusts, although a
4 number of courts have done so as a matter of judicial construction. *See* Restatement (Third) of
5 Trusts § 25, Reporter's Notes to cmt. d and e (Tentative Draft No. 1, approved 1996).

6 Because of the wide variation among the States on the rules of construction applicable to
7 wills, this Code does not attempt to prescribe the exact rules to be applied to trusts but instead adopts
8 the philosophy of the Restatement that the rules applicable to trusts ought to be the same, whatever
9 those rules might be.

10 Rules of construction are not the same as constructional preferences. A constructional
11 preference is general in nature, providing general guidance for resolving a wide variety of
12 ambiguities. An example is a preference for a construction that results in a complete disposition and
13 avoid illegality. Rules of construction, on the other hand, are specific in nature, providing guidance
14 for resolving specific situations or construing specific terms. Unlike a constructional preference, a
15 rule of construction, when applicable, can lead to only one result. *See* Restatement (Third) of
16 Property: Donative Transfers § 11.3 and cmt. b (Tentative Draft No. 1, approved 1995).

17 Rules of construction attribute intention to individual donors based on assumptions of
18 common intention. Rules of construction are found both in enacted statutes and in judicial decisions.
19 Rules of construction can involve the meaning to be given to particular language in the document,
20 such as the meaning to be given to "heirs" or "issue." Rules of construction also address situations
21 the donor failed to anticipate. These include the failure to anticipate the predecease of a beneficiary
22 or to specify the source from which expenses are to be paid. Rules of construction can also concern
23 assumptions as to how a donor would have revised donative documents in light of certain events
24 occurring after execution. These include rules dealing with the effect of a divorce and whether a
25 specific devisee will receive a substitute gift if the subject matter of the devise is disposed of during
26 the testator's lifetime.

27 Instead of enacting this section, a jurisdiction enacting this Code may wish to enact detailed
28 rules on the construction of trusts, either in addition to its rules on the construction of wills or as part
29 of one comprehensive statute applicable to both wills and trusts. For this reason and to encourage
30 this alternative, the section has been made optional. For possible models, see Uniform Probate
31 Code, Article 2, Parts 7 and 8, which was added to the UPC in 1990, and California Probate Code
32 §§ 21101-21630, enacted in 1994.

1 **ARTICLE 2**

2 **JUDICIAL PROCEEDINGS**

3 **General Comment**

4 This article addresses selected issues involving judicial proceedings concerning trusts,
5 particularly trusts with contacts in more than one State or country. This article is not intended to
6 provide comprehensive coverage of court jurisdiction or procedure with respect to trusts. These
7 issues are better addressed elsewhere, for example in the State's rules of civil procedure or as
8 provided by court rule.

9 Section 201 makes clear that the jurisdiction of the court is available as invoked by interested
10 persons or as otherwise provided by law. Proceedings involving the administration of a trust
11 normally will be brought in the court at the trust's principal place of administration. Section 202
12 provides that the trustee and beneficiaries are deemed to have consented to the jurisdiction of the
13 court at the principal place of administration as to any matter relating to the trust. Sections 203 and
14 204 are optional, bracketed provisions relating to subject-matter jurisdiction and venue.
15

16 **SECTION 201. ROLE OF COURT IN ADMINISTRATION OF TRUST.**

17 (a) The court may intervene in the administration of a trust to the extent its jurisdiction is
18 invoked by an interested person or as provided by law.

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

20 (c) A judicial proceeding involving a trust may relate to any matter involving the trust's
21 administration, including ~~a request for instructions and an action to declare rights~~ an action for
22 declaratory judgement pursuant to K.S.A. 60-1701 et seq.

23 **Kansas Comment**

24 Subsection (a) conforms to Kansas law. See *Coolbaugh v. Gage*, 182 Kan. 145, 150-51, 319
25 P.2d 146 (1957) (court of equity always has the right to direct and control management of trust
26 estates; trustee always entitled to obtain judicial construction of trust instrument and directions as
27 to his conduct); K.S.A. 59-1607 (no expression of intent by testators or settlors shall affect the
28 jurisdiction of the court over inventories and accounts of trustees); K.S.A. 17-5004(a)(3) (nothing
29 in prudent investor rule abrogates or restricts power of court to direct or permit trustee to deviate

1 from the terms of a trust or to take any action regarding investments); K.S.A 58-1205(a) (court has
2 power to relieve trustee from any restrictions on trustee's power).

3 Subsection (b) is new.

4 Subsection (c) conforms to Kansas law. See generally *Coolbaugh*, 182 Kan. 145.

5 In subsection (c), the Kansas drafting committee changed the UTC by striking the phrase,
6 "a request for instructions and an action to declare rights" and inserting the phrase "an action for
7 declaratory judgement pursuant to K.S.A. 60-1701 *et seq.*" The purpose of the change was to
8 remove the concept of a request for instructions and to cite the K.S.A. Article relating to declaratory
9 judgements.

10 UTC Comment

11 While the Uniform Trust Code encourages the resolution of disputes without resort to the
12 courts by providing such options as the nonjudicial settlement authorized by Section 111, the court
13 is always available to the extent its jurisdiction is invoked by interested persons. The jurisdiction
14 of the court with respect to trust matters is inherent and historical and also includes the ability to act
15 on its own initiative, to appoint a special master to investigate the facts of a case, and to provide a
16 trustee with instructions even in the absence of an actual dispute.

17 Contrary to the trust statutes in some States, the Uniform Trust Code does not create a system
18 of routine or mandatory court supervision. While subsection (b) authorizes a court to direct that a
19 particular trust be subject to continuing court supervision, the court's intervention will normally be
20 confined to the particular matter brought before it.

21 Subsection (c) makes clear that the court's jurisdiction may be invoked even absent an actual
22 dispute. Traditionally, courts in equity have heard petitions for instructions and have issued
23 declaratory judgments if there is a reasonable doubt as to the extent of the trustee's powers or duties.
24 The court will not ordinarily instruct trustees on how to exercise discretion, however. See
25 Restatement (Second) of Trusts §§ 187, 259 (1959). This section does not limit the court's equity
26 jurisdiction. Beyond mentioning petitions for instructions and actions to declare rights, subsection
27 (c) does not attempt to list the types of judicial proceedings involving trust administration that might
28 be brought by a trustee or beneficiary. Such an effort is made in California Probate Code § 17200.
29 Excluding matters not germane to the Uniform Trust Code, the California statute lists the following
30 as items relating to the "internal affairs" of a trust: determining questions of construction;
31 determining the existence or nonexistence of any immunity, power, privilege, duty, or right;
32 determining the validity of a trust provision; ascertaining beneficiaries and determining to whom
33 property will pass upon final or partial termination of the trust; settling accounts and passing upon
34 the acts of a trustee, including the exercise of discretionary powers; instructing the trustee;
35 compelling the trustee to report information about the trust or account to the beneficiary; granting
36 powers to the trustee; fixing or allowing payment of the trustee's compensation or reviewing the

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1 reasonableness of the compensation; appointing or removing a trustee; accepting the resignation of
2 a trustee; compelling redress of a breach of trust by any available remedy; approving or directing the
3 modification or termination of a trust; approving or directing the combination or division of trusts;
4 and authorizing or directing transfer of a trust or trust property to or from another jurisdiction.

5 **SECTION 202. JURISDICTION OVER TRUSTEE AND BENEFICIARY.**

6 (a) By accepting the trusteeship of a trust having its principal place of administration in this
7 State or by moving the principal place of administration to this State, the trustee submits personally
8 to the jurisdiction of the courts of this State regarding any matter involving the trust.

9 (b) With respect to their interests in the trust, the beneficiaries of a trust having its principal
10 place of administration in this State are subject to the jurisdiction of the courts of this State regarding
11 any matter involving the trust. By accepting a distribution from such a trust, the recipient submits
12 personally to the jurisdiction of the courts of this State regarding any matter involving the trust.

13 (c) This section does not preclude other methods of obtaining jurisdiction over a trustee,
14 beneficiary, or other person receiving property from the trust.

15
16 **Kansas Comment**

17 Subsection (a) conforms to Kansas law. See K.S.A. 59-1706 (nonresident fiduciary required
18 to appoint agent and consent to service of process upon such agent); K.S.A. 59-1708 (nonresident
19 fiduciary may sue and be sued in this state).

20 Subsection (b) is new.

21 Subsection (c) refers to the Kansas long-arm statute, K.S.A. 60-308.

22 **UTC Comment**

23 This section clarifies that the courts of the principal place of administration have jurisdiction
24 to enter orders relating to the trust that will be binding on both the trustee and beneficiaries. Consent
25 to jurisdiction does not dispense with any required notice, however. With respect to jurisdiction over
26 a beneficiary, the Comment to Uniform Probate Code § 7-103, upon which portions of this section
27 are based, is instructive:

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1 It also seems reasonable to require beneficiaries to go to the seat of the trust when
2 litigation has been instituted there concerning a trust in which they claim beneficial
3 interests, much as the rights of shareholders of a corporation can be determined at a
4 corporate seat. The settlor has indicated a principal place of administration by its
5 selection of a trustee or otherwise, and it is reasonable to subject rights under the trust
6 to the jurisdiction of the Court where the trust is properly administered.

7 The jurisdiction conferred over the trustee and beneficiaries by this section does not preclude
8 jurisdiction by courts elsewhere on some other basis. Furthermore, the fact that the courts in a new
9 State acquire jurisdiction under this section following a change in a trust's principal place of
10 administration does not necessarily mean that the courts of the former principal place of
11 administration lose jurisdiction, particularly as to matters involving events occurring prior to the
12 transfer.

13 The jurisdiction conferred by this section is limited. Pursuant to subsection (b), until a
14 distribution is made, jurisdiction over a beneficiary is limited to the beneficiary's interests in the
15 trust. Personal jurisdiction over a beneficiary is conferred only upon the making of a distribution.
16 Subsection (b) also gives the court jurisdiction over other recipients of distributions. This would
17 include individuals who receive distributions in the mistaken belief they are beneficiaries.

18 For a discussion of jurisdictional issues concerning trusts, see 5A Austin W. Scott & William
19 F. Fratcher, *The Law of Trusts* §§ 556-573 (4th ed. 1989).

20 **{SECTION 203. SUBJECT-MATTER JURISDICTION.**

21 ~~(a)~~ The district court has exclusive jurisdiction of proceedings in this State brought by a
22 trustee or beneficiary concerning the administration of a trust.

23 ~~(b) The [designate] court has concurrent jurisdiction with other courts of this State of other~~
24 ~~proceedings involving a trust.]~~

25 **Kansas Comment**

26 This section is consistent with the Kansas probate code. See K.S.A. 59-103 (K.S.A. Chapter
27 59 may be used to supervise the administration of trusts created by wills and other trusts created in
28 favor of persons subject to conservatorship).

29 The Kansas drafting committee changed this section of the UTC by striking subsection (b)
30 which read as follows: "(b) The [designate] court has concurrent jurisdiction with other courts of
31 this State of other proceedings involving a trust."]

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UTC Comment

3 This section provides a means for distinguishing the jurisdiction of the court having primary
4 jurisdiction for trust matters, whether denominated the probate court, chancery court, or by some
5 other name, from other courts in a State that may on occasion resolve disputes concerning trusts.
6 The section has been placed in brackets because the enacting jurisdiction may already address
7 subject-matter jurisdiction by other statute or court rule. The topic also need not be addressed in
8 States having unified court systems. For an explanation of types of proceedings which may be
9 brought concerning the administration of a trust, see the Comment to Section 201.

10 {SECTION 204. VENUE.

11 (a) Except as otherwise provided in subsection (b), venue for a judicial proceeding involving
12 a trust is in the county of this State in which the trust’s principal place of administration has been,
13 is or will be located or in the county in which any real property in which the trust has an interest is
14 located and, if the trust is created by will and the estate is not yet closed, in the [county] in which
15 the decedent’s estate is being administered.

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

20 Kansas Comment

21 This section generally conforms to Kansas law. See K.S.A. 59-2203 (proceedings for probate
22 of will or administration shall be in county of decedent’s residence at time of death if decedent
23 owned an interest in real property in such county or if decedent does not own an interest in real
24 property in such county, in county of decedent’s residence at time of death or in any county where
25 decedent owned an interest in real property); K.S.A. 59-2207 (any fiduciary may be sued in county
26 in which appointed or resides); K.S.A. 59-1601 *et seq.* (testamentary trust accountings to be filed
27 in court where will admitted to probate); *Godfrey v. Chandley*, 248 Kan. 975, Syl. 6, 811 P.2d 1248
28 (1991) (proper venue for construction of testamentary trust is in county where will creating trust is
29 filed for probate). Provision regarding principal place of administration is new if such place is other
30 than trustee’s county of residence or appointment.

1 **ARTICLE 3**

2 **REPRESENTATION**

3 **General Comment**

4 This article deals with representation of beneficiaries, both representation by fiduciaries
5 (personal representatives, trustees, guardians, and conservators), and what is known as virtual
6 representation. Representation is a topic not adequately addressed under the trust law of most States.
7 Representation is addressed in the Restatement (First) of Property §§ 180-186 (1936), but the
8 coverage of this article is more complete.

9 Section 301 is the introductory section, laying out the scope of the article. The
10 representation principles of this article have numerous applications under this Code. The
11 representation principles of the article apply for purposes of settlement of disputes, whether by a
12 court or nonjudicially. They apply for the giving of required notices. They apply for the giving of
13 consents to certain actions.

14 Sections 302-305 cover the different types of representation. Section 302 deals with
15 representation by the holder of a general testamentary power of appointment. (Revocable trusts and
16 presently exercisable general powers of appointment are covered by Section 603, which grant the
17 settlor or holder of the power all rights of the beneficiaries or persons whose interests are subject to
18 the power). Section 303 deals with representation by a fiduciary, whether of an estate, trust,
19 conservatorship, or guardianship. The section also allows a parent without a conflict of interest to
20 represent and bind a minor or unborn child. Section 304 is the virtual representation provision. It
21 provides for representation of and the giving of a binding consent by another person having a
22 substantially identical interest with respect to the particular issue. Section 305 authorizes the court
23 to appoint a representative to represent the interests of unrepresented persons or persons for whom
24 the court concludes the other available representation might be inadequate.

25 The provisions of this article are subject to modification in the terms of the trust. *See* Section
26 105. Settlers are free to specify their own methods for providing substituted notice and obtaining
27 substituted consent.

28 **SECTION 301. REPRESENTATION: BASIC EFFECT.**

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

31 (b) The consent of a person who may represent and bind another person under this [article]

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

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

6 **Kansas Comment**

7 This section is new.

8 **UTC Comment**

9 This section is general and introductory, laying out the scope of the article.

10 Subsection (a) validates substitute notice to a person who may represent and bind another
11 person as provided in the succeeding sections of this article. Notice to the substitute has the same
12 effect as if given directly to the other person. Subsection (a) does not apply to notice of a judicial
13 proceeding. Pursuant to Section 109(d), notice of a judicial proceeding must be given as provided
14 in the applicable rules of civil procedure, which may require that notice not only be given to the
15 representative but also to the person represented. For a model statute for the giving of notice in such
16 cases, see Uniform Probate Code § 1-403(3). Subsection (a) may be used to facilitate the giving of
17 notice to the qualified beneficiaries of a proposed transfer of principal place of administration
18 (Section 108(d)), of a proposed trust combination or division (Section 417), of a temporary
19 assumption of duties without accepting trusteeship (Section 701(c)(1)), of a trustee's resignation
20 (Section 705(a)(1)), and of a trustee's report (Section 813(c)).

21 Subsection (b) deals with the effect of a consent, whether by actual or virtual representation.
22 Subsection (b) may be used to facilitate consent of the beneficiaries to modification or termination
23 of a trust, with or without the consent of the settlor (Section 411), agreement of the qualified
24 beneficiaries on appointment of a successor trustee (Section 704(c)(2)), and consent, release, or
25 affirmance of a beneficiary's to actions of trustee (Section 1009).

26 A consent by a representative bars a later objection by the person represented, but a consent
27 is not binding if the person represented raises an objection prior to the date the consent would
28 otherwise become effective. The possibility that a beneficiary might object to a consent given on
29 the beneficiary's behalf will not be germane in many cases because the person represented will be
30 unborn or unascertained. However, the representation principles of this article will sometimes apply
31 to adult and competent beneficiaries. For example, while the trustee of a revocable trust entitled to
32 a pourover devise has authority under Section 303 to approve the personal representative's account

1 on behalf of the trust beneficiaries, such consent would not be binding on a trust beneficiary who
2 registers an objection. Subsection (b) implements cases such as *Barber v. Barber*, 837 P.2d 714
3 (Alaska 1992), which held that the a refusal to allow an objection by an adult competent remainder
4 beneficiary violated due process.

5 Subsection (c) implements the policy of Sections 411 and 602 that a conservator or guardian
6 may represent a settlor with respect to the revocation or termination of a trust only with the approval
7 of the court supervising the conservatorship or guardianship.

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

13 **Kansas Comment**

This section is new.

15 **UTC Comment**

16 This section specifies the circumstances under which a holder of a general testamentary
17 power of appointment may receive notices on behalf of and otherwise represent and bind persons
18 whose interests are subject to the power, whether as permissible appointees, takers in default, or
19 otherwise. Such representation is allowed except to the extent there is a conflict of interest with
20 respect to the particular matter or dispute. Typically, the holder of a general testamentary power of
21 appointment is also a life income beneficiary of the trust, oftentimes of a trust intended to qualify
22 for the federal estate tax marital deduction. *See* I.R.C. § 2056(b)(5). Without the exception for
23 conflict of interest, the holder of the power could act in a way that could enhance the holder's
24 income interests to the detriment of the appointees or takers in default, whoever they may be.

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

28 (1) a [conservator] may represent and bind the estate that the [conservator] controls;

1 (2) a [guardian] may represent and bind the ward ~~if a [conservator] of the ward's estate has~~
2 ~~not been appointed~~ within the scope of the guardian's powers and duties;

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

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

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

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

10 **Kansas Comment**

11 Specific provisions are new, but consistent with Kansas law. See K.S.A. 59-2254 (any
12 beneficiary under legal disability may be represented in a trust accounting by a guardian ad litem or
13 by living competent members of the class, as the court deems best). See also K.S.A. 59-3018a
14 (powers and duties of guardian); K.S.A. 59-3019 (rights and duties of conservator); K.S.A. 59-3003
15 (powers and duties of natural guardian); *Bucher & Willis Consulting Engineers v. Smith*, 7 Kan.
16 App. 2d 467, Syl. 2, 643 P.2d 1156 (1982) (agent contracting on behalf of principal binds principal
17 if contract was authorized by principal); K.S.A. 59-101 *et seq.* (Kansas probate code).

18 In subsection (2), the Kansas drafting committee changed the UTC as follows: "(2) a
19 [guardian] may represent and bind the ward ~~if a [conservator] of the ward's estate has not been~~
20 ~~appointed~~ within the scope of the guardian's powers and duties."

21 **UTC Comment**

22 This section allows for representation of persons by their fiduciaries (conservators, guardians,
23 agents, trustees, and personal representatives), a principle that has long been part of the law.
24 Paragraph (6), which allows parents to represent their children, is more recent, having originated in
25 1969 upon approval of the Uniform Probate Code. This section is not limited to representation of
26 beneficiaries. It also applies to representation of the settlor. Representation is not available if the
27 fiduciary or parent is in a conflict position with respect to the particular matter or dispute, however.
28 A typical conflict would be where the fiduciary or parent seeking to represent the beneficiary is
29 either the trustee or holds an adverse beneficial interest.

30 Paragraph (2) authorizes a guardian to bind and represent a ward if a conservator of the

1 ward's estate has not been appointed. Granting a guardian authority to represent the ward with
2 respect to interests in the trust can avoid the need to seek appointment of a conservator. This grant
3 of authority to act with respect to the ward's trust interest may broaden the authority of a guardian
4 in some States although not in States that have adopted the Section 1-403 of the Uniform Probate
5 Code, from which this section was derived. Under the Uniform Trust Code, a "conservator" is
6 appointed by the court to manage the ward's property, a "guardian" to make decisions with respect
7 to the ward's personal affairs. See Section 103.

8 Paragraph (3) authorizes an agent to represent a principal only to the extent the agent has
9 authority to act with respect to the particular question or dispute. Pursuant to Sections 411 and 602,
10 an agent may represent a settlor with respect to the amendment, revocation or termination of the trust
11 only to the extent this authority is expressly granted either in the trust or the power. Otherwise,
12 depending on the particular question or dispute, a general grant of authority in the power may be
13 sufficient to confer the necessary authority.
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15 **SECTION 304. REPRESENTATION BY PERSON HAVING SUBSTANTIALLY**
16 **IDENTICAL INTEREST.** Unless otherwise represented, a minor, incapacitated, or unborn
17 individual, or a person whose identity or location is unknown and not reasonably ascertainable, may
18 be represented by and bound by another having a substantially identical interest with respect to the
19 particular question or dispute, but only to the extent there is no conflict of interest between the
20 representative and the person represented.

21 **Kansas Comment**

22 K.S.A. 59-2254 contains a similar provision for representation for trust accountings,
23 although it gives the court discretion in selecting a living competent member of the class or a
24 guardian ad litem.

25 **UTC Comment**

26 This section authorizes a person with a substantially identical interest with respect to a
27 particular question or dispute to represent and bind an otherwise unrepresented minor, incapacitated
28 or unborn individual, or person whose location is unknown and not reasonably ascertainable. This
29 section is derived from Section 1-403(2)(iii) of the Uniform Probate Code, but with several
30 modifications. Unlike the UPC, this section does not expressly require that the representation be
31 adequate, the drafters preferring to leave this issue to the courts. Furthermore, this section extends
32 the doctrine of virtual representation to representation of minors and incapacitated individuals.

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1 Finally, this section does not apply to the extent there is a conflict of interest between the
2 representative and the person represented.

3 Restatement (First) of Property §§ 181 and 185 (1936) provide that virtual representation is
4 inapplicable if the interest represented was not sufficiently protected. Representation is deemed
5 sufficiently protective as long as it does not appear that the representative acted in hostility to the
6 interest of the person represented. Restatement (First) of Property § 185 (1936). Evidence of
7 inactivity or lack of skill is material only to the extent it establishes such hostility. Restatement
8 (First) of Property § 185 cmt. b (1936).

9 Typically, the interests of the representative and the person represented will be identical. A
10 common example would be a trust providing for distribution to the settlor's children as a class, with
11 an adult child being able to represent the interests of children who are either minors or unborn.
12 Exact identity of interests is not required, only substantial identity with respect to the particular
13 question or dispute. Whether such identity is present may depend on the nature of the interest. For
14 example, a presumptive remaindermen may be able to represent alternative remaindermen with
15 respect to approval of a trustee's report but not with respect to interpretation of the remainder
16 provision or termination of the trust. Even if the beneficial interests of the representative and person
17 represented are identical, representation is not allowed in the event of conflict of interest. The
18 representative may have interests outside of the trust that are adverse to the interest of the person
19 represented, such as a prior relationship with the trustee or other beneficiaries. *See* Restatement
20 (First) of Property § 185 cmt. d (1936).

21 SECTION 305. APPOINTMENT OF REPRESENTATIVE.

22 (a) If the court or trustee determines that an interest is not represented under this [article],
23 or that the otherwise available representation might be inadequate, the court may appoint or the
24 trustee may retain a [representative] to receive notice, give consent, and otherwise represent, bind,
25 and act on behalf of a minor, incapacitated, or unborn individual, or a person whose identity or
26 location is unknown. A [representative] may be appointed to represent several persons or interests.

27 (b) A [representative] may act on behalf of the individual represented with respect to any
28 matter arising under this [Code], whether or not a judicial proceeding concerning the trust is pending.

29 (c) In making decisions, a [representative] may consider general benefit accruing to the
30 living members of the individual's family.

Kansas Comment

2 Subsection (a) expands current law which is limited to allowing a court, in its discretion, to
3 appoint either a guardian ad litem or a living competent member of the class to represent a
4 beneficiary under a legal disability or unborn or unascertained beneficiaries in a trust accounting.
5 K.S.A. 59-2254.

6 In subsection (a), the Kansas drafting committee changed the UTC by inserting after the word
7 “court” the phrase “or trustee” and by inserting after the word “appoint” the phrase “or the trustee
8 may retain.”

9 Subsections (b) and (c) are new.

UTC Comment

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11 This section is derived from Section 1-403(4) of the Uniform Probate Code. However, this
12 section substitutes “representative” for “guardian ad litem” to signal that a representative under this
13 Code serves a different role. Unlike a guardian ad litem, under this section a representative can be
14 appointed to act with respect to a nonjudicial settlement or to receive a notice on a beneficiary’s
15 behalf. Furthermore, in making decisions, a representative may consider general benefit accruing
16 to living members of the family. “Representative” is placed in brackets in case the enacting
17 jurisdiction prefers a different term. The court may appoint a representative to act for a person even
if the person could be represented under another section of this article.

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

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General Comment

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Sections 401 through 409, which specify the requirements for the creation of a trust, largely codify traditional doctrine. Section 401 specifies the methods by which trusts are created, that is, by transfer of property, self-declaration, or exercise of a power of appointment. Whatever method may have been employed, other requirements, including intention, capacity and, for certain types of trusts, an ascertainable beneficiary, also must be satisfied before a trust is created. These requirements are listed in Section 402. Section 403 addresses the validity in the enacting jurisdiction of trusts created in other jurisdictions. A trust not created by will is validly created if its creation complied with the law of specified jurisdictions in which the settlor or trustee had a significant contact. Section 404 forbids trusts for illegal or impossible purposes, and requires that a trust and its terms must be for the benefit of its beneficiaries. Section 405 recites the permitted purposes of a charitable trust. Section 406 lists some of the grounds for contesting a trust. Section 407 validates oral trusts. The remaining sections address what are often referred to as “honorary” trusts, although such trusts are valid and enforceable under this Code. Section 408 covers a trust for the care of an animal; Section 409 allows creation of a trust for another noncharitable purpose such as maintenance of a cemetery lot.

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Sections 410 through 417 provide a series of interrelated rules on when a trust may be terminated or modified other than by its express terms. The overall objective of these sections is to enhance flexibility consistent with the principle that preserving the settlor’s intent is paramount. Termination or modification may be allowed upon beneficiary consent if the court concludes that the trust or a particular provision no longer achieves a material purpose or if the settlor concurs (Section 411), by the court in response to unanticipated circumstances or due to ineffective administrative terms (Section 412), or by the court or trustee if continued administration under the trust’s existing terms would be uneconomical (Section 414). A trust may be reformed to correct a mistake of law or fact (Section 415), or modified to achieve the settlor’s tax objectives (Section 416). Trusts may be combined or divided (Section 417). A trustee or beneficiary has standing to petition the court with respect to a proposed termination or modification (Section 410).

Section 413 codifies and at the same time modifies the doctrine of cy pres, at least as applied in most States. The Uniform Trust Code authorizes the court to apply cy pres not only if the original means becomes impossible or unlawful but also if the means become impracticable or wasteful. Section 413 also creates a presumption of general charitable intent. Upon failure of the settlor’s original plan, the court cannot divert the trust property to a noncharity unless the terms of the trust expressly so provide. Furthermore, absent a contrary provision in the terms of the trust, limits are placed on when a gift over to a noncharity can take effect upon failure or impracticality of the original charitable purpose. The gift over is effective only if, when the provision takes effect, the trust property is to revert to the settlor and the settlor is still living, or fewer than 21 years have

1 elapsed since the date of the trust's creation.

2 The requirements for a trust's creation, such as the necessary level of capacity and the
3 requirement that a trust have a legal purpose, are controlled by statute and common law, not by the
4 settlor. *See* Section 105(b)(1). Nor may the settlor negate the court's ability to modify or terminate
5 a trust as provided in Sections 410 through 416. *See* Section 105(b)(4). However, a settlor is free
6 to restrict or modify the trustee's power to terminate an uneconomic trust as provided in Sections
7 414, and the trustee's power to combine and divide trusts as provided in Section 417.

8 **SECTION 401. METHODS OF CREATING TRUST.** A trust may be created by:

9 (1) transfer of property to another person as trustee during the settlor's lifetime or by will or
10 other disposition taking effect upon the settlor's death;

11 (2) declaration by the owner of property that the owner holds identifiable property as trustee;

12 or

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

14 **Kansas Comment**

15 Paragraph (1) conforms to Kansas law. A trust may be created by transfer inter vivos by the
16 owner of property to another person as trustee. *Taliaferro v. Taliaferro*, 260 Kan. 573, 921 P.2d 803
17 (1996). Creation of a trust by will is well-established in Kansas law. *See e.g. Godfrey v. Chandley*,
18 248 Kan. 975, 811 P.2d 1248 (1991) (court construes testamentary trust); K.S.A. 59-103(a)(7)
19 (provision for administration of trusts created by will); K.S.A. 58-1201 (Uniform Trustees' Powers
20 Act includes trusts created by trust instrument or will).

21 Paragraph (2) conforms to Kansas law. *See Taliaferro*, 260 Kan. 573 (trust may be created
22 by declaration by owner of property that he holds property as trustee).

23 Paragraph (3) conforms to Kansas law. *See In re Will of Daniels*, 247 Kan. 349, 799 P.2d
24 479 (1990) (power of appointment exercised in favor of bank as trustee).

25 **UTC Comment**

26 This section is based on Restatement (Third) of Trusts § 10 (Tentative Draft No. 1, approved
27 1996), and Restatement (Second) of Trusts § 17 (1959). Under the methods specified for creating
28 a trust in this section, a trust is not created until it receives property. For what constitutes an

1 adequate property interest, see Restatement (Third) of Trusts §§ 40-41 (Tentative Draft No. 2,
2 approved 1999); Restatement (Second) of Trusts §§ 74-86 (1959). The property interest necessary
3 to fund and create a trust need not be substantial. A revocable designation of the trustee as
4 beneficiary of a life insurance policy or employee benefit plan has long been understood to be a
5 property interest sufficient to create a trust. See Section 103(11) (“property” defined). Furthermore,
6 the property interest need not be transferred contemporaneously with the signing of the trust
7 instrument. A trust instrument signed during the settlor’s lifetime is not rendered invalid simply
8 because the trust was not created until property was transferred to the trustee at a much later date,
9 including by contract after the settlor’s death. A pourover devise to a previously unfunded trust is
10 also valid and may constitute the property interest creating the trust. See Uniform Testamentary
11 Additions to Trusts Act § 1 (1991), *codified at* Uniform Probate Code § 2-511 (pourover devise to
12 trust valid regardless of existence, size, or character of trust corpus). See also Restatement (Third)
13 of Trusts § 19 (Tentative Draft No. 1, approved 1996).

14 While this section refers to transfer of property to a trustee, a trust can be created even though
15 for a period of time no trustee is in office. See Restatement (Third) of Trusts § 2 cmt. g (Tentative
16 Draft No. 1, approved 1996); Restatement (Second) of Trusts § 2 cmt. i (1959). A trust can also be
17 created without notice to or acceptance by a trustee or beneficiary. See Restatement (Third) of
18 Trusts § 14 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts §§ 35-36
19 (1959).

20 The methods specified in this section are not exclusive. Section 102 recognizes that trusts
21 can also be created by special statute or court order. See also Restatement (Third) of Trusts § 1 cmt.
22 a (Tentative Draft No. 1, approved 1996); Uniform Probate Code § 2-212 (elective share of
23 incapacitated surviving spouse to be held in trust on terms specified in statute); Uniform Probate
24 Code § 5-411(a)(4) (conservator may create trust with court approval); Restatement (Second) of
25 Trusts § 17 cmt. i (1959) (trusts created by statutory right to bring wrongful death action).

26 A trust can also be created by a promise that creates enforceable rights in a person who
27 immediately or later holds these rights as trustee. See Restatement (Third) of Trusts §10(e)
28 (Tentative Draft No. 1, approved 1996). A trust thus created is valid notwithstanding that the trustee
29 may resign or die before the promise is fulfilled. Unless expressly made personal, the promise can
30 be enforced by a successor trustee. For examples of trusts created by means of promises enforceable
31 by the trustee, see Restatement (Third) of Trusts § 10 cmt. g (Tentative Draft No. 1, approved
32 1996); Restatement (Second) of Trusts §§ 14 cmt. h, 26 cmt. n (1959).

33 A trust created by self-declaration is best created by reregistering each of the assets that
34 comprise the trust into the settlor’s name as trustee. However, such reregistration is not necessary
35 to create the trust. See, e.g., *In re Estate of Heggstad*, 20 Cal. Rptr. 2d 433 (Ct. App. 1993);
36 Restatement (Third) of Trusts § 10 cmt. e (Tentative Draft No. 1, approved 1996); Restatement
37 (Second) of Trusts § 17 cmt. a (1959). A declaration of trust can be funded merely by attaching a
38 schedule listing the assets that are to be subject to the trust without executing separate instruments
39 of transfer. But such practice can make it difficult to later confirm title with third party transferees

1 and for this reason is not recommended.

2 While a trust created by will may come into existence immediately at the testator's death and
3 not necessarily only upon the later transfer of title from the personal representative, Section 701
4 makes clear that the nominated trustee does not have a duty to act until there is an acceptance of the
5 trusteeship, express or implied. To avoid an implied acceptance, a nominated testamentary trustee
6 who is monitoring the actions of the personal representative but who has not yet made a final
7 decision on acceptance should inform the beneficiaries that the nominated trustee has assumed only
8 a limited role. The failure so to inform the beneficiaries could result in liability if misleading
9 conduct by the nominated trustee causes harm to the trust beneficiaries. *See* Restatement (Third) of
10 Trusts § 35 cmt. b (Tentative Draft No. 2, approved 1999).

11 While this section confirms the familiar principle that a trust may be created by means of the
12 exercise of a power of appointment (paragraph (3)), this Code does not legislate comprehensively
13 on the subject of powers of appointment but addresses only selected issues. *See* Sections 302
14 (representation by holder of general testamentary power of appointment); 505(b) (creditor claims
15 against holder of power of withdrawal); and 603(d) (rights of holder of power of withdrawal). For
16 the law on powers of appointment generally, see Restatement (Second) of Property: Donative
17 Transfers §§ 11.1-24.4 (1986); Restatement (Third) of Property: Wills and Other Donative Transfers
18 (in progress).

19
20 **SECTION 402. REQUIREMENTS FOR CREATION.**

21 (a) A trust is created only if:

- 22 (1) the settlor has capacity to create a trust;
- 23 (2) the settlor indicates an intention to create the trust;
- 24 (3) the trust has a definite beneficiary or is:
- 25 (A) a charitable trust;
- 26 (B) a trust for the care of an animal, as provided in Section 408; or
- 27 (C) a trust for a noncharitable purpose, as provided in Section 409;
- 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 or in the future, subject

1 to any applicable rule against perpetuities.

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

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Kansas Comment

7 Subsection (a)(1) conforms to Kansas law. See *Peterson v. Peterson*, 10 Kan. App. 2d 437,
8 700 P.2d 585 (1985) (equity will set aside a trust where it is not the pure, voluntary, well understood
9 act of the grantor's mind); 59-601 (person must be of sound mind to dispose of property by will).

10 Subsection (a)(2) conforms to Kansas law. See *Taliaferro v. Taliaferro*, 260 Kan. 573, Syl.
11 1, 921 P.2d 803 (1996) (express trust requires intention by settlor to create a trust).

12 Subsection (a)(3) conforms to Kansas law as to the requirement of a definite beneficiary. See
13 *In re Freshours Estate*, 185 Kan. 434, 440, 345 P.2d 689 (1959) (private trust requires a beneficiary
14 who is definitely ascertained at the time of the creation of the trust or definitely ascertainable within
15 the rule against perpetuities). See later sections regarding other types of trusts.

16 Subsection (a)(4) conforms to Kansas law. See generally *Shumway v. Shumway*, 141 Kan.
17 835, 44 P.2d 247 (1935) (requirement for valid trust is that trustee must accept and handle subject
18 matter of trust as a trust); K.S.A. 58-1201 *et seq.* (Uniform Trustees' Powers Act).

19 Subsection (a)(5) conforms to Kansas law. See *Matthews v. Salvage*, 195 Kan. 501, 407 P.2d
20 559 (1965) (same person cannot at the same time be sole trustee and sole beneficiary of the same
21 identical interest and trust cannot exist where legal and sole beneficial interests are in the same
22 person).

23 Subsection (b) generally conforms to Kansas law. See parenthetical above for *Freshours*,
24 185 Kan. 434.

25 Subsection (c) is new.

26

UTC Comment

27 Subsection (a) codifies the basic requirements for the creation of a trust. To create a valid
28 trust, the settlor must indicate an intention to create a trust. See Restatement (Third) of Trusts § 13
29 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts § 23 (1959). But only such

1 manifestations of intent as are admissible as proof in a judicial proceeding may be considered. *See*
2 Section 103(17) (“terms of a trust” defined).

3 To create a trust, a settlor must have the requisite mental capacity. To create a revocable or
4 testamentary trust, the settlor must have the capacity to make a will. To create an irrevocable trust,
5 the settlor must have capacity during lifetime to transfer the property free of trust. *See* Section 601
6 (capacity of settlor to create revocable trust), and *see generally* Restatement (Third) of Trusts § 11
7 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts §§ 18-22 (1959); and
8 Restatement (Third) of Property: Wills and Other Donative Transfers §8.1 (Tentative Draft No. 3,
9 2001).

10 Subsection (a)(3) requires that a trust, other than a charitable trust, a trust for the care of an
11 animal, or a trust for another valid noncharitable purpose, have a definite beneficiary. While some
12 beneficiaries will be definitely ascertained as of the trust’s creation, subsection (b) recognizes that
13 others may be ascertained in the future as long as this occurs within the applicable perpetuities
14 period. The definite beneficiary requirement does not prevent a settlor from making a disposition
15 in favor of a class of persons. Class designations are valid as long as the membership of the class
16 will be finally determined within the applicable perpetuities period. For background on the definite
17 beneficiary requirement, *see* Restatement (Third) of Trusts §§ 44-46 (Tentative Draft No. 2,
18 approved 1999); Restatement (Second) of Trusts §§ 112-122 (1959).

19 Subsection (a)(4) recites standard doctrine that a trust is created only if the trustee has duties
20 to perform. *See* Restatement (Third) of Trusts § 2 (Tentative Draft No. 1, approved 1996);
21 Restatement (Second) of Trusts § 2 (1959). Trustee duties are usually active, but a validating duty
22 may also be passive, implying only that the trustee has an obligation not to interfere with the
23 trustee’s enjoyment of the trust property. Such passive trusts, while valid under this Code, may be
24 terminable under the enacting jurisdiction’s Statute of Uses. *See* Restatement (Third) of Trusts § 6
25 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts §§ 67-72 (1959).

26 Subsection (a)(5) addresses the doctrine of merger, which, as traditionally stated, provides
27 that a trust is not created if the settlor is the sole trustee and sole beneficiary of *all* beneficial
28 interests. The doctrine of merger has been inappropriately applied by the courts in some
29 jurisdictions to invalidate self-declarations of trust in which the settlor is the sole life beneficiary but
30 other persons are designated as beneficiaries of the remainder. The doctrine of merger is properly
31 applicable only if all beneficial interests, both life interests and remainders, are vested in the same
32 person, whether in the settlor or someone else. An example of a trust to which the doctrine of
33 merger would apply is a trust of which the settlor is sole trustee, sole beneficiary for life, and with
34 the remainder payable to the settlor’s probate estate. On the doctrine of merger generally, *see*
35 Restatement (Third) of Trusts § 69 (Tentative Draft No. 3, 2001); Restatement (Second) of Trusts
36 § 341 (1959).

37 Subsection (c) allows a settlor to empower the trustee to select the beneficiaries even if the
38 class from whom the selection may be made cannot be ascertained. Such a provision would fail

1 under traditional doctrine; it is an imperative power with no designated beneficiary capable of
2 enforcement. Such a provision is valid, however, under both this Code and the Restatement, if there
3 is at least one person who can meet the description. If the trustee does not exercise the power within
4 a reasonable time, the power fails and the property will pass by resulting trust. *See* Restatement
5 (Third) of Trusts § 46 (Tentative Draft No. 2, approved 1999). *See also* Restatement (Second) of
6 Trusts § 122 (1959); Restatement (Second) of Property: Donative Transfers § 12.1 cmt. e (1986).

7 **SECTION 403. TRUSTS CREATED IN OTHER JURISDICTIONS.** A trust not created
8 by will is validly created if its creation complies with the law of the jurisdiction in which the trust
9 instrument was executed, or the law of the jurisdiction in which, at the time of creation:

10 (1) the settlor was domiciled, had a place of abode, or was a national;

11 (2) a trustee was domiciled or had a place of business; or

12 (3) any trust property was located.

13 **Kansas Comment**

14 This section is new.

15 **UTC Comment**

16 This section is comparable to Section 2-506 of the Uniform Probate Code, which validates
17 wills executed in compliance with the law of a variety of places in which the testator had a
18 significant contact. Unlike the UPC, however, this section is not limited to execution of the
19 instrument but applies to the entire process of a trust's creation, including compliance with the
20 requirement that there be trust property. In addition, unlike the UPC, this section validates a trust
21 valid under the law of the domicile or place of business of the designated trustee, or if valid under
22 the law of the place where any of the trust property is located. For the requirements for creating a
23 trust, see Section 402.

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

1 **Kansas Comment**

2 Section clarifies Kansas law. Rule apparently not clearly stated in Kansas case law for
3 private trusts. See e.g. *Fry v. McCormick*, 170 Kan. 741, 228 P.2d 727 (1951) (limited analysis
4 whether trust was void based on public policy); *In re Estate of Sheets*, 175 Kan. 741, 750, 267 P.2d
5 962 (1954) (provisions of will must be lawful in their purpose, do not contravene the prohibitions
6 of any statute, and do not violate any positive rule of law); *Taliaferro v. Taliaferro*, 260 Kan. 573,
7 Syl. 2, 921 P.2d 803 (1996) (trust property must be held for benefit of another person).

8 **UTC Comment**

9 For an explication of the requirement that a trust must not have a purpose that is unlawful
10 or against public policy, see Restatement (Third) of Trusts §§ 27-30 (Tentative Draft No. 2,
11 approved 1999); Restatement (Second) of Trusts §§ 59-65 (1959). A trust with a purpose that is
12 unlawful or against public policy is invalid. Depending on when the violation occurred, the trust
13 may be invalid at its inception or it may become invalid at a later date. The invalidity may also
14 affect only particular provisions. Generally, a trust has a purpose which is illegal if (1) its
15 performance involves the commission of a criminal or tortious act by the trustee; (2) the settlor's
16 purpose in creating the trust was to defraud creditors or others; or (3) the consideration for the
17 creation of the trust was illegal. See Restatement (Third) of Trusts § 28 cmt. a (Tentative Draft No.
18 2, approved 1999); Restatement (Second) of Trusts § 60 cmt. a (1959). Purposes violative of public
19 policy include those that tend to encourage criminal or tortious conduct, that interfere with freedom
20 to marry or encourage divorce, that limit religious freedom, or which are frivolous or capricious.
21 See Restatement (Third) of Trusts § 29 cmt. d-h (Tentative Draft No. 2, 1999); Restatement (Second)
22 of Trusts § 62 (1959).

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

34 Section 412(b), which allows the court to modify administrative terms that are impracticable,
35 wasteful, or impair the trust's administration, is a specific application of the requirement that a trust
36 and its terms be for the benefit of the beneficiaries. The fact that a settlor suggests or directs an
37 unlawful or other inappropriate means for performing a trust does not invalidate the trust if the trust
38 has a substantial purpose that can be achieved by other methods. See Restatement (Third) of Trusts

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1 § 28 cmt. e (Tentative Draft No. 2, approved 1999).

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

3 (a) A charitable trust may be created for the relief of poverty, the advancement of education
4 or religion, the promotion of health, governmental or municipal purposes, or other purposes the
5 achievement of which is beneficial to the community.

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

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

11 **Kansas Comment**

12 Subsection (a) generally conforms to Kansas Law. See K.S.A. 59-22a01(c)(1) ("charity and
13 charitable includes, but is not limited to, any eleemosynary, religious, benevolent, educational,
14 scientific, artistic or literary purpose"); *Evangelical Village & Bible Conference, Inc. v. Board of*
15 *County Com'rs of Johnson County*, 207 Kan. 383, 388-89, 485 P.2d 343 (1971) (charity is broadly
16 defined as a gift for general public use).

17 Subsection (b) is new, although consistent with Kansas law. See K.S.A. 59-22a01 (cy-pres
18 rule allows court to administer charitable trust in accordance with settlor's general charitable
19 intention if a trust is illegal, impossible or impracticable of fulfillment); *In re Estate of Porter*, 164
20 Kan. 92, 98, 187 P.2d 520 (1947) (charitable gifts are not void for uncertainty as to beneficiaries
21 where their selection is left to the discretion of the trustee appointed by the donor).

22 Subsection (c) conforms to Kansas law. See K.S.A. 59-22a01 ("any interested party" may
23 bring an action for administration of a charitable trust).

24 **UTC Comment**

25 The required purposes of a charitable trust specified in subsection (a) restate the well-
26 established categories of charitable purposes listed in Restatement (Third) of Trusts § 28 (Tentative

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1 Draft No. 3, 2001), and Restatement (Second) of Trusts § 368 (1959), which ultimately derive from
2 the Statute of Charitable Uses, 43 Eliz. I, c.4 (1601). The directive to the courts to validate purposes
3 the achievement of which are beneficial to the community has proved to be remarkably adaptable
4 over the centuries. The drafters concluded that it should not be disturbed.

5 Charitable trusts are subject to the restriction in Section 404 that a trust purpose must be legal
6 and not contrary to public policy. This would include trusts that involve invidious discrimination.
7 *See* Restatement (Third) of Trusts § 28 cmt. f (Tentative Draft No. 3, 2001).

8 Under subsection (b), a trust that states a general charitable purpose does not fail if the settlor
9 neglected to specify a particular charitable purpose or organization to receive distributions. The
10 court may instead validate the trust by specifying particular charitable purposes or recipients, or
11 delegate to the trustee the framing of an appropriate scheme. *See* Restatement (Second) of Trusts
12 § 397 cmt. d (1959). Subsection (b) of this section is a corollary to Section 413, which states the
13 doctrine of cy pres. Under Section 413(a), a trust failing to state a general charitable purpose does
14 not fail upon failure of the particular means specified in the terms of the trust. The court must
15 instead apply the trust property in a manner consistent with the settlor's charitable purposes to the
16 extent they can be ascertained.

17 Subsection (b) does not apply to the long-established estate planning technique of delegating
18 to the trustee the selection of the charitable purposes or recipients. In that case, judicial intervention
19 to supply particular terms is not necessary to validate the creation of the trust. The necessary terms
20 instead will be supplied by the trustee. *See* Restatement (Second) of Trusts § 396 (1959). Judicial
21 intervention under subsection (b) will become necessary only if the trustee fails to make a selection.
22 *See* Restatement (Second) of Trusts § 397 cmt. d (1959). Pursuant to Section 110(b), the charitable
23 organizations selected by the trustee would not have the rights of qualified beneficiaries under this
24 Code because they are not expressly designated to receive distributions under the terms of the trust.

25 Contrary to Restatement (Second) of Trusts § 391 (1959), subsection (c) grants a settlor
26 standing to maintain an action to enforce a charitable trust. The grant of standing to the settlor does
27 not negate the right of the state attorney general or persons with special interests to enforce either
28 the trust or their interests. For the law on the enforcement of charitable trusts, see Susan N. Gary,
29 *Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law*, 21 U. Hawaii
30 L. Rev. 593 (1999).

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

34 (b) Any provision in a trust, written or prepared for another person, that transfers property

1 and that gives the scrivener or the scrivener's parent, children, issue, sibling or spouse any direct or
2 indirect gift is invalid unless: (1) the scrivener is related to the settlor by blood or marriage; or (2)
3 it affirmatively appears that the settlor had read and knew the contents of the trust and had
4 independent legal advice with reference thereto. The words "children" and "issue" as used in this
5 section, are defined in K.S.A. 59-501.

6 **Kansas Comment**

7 Subsection (a) conforms to Kansas law. See *Peterson v. Peterson*, 10 Kan. App. 2d 437, Syl.
8 2, 700 P.2d 585 (1985).

9 The Kansas drafting committee changed the UTC by adding new subsection (b) regarding
10 inter vivos trusts. K.S.A. 59-605 contains a related provision for wills, although it differs
11 significantly from this subsection. K.S.A. 59-605 provides that, where the sole or principal
12 beneficiary under a will, while occupying a position of trust with the testator, caused the will to be
13 prepared, the will shall be held invalid unless the testator read or knew the contents of the will and
14 had independent counsel. For a discussion of this statute and its application, see *In re Estate of*
15 *Bolinder*, 19 Kan. App. 2d 72, 864 P.2d 228 (1993).

16 **UTC Comment**

17
18 This section is a specific application of Restatement (Third) of Trusts § 12 (Tentative Draft
19 No. 1, approved 1996), and Restatement (Second) of Trusts § 333 (1959), which provide that a trust
20 can be set aside or reformed on the same grounds as those which apply to a transfer of property not
21 in trust, among which include undue influence, duress, and fraud, and mistake. This section
22 addresses undue influence, duress, and fraud. For reformation of a trust on grounds of mistake, see
23 Section 415. See also Restatement (Third) of Property: Wills and Other Donative Transfers § 8.3
24 (Tentative Draft No. 3, 2001), which closely tracks the language above. Similar to a will, the
25 invalidity of a trust on grounds of undue influence, duress, or fraud may be in whole or in part.

26 **SECTION 407. EVIDENCE OF ORAL TRUST.** Except as required by ~~a statute other~~
27 ~~than this [Code]~~ K.S.A. 59-606 with respect to testamentary trusts or K.S.A. 33-105, 33-106 and 58-
28 2401, a trust need not be evidenced by a trust instrument, but the creation of an oral trust and its
29 terms may be established only by clear and convincing evidence.

1 **Kansas Comment**

2 This section conforms to Kansas law. See *Diller v. Kilgore*, 135 Kan. 200, 9 P.2d 643
3 (1932) (express trust in personal property may be created by parol agreement); *Kampschroeder v.*
4 *Kampschroeder*, 20 Kan. App. 2d 361, 887 P.2d 1152 (1995) (clear and convincing evidence
5 required to establish an oral trust).

6 The Kansas drafting committee changed this section of the UTC by striking the phrase, “a
7 statute other than under this [Code]” and inserting in lieu thereof the phrase, “K.S.A. 59-606 with
8 respect to testamentary trusts or K.S.A. 33-105, 33-106 and 58-2401.”

9 **UTC Comment**

10 While it is always advisable for a settlor to reduce a trust to writing, the Uniform Trust Code
11 follows established law in recognizing oral trusts. Such trusts are viewed with caution, however.
12 The requirement of this section that an oral trust can be established only by clear and convincing
13 evidence is a higher standard than is in effect in many States. See Restatement (Third) of Trusts § 20
14 Reporter’s Notes (Tentative Draft No. 1, approved 1996).

15 Absent some specific statutory provision, such as a provision requiring that transfers of real
16 property be in writing, a trust need not be evidenced by a writing. States with statutes of frauds or
17 other provisions requiring that the creation of certain trusts must be evidenced by a writing may wish
specifically to cite such provisions.

19 For the Statute of Frauds generally, see Restatement (Second) of Trusts §§ 40-52 (1959).
20 For a description of what the writing must contain, assuming that a writing is required, see
21 Restatement (Third) of Trusts § 22 (Tentative Draft No. 1, approved 1996); Restatement (Second)
22 of Trusts § 46-49 (1959). For a discussion of when the writing must be signed, see Restatement
23 (Third) of Trusts § 23 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts
24 § 41-42 (1959). For the law of oral trusts, see Restatement (Third) of Trusts § 20 (Tentative Draft
25 No. 1, approved 1996); Restatement (Second) of Trusts §§ 43-45 (1959).

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

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

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

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

10 **Kansas Comment**

11 This section is new.

12 The Kansas drafting committee changed this section of the UTC in the last sentence by
13 striking the word "must" and inserting in lieu thereof the word "may."

14 **UTC Comment**

15 This section and the next section of the Code validate so called honorary trusts. Unlike
16 honorary trusts created pursuant to the common law of trusts, which are arguably no more than
17 powers of appointment, the trusts created by this and the next section are valid and enforceable. For
18 a discussion of the common law doctrine, see Restatement (Third) of Trusts § 47 (Tentative Draft
19 No. 2, approved 1999); Restatement (Second) of Trusts § 124 (1959).

20 This section addresses a particular type of honorary trust, the trust for the care of an animal.
21 Section 409 specifies the requirements for trusts without ascertainable beneficiaries that are created
22 for other noncharitable purposes. A trust for the care of an animal may last for the life of the animal.
23 While the animal will ordinarily be alive on the date the trust is created, an animal may be added as
24 a beneficiary after that date as long as the addition is made prior to the settlor's death. Animals in
25 gestation but not yet born at the time of the trust's creation may also be covered by its terms. A trust
26 authorized by this section may be created to benefit one designated animal or several designated
27 animals.

28 Subsection (b) addresses enforcement. Noncharitable trusts ordinarily may be enforced by

1 their beneficiaries. Charitable trusts may be enforced by the State's attorney general or by a person
2 deemed to have a special interest. *See* Restatement (Second) of Trusts § 391 (1959). But at common
3 law, a trust for the care of an animal or a trust without an ascertainable beneficiary created for a
4 noncharitable purpose was unenforceable because there was no person authorized to enforce the
5 trustee's obligations.

6 Sections 408 and 409 close this gap. The intended use of a trust authorized by either section
7 may be enforced by a person designated in the terms of the trust or, if none, by a person appointed
8 by the court. In either case, Section 110(b) grants to the person appointed the rights of a qualified
9 beneficiary for the purpose of receiving notices and providing consents. If the trust is created for
10 the care of an animal, a person with an interest in the welfare of the animal has standing to petition
11 for an appointment. The person appointed by the court to enforce the trust should also be a person
12 who has exhibited an interest in the animal's welfare. The concept of granting standing to a person
13 with a demonstrated interest in the animal's welfare is derived from the Uniform Guardianship and
14 Protective Proceedings Act, which allows a person interested in the welfare of a ward or protected
15 person to file petitions on behalf of the ward or protected person. *See, e.g.*, Uniform Probate Code
16 §§ 5-210(b), 5-414(a).

17 Subsection (c) addresses the problem of excess funds. If the court determines that the trust
18 property exceeds the amount needed for the intended purpose and that the terms of the trust do not
19 direct the disposition, a resulting trust is ordinarily created in the settlor or settlor's successors in
20 interest. *See* Restatement (Third) of Trusts § 47 (Tentative Draft No. 2, approved 1999);
21 Restatement (Second) of Trusts § 124 (1959). Successors in interest include the beneficiaries under
22 the settlor's will, if the settlor has a will, or in the absence of an effective will provision, the settlor's
23 heirs. The settlor may also anticipate the problem of excess funds by directing their disposition in
24 the terms of the trust. The disposition of excess funds is within the settlor's control. *See* Section
25 105(a). While a trust for an animal is usually not created until the settlor's death, subsection (a)
26 allows such a trust to be created during the settlor's lifetime. Accordingly, if the settlor is still living,
27 subsection (c) provides for distribution of excess funds to the settlor, and not to the settlor's
28 successors in interest.

29 Should the means chosen not be particularly efficient, a trust created for the care of an animal
30 can also be terminated by the trustee or court under Section 414. Termination of a trust under that
31 section, however, requires that the trustee or court develop an alternative means for carrying out the
32 trust purposes. *See* Section 414(c).

33 This section and the next section are suggested by Section 2-907 of the Uniform Probate
34 Code, but much of this and the following section is new.
35

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

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

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

9 (3) Property of a trust authorized by this section may be applied only to its intended use,
10 except to the extent the court determines that the value of the trust property exceeds the amount
11 required for the intended use. Except as otherwise provided in the terms of the trust, property not
12 required for the intended use ~~must~~ may be distributed to the settlor, if then living, otherwise to the
13 settlor's successors in interest.

14 **Kansas Comment**

15 This section is new. Trust funds established for the permanent care of cemetery plots are
16 addressed by K.S.A. 17-1302 *et seq.*

17 The Kansas drafting committee changed this section of the UTC in the last sentence by
18 striking the word "must" and inserting in lieu thereof the word "may."

19 **UTC Comment**

20 This section authorizes two types of trusts without ascertainable beneficiaries; trusts for
21 general but noncharitable purposes, and trusts for a specific noncharitable purpose other than the care
22 of an animal, on which see Section 408. Examples of trusts for general noncharitable purposes
23 include a bequest of money to be distributed to such objects of benevolence as the trustee might
24 select. Unless such attempted disposition was interpreted as charitable, at common law the
25 disposition was honorary only and did not create a trust. Under this section, however, the disposition
26 is enforceable as a trust for a period of up to 21 years, although that number is placed in brackets to

1 indicate that States may wish to select a different time limit.

2 The most common example of a trust for a specific noncharitable purpose is a trust for the
3 care of a cemetery plot. The lead-in language to the section recognizes that some special purpose
4 trusts, particularly those for care of cemetery plots, are subject to other statutes. Such legislation will
5 typically endeavor to facilitate perpetual care as opposed to care limited to 21 years as under this
6 section.

7 For the requirement that a trust, particularly the type of trust authorized by this section, must
8 have a purpose that is not capricious, see Section 404 Comment. For examples of the types of trusts
9 authorized by this section, see Restatement (Third) of Trusts § 47 (Tentative Draft No. 2, approved
10 1999), and Restatement (Second) of Trusts § 62 cmt. w and § 124 (1959). The case law on
11 capricious purposes is collected in 2 Austin W. Scott & William F. Fratcher, The Law of Trusts
12 § 124.7 (4th ed. 1987).

13 This section is similar to Section 408, although less detailed. Much of the Comment to
14 Section 408 also applies to this section.
15

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

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

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

1 **Kansas Comment**

2 Subsection (a) generally conforms to Kansas law. See K.S.A. 59-2295(b) (trustee has right
3 to terminate trust in accordance with provisions of trust instrument or the law); *In re Estate of*
4 *Sanders*, 261 Kan. 176, 929 P.2d 153 (1996) (trust terminates only when settlor revokes trust in
5 accordance with trust provisions).

6 Subsection (b) is new.

7 **UTC Comment**

8 Subsection (a) lists the grounds on which trusts typically terminate. For a similar
9 formulation, see Restatement (Third) of Trusts § 61 (Tentative Draft No. 3, 2001). Terminations
10 under subsection (a) may be in either in whole or in part. Other types of terminations, all of which
11 require action by a court, trustee, or beneficiaries, are covered in Sections 411-414, which also
12 address trust modification. Of these sections, all but Section 411 apply to charitable trusts and all
13 but Section 413 apply to noncharitable trusts.

14 Withdrawal of the trust property is not an event terminating a trust. The trust remains in
15 existence although the trustee has no duties to perform unless and until property is later contributed
16 to the trust.

17 Subsection (b) specifies the persons who have standing to seek court approval or disapproval
18 of proposed trust modifications, terminations, combinations, or divisions. An approval or
19 disapproval may be sought for an action that does not require court permission, including a petition
20 questioning the trustee's distribution upon termination of a trust under \$50,000 (Section 414), and
21 a petition to approve or disapprove a proposed trust division or consolidation (Section 417).
22 Subsection (b) makes the settlor an interested person with respect to a judicial proceeding brought
23 by the beneficiaries under Section 411 to terminate or modify a trust. Contrary to Restatement
24 (Second) of Trusts § 391 (1959), subsection (b) grants a settlor standing to petition the court under
25 Section 413 to apply cy pres to modify the settlor's charitable trust.

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

28 (a) A noncharitable irrevocable trust may be modified or terminated upon consent of the
29 settlor and all beneficiaries, even if the modification or termination is inconsistent with a material
30 purpose of the trust. A settlor's power to consent to a trust's termination may be exercised by an

1 agent under a power of attorney only to the extent expressly authorized by the power of attorney or
2 the terms of the trust; by the settlor's [conservator] with the approval of the court supervising the
3 [conservatorship] if an agent is not so authorized; or by the settlor's [guardian] with the approval of
4 the court supervising the [guardianship] if an agent is not so authorized and a conservator has not
5 been appointed.

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

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

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

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

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

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

21 Kansas Comment

22 The first sentence of subsection (a) generally conforms to Kansas law. In *Diller v. Kilgore*,

1 135 Kan. 200, Syl. 6, 9 P.2d 643 (1932), the Kansas Supreme Court recognized that if no power of
2 revocation has been reserved, a trust cannot be revoked by the creator without consent of the
3 beneficiaries. See also *Neeley v. Neeley*, 26 Kan. App. 2d 924, Syl. 2, 996 P.2d 346 (2000) (court
4 recognized general rule that an irrevocable spendthrift trust can be modified if settlor and all
5 beneficiaries consent). The second sentence of subsection (a) is new, although the Kansas Court of
6 Appeals has held that a settlor's right to revoke is personal to the settlor and nondelegable unless the
7 settlor expressly states otherwise in a power of attorney or the trust document. *Muller v. Bank of*
8 *America, N.A.*, __ Kan. App. 2d __, __ P.3d __ (2000).

9 The first sentence of subsection (b) conforms to Kansas law. See *McClary v. Harbaugh*, 231
10 Kan. 564, 566, 646 P.2d 498 (1982) (beneficiaries may not compel termination of trust if
11 continuance is necessary to carry out a material purpose of trust). The second sentence clarifies
12 Kansas law regarding modification, which apparently has not been addressed by Kansas courts.

13
14 The Kansas drafting committee changed subsection (c) by striking the word "not," thus
15 changing the UTC proposed language 180 degrees. As changed by the drafting committee,
16 subsection (c) is consistent with Kansas law. See *Neeley*, 26 Kan. App. 2d 924 (court held
17 spendthrift provision constitutes material purpose of trust).

18 Subsections (d) and (e) are new.

19 **UTC Comment**

20 This section describes the circumstances in which termination or modification of a
21 noncharitable irrevocable trust may be compelled by the beneficiaries, with or without the
22 concurrence of the settlor. For provisions governing modification or termination of trusts without
23 the need to seek beneficiary consent, see Sections 412 (modification or termination due to
24 unanticipated circumstances or inability to administer trust effectively), 414 (termination or
25 modification of uneconomic noncharitable trust), and 416 (modification to achieve settlor's tax
26 objectives). If the trust is revocable by the settlor, the method of revocation specified in Section 602
27 applies.

28 Subsection (a) states the test for termination or modification by the beneficiaries with the
29 concurrence of the settlor. Subsection (b) states the test for termination or modification by
30 unanimous consent of the beneficiaries without the concurrence of the settlor. The rules on trust
31 termination in Subsections (a)-(b) carries forward the *Clafin* rule, first stated in the famous case of
32 *Clafin v. Clafin*, 20 N.E. 454 (Mass. 1889). Subsection (c) addresses the effect of a spendthrift
33 provision. Subsection (d) directs how the trust property is to be distributed following a termination
34 under either subsection (a) or (b). Subsection (e) creates a procedure for judicial approval of a
35 proposed termination or modification when the consent of less than all of the beneficiaries is
36 available.

37 Under this section, a trust may be modified or terminated over a trustee's objection.
38 However, pursuant to Section 410, the trustee has standing to object to a proposed termination or

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1 modification.

2 The settlor's right to join the beneficiaries in terminating or modifying a trust under this
3 section does not rise to the level of a taxable power. *See* Treas. Reg. § 20.2038-1(a)(2). No gift tax
4 consequences result from a termination as long as the beneficiaries agree to distribute the trust
5 property in accordance with the value of their proportionate interests.

6 The provisions of Article 3 on representation, virtual representation and the appointment and
7 approval of representatives appointed by the court apply to the determination of whether all
8 beneficiaries have signified consent under this section. The authority to consent on behalf of
9 another person, however, does not include authority to consent over the other person's objection.
10 *See* Section 301(b). Regarding the persons who may consent on behalf of a beneficiary, see Sections
11 302 through 305. A consent given by a representative is invalid to the extent there is a conflict of
12 interest between the representative and the person represented. Given this limitation, virtual
13 representation of a beneficiary's interest by another beneficiary pursuant to Section 304 will rarely
14 be available in a trust termination case, although it should be routinely available in cases involving
15 trust modification, such as a grant to the trustee of additional powers. If virtual or other form of
16 representation is unavailable, Section 305 of the Code permits the court to appoint a representative
17 who may give the necessary consent to the proposed modification or termination on behalf of the
18 minor, incapacitated, unborn, or unascertained beneficiary. The ability to use virtual and other forms
19 of representation to consent on a beneficiary's behalf to a trust termination or modification has not
20 traditionally been part of the law, although there are some notable exceptions. *Compare* Restatement
21 (Second) § 337(1) (1959) (beneficiary must not be under incapacity), *with Hatch v. Riggs National*
22 *Bank*, 361 F.2d 559 (D.C. Cir. 1966) (guardian ad litem authorized to consent on beneficiary's
23 behalf).

24 Subsection (a) also addresses the authority of an agent, conservator, or guardian to act on a
25 settlor's behalf. Consistent with Section 602 on revocation or modification of a revocable trust, the
26 section assumes that a settlor, in granting an agent general authority, did not intend for the agent to
27 have authority to consent to the termination or modification of a trust, authority that could be
28 exercised to radically alter the settlor's estate plan. In order for an agent to validly consent to a
29 termination or modification of the settlor's revocable trust, such authority must be expressly
30 conveyed either in the power or in the terms of the trust.

31 Subsection (a), however, does not impose restrictions on consent by a conservator or
32 guardian, other than prohibiting such action if the settlor is represented by an agent. The section
33 instead leaves the issue of a conservator's or guardian's authority to local law. Many
34 conservatorship statutes recognize that termination or modification of the settlor's trust is a
35 sufficiently important transaction that a conservator should first obtain the approval of the court
36 supervising the conservatorship. *See, e.g.,* Uniform Probate Code § 5-411(a)(4). Because the
37 Uniform Trust Code uses the term "conservator" to refer to the person appointed by the court to
38 manage an individual's property (*see* Section 103(6)), a guardian may act on behalf of a settlor under
39 this section only if a conservator has not been appointed.

1 Subsection (a) is similar to Restatement (Third) of Trusts § 65(2) (Tentative Draft No. 3,
2 2001), and Restatement (Second) of Trusts § 338(2) (1959), both of which permit termination upon
3 joint action of the settlor and beneficiaries. Unlike termination by the beneficiaries alone under
4 subsection (b), termination with the concurrence of the settlor does not require a finding that the trust
5 no longer serves a material purpose. No finding of failure of material purpose is required because
6 all parties with a possible interest in the trust's continuation, both the settlor and beneficiaries, agree
7 there is no further need for the trust. Restatement Third goes further than subsection (b) of this
8 section and Restatement Second, however, in also allowing the beneficiaries to compel termination
9 of a trust that still serves a material purpose if the reasons for termination outweigh the continuing
10 material purpose.

11 Subsection (b), similar to Restatement Third but not Restatement Second, allows
12 modification by beneficiary action. The beneficiaries may modify any term of the trust if the
13 modification is not inconsistent with a material purpose of the trust. Restatement Third, though,
14 goes further than this Code in also allowing the beneficiaries to use trust modification as a basis for
15 removing the trustee if removal would not be inconsistent with a material purpose of the trust.
16 Under the Code, however, Section 706 is the exclusive provision on removal of trustees. Section
17 706(b)(4) recognizes that a request for removal upon unanimous agreement of the qualified
18 beneficiaries is a factor for the court to consider, but before removing the trustee the court must also
19 find that such action best serves the interests of all the beneficiaries, that removal is not inconsistent
20 with a material purpose of the trust, and that a suitable cotrustee or successor trustee is available.
21 *Compare* Section 706(b)(4), *with* Restatement (Third) § 65 cmt. f (Tentative Draft No. 3, 2001).

22 The requirement that the trust no longer serve a material purpose before it can be terminated
23 by the beneficiaries does not mean that the trust have no remaining function. In order to be material,
24 the purpose remaining to be performed must be of some significance:

25 Material purposes are not readily to be inferred. A finding of such a purpose generally
26 requires some showing of a particular concern or objective on the part of the settlor, such as concern
27 with regard to the beneficiary's management skills, judgment, or level of maturity. Thus, a court
28 may look for some circumstantial or other evidence indicating that the trust arrangement represented
29 to the settlor more than a method of allocating the benefits of property among multiple beneficiaries,
30 or a means of offering to the beneficiaries (but not imposing on them) a particular advantage.
31 Sometimes, of course, the very nature or design of a trust suggests its protective nature or some other
32 material purpose.

33 Restatement (Third) of Trusts § 65 cmt. d (Tentative Draft No. 3, 2001).

34 Subsection (c) of this section deals with the effect of a spendthrift provision on the right of
35 a beneficiary to concur in a trust termination or modification. Spendthrift terms have sometimes
36 been construed to constitute a material purpose without inquiry into the intention of the particular
37 settlor. For examples, see Restatement (Second) of Trusts § 337 (1959); George G. Bogert &
38 George T. Bogert, *The Law of Trusts and Trustees* § 1008 (Rev. 2d ed. 1983); and 4 Austin W. Scott

1 & William F. Fratcher, The Law of Trusts § 337 (4th ed. 1989). This result is troublesome because
2 spendthrift provisions are often added to instruments with little thought. Subsection (c), similar to
3 Restatement (Third) of Trusts § 65 cmt. e (Tentative Draft No. 3, 2001), does not negate the
4 possibility that continuation of a trust to assure spendthrift protection might have been a material
5 purpose of the particular settlor. The question of whether that was the intent of a particular settlor
6 is instead a matter of fact to be determined on the totality of the circumstances.
7

8 Subsection (d) recognizes that the beneficiaries' power to compel termination of the trust
9 includes the right to direct how the trust property is to be distributed. While subsection (a) requires
10 the settlor's consent to terminate an irrevocable trust, the settlor does not control the subsequent
11 distribution of the trust property. Once termination has been approved, how the trust property is to
12 be distributed is solely for the beneficiaries to decide.

13 Subsection (e), similar to Restatement (Third) of Trusts § 65 cmt. c (Tentative Draft No. 3,
14 2001), and Restatement (Second) of Trusts §§ 338(2) and 340(2) (1959), addresses situations in
15 which a termination or modification is requested by less than all the beneficiaries, either because a
16 beneficiary objects, the consent of a beneficiary cannot be obtained, or representation is either
17 unavailable or its application uncertain. Subsection (e) allows the court to fashion an appropriate
18 order protecting the interests of the nonconsenting beneficiaries while at the same time permitting
19 the remainder of the trust property to be distributed without restriction. The order of protection for
20 the nonconsenting beneficiaries might include partial continuation of the trust, the purchase of an
21 annuity, or the valuation and cashout of the interest.

22 **SECTION 412. MODIFICATION OR TERMINATION BECAUSE OF**
23 **UNANTICIPATED CIRCUMSTANCES OR INABILITY TO ADMINISTER TRUST**
24 **EFFECTIVELY.**

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

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

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

3 **Kansas Comment**

4 Subsections (a) and (b) expand Kansas law which currently allows the court to terminate a
5 trust if the costs of administration defeat the purposes of the trust. K.S.A. 59-2295.
6

7 Subsection (c) is consistent with K.S.A. 59-2295 which requires the court to distribute
8 property in accordance with settlor's intention.

9 **UTC Comment**

10 This section broadens the court's ability to apply equitable deviation to terminate or modify
11 a trust. Subsection (a) allows a court to modify the dispositive provisions of the trust as well as its
12 administrative terms. For example, modification of the dispositive provisions to increase support
13 of a beneficiary might be appropriate if the beneficiary has become unable to provide for support due
14 to poor health or serious injury. Subsection (a) is similar to Restatement (Third) of Trusts § 66(1)
15 (Tentative Draft No. 3, 2001), except that this section, unlike the Restatement, does not impose a
16 duty on the trustee to petition the court if the trustee is aware of circumstances justifying judicial
17 modification. The purpose of the "equitable deviation" authorized by subsection (a) is not to
18 disregard the settlor's intent but to modify inopportune details to effectuate better the settlor's
19 broader purposes. Among other things, equitable deviation may be used to modify administrative
20 or dispositive terms due to the failure to anticipate economic change or the incapacity of a
21 beneficiary. For numerous illustrations, see Restatement (Third) of Trusts § 66 cmt. b (Tentative
22 Draft No. 3, 2001). While it is necessary that there be circumstances not anticipated by the settlor
23 before the court may grant relief under subsection (a), the circumstances may have been in existence
24 when the trust was created. This section thus complements Section 415, which allows for
25 reformation of a trust based on mistake of fact or law at the creation of the trust.

26 Subsection (b) broadens the court's ability to modify the administrative terms of a trust. The
27 standard under subsection (b) is similar to the standard for applying cy pres to a charitable trust. See
28 Section 413(a). Just as a charitable trust may be modified if its particular charitable purpose
29 becomes impracticable or wasteful, so can the administrative terms of any trust, charitable or
30 noncharitable. Subsections (a) and (b) are not mutually exclusive. Many situations justifying
31 modification of administrative terms under subsection (a) will also justify modification under
32 subsection (b). Subsection (b) is also an application of the requirement in Section 404 that a trust
33 and its terms must be for the benefit of its beneficiaries. See also Restatement (Third) of Trusts
34 § 27(2) and cmt. b (Tentative Draft No. 2, approved 1999). Although the settlor is granted
35 considerable latitude in defining the purposes of the trust, the principle that a trust have a purpose
36 which is for the benefit of its beneficiaries precludes unreasonable restrictions on the use of trust
37 property. An owner's freedom to be capricious about the use of the owner's own property ends when

1 the property is impressed with a trust for the benefit of others. *See* Restatement (Second) of Trusts
2 § 124 cmt. g (1959). Thus, attempts to impose unreasonable restrictions on the use of trust property
3 will fail. *See* Restatement (Third) of Trusts § 27 Reporter's Notes to cmt. b (Tentative Draft No. 2,
4 approved 1999). Subsection (b), unlike subsection (a), does not have a direct precedent in the
5 common law, but various States have insisted on such a measure by statute. *See, e.g.,* Mo. Rev. Stat.
6 §456.590.1.

7 Upon termination of a trust under this section, subsection (c) requires that the trust be
8 distributed in a manner consistent with the purposes of the trust. As under the doctrine of cy pres,
9 effectuating a distribution consistent with the purposes of the trust requires an examination of what
10 the settlor would have intended had the settlor been aware of the unanticipated circumstances.
11 Typically, such terminating distributions will be made to the qualified beneficiaries, often in
12 proportion to the actuarial value of their interests, although the section does not so prescribe. For
13 the definition of qualified beneficiary, see Section 103(12).

14 Modification under this section, because it does not require beneficiary action, is not
15 precluded by a spendthrift provision.

16 SECTION 413. CY PRES.

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

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

20 ~~(2) the trust property does not revert to the settlor or the settlor's successors in~~
21 ~~interest; and~~

22 ~~(3) the court may apply cy pres to modify or terminate the trust by directing that the~~
23 ~~trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's~~
24 ~~charitable purposes.~~

25 ~~(b) A provision in the terms of a charitable trust that would result in distribution of the trust~~
26 ~~property to a noncharitable beneficiary prevails over the power of the court under subsection (a) to~~
27 ~~apply cy pres to modify or terminate the trust only if, when the provision takes effect:~~

1 ~~(1) the trust property is to revert to the settlor and the settlor is still living; or~~

2 ~~(2) fewer than 21 years have elapsed since the date of the trust's creation.~~

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

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

20 (1) With the written consent of the charitable beneficiaries, the noncharitable beneficiaries not under
21 any legal disability and duly appointed guardians or guardians ad litem acting on behalf of any
22 beneficiaries under legal disability or conservator; or

1 (2) upon a finding that the interest of such beneficiaries is substantially preserved, order a change
2 to the trust by reformation, amendment, construction or otherwise, which changes a reformable
3 interest into a qualified interest within the meaning of section 2055(e)(3) of the internal revenue code
4 of 1986. In every such proceeding, the attorney general, as representative of the public interest, shall
5 be notified and given an opportunity to be heard.

6 (c) As used in this act "Impracticable of fulfillment" includes, but is not limited to, the failure of any
7 charitable trust, testamentary or inter vivos, including, without limitation, trusts described in section
8 509 of the internal revenue code of 1986 and charitable remainder trusts described in section 664 of
9 the internal revenue code of 1986, to include, if required to do so by section 508(e) or section
10 4947(a) of the internal revenue code of 1986, the provisions relating to governing instruments set
11 forth in section 508(e) of the internal revenue code of 1986.

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

14 **Kansas Comment**

15 The Kansas drafting committee amended the Uniform Trust Code by striking Section 413
16 and replacing it with an amended version of K.S.A. 59-22a01. The drafting committee preferred
17 K.S.A. 59-22a01 which specifically allows reformation or amendment of a charitable trust if
18 necessary to preserve a federal estate tax deduction.

19 The Kansas drafting committee also noted that subsection (b) of the Uniform Trust Code
20 modifies Kansas law, which provides the cy pres rule shall not apply if the settlor has provided,
21 either directly or indirectly, for an alternative plan. The committee preferred the Kansas law.

22 For a detailed discussion of K.S.A. 59-22a01 and the common law doctrine of cy pres, see
23 *In re Estate of Crawshaw*, 249 Kan. 388, 806 P.2d 1014 (1991).

24 **UTC Comment**

25 Subsection (a) codifies the court's inherent authority to apply cy pres. The power may be

1 applied to modify an administrative or dispositive term. The court may order the trust terminated
2 and distributed to other charitable entities. Partial termination may also be ordered if the trust
3 property is more than sufficient to satisfy the trust's current purposes. Subsection (a), which is
4 similar to Restatement (Third) of Trusts § 67 (Tentative Draft No. 3, 2001), modifies the doctrine
5 of cy pres by presuming that the settlor had a general charitable intent when a particular charitable
6 purpose becomes impossible or impracticable to achieve. Traditional doctrine did not supply that
7 presumption, leaving it to the courts to determine whether the settlor had a general charitable intent.
8 If such an intent is found, the trust property is applied to other charitable purposes. If not, the
9 charitable trust fails. See Restatement (Second) of Trusts § 399 (1959). In the great majority of
10 cases the settlor would prefer that the property be used for other charitable purposes. Courts are
11 usually able to find a general charitable purpose to which to apply the property, no matter how
12 vaguely such purpose may have been expressed by the settlor. Under subsection (a), if the particular
13 purpose for which the trust was created becomes impracticable, unlawful, impossible to achieve, or
14 wasteful, the trust does not fail. The court instead must either modify the terms of the trust or
15 distribute the property of the trust in a manner consistent with the settlor's charitable purposes.

16 The settlor, with one exception, may mandate that the trust property pass to a noncharitable
17 beneficiary upon failure of a particular charitable purpose. Responding to concerns about the
18 clogging of title and other administrative problems caused by remote default provisions upon failure
19 of a charitable purpose, subsection (b) invalidates a gift over to a noncharitable beneficiary upon
20 failure of a particular charitable purpose unless the trust property is to revert to a living settlor or
21 fewer than 21 years have elapsed since the trust's creation. Subsection (b) will not apply to a
22 charitable lead trust, under which a charity receives payments for a term certain with a remainder
23 to a noncharity. In the case of a charitable lead trust, the settlor's particular charitable purpose does
24 not fail upon completion of the specified trust term and distribution of the remainder to the
25 noncharity. Upon completion of the specified trust term, the settlor's particular charitable purpose
26 has instead been fulfilled. For a discussion of the reasons for a provision such as subsection (b), see
27 Ronald R. Chester, *Cy Pres of Gift Over: The Search for Coherence in Judicial Reform of Failed*
28 *Charitable Trusts*, 23 Suffolk U. L. Rev. 41 (1989).

29 The doctrine of cy pres is applied not only to trusts, but also to other types of charitable
30 dispositions, including those to charitable corporations. This section does not control dispositions
31 made in nontrust form. However, in formulating rules for such dispositions, the courts often refer
32 to the principles governing charitable trusts, which would include this Code.

33 For the definition of charitable purpose, see Section 405(a). Pursuant to Sections 405(c) and
34 410(b), a petition requesting a court to enforce a charitable trust or to apply cy pres may be
35 maintained by a settlor. Such actions can also be maintained by a cotrustee, the state attorney
36 general, or by a person having a special interest in the charitable disposition. See Restatement
37 (Second) of Trusts § 391 (1959).

1 would otherwise be excessive in relation to the size of the trust. The court may terminate a trust
2 under this section even if the settlor has forbidden it. *See* Section 105(b)(4). Judicial termination
3 under this subsection may be used whether or not the trust is larger or smaller than \$50,000.

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

9 Upon termination of a trust under this section, subsection (c) requires that the trust property
10 be distributed in a manner consistent with the purposes of the trust. In addition to outright
11 distribution to the beneficiaries, Section 816(21) authorizes payment to be made by a variety of
12 alternate payees. Distribution under this section will typically be made to the qualified beneficiaries
13 in proportion to the actuarial value of their interests.

14 Even though not accompanied by the usual trappings of a trust, the creation and transfer of
15 an easement for conservation or preservation will frequently create a charitable trust. The
16 organization to whom the easement was conveyed will be deemed to be acting as trustee of what will
17 ostensibly appear to be a contractual or property arrangement. Because of the fiduciary obligation
18 imposed, the termination or substantial modification of the easement by the "trustee" could
19 constitute a breach of trust. The drafters of the Uniform Trust Code concluded that easements for
20 conservation or preservation are sufficiently different from the typical cash and securities found in
21 small trusts that they should be excluded from this section, and subsection (d) so provides. Most
22 creators of such easements, it was surmised, would prefer that the easement be continued unchanged
23 even if the easement, and hence the trust, has a relatively low market value. For the law of
24 conservation easements, see Restatement (Third) of Property: Servitudes §1.6 (2000).

25 While this section is not directed principally at honorary trusts, it may be so applied. *See*
26 Sections 408, 409.

27 Because termination of a trust under this section is initiated by the trustee or ordered by the
28 court, termination is not precluded by a spendthrift provision.

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

1 **Kansas Comment**

2 This section generally conforms to Kansas law. See *Collins v. Richardson*, 168 Kan. 203,
3 209, 212 P.2d 302 (1949) (cause of action for reformation of trust based on mistake proper);
4 *Taliaferro v. Taliaferro*, 260 Kan. 573, Syl. 13, 921 P.2d 803 (1996) (extrinsic evidence admissible
5 to establish settlor's intention in written trust agreement upon showing of fraud, duress, mistake or
6 other ground for reformation or rescission).

7 **UTC Comment**

8 Reformation of inter vivos instruments to correct for a mistake of law or fact is a long-
9 established remedy. Restatement (Third) of Property: Wills and Other Donative Transfers § 12.1
10 (Tentative Draft No. 1, 1995), upon which this section is based, clarifies that this doctrine also
11 applies to wills.

12 This section applies whether the mistake is one of expression or one of inducement. A
13 mistake of expression occurs when the terms of the trust misstate the settlor's intention, fail to
14 include a term that was intended to be included, or include a term that was not intended to be
15 excluded. A mistake in the inducement occurs when the terms of the trust accurately reflect what
16 the settlor intended to be included or excluded but this intention was based on a mistake of fact or
17 law. Restatement (Third) of Property: Wills and Other Donative Transfers § 12.1 cmt. i (Tentative
18 Draft No. 1, 1995).

19 Reformation is different from clarification of an ambiguity. Clarification of an ambiguity
20 involves the interpretation of language already in the instrument. Reformation, on the other hand,
21 involves the addition of language not originally in the instrument, or the deletion of language
22 originally included by mistake. Because reformation involves the addition of language to the
23 instrument, or deletion of language in an instrument that may appear clear on its face, reliance on
24 extrinsic evidence is essential. To guard against the possibility of unreliable or contrived evidence
25 in such circumstance, the higher standard of clear and convincing proof is required. See Restatement
26 (Third) of Property: Wills and Other Donative Transfers § 12.1 cmt. e (Tentative Draft No. 1, 1995).

27 In determining the settlor's original intent, the court should not be bound by the so-called
28 "plain meaning" rule, which often produces a meaning plain only in the eye of the beholder. For this
29 reason, under leading American case law and scholarly analysis, evidence contradicting the so-called
30 plain meaning of the text is admissible. The objective of the plain meaning rule, to protect against
31 fraudulent testimony, is satisfied by the requirement in this section that clear and convincing
32 evidence be presented before a requested reformation may be granted. See Restatement (Third) of
33 Property: Wills and Other Donative Transfers § 12.1 cmt. d (Tentative Draft No. 1, 1995).

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1 **SECTION 417. COMBINATION AND DIVISION OF TRUSTS.** (a) After notice to the
2 qualified beneficiaries, a trustee may combine two or more trusts into a single trust or divide a trust
3 into two or more separate trusts, if the result does not impair rights of any beneficiary or adversely
4 affect achievement of the purposes of the trust. The trustee may make a division under this section
5 by:

6 (1) Giving written notice of the division, not later than the 30th day before the date of a
7 division under this subsection, to each qualified beneficiary; and (2) executing a written instrument,
8 acknowledged before a notary public or other person authorized to take acknowledgments of
9 conveyances of real estate stating that the trust has been divided pursuant to this section and that the
10 notice requirements of this subsection have been satisfied.

11 (b) A trustee, in the written instrument dividing a trust, shall allocate trust property among
12 the separate trusts on a fractional basis by identifying the assets and liabilities passing to each
13 separate trust, or on any other reasonable basis. The trustee shall allocate undesignated trust property
14 received after the trustee has divided the trust into separate trusts in the manner provided by the
15 written instrument dividing the trust, or, in the absence of a provision in the written instrument, in
16 a manner determined by the trustee.

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

18 (1) Giving a written notice of the combination, not later than the 30th day before the effective
19 date of the combination, to each qualified beneficiary; and

20 (2) executing a written instrument, acknowledged before a notary public or other person
21 authorized to take acknowledgments of conveyances of real estate stating that the trust has been
22 combined pursuant to this section and that the notice requirements of this subsection have been

1 satisfied.

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

6 **Kansas Comment**

7 The Kansas drafting committee combined Section 417 of the Uniform Trust Code with an
8 amended form of K.S.A. 58-2420 to draft this section.

9 **UTC Comment**

10 This section, which authorizes the combination or division of trusts, is subject to contrary
11 provision in the terms of the trust. *See* Section 105 and Article 4 General Comment. Many trust
12 instruments and standardized estate planning forms include comprehensive provisions governing
13 combination and division of trusts. Except for the requirement that the qualified beneficiaries
14 receive advance notice of a proposed combination or division, this section is similar to Restatement
15 (Third) of Trusts § 68 (Tentative Draft No. 3, 2001).

16 This section allows a trustee to combine two or more trusts even though their terms are not
17 identical. Typically the trusts to be combined will have been created by different members of the
18 same family and will vary on only insignificant details, such as the presence of different perpetuities
19 savings periods. The more the dispositive provisions of the trusts to be combined differ from each
20 other the more likely it is that a combination would impair some beneficiary's interest, hence the less
21 likely that the combination can be approved. Combining trusts may prompt more efficient trust
22 administration and is sometimes an alternative to terminating an uneconomic trust as authorized by
23 Section 414. Administrative economies promoted by combining trusts include a potential reduction
24 in trustees' fees, particularly if the trustee charges a minimum fee per trust, the ability to file one
25 trust income tax return instead of multiple returns, and the ability to invest a larger pool of capital
26 more effectively. Particularly if the terms of the trust are identical, available administrative
27 economies may suggest that the trustee has a responsibility to pursue a combination. *See* Section
28 805 (duty to incur only reasonable costs).

29 Division of trusts is often beneficial and, in certain circumstances, almost routine. Division
30 of trusts is frequently undertaken due to a desire to obtain maximum advantage of exemptions
31 available under the federal generation-skipping tax. While the terms of the trusts which result from
32 such a division are identical, the division will permit differing investment objectives to be pursued
33 and allow for discretionary distributions to be made from one trust and not the other. Given the

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1 substantial tax benefits often involved, a failure by the trustee to pursue a division might in certain
cases be a breach of fiduciary duty. The opposite could also be true if the division is undertaken to
3 increase fees or to fit within the small trust termination provision. See Section 414.

4 This section authorizes a trustee to divide a trust even if the trusts that result are dissimilar.
5 Conflicts among beneficiaries, including differing investment objectives, often invite such a division,
6 although as in the case with a proposed combination of trusts, the more the terms of the divided
7 trusts diverge from the original plan, the less likely it is that the settlor's purposes would be achieved
8 and that the division could be approved.

9 This section does not require that a combination or division be approved either by the court
10 or by the beneficiaries. Prudence may dictate, however, that court approval under Section 410 be
11 sought and beneficiary consent obtained whenever the terms of the trusts to be combined or the trusts
12 that will result from a division differ substantially one from the other. For the provisions relating
13 to beneficiary consent or ratification of a transaction, or release of trustee from liability, see Section
14 1009.

15 While the consent of the beneficiaries is not necessary before a trustee may combine or
16 divide trusts under this section, advance notice to the qualified beneficiaries of the proposed
17 combination or division is required. This is consistent with Section 813, which requires that the
18 trustee keep the beneficiaries reasonably informed of trust administration, including the giving of
19 advance notice to the qualified beneficiaries of several specified actions that may have a major
impact on their interests.

21 Numerous States have enacted statutes authorizing division of trusts, either by trustee action
22 or upon court order. For a list of these statutes, see Restatement (Third) Property: Donative
23 Transfers § 12.2 Statutory Note (Tentative Draft No. 1, approved 1995). Combination or division
24 has also been authorized by the courts in the absence of authorizing statute. See, e.g., *In re Will of*
25 *Marcus*, 552 N.Y.S. 2d 546 (Surr. Ct.1990) (combination); *In re Heller Inter Vivos Trust*, 613
26 N.Y.S. 2d 809 (Surr. Ct. 1994) (division); and *BankBoston v. Marlow*, 701 N.E. 2d 304 (Mass. 1998)
27 (division).

28 For a provision authorizing a trustee, in distributing the assets of the divided trust, to make
29 non-pro-rata distributions, see Section 816(22).

30 **SECTION 418. REFERENCE TO WRITTEN STATEMENT OR LIST.** A trust instrument
31 which establishes an inter vivos trust and which directs the trustee to distribute trust assets upon the
32 death of the settlor may refer to a separate written statement or list of items of personal property,
33 other than money, evidences of debt, documents of title, securities, and properties used in trade or

1 business, which are assets of the trust estate, and may direct the trustee to make distribution of such
2 items as indicated in the written statement or list. The trustee may distribute such items upon death
3 of the settlor in accordance with the written statement or list. Such written statement or list either
4 must be in the handwriting of the settlor or be signed by the settlor, and must describe the items with
5 reasonable certainty. The writing may be referred to in the trust instrument as one to be in existence
6 at the time of the settlor's death, prepared before or after execution of the trust instrument, and
7 altered by the settlor after its preparation. Transfer of items of personal property pursuant to this
8 section shall not be considered testamentary or be invalidated due to nonconformity with the
9 provisions of chapter 59 of the Kansas Statutes Annotated.

10 **Kansas Comment**

11 This section was not a part of the Uniform Trust Code as recommended by the Uniform Law
12 Commissioners. The source of the section is K.S.A. 59-2296, which is recommended for repeal.
13 The Kansas drafting committee is of the opinion this section should be included in the Kansas
14 Uniform Trust Code.

1 **ARTICLE 5**

2 **CREDITOR'S CLAIMS; SPENDTHRIFT AND DISCRETIONARY TRUSTS**

3 **General Comment**

4 This article addresses the validity of a spendthrift provision and the rights of creditors, both
5 of the settlor and beneficiaries, to reach a trust to collect a debt. Sections 501 and 502 state the
6 general rules. To the extent that a trust is protected by a spendthrift provision, a beneficiary's
7 creditor may not reach the beneficiary's interest until distribution is made by the trustee. To the
8 extent not protected by a spendthrift provision, however, the creditor can reach the beneficiary's
9 interest subject to the court's power to limit the relief. Section 503 lists the categories of creditors
10 whose claims are not subject to a spendthrift restriction. Sections 504 through 507 address special
11 categories in which the rights of a beneficiary's creditors are the same whether or not the trust
12 contains a spendthrift provision. Section 504 deals with discretionary trusts and trusts for which
13 distributions are subject to a standard. Section 505 covers creditor claims against a settlor, whether
14 the trust is revocable or irrevocable, and if revocable, whether the claim is made during the settlor's
15 lifetime or incident to the settlor's death. Section 506 provides a creditor with a remedy if a trustee
16 fails to make a mandated distribution within a reasonable time. Section 507 clarifies that although
17 the trustee holds legal title to trust property, that property is not subject to the trustee's personal
18 debts.

19 The provisions of this article relating to the validity and effect of a spendthrift provision and
20 the rights of certain creditors and assignees to reach the trust may not be modified by the terms of
21 the trust. *See* Section 105(b)(5).

22 This article does not supersede state exemption statutes nor an enacting jurisdiction's
23 Uniform Fraudulent Transfers Act which, when applicable, invalidates any type of gratuitous
24 transfer, including transfers into trust.

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

1 **Kansas Comment**

2 This section generally conforms to Kansas law. See *Wilcox v. Gentry*, 254 Kan. 411, 413-16,
3 867 P.2d 281 (1994) (absent spendthrift provision, payments made by trustee to or on behalf of
4 beneficiary are subject to creditors' garnishment).

5 **UTC Comment**

6 Absent a valid spendthrift provision, a creditor may reach the interest of a beneficiary the
7 same as any other of the beneficiary's assets. This does not necessarily mean that the creditor can
8 collect all distributions made to the beneficiary. Other creditor law of the State may limit the
9 creditor to a specified percentage of a distribution. See, e.g., Cal. Prob. Code § 15306.5. This
10 section does not prescribe the procedures for reaching a beneficiary's interest or of priority among
11 claimants, leaving those issues to the enacting State's laws on creditor rights. The section does
12 clarify, however, that an order obtained against the trustee, whatever state procedure may have been
13 used, may extend to future distributions whether made directly to the beneficiary or to others for the
14 beneficiary's benefit. By allowing an order to extend to future payments, the need for the creditor
15 periodically to return to court will be reduced.

16 A creditor typically will pursue a claim by serving an order on the trustee attaching the
17 beneficiary's interest. Assuming that the validity of the order cannot be contested, the trustee will
18 then pay to the creditor instead of to the beneficiary any payments the trustee would otherwise be
19 required to make to the beneficiary, as well as discretionary distributions the trustee decides to make.
20 The creditor may also, in theory, force a judicial sale of a beneficiary's interest.

21 Because proceedings to satisfy a claim are equitable in nature, the second sentence of this
22 section ratifies the court's discretion to limit the award as appropriate under the circumstances. In
23 exercising its discretion to limit relief, the court may appropriately consider the support needs of a
24 beneficiary and the beneficiary's family. See Restatement (Third) of Trusts § 56 cmt. e (Tentative
25 Draft No. 2, approved 1999).

26 **SECTION 502. SPENDTHRIFT PROVISION.**

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

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

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

5 **Kansas Comment**

6 Subsection (a) expands Kansas law. Although spendthrift trusts have been upheld in Kansas,
7 see e.g. *In re Watts*, 160 Kan. 377, 383-85, 162 P.2d 82 (1945), Kansas courts have not addressed
8 whether restraint of *both* voluntary and involuntary transfers is required for a spendthrift provision
9 to be valid.

10 Subsection (b) modifies Kansas law, which provides that the intent to create a spendthrift
11 trust need not be stated in express terms but may come from construction of the trust instrument as
12 a whole; inference of an intent to create a spendthrift trust must be made with reasonable certainty
13 and cannot come from loose and vague declarations. See *In re Estate of Sowers*, 1 Kan. App. 2d
14 675, 680, 574 P.2d 224 (1977).

15 Subsection (c) conforms to Kansas law. See definition of spendthrift trust in *Watts*, 160 Kan.
at 383-85.

17 **UTC Comment**

18 Under this section, a settlor has the power to restrain the transfer of a beneficiary's interest,
19 regardless of whether the beneficiary has an interest in income, in principal, or in both. Unless one
20 of the exceptions under this article applies, a creditor of the beneficiary is prohibited from attaching
21 a protected interest and may only attempt to collect directly from the beneficiary after payment is
22 made. This section is similar to Restatement (Third) of Trusts § 58 (Tentative Draft No. 2, approved
23 1999), and Restatement (Second) of Trusts §§ 152-153 (1959). For the definition of spendthrift
24 provision, see Section 103(15).

25 For a spendthrift provision to be effective under this Code, it must prohibit both the voluntary
26 and involuntary transfer of the beneficiary's interest, that is, a settlor may not allow a beneficiary
27 to assign while prohibiting a beneficiary's creditor from collecting, and vice versa. See Restatement
28 (Third) of Trusts § 58 cmt. b (Tentative Draft No. 2, approved 1999). See also Restatement (Second)
29 of Trusts § 152(2) (1959). A spendthrift provision valid under this Code will also be recognized as
30 valid in a federal bankruptcy proceeding. See 11 U.S.C. § 541(c)(2).

31 Subsection (b), which is derived from Texas Property Code § 112.035(b), allows a settlor to
32 provide maximum spendthrift protection simply by stating in the instrument that all interests are held

1 subject to a “spendthrift trust” or words of similar effect.

2 A disclaimer, because it is a refusal to accept ownership of an interest and not a transfer of
3 an interest already owned, is not affected by the presence or absence of a spendthrift provision. Most
4 disclaimer statutes expressly provide that the validity of a disclaimer is not affected by a spendthrift
5 protection. *See, e.g.*, Uniform Probate Code § 2-801(a). Releases and exercises of powers of
6 appointment are also not affected because they are not transfers of property. *See* Restatement (Third)
7 of Trusts § 58 cmt. c (Tentative Draft No. 2, approved 1999).

8 A spendthrift provision is ineffective against a beneficial interest retained by the settlor. *See*
9 Restatement (Third) of Trusts §58(2), approved 1999. This is a necessary corollary to Section
10 505(a)(2), which allows a creditor or assignee of the settlor to reach the maximum amount that can
11 be distributed to or for the settlor’s benefit. This right to reach the trust applies whether or not the
12 trust contains a spendthrift provision.

13 A valid spendthrift provision makes it impossible for a beneficiary to make a legally binding
14 transfer, but the trustee may choose to honor the beneficiary’s purported assignment. The trustee
15 may recommence distributions to the beneficiary at anytime. The beneficiary, not having made a
16 binding transfer, can withdraw the beneficiary’s direction but only as to future payments. *See*
17 Restatement (Third) of Trusts § 58 cmt. d (Tentative Draft No. 2, approved 1999); Restatement
18 (Second) of Trusts § 152 cmt. i (1959).

19 **SECTION 503. EXCEPTIONS TO SPENDTHRIFT PROVISION.**

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

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

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

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1 **Kansas Comment**

2 The rules in subsections (b) and (c) were recognized in *State ex rel. Secretary of Social and*
3 *Rehabilitation Services v. Jackson*, 249 Kan. 635, 640-41, 822 P.2d 1033 (1991). Subsection (a) is
4 new.

5 In subsection (c), the Kansas drafting committee changed the UTC by inserting the phrase,
6 “subdivisions thereof.”

7 **UTC Comment**

8 This section exempts the claims of certain categories of creditors from the effects of a
9 spendthrift restriction.

10 The exception in subsection (b) for judgments or orders to support a beneficiary’s child or
11 current or former spouse is in accord with Restatement (Third) of Trusts § 59(a) (Tentative Draft
12 No. 2, approved 1999), Restatement (Second) of Trusts § 157(a) (1959), and numerous state statutes.
13 It is also consistent with federal bankruptcy law, which exempts such support orders from discharge.
14 The effect of this exception is to permit the claimant for unpaid support to attach present or future
15 distributions that would otherwise be made to the beneficiary. Distributions subject to attachment
16 include distributions required by the express terms of the trust, such as mandatory payments of
17 income, and distributions the trustee has otherwise decided to make, such as through the exercise
18 of discretion. Subsection (b), unlike Section 504, does not authorize the spousal or child claimant
19 to compel a distribution from the trust. Section 504 authorizes a spouse or child claimant to compel
20 a distribution to the extent the trustee has abused a discretion or failed to comply with a standard for
21 distribution.

22 Subsection (b) refers both to “support” and “maintenance” in order to accommodate
23 differences among the States in terminology employed. No difference in meaning between the two
24 terms is intended.

25 The definition of “child” in subsection (a) accommodates the differing approaches States take
26 to defining the class of individuals eligible for child support, including such issues as whether
27 support can be awarded to stepchildren. However the State making the award chooses to define
28 “child” will be recognized under this Code, whether the order sought to be enforced was entered in
29 the same or different State.

30 The exception in subsection (b) for a judgment creditor who has provided services for the
31 protection of a beneficiary’s interest in the trust is in accord with Restatement (Third) of Trusts
32 § 59(b) (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts § 157(c) (1959).
33 This exception allows a beneficiary of modest means to overcome an obstacle preventing the
34 beneficiary’s obtaining services essential to the protection or enforcement of the beneficiary’s rights
35 under the trust. *See* Restatement (Third) of Trusts § 59 cmt. d (Tentative Draft No. 2, approved

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1 1999).

2 Subsection (c), which is similar to Restatement (Third) of Trusts § 59 cmt. a (Tentative Draft
3 No. 2, approved 1999), exempts certain governmental claims from a spendthrift restriction. Federal
4 preemption guarantees that certain federal claims, such as claims by the Internal Revenue Service,
5 may bypass a spendthrift provision no matter what this Code might say. The case law and relevant
6 Internal Revenue Code provisions on the exception for federal tax claims are collected in George G.
7 Bogert & George T. Bogert, *The Law of Trusts and Trustees* § 224 (Rev. 2d ed. 1992); and 2A
8 Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 157.4 (4th ed. 1987). Regarding claims
9 by state governments, this subsection recognizes that States take a variety of approaches with respect
10 to collection, depending on whether the claim is for unpaid taxes, for care provided at an institution,
11 or for other charges. Acknowledging this diversity, subsection (c) does not prescribe a rule, but
12 refers to other statutes of the State on whether particular claims are subject to or exempted from
13 spendthrift provisions.

14 Unlike Restatement (Third) of Trusts § 59(2) (Tentative Draft No. 2, approved 1999), and
15 Restatement (Second) of Trusts § 157(b) (1959), this Code does not create an exception to the
16 spendthrift restriction for creditors who have furnished necessary services or supplies to the
17 beneficiary. Most of these cases involve claims by governmental entities, which the drafters
18 concluded are better handled by the enactment of special legislation as authorized by subsection (c).
19 The drafters also declined to create an exception for tort claimants. For a discussion of the exception
20 for tort claims, which has not generally been recognized, see Restatement (Third) of Trusts § 59
21 Reporter's Notes to cmt. a (Tentative Draft No. 2, approved 1999). For a discussion of other
22 exceptions to a spendthrift restriction, recognized in some States, see George G. Bogert & George
23 T. Bogert, *The Law of Trusts and Trustees* § 224 (Rev. 2d ed. 1992); and 2A Austin W. Scott &
24 William F. Fratcher, *The Law of Trusts* §§ 157-157.5 (4th ed. 1987).

25
26 **SECTION 504. DISCRETIONARY TRUSTS; EFFECT OF STANDARD.**

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

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

- 32 (1) the discretion is expressed in the form of a standard of distribution; or
33 (2) the trustee has abused the discretion.

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

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

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

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

13 **Kansas Comment**

14 Subsection (a) is new.

15 Subsection (b) conforms to Kansas law which recognizes the validity of discretionary trusts.
16 See e.g. *Myers v. Kansas Dept. of Social and Rehabilitation Services*, 254 Kan. 467, 866 P.2d 1052
17 (1994). Whether or not a creditor can compel a distribution if the trustee has failed to comply with
18 the standard or abused the discretion, however, has not been directly addressed by Kansas courts.

19 In *Myers*, the Kansas Supreme Court recognized that a trustee may be required to distribute
20 funds from a discretionary trust if it can be demonstrated that the trustee is abusing its discretion by
21 acting arbitrarily, dishonestly or improperly. *Myers*, 254 Kan. at 478 (assets of discretionary trust
22 could not be considered as available resource in determining beneficiary's eligibility for medical
23 assistance). On the other hand, the Kansas Court of Appeals has held that the beneficiary of a
24 discretionary trust may not be required to take legal action to force the trustee to make distributions
25 because the probability of such an action being successful is minimal. *Simpson v. State Dept. of*
26 *Social and Rehabilitation Services*, 21 Kan. App. 2d 680, Syl, 4, 906 P.2d 174 (1995), *rev. denied*
27 259 Kan. 928 (1996) (beneficiary of discretionary trust cannot be denied public assistance because

1 of refusal to bring legal action to remove trustees or force distributions).

2 Subsection (c) modifies Kansas law. The Kansas Supreme Court has held that a beneficiary's
3 ex-wife cannot reach the assets of a discretionary trust to satisfy a judgment for alimony. *In re*
4 *Watts*, 160 Kan. 377, 162 P.2d 82 (1945).

5 Subsection (d) conforms to Kansas law. See e.g. *Simpson*, 21 Kan. App. 2d at __ (citing
6 *Myers*, 254 Kan. at 478) (trustee of discretionary trust may be required to distribute funds if it is
7 demonstrated he is abusing his discretion by acting arbitrarily, dishonestly or improperly).

8 **UTC Comment**

9 This section addresses the ability of a beneficiary's creditor to reach the beneficiary's
10 discretionary trust interest, whether or not the exercise of the trustee's discretion is subject to a
11 standard. This section, similar to the Restatement, eliminates the distinction between discretionary
12 and support trusts, unifying the rules for all trusts fitting within either of the former categories. See
13 Restatement (Third) of Trusts § 60 Reporter's Notes to cmt. a (Tentative Draft No. 2, approved
14 1999).

15 This section will have limited application. Pursuant to Section 502, the effect of a valid
16 spendthrift provision, where applicable, is to prohibit a creditor from collecting on a distribution
17 prior to its receipt by the beneficiary. Only if the trust is not protected by a spendthrift provision,
18 or if the creditor falls within one of the exceptions to spendthrift enforcement created by Section 503,
19 does this section become relevant.

20 For a discussion of the definition of "child" in subsection (a), see Section 503 Comment.

21 Subsection (b), which establishes the general rule, forbids a creditor from compelling a
22 distribution from the trust, even if the trustee has failed to comply with the standard of distribution
23 or has abused a discretion. Under subsection (d), the power to force a distribution due to an abuse
24 of discretion or failure to comply with a standard belongs solely to the beneficiary. Under Section
25 814(a), a trustee must always exercise a discretionary power in good faith and with regard to the
26 purposes of the trust and the interests of the beneficiaries.

27 Subsection (c) creates an exception for support claims of a child, spouse, or former spouse
28 who has a judgment or order against a beneficiary for support or maintenance. While a creditor of
29 a beneficiary generally may not assert that a trustee has abused a discretion or failed to comply with
30 a standard of distribution, such a claim may be asserted by the beneficiary's child, spouse, or former
31 spouse enforcing a judgment or court order against the beneficiary for unpaid support or
32 maintenance. The court must direct the trustee to pay the child, spouse or former spouse such
33 amount as is equitable under the circumstances but not in excess of the amount the trustee was
34 otherwise required to distribute to or for the benefit of the beneficiary. Before fixing this amount,

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1 the court having jurisdiction over the trust should consider that in setting the respective support
2 award, the family court has already considered the respective needs and assets of the family. The
3 Uniform Trust Code does not prescribe a particular procedural method for enforcing a judgment or
4 order against the trust, leaving that matter to local collection law.
5

6 **SECTION 505. CREDITOR'S CLAIM AGAINST SETTLOR.**

7 (a) Except as provided by K.S.A. 33-101 and 33-201 et seq., ~~Whether~~ whether or not
8 the terms of a trust contain a spendthrift provision, the following rules apply:

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

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

15 (3) After the death of a settlor, and subject to the settlor's right to direct the
16 source from which liabilities will be paid, the property of a trust that was revocable at the settlor's
17 death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the
18 expenses of the settlor's funeral and disposal of remains, ~~and [statutory allowances]~~ the homestead,
19 homestead allowance, all elective share rights of the surviving spouse and statutory allowance to a
20 surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those
21 claims, costs, expenses, and [allowances].

22 (b) For purposes of this section:

23 (1) during the period the power may be exercised, the holder of a power of

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1 withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the
2 property subject to the power; and

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

8 **Kansas Comment**

9 Subsections (a)(1) and (a)(2) generally conform to Kansas law. A person cannot create out
10 of his own property for his own benefit a trust for himself and thereby defeat his creditors of their
11 lawful demands. See *Herd v. Chambers*, 158 Kan. 614, 622-28, 149 P.2d 583 (1944); *In re Estate*
12 *of Sowers*, 1 Kan. App. 2d 675, Syl. 7, 574 P.2d 224.

13 Subsection (a)(3) modifies Kansas law regarding payment of settlor's debts and expenses.
14 The Kansas Supreme Court has held that a surviving spouse was not entitled to reimbursement for
15 expenses and debts of the settlor of a revocable trust that she voluntarily paid upon insolvency of the
16 settlor's probate estate. The trust language did not require reimbursement of the claimed expenses
17 and the surviving spouse failed to demonstrate any rights as an alleged creditor. *Taliaferro v.*
18 *Taliaferro*, __ Kan. __, __ P.3d __ (2000). Provision regarding statutory rights of a surviving spouse
19 conforms to Kansas law. See *Taliaferro v. Taliaferro*, 252 Kan. 192, 843 P.2d 240 (1992) (surviving
20 spouse who does not consent to revocable trust can reach trust assets to extent necessary to obtain
21 her lawful distributive share of husband's estate). Also, provision that settlor may direct the source
22 from which liabilities will be paid conforms to Kansas law. See *In re Estate of Pickrell*, 248 Kan.
23 247, 256, 806 P.2d 1007 (1991) (settlor may designate who or what portion of estate is to bear taxes
24 and costs of administration).

25 In subsection (a), the Kansas drafting committee changed the UTC by beginning the
26 subsection with the phrase, "Except as provided in K.S.A. 33-101 and 33-201 *et seq.*" In subsection
27 (a)(3), the drafting committee changed the UTC by striking the phrase, "and [statutory allowances]"
28 and inserting in lieu thereof the phrase, "the homestead, homestead allowance, all elective share
29 rights of the surviving spouse and statutory allowance."

30 Subsection (b) is new.

31 In subsection (b), the drafting committee changed the UTC by striking the phrase, "in each

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1 case as in effect on [the effective date of this [Code]] [, or as later amended].”

2 UTC Comment

3 Subsection (a)(1) states what is now a well accepted conclusion, that a revocable trust is
4 subject to the claims of the settlor’s creditors while the settlor is living. *See* Restatement (Third) of
5 Trusts § 25 cmt. e (Tentative Draft No. 1, approved 1996). Such claims were not allowed at
6 common law, however. *See* Restatement (Second) of Trusts § 330 cmt. o (1959). Because a settlor
7 usually also retains a beneficial interest that a creditor may reach under subsection (a)(2), the
8 common law rule, were it retained in this Code, would be of little significance. *See* Restatement
9 (Second) of Trusts § 156(2) (1959).

10 Subsection (a)(2), which is based on Restatement (Third) of Trusts § 58(2) and cmt. e
11 (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts § 156 (1959), follows
12 traditional doctrine in providing that a settlor who is also a beneficiary may not use the trust as a
13 shield against the settlor’s creditors. The drafters of the Uniform Trust Code concluded that
14 traditional doctrine reflects sound policy. Consequently, the drafters rejected the approach taken in
15 States like Alaska and Delaware, both of which allow a settlor to retain a beneficial interest immune
16 from creditor claims. *See* Henry J. Lischer, Jr., *Domestic Asset Protection Trusts: Pallbearers to*
17 *Liability*, 35 Real Prop. Prob. & Tr. J. 479 (2000); John E. Sullivan, III, *Gutting the Rule Against*
18 *Self-Settled Trusts: How the Delaware Trust Law Competes with Offshore Trusts*, 23 Del. J. Corp.
19 L. 423 (1998). Under the Code, whether the trust contains a spendthrift provision or not, a creditor
20 of the settlor may reach the maximum amount that the trustee could have paid to the settlor-
21 beneficiary. If the trustee has discretion to distribute the entire income and principal to the settlor,
22 the effect of this subsection is to place the settlor’s creditors in the same position as if the trust had
23 not been created. For the definition of “settlor,” see Section 103(14).

24 This section does not address possible rights against a settlor who was insolvent at the time
25 of the trust’s creation or was rendered insolvent by the transfer of property to the trust. This subject
26 is instead left to the State’s law on fraudulent transfers. A transfer to the trust by an insolvent settlor
27 might also constitute a voidable preference under federal bankruptcy law.

28 Subsection (a)(3) recognizes that a revocable trust is usually employed as a will substitute.
29 As such, the trust assets, following the death of the settlor, should be subject to the settlor’s debts
30 and other charges. However, in accordance with traditional doctrine, the assets of the settlor’s
31 probate estate must normally first be exhausted before the assets of the revocable trust can be
32 reached. This section does not attempt to address the procedural issues raised by the need first to
33 exhaust the decedent’s probate estate before reaching the assets of the revocable trust. Nor does this
34 section address the priority of creditor claims or liability of the decedent’s other nonprobate assets
35 for the decedent’s debts and other charges. Subsection (a)(3), however, does ratify the typical
36 pourover will, revocable trust plan. As long as the rights of the creditor or family member claiming
37 a statutory allowance are not impaired, the settlor is free to shift liability from the probate estate to
38 the revocable trust. Regarding other issues associated with potential liability of nonprobate assets

1 for unpaid claims, see Section 6-102 of the Uniform Probate Code, which was added to that Code
2 in 1998.

3 Subsection (b)(1) treats a power of withdrawal as the equivalent of a power of revocation
4 because the two powers are functionally identical. This is also the approach taken in Restatement
5 (Third) of Trusts § 56 cmt. b (Tentative Draft No. 2, approved 1999). If the power is unlimited, the
6 property subject to the power will be fully subject to the claims of the power holder's creditors, the
7 same as the power holder's other assets. If the power holder retains the power until death, the
8 property subject to the power may be liable for claims and statutory allowances to the extent the
9 power holder's probate estate is insufficient to satisfy those claims and allowances. For powers
10 limited either in time or amount, such as a right to withdraw a \$10,000 annual exclusion contribution
11 within 30 days, this subsection would limit the creditor to the \$10,000 contribution and require the
12 creditor to take action prior to the expiration of the 30-day period.

13 Upon the lapse, release, or waiver of a power of withdrawal, the property formerly subject
14 to the power will normally be subject to the claims of the power holder's creditors and assignees the
15 same as if the power holder were the settlor of a now irrevocable trust. Pursuant to subsection (a)(2),
16 a creditor or assignee of the power holder generally may reach the power holder's entire beneficial
17 interest in the trust, whether or not distribution is subject to the trustee's discretion. However,
18 following the lead of Arizona Revised Statutes § 14-7705(g) and Texas Property Code § 112.035(e),
19 subsection (b)(2) creates an exception for trust property which was subject to a Crummey or five and
20 five power. Upon the lapse, release, or waiver of a power of withdrawal, the holder is treated as the
21 settlor of the trust only to the extent the value of the property subject to the power at the time of the
22 lapse, release, or waiver exceeded the greater of the amounts specified in IRC §§ 2041(b)(2) or
23 2514(e) [greater of 5% or \$5,000], or IRC § 2503(b) [\$10,000 in 2001].

24 The Uniform Trust Code does not address creditor issues with respect to property subject to
25 a special power of appointment or a testamentary general power of appointment. For creditor rights
26 against such interests, see Restatement (Property) Second: Donative Transfers §§ 13.1-13.7 (1986).
27

28 **SECTION 506. OVERDUE DISTRIBUTION.** Whether or not a trust contains a
29 spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of
30 income or principal, including a distribution upon termination of the trust, if the trustee has not
31 made the distribution to the beneficiary within a reasonable time after the mandated distribution date.

32 **Kansas Comment**

33 This section is new.

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1 **UTC Comment**

3 The effect of a spendthrift provision is generally to insulate totally a beneficiary's interest
4 until a distribution is made and received by the beneficiary. See Section 502. But this section,
5 along with several other sections in this article, recognizes exceptions to this general rule. Whether
6 a trust contains a spendthrift provision or not, a trustee should not be able to avoid creditor claims
7 against a beneficiary by refusing to make a distribution required to be made by the express terms
8 of the trust. On the other hand, a spendthrift provision would become largely a nullity were a
9 beneficiary's creditors able to attach all required payments as soon as they became due. This section
10 reflects a compromise between these two competing principles. A creditor can reach a mandatory
11 distribution, including a distribution upon termination, if the trustee has failed to make the payment
12 within a reasonable time after the required distribution date. Following this reasonable period,
13 payments mandated by the express terms of the trust are in effect being held by the trustee as agent
14 for the beneficiary and should be treated as part of the beneficiary's personal assets.

15 This section is similar to Restatement (Third) of Trusts § 58 cmt. d (Tentative Draft No. 2,
16 1999).

17 **2001 UTC Comment**

18 This section includes the 2001 amendments to the 2000 Uniform Trust Code. Section 506
19 is amended as follows:

20 "Section 506. Overdue Distribution. Whether or not a trust contains a spendthrift provision,
21 a creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal,
22 including a distribution upon termination of the trust, if the trustee has not made the distribution to
23 the beneficiary within a reasonable time after the ~~required~~ mandated distribution date."

24 The section was revised to assure consistent use of language.
25

26 **SECTION 507. PERSONAL OBLIGATIONS OF TRUSTEE.** Trust property is not
27 subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt.

28 **Kansas Comment**

29 This section is new. Kansas law, however, is well settled that a trustee may not profit from
30 the trust estate. K.S.A. 59-1703; *Kline v. Orebaugh*, 214 Kan. 207, 519 P.2d 691 (1974).

31 **UTC Comment**

32 Because the beneficiaries of the trust hold the beneficial interest in the trust property and the

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1 trustee holds only legal title without the benefits of ownership, the creditors of the trustee have only
2 a personal claim against the trustee. *See* Restatement (Third) § 5 cmt. k (Tentative Draft No.1,
3 approved 1996); Restatement (Second) of Trusts § 12 cmt. a (1959). Similarly, a personal creditor
4 of the trustee who attaches trust property to satisfy the debt does not acquire title as a bona fide
5 purchaser even if the creditor is unaware of the trust. *See* Restatement (Second) of Trusts § 308
6 (1959). The protection afforded by this section is consistent with that provided by the Bankruptcy
7 Code. Property in which the trustee holds legal title as trustee is not part of the trustee's bankruptcy
8 estate. 11 U.S.C. § 541(d).

9 The exemption of the trust property from the personal obligations of the trustee is the most
10 significant feature of Anglo-American trust law by comparison with the devices available in civil
11 law countries. A principal objective of the Hague Convention on the Law Applicable to Trusts and
12 on their Recognition is to protect the Anglo-American trust with respect to transactions in civil law
13 countries. *See* Hague Convention art. 11. *See also* Henry Hansmann & Ugo Mattei, *The Functions*
14 *of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. Rev. 434 (1998); John
15 H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 Yale L.J.
16 165, 179-80 (1997).

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ARTICLE 6

REVOCABLE TRUSTS

General Comment

This article deals with issues of significance not totally settled under prior law. Because of the widespread use in recent years of the revocable trust as an alternative to a will, this short article is one of the more important articles of the Code. This article and the other articles of the Code treat the revocable trust as the functional equivalent of a will. Section 601 provides that the capacity standard for wills applies in determining whether the settlor had capacity to create a revocable trust. Section 602, after providing that a trust is presumed revocable unless stated otherwise, prescribes the procedure for revocation or amendment, whether the trust contains one or several settlors. Section 603 provides that while a trust is revocable and the settlor has capacity, the rights of the beneficiaries are subject to the settlor's control. Section 604 prescribes a statute of limitations on contest of revocable trusts.

Sections 601 and 604, because they address requirements relating to creation and contest of trusts, are not subject to alteration or restriction in the terms of the trust. *See* Section 105. Sections 602 and 603, by contrast, are not so limited and are fully subject to the settlor's control.

SECTION 601. CAPACITY OF SETTLOR OF REVOCABLE TRUST. The capacity

required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will.

Kansas Comment

Kansas law apparently contains no clear statement of rule. In *Giblin v. Giblin*, 253 Kan. 240, 854 P.2d 816 (1993), requirement that settlor needed testamentary capacity to execute an amendment to her revocable trust was not an issue.

See also *Olson v. Harshman*, 233 Kan. 1055, 1059, 668 P.2d 147 (1983) (undue influence constitutes ground for setting aside revocable trust).

UTC Comment

This section is patterned after Restatement (Third) of Trusts § 11(1) (Tentative Draft No. 1, approved 1996). The revocable trust is used primarily as a will substitute, with its key provision being the determination of the persons to receive the trust property upon the settlor's death. To

1 solidify the use of the revocable trust as a device for transferring property at death, the settlor usually
2 also executes a pourover will. The use of a pourover will assures that property not transferred to the
3 trust during life will be combined with the property the settlor did manage to convey. Given this
4 primary use of the revocable trust as a device for disposing of property at death, the capacity
5 standard for wills rather than that for lifetime gifts should apply. The application of the capacity
6 standard for wills does not mean that the revocable trust must be executed with the formalities of a
7 will. There are no execution requirements under this Code for a trust not created by will, and a trust
8 not containing real property may be created by an oral statement. *See* Section 407 and Comment.

9 The Uniform Trust Code does not explicitly spell out the standard of capacity necessary to
10 create other types of trusts, although Section 402 does require that the settlor have capacity. This
11 section includes a capacity standard for creation of a revocable trust because of the uncertainty in
12 the case law and the importance of the issue in modern estate planning. No such uncertainty exists
13 with respect to the capacity standard for other types of trusts. To create a testamentary trust, the
14 settlor must have the capacity to make a will. To create an irrevocable trust, the settlor must have
15 the capacity that would be needed to transfer the property free of trust. *See generally* Restatement
16 (Third) of Trusts § 11 (Tentative Draft No. 1, approved 1996); Restatement (Third) of Property:
17 Wills and Other Donative Transfers § 8.1 (Tentative Draft No. 3, 2001).

18 SECTION 602. REVOCATION OR AMENDMENT OF REVOCABLE TRUST.

19 (a) Unless the terms of a trust expressly provide that the trust is irrevocable, the
20 settlor may revoke or amend the trust. This subsection does not apply to a trust created under an
21 instrument executed before [the effective date of this [Code]].

22 (b) If a revocable trust is created or funded by more than one settlor:

23 (1) to the extent the trust consists of community property, the trust may be
24 revoked by either spouse acting alone but may be amended only by joint action of both spouses; and

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

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

1 (1) by substantial compliance with a method provided in the terms of the trust;

2 or

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

5 (A) a later will or codicil that expressly refers to the trust or
6 specifically devises property that would otherwise have passed according to the terms of the trust;

7 or

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

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

12 (e) A settlor's powers with respect to revocation, amendment, or distribution of trust
13 property may be exercised by an agent under a power of attorney only to the extent expressly
14 authorized by the terms of the trust or the power.

15 (f) A [conservator] of the settlor ~~or, if no [conservator] has been appointed, a~~
16 ~~[guardian] of the settlor~~ may exercise a settlor's powers with respect to revocation, amendment, or
17 distribution of trust property only with the approval of the court supervising the [conservatorship]
18 ~~or [guardianship]~~.

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

1 **Kansas Comment**

2 Subsection (a) changes current law which provides that a trust is irrevocable unless authority
3 to revoke is reserved in the trust instrument. K.S.A. 58-2417.

4
5 Subsection (b) is new.

6
7 Subsection (c)(1) arguably expands current law by allowing substantial compliance. Kansas
8 law requires specific provisions in a trust document to be followed. *In re Estate of Sanders*, 261
9 Kan. 176, Syl. 5 and 6, 929 P.2d 153 (1996) (if settlor reserves power to revoke trust only in a
10 particular manner and under particular circumstances, settlor can revoke trust only in that manner
11 or under those circumstances).

12 Subsection (c)(2) arguably expands current law. The Kansas Supreme Court has held that
13 the revocation of an inter vivos trust requires an express statement and cannot be accomplished
14 through implication. *Sanders*, 261 Kan. 176, Syl. 8. A settlor's general testamentary disposition of
15 his or her property is ineffective to exercise a general or unrestricted power to revoke or modify an
16 inter vivos trust. *Sanders*, 261 Kan. 176, Syl. 7.

17 Subsection (d) is new.

18 Subsection (e) conforms to Kansas law regarding amendment and revocation. See *Muller*
19 *v. Bank of America, N.A.*, __ Kan. App. 2d __, __ P.3d __ (2000) (unless settlor expressly states
20 otherwise in trust document or power of attorney, right to amend or revoke a trust is personal to
21 settlor and nondelegable). Provision regarding distribution of trust property is new.

22 Subsections (f) and (g) are new.

23 In subsection (f), the Kansas drafting committee changed the UTC by striking the phrase, "or,
24 if no [conservator] has been appointed, a [guardian] of the settlor" and by striking the phrase at the
25 end of the subsection, "or [guardianship]."

26 **UTC Comment**

27 Subsection (a), which provides that a settlor may revoke or modify a trust unless the terms
28 of the trust expressly state that the trust is irrevocable, changes the common law. Most States follow
29 the rule that a trust is presumed irrevocable absent evidence of contrary intent. See Restatement
30 (Second) of Trusts § 330 (1959). California, Iowa, Montana, Oklahoma, and Texas presume that
31 a trust is revocable. The Uniform Trust Code endorses this minority approach, but only for trusts
32 created after its effective date. This Code presumes revocability when the instrument is silent
33 because the instrument was likely drafted by a nonprofessional, who intended the trust as a will
34 substitute. The most recent revision of the Restatement of Trusts similarly reverses the former

1 approach. A trust is presumed revocable if the settlor has retained a beneficial interest. See
2 Restatement (Third) of Trusts § 63 cmt. c (Tentative Draft No. 3, 2001). Because professional
3 drafters habitually spell out whether or not a trust is revocable, subsection (a) will have limited
4 application.

5 A power of revocation includes the power to amend. An unrestricted power to amend may
6 also include the power to revoke a trust. See Restatement (Third) of Trusts § 63 cmt. g (Tentative
7 Draft No. 3, 2001); Restatement (Second) of Trusts § 331 cmt. g and h (1959).

8 Subsection (b), which is similar to Restatement (Third) of Trusts § 63 cmt. k (Tentative
9 Draft No. 3, 2001), provides default rules for revocation or amendment of a trust having several
10 settlors. The settlor's authority to revoke or modify the trust depends on whether the trust contains
11 community property. To the extent the trust contains community property, the trust may be revoked
12 by either spouse acting alone but may be amended only by joint action of both spouses. The purpose
13 of this provision, and the reason for the use of joint trusts in community property States, is to
14 preserve the community character of property transferred to the trust. While community property
15 does not prevail in a majority of States, contributions of community property to trusts created in
16 noncommunity property States does occur. This is due to the mobility of settlors, and the fact that
17 community property retains its community character when a couple move from a community to a
18 noncommunity State. For this reason, subsection (b), and its provision on contributions of
19 community property, should be enacted in all States, whether community or noncommunity.

20 With respect to separate property contributed to the trust, or all property of the trust if none
21 of the trust property consists of community property, subsection (b) provides that each settlor may
22 revoke or amend the trust as to the portion of the trust contributed by that settlor. The inclusion of
23 a rule for contributions of separate property does not mean that the drafters of this Code concluded
24 that the use of joint trusts should be encouraged. The rule is included because of the widespread use
25 of joint trusts in noncommunity property States in recent years. Due to the desire to preserve the
26 community character of trust property, joint trusts are a necessity in community property States.
27 Unless community property will be contributed to the trust, no similarly important reason exists for
28 the creation of a joint trust in a noncommunity property State. Joint trusts are often poorly drafted,
29 confusing the dispositive provisions of the respective settlors. Their use can also lead to unintended
30 tax consequences. See Melinda S. Merk, *Joint Revocable Trusts for Married Couples Domiciled in*
31 *Common-Law Property States*, 32 Real Prop. Prob. & Tr. J. 345 (1997).

32 Subsection (b) does not address the many technical issues that can arise in determining the
33 settlors' proportionate contribution to a joint trust. Most problematic are contributions of jointly-
34 owned property. In the case of joint tenancies in real estate, each spouse would presumably be
35 treated as having made an equal contribution because of the right to sever the interest and convert
36 it into a tenancy in common. This is in contrast to joint accounts in financial institutions, ownership
37 of which in most States is based not on fractional interest but on actual dollar contribution. See, e.g.,
38 Uniform Probate Code § 6-211. Most difficult may be determining a contribution rule for entireties
39 property. In *Holdener v. Fieser*, 971 S.W. 2d 946 (Mo. Ct. App. 1998), the court held that a

1 surviving spouse could revoke the trust with respect to the entire interest but did not express a view
2 as to revocation rights while both spouses were living

3 This section does not explicitly require that the other settlor or settlors be notified if a joint
4 trust is revoked by less than all of the settlors, but such notice would be required pursuant to Section
5 603. While a trust is revocable and the settlor has capacity, Section 603(a) provides that the duties
6 of the trustee, including the duty to keep the beneficiaries informed of administrative developments,
7 are owed exclusively to the settlor. With respect to trusts having several settlors, Section 603(c)
8 clarifies that the trustee's duties, including the duty to keep the beneficiaries informed of
9 developments, are owed to *all* settlors having capacity. Notifying the other settlor or settlors of the
10 revocation or amendment will place them in a better position to protect their interests. If the
11 revocation or amendment by less than all of the settlors breaches an implied agreement not to revoke
12 or amend the trust, those harmed by the action can sue for breach of contract. If the trustee fails to
13 notify the other settlor or settlors of the revocation or amendment, the parties aggrieved by the
14 trustee's failure can sue the trustee for breach of trust.

15 Subsection (c), which is similar to Restatement (Third) of Trusts § 63 cmt. h and i (Tentative
16 Draft No. 3, 2001), specifies the method of revocation and amendment. Revocation of a trust differs
17 fundamentally from revocation of a will. Revocation of a will, because a will is not effective until
18 death, cannot affect an existing fiduciary relationship. With a trust, however, because a revocation
19 will terminate an already existing fiduciary relationship, there is a need to protect a trustee who
20 might act without knowledge that the trust has been revoked. There is also a need to protect trustees
21 against the risk that they will misperceive the settlor's intent and mistakenly assume that an informal
22 document or communication constitutes a revocation when that was not in fact the settlor's intent.
23 To protect trustees against these risks, drafters habitually insert provisions providing that a revocable
24 trust may be revoked only by delivery to the trustee of a formal revoking document. Some courts
25 require strict compliance with the stated formalities. Other courts, recognizing that the formalities
26 were inserted primarily for the trustee's and not the settlor's benefit, will accept other methods of
27 revocation as long as the settlor's intent is clear. *See* Restatement (Third) of Trusts § 63 Reporter's
28 Notes to cmt. h-j (Tentative Draft No. 3, 2001).

29 This Code tries to effectuate the settlor's intent to the maximum extent possible while at the
30 same time protecting a trustee against inadvertent liability. While notice to the trustee of a
31 revocation is good practice, this section does not make the giving of such notice a prerequisite to a
32 trust's revocation. To protect a trustee who has not been notified of a revocation or amendment,
33 subsection (g) provides that a trustee who does not know that a trust has been revoked or amended
34 is not liable to the settlor or settlor's successors in interest for distributions made and other actions
35 taken on the assumption that the trust, as unamended, was still in effect. However, to honor the
36 settlor's intent, subsection (c) generally honors a settlor's clear expression of intent even if
37 inconsistent with stated formalities in the terms of the trust.

38 Under subsection (c), the settlor may revoke or amend a revocable trust by substantially
39 complying with the method specified in the terms of the trust or by a later executed will or codicil

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1 or any other method manifesting clear and convincing evidence of the settlor's intent. Only if the
2 method specified in the terms of the trust is made exclusive is use of the other methods prohibited.
3 Even then, a failure to comply with a technical requirement, such as required notarization, may be
4 excused as long as compliance with the method specified in the terms of the trust is otherwise
5 substantial.

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

12 Revocation or amendment by will is mentioned in subsection (c) not to encourage the
13 practice but to make clear that it is not precluded by omission. *See* Restatement (Third) of Property:
14 Will and Other Donative Transfers § 7.2 cmt. e (Tentative Draft No. 3, 2001), which validates
15 revocation or amendment of will substitutes by later will. Situations do arise, particularly in death-
16 bed cases, where revocation by will may be the only practicable method. In such cases, a will, a
17 solemn document executed with a high level of formality, may be the most reliable method for
18 expressing intent. A revocation in a will ordinarily becomes effective only upon probate of the will
19 following the testator's death. For the cases, see Restatement (Third) of Trusts § 63 Reporter's
20 Notes to cmt. h-i (Tentative Draft No. 3, 2001).

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

27 Subsection (c) does not require that a trustee concur in the revocation or amendment of a
28 trust. Such a concurrence would be necessary only if required by the terms of the trust. If the trustee
29 concludes that an amendment unacceptably changes the trustee's duties, the trustee may resign as
30 provided in Section 705.

31 Subsection (d), providing that upon revocation the trust property is to be distributed as the
32 settlor directs, codifies a provision commonly included in revocable trust instruments.

33 Subsection (e), which is similar to Restatement (Third) of Trusts § 63 cmt. l (Tentative Draft
34 No. 3, 2001), authorizes an agent under a power of attorney to revoke or modify a revocable trust
35 only to the extent the terms of the trust or power of attorney expressly so permit. An express
36 provision is required because most settlors usually intend that the revocable trust, and not the power
37 of attorney, to function as the settlor's principal property management device. The power of attorney

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1 is usually intended as a backup for assets not transferred to the revocable trust or to address specific
2 topics, such as the power to sign tax returns or apply for government benefits, which may be beyond
3 the authority of a trustee or are not customarily granted to a trustee.

4 Subsection (f) addresses the authority of a conservator or guardian to revoke or amend a
5 revocable trust. Under the Uniform Trust Code, a "conservator" is appointed by the court to manage
6 the ward's party, a "guardian" to make decisions with respect to the ward's personal affairs. See
7 Section 103. Consequently, subsection (f) authorizes a guardian to exercise a settlor's power to
8 revoke or amend a trust only if a conservator has not been appointed.

9 Many state conservatorship statutes authorize a conservator to exercise the settlor's power
10 of revocation with the prior approval of the court supervising the conservatorship. See, e.g., Uniform
11 Probate Code § 411(a)(4). Subsection (f) ratifies this practice. Under the Code, a conservator may
12 exercise a settlor's power of revocation, amendment, or right to withdraw trust property upon
13 approval of the court supervising the conservatorship. Because a settlor often creates a revocable
14 trust for the very purpose of avoiding conservatorship, this power should be exercised by the court
15 reluctantly. Settlers concerned about revocation by a conservator may wish to deny a conservator
16 a power to revoke. However, while such a provision in the terms of the trust is entitled to
17 considerable weight, the court may override the restriction if it concludes that the action is necessary
18 in the interests of justice. See Section 105(b)(13).

19 Steps a conservator can take to stem possible abuse is not limited to petitioning to revoke the
20 trust. The conservator could petition for removal of the trustee under Section 706. The conservator,
21 acting on the settlor-beneficiary's behalf, could also bring an action to enforce the trust according
22 to its terms. Pursuant to Section 303, a conservator may act on behalf of the beneficiary whose
23 estate the conservator controls whenever a consent or other action by the beneficiary is required or
24 may be given under the Code.

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

30 **2001 UTC Comment**

31 This section includes the 2001 amendments to the 2000 Uniform Trust Code in subsections
32 (c)(1) and (c)(2)(A). The changes are as follows:

33 "(c)(1) by ~~substantially complying~~ substantial compliance with a
34 method provided in the terms of the trust;"

35 "(c)(2)(A) ~~executing~~ a later will or codicil that expressly refers to the

1 trust or specifically devises property that would otherwise have
passed according to the terms of the trust; or".

3 Subsection (c)(2)(A) is revised to avoid an implication that a revocatory provision in a will
4 or codicil is effective immediately upon execution of the testamentary document.

5
6 **SECTION 603. SETTLOR'S POWERS; POWERS OF WITHDRAWAL.**

7 (a) While a trust is revocable and the settlor has capacity to revoke the trust, rights
8 of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively
9 to, the settlor.

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

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

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

17 **Kansas Comment**

18 This section is new.

19 **UTC Comment**

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

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

1 having several settlors, subsection (c) clarifies that this duty extends to all settlors having capacity.
2 Should fewer than all settlors revoke or modify their portion of the trust, the trustee must notify the
3 other settlor or settlors of the action. *See* Section 602 Comment.

4 If the settlor loses capacity, subsection (b) clarifies that the rights of the beneficiaries are no
5 longer subject to the settlor's control. The beneficiaries are entitled to request information
6 concerning the trust and the trustee must provide the beneficiaries with annual trustee reports and
7 whatever other information may be required under Section 813. However, because this section may
8 be freely overridden in the terms of the trust, a settlor is free to deny the beneficiaries these rights,
9 even to the point of directing the trustee not to inform them of the existence of the trust. Also,
10 should an incapacitated settlor later regain capacity, the beneficiaries' rights will again be subject
11 to the settlor's control. The cessation of the settlor's control upon the settlor's incapacity or death
12 does not mean that the beneficiaries may reopen transactions the settlor approved while having
13 capacity.

14
15 Typically, the settlor of a revocable trust will also be the sole or primary beneficiary of the
16 trust. Upon the settlor's incapacity, any right of action the settlor-trustee may have against the
17 trustee for breach of fiduciary duty will pass to the settlor's agent or conservator.

18 Subsection (d) makes clear that a holder of a power of withdrawal has the same powers over
19 the trust as the settlor of a revocable trust. Equal treatment is warranted due to the holder's
20 equivalent power to control the trust. For the definition of power of withdrawal, see Section
21 103(10).

22 2001 UTC Comment

23 This section includes the 2001 amendments to the 2000 Uniform Trust Code in subsection
24 (b), which is stricken. The change is as follows:

25 "(a) While a trust is revocable and the settlor has capacity to revoke
26 the trust, rights of the beneficiaries are subject to the control of, and
27 the duties of the trustee are owed exclusively to, the settlor.

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

31
32 (e) If a revocable trust has more than one settlor, the duties of the
33 trustee are owed to all of the settlors having capacity to revoke the
34 trust.

35 ~~(d)~~ (c) During the period the power may be exercised, the holder of

1 a power of withdrawal has the rights of a settlor of a revocable trust
2 under this section to the extent of the
3 property subject to the power.

4 Former subsection (b) is stricken as unnecessary surplusage.

5 **SECTION 604. LIMITATION ON ACTION CONTESTING VALIDITY OF**
6 **REVOCABLE TRUST; DISTRIBUTION OF TRUST PROPERTY.**

7 (a) A person may commence a judicial proceeding to contest the validity of a trust
8 that was revocable at the settlor's death within the earlier of:

9 (1) ~~three~~ years one year after the settlor's death; or

10 (2) ~~120~~ days four months after the trustee sent the person a copy of the trust
11 instrument and a notice informing the person of the trust's existence, of the trustee's name and
12 address, and of the time allowed for commencing a proceeding.

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

16 (1) the trustee knows of a pending judicial proceeding contesting the validity
17 of the trust; or

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

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

1 **Kansas Comment**

2 This section is new.

3 In subsection (a)(1), the Kansas drafting committee changed the UTC by striking “[three]
4 years” and inserting in lieu thereof “one year.” In subsection (a)(2), the committee struck “[120]
5 days” and inserted in lieu thereof “four months.”

6 **UTC Comment**

7 This section provides finality to the question of when a contest of a revocable trust may be
8 brought. The section is designed to allow an adequate time in which to bring a contest while at the
9 same time permitting the expeditious distribution of the trust property following the settlor’s death.

10 A trust can be contested on a variety of grounds. For example, the contestant may allege that
11 no trust was created due to lack of intent to create a trust or lack of capacity (*see* Section 402), that
12 undue influence, duress, or fraud was involved in the trust’s creation (*see* Section 406), or that the
13 trust had been revoked or modified (*see* Section 602). A “contest” is an action to invalidate all or
14 part of the terms of the trust or of property transfers to the trustee. An action against a beneficiary
15 or other person for intentional interference with an inheritance or gift, not being a contest, is not
16 subject to this section. For the law on intentional interference, see Restatement (Second) of Torts
17 § 774B (1979). Nor does this section preclude an action to determine the validity of a trust that is
18 brought during the settlor’s lifetime, such as a petition for a declaratory judgment, if such action is
19 authorized by other law. *See* Section 106 (Uniform Trust Code supplemented by common law of
20 trusts and principles of equity).

21 This section applies only to a revocable trust that becomes irrevocable by reason of the
22 settlor’s death. A trust that became irrevocable by reason of the settlor’s lifetime release of the
23 power to revoke is outside its scope. A revocable trust does not become irrevocable upon a settlor’s
24 loss of capacity. Pursuant to Section 602, the power to revoke may be exercised by the settlor’s
25 agent, conservator, or guardian, or personally by the settlor if the settlor regains capacity.

26 Subsection (a) specifies a time limit on when a contest can be brought. A contest is barred
27 upon the first to occur of two possible events. The maximum possible time for bringing a contest
28 is three years from the settlor’s death. This should provide potential contestants with ample time in
29 which to determine whether they have an interest that will be affected by the trust, even if formal
30 notice of the trust is lacking. The three-year period is derived from Section 3-108 of the Uniform
31 Probate Code. Three years is the maximum limit under the UPC for contesting a nonprobated will.
32 Enacting jurisdictions prescribing shorter or longer time limits for contest of a nonprobated will
33 should substitute their own time limit. To facilitate this process, the “three-year” period has been
34 placed in brackets.

35 A trustee who wishes to shorten the contest period may do so by giving notice. Drawing

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1 from California Probate Code § 16061.7, subsection (a)(2) bars a contest by a potential contestant
2 120 days after the date the trustee sent that person a copy of the trust instrument and informed the
3 person of the trust's existence, of the trustee's name and address, and of the time allowed for
4 commencing a contest. The reference to "120" days is placed in brackets to suggest to the enacting
5 jurisdiction that it substitute its statutory time period for contesting a will following notice of
6 probate. The 120 day period in subsection (a)(2) is subordinate to the three-year bar in subsection
7 (a)(1). A contest is automatically barred three years after the settlor's death even if notice is sent by
8 the trustee less than 120 days prior to the end of that period.

9 Because only a small minority of trusts are actually contested, trustees should not be
10 restrained from making distributions because of concern about possible liability should a contest
11 later be filed. Absent a protective statute, a trustee is ordinarily absolutely liable for misdelivery of
12 the trust assets, even if the trustee reasonably believed that the distribution was proper. *See*
13 Restatement (Second) of Trusts § 226 (1959). Subsection (b) addresses liability concerns by
14 allowing the trustee, upon the settlor's death, to proceed expeditiously to distribute the trust property.
15 The trustee may distribute the trust property in accordance with the terms of the trust until and unless
16 the trustee receives notice of a pending judicial proceeding contesting the validity of the trust, or
17 until notified by a potential contestant of a possible contest, followed by its filing within 60 days.

18 Even though a distribution in compliance with subsection (b) discharges the trustee from
19 potential liability, subsection (c) makes the beneficiaries of what later turns out to have been an
20 invalid trust liable to return any distribution received. Issues as to whether the distribution must be
21 returned with interest, or with income earned or profit made are not addressed in this section but are
22 left to the law of restitution.

23
24 For purposes of notices under this section, the substitute representation principles of Article
25 3 are applicable. The notice by the trustee under subsection (a)(2) or by a potential contestant under
26 subsection (b)(2) must be given in a manner reasonably suitable under the circumstances and likely
27 to result in its receipt. *See* Section 109(a).

28 This section does not address possible liability for the debts of the deceased settlor or a
29 trustee's possible liability to creditors for distributing trust assets. For possible liability of the trust,
30 see Section 505(a)(3) and Comment. Whether a trustee can be held personally liable for creditor
31 claims following distribution of trust assets is addressed in Uniform Probate Code § 6-102, which
32 was added to that Code in 1998.

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

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

6 **Kansas Comment**

7 Subsection (a)(1) conforms to Kansas law. See generally *In re Estate of Sanders*, 261 Kan.
8 176, Syl 5, 929 P.2d 153 (1996) (specific provisions in trust document must be followed).

9
10 Subsection (a)(2) conforms to Kansas law. See *Rathbun v. Hill*, 187 Kan. 130, Syl. 3, 354
11 P.2d 338 (1960) (taking control of trust property and performing any act with regard to such trust
12 property or persons which could not lawfully be performed except as a trustee are strong evidence
13 that the trustee has acquiesced in the trusteeship).

14
15 The first sentence of subsection (b) conforms to Kansas law. See *Rathbun v. Hill*, 187 Kan.
16 130, Syl. 3, 354 P.2d 338 (1960) (trustee named in deed or will always has election of accepting or
rejecting the trust). The second sentence is new.

17
18 Subsection (c) is new.

19 **UTC Comment**

20 This section, which specifies the requirements for a valid acceptance of the trusteeship,
21 implicates many of the same issues that arise in determining whether a trust has been revoked.
22 Consequently, the two provisions track each other closely. Compare Section 701(a), with Section
23 602(c) (procedure for revoking or modifying trust). Procedures specified in the terms of the trust
24 are recognized, but only substantial, not literal compliance is required. A failure to meet technical
25 requirements, such as notarization of the trustee's signature, does not result in a failure to accept.
26 Ordinarily, the trustee will indicate acceptance by signing the trust instrument or signing a separate
27 written instrument. However, this section validates any other method demonstrating the necessary
28 intent, such as by knowingly exercising trustee powers, unless the terms of the trust make the
29 specified method exclusive. This section also does not preclude an acceptance by estoppel. For
30 general background on issues relating to trustee acceptance and rejection, see Restatement (Third)
31 of Trusts § 35 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 102
32 (1959). Consistent with Section 201(b), which emphasizes that continuing judicial supervision of
33 a trust is the rare exception, not the rule, the Uniform Trust Code does not require that a trustee
34 qualify in court.

1 To avoid the inaction that can result if the person designated as trustee fails to communicate
2 a decision either to accept or to reject the trusteeship, subsection (b) provides that a failure to accept
3 within a reasonable time constitutes a rejection of the trusteeship. What will constitute a reasonable
4 time depends on the facts and circumstances of the particular case. A major consideration is possible
5 harm that might occur if a vacancy in a trusteeship is not filled in a timely manner. A trustee's
6 rejection normally precludes a later acceptance but does not cause the trust to fail. *See* Restatement
7 (Third) of Trusts § 35 cmt. c (Tentative Draft No. 2, approved 1999). Regarding the filling of a
8 vacancy in the event of a rejection, see Section 704.

9 A person designated as trustee who decides not to accept the trusteeship need not provide a
10 formal rejection, but a clear and early communication is recommended. The appropriate recipient
11 of the rejection depends upon the circumstances. Ordinarily, it would be appropriate to
12 communicate the rejection to the person who informed the designee of the proposed trusteeship. If
13 judicial proceedings involving the trust are pending, the rejection could be filed with the court. In
14 the case of a person named as trustee of a revocable trust, it would be appropriate to communicate
15 the rejection to the settlor. In any event, it would be best to inform a beneficiary with a significant
16 interest in the trust because that beneficiary might be more motivated than others to seek
17 appointment of a new trustee.

18 Subsection (c)(1) makes clear that a nominated trustee may act expeditiously to protect the
19 trust property without being considered to have accepted the trusteeship. However, upon conclusion
20 of the intervention, the nominated trustee must send a rejection of office to the settlor, if living and
21 competent, otherwise to a qualified beneficiary.

22 Because of the potential liability that can inhere in trusteeship, subsection (c)(2) allows a
23 person designated as trustee to inspect the trust property without accepting the trusteeship. The
24 condition of real property is a particular concern, including possible tort liability for the condition
25 of the premises or liability for violation of state or federal environmental laws such as CERCLA, 42
26 U.S.C. § 9607. For a provision limiting a trustee's personal liability for obligations arising from
27 ownership or control of trust property, see Section 1010(b).

28 **SECTION 702. TRUSTEE'S BOND.**

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

32 (b) The court may specify the amount of a bond, its liabilities, and whether sureties

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1 amount of a bond otherwise required may be reduced by the value of trust property deposited in a
2 manner that prevents its unauthorized disposition, and by the value of real property which the trustee,
3 by express limitation of power, lacks power to convey without court authorization. Also, the court
4 may excuse or otherwise modify a requirement of a bond, reduce or increase the amount of a bond,
5 release a surety, or permit the substitution of another bond with the same or different sureties.

6 Subsection (c) clarifies that a regulated financial-service institution need not provide bond
7 for individual trusts. Such institutions must meet detailed financial responsibility requirements in
8 order to do trust business in the State, thereby obviating the need to post bonds in individual trusts.
9 Subsection (c) is placed in brackets because the enacting jurisdiction may have already dealt with
10 the subject in separate legislation, such as in its statutes on regulation of financial institutions.
11 Instead of the phrase "regulated financial-service institution," enacting jurisdictions may wish to
12 substitute their own term for institutions qualified to engage in trust business in the State.

13
14 **SECTION 703. COTRUSTEES.**

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

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

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

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

27 (e) A trustee may not delegate to a cotrustee the performance of a function the settlor

1 reasonably expected the trustees to perform jointly. Unless a delegation was irrevocable, a trustee
2 may revoke a delegation previously made.

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

5 (g) Each trustee shall exercise reasonable care to:

6 (1) prevent a cotrustee from committing a serious breach of trust; and

7 (2) compel a cotrustee to redress a serious breach of trust.

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

11 **Kansas Comment**

12 Subsection (a) conforms to Kansas law. See K.S.A. 58-1206(a) (any power vested in three
13 or more trustees may be exercised by a majority).

14 Subsection (b) conforms to Kansas law. See K.S.A. 58-1206(b) (if cotrustee declines
15 appointment or ceases to be a trustee, surviving or remaining trustees shall perform the trust).

16 Subsection (c) generally conforms to Kansas law. See K.S.A. 58-1206(d) (cotrustee required
17 to participate in administration of trust); K.S.A. 17-5004(b) (trustee may delegate investment
18 functions). Provision excusing cotrustee is new.

19 Subsection (d) is new, although consistent with Kansas law. See K.S.A. 58-1206(b) (if
20 cotrustee unable to accept appointment, remaining trustee(s) shall perform the trust).

21 Subsection (e) is generally consistent with Kansas law. See K.S.A. 58-1204 (trustee shall
22 not transfer office to another or delegate entire administration of trust to cotrustee or another);
23 K.S.A. 17-5004(b)(1) (trustee has duty not to delegate the performance of any acts involving the
24 exercise of judgment and discretion, except acts constituting investment functions). The second
25 sentence is new.

26 Subsection (f) conforms to Kansas law. See K.S.A. 58-1206(a).

1 Subsection (g)(1) conforms to Kansas law. See K.S.A. 58-1206(d) (cotrustee liable for
2 failure to attempt to prevent a breach of trust). See also *Gillespie v. Seymour*, 250 Kan. 123, 150,
3 823 P.2d 782 (1991) (dissenting opinion) (trustee has duty to guard trust estate against breaches of
4 trust by cotrustees).

5 Subsection (g)(2) is new.

6 Subsection (h) generally conforms to Kansas law, except the dissent must be made in writing.
7 K.S.A. 58-1206(a). Also, imposition of liability against a dissenting trustee upon a material breach
8 of trust is new.

9 UTC Comment

10 This section contains most but not all of the Code's provisions on cotrustees. Other
11 provisions relevant to cotrustees include Sections 704 (vacancy in trusteeship need not be filled if
12 cotrustee remains in office), 705 (notice of resignation must be given to cotrustee), 706 (lack of
13 cooperation among cotrustees as ground for removal), 707 (obligations of resigning or removed
14 trustee), 813 (reporting requirements upon vacancy in trusteeship), and 1013 (authority of cotrustees
15 to authenticate documents).

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

22 Cotrusteeship should not be called for without careful reflection. Division of responsibility
23 among cotrustees is often confused, the accountability of any individual trustee is uncertain,
24 obtaining consent of all trustees can be burdensome, and unless an odd number of trustees is named
25 deadlocks requiring court resolution can occur. Potential problems can be reduced by addressing
26 division of responsibilities in the terms of the trust. Like the other sections of this article, this
27 section is freely subject to modification in the terms of the trust. See Section 105.

28 Much of this section is based on comparable provisions of the Restatement of Trusts,
29 although with extensive modifications. Reference should also be made to ERISA § 405 (29 U.S.C.
30 § 1105), which in recent years has been the statutory base for the most significant case law on the
31 powers and duties of cotrustees.

32 Subsection (a) is in accord with Restatement (Third) of Trusts § 39 (Tentative Draft No. 2,
33 approved 1999), which rejects the common law rule, followed in earlier Restatements, requiring
34 unanimity among the trustees of a private trust. See Restatement (Second) of Trusts § 194 (1959).

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1 This section is consistent with the prior Restatement rule applicable to charitable trusts, which
2 allowed for action by a majority of trustees. *See* Restatement (Second) of Trusts § 383 (1959).

3 Under subsection (b), a majority of the remaining trustees may act for the trust when a
4 vacancy occurs in a cotrusteeship. Section 704 provides that a vacancy in a cotrusteeship need be
5 filled only if there is no trustee remaining in office.

6 Pursuant to subsection (c), a cotrustee must participate in the performance of a trustee
7 function unless the cotrustee has properly delegated performance to another cotrustee, or the
8 cotrustee is unable to participate due to temporary incapacity or disqualification under other law.
9 Other laws under which a cotrustee might be disqualified include federal securities law and the
10 ERISA prohibited transactions rules. Subsection (d) authorizes a cotrustee to assume some or all
11 of the functions of another trustee who is unavailable to perform duties as provided in subsection (c).

12 Subsection (e) addresses the extent to which a trustee may delegate the performance of
13 functions to a cotrustee. The standard differs from the standard for delegation to an agent as
14 provided in Section 807 because the two situations are different. Section 807, which is identical to
15 Section 9 of the Uniform Prudent Investor Act, recognizes that many trustees are not professionals.
16 Consequently, trustees should be encouraged to delegate functions they are not competent to
17 perform. Subsection (e) is premised on the assumption that the settlor selected cotrustees for a
18 specific reason and that this reason ought to control the scope of a permitted delegation to a
19 cotrustee. Subsection (e) prohibits a trustee from delegating to another trustee functions the settlor
20 reasonably expected the trustees to perform jointly. The exact extent to which a trustee may delegate
21 functions to another trustee in a particular case will vary depending on the reasons the settlor decided
22 to appoint cotrustees. The better practice is to address the division of functions in the terms of the
23 trust, as allowed by Section 105. Subsection (e) is based on language derived from Restatement
24 (Second) of Trusts § 171 (1959). This section of the Restatement Second, which applied to
25 delegations to both agents and cotrustees, was superseded, as to delegation to agents, by Restatement
26 (Third) of Trusts: Prudent Investor Rule § 171 (1992).

27 By permitting the trustees to act by a majority, this section contemplates that there may be
28 a trustee or trustees who might dissent. Trustees who dissent from the acts of a cotrustee are in
29 general protected from liability. Subsection (f) protects trustees who refused to join in the action.
30 Subsection (h) protects a dissenting trustee who joined the action at the direction of the majority,
31 such as to satisfy a demand of the other side to a transaction, if the trustee expressed the dissent to
32 a cotrustee at or before the time of the action in question. However, the protections provided by
33 subsections (f) and (h) no longer apply if the action constitutes a serious breach of trust. In that
34 event, subsection (g) may impose liability against a dissenting trustee for failing to take reasonable
35 steps to rectify the improper conduct. The responsibility to take action against a breaching cotrustee
36 codifies the substance of Sections 184 and 224 of the Restatement (Second) of Trusts (1959).

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

2 (a) A vacancy in a trusteeship occurs if:

3 (1) a person designated as trustee rejects the trusteeship;

4 (2) a person designated as trustee cannot be identified or does not exist;

5 (3) a trustee resigns;

6 (4) a trustee is disqualified or removed;

7 (5) a trustee dies; or

8 (6) a [guardian] or [conservator] is appointed for an individual serving as

9 trustee.

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

12 (c) A vacancy in a trusteeship of a noncharitable trust that is required to be filled
13 must be filled in the following order of priority:

14 (1) by a person designated in the terms of the trust to act as successor trustee;

15 (2) by a person appointed by unanimous agreement of the qualified
16 beneficiaries; or

17 (3) by a person appointed by the court.

18 (d) A vacancy in a trusteeship of a charitable trust that is required to be filled must
19 be filled in the following order of priority:

20 (1) by a person designated in the terms of the trust to act as successor trustee;

21 (2) by a person selected by the charitable organizations expressly designated
22 to receive distributions under the terms of the trust if the [attorney general] concurs in the selection;

1 or

2 (3) by a person appointed by the court.

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

6 **Kansas Comment**

7 Subsection (a)(1) was recognized in *Rathbun v. Hill*, 187 Kan. 130, Syl. 3, 354 P.2d 338
8 (1960) (person may reject trust).

9 Subsection (a)(2) is new.

10 Subsection (a)(3) is recognized in K.S.A. 58-2411 (resignation of trustee).

11 Subsection (a)(4) is recognized in K.S.A. 58-2412 (removal of trustee).

12 Subsection (a)(5) is recognized in K.S.A. 58-2410 (death of trustee).

13 Subsection (a)(6) is recognized in K.S.A. 59-1711 (incapacity of trustee).

14 Subsection (b) conforms to Kansas law. See K.S.A. 58-1206(b) (if trust has two or more
15 trustees and if any of them declines or ceases to serve, surviving or remaining trustees shall perform
16 the trust).

17 Subsection (c) modifies Kansas law which allows the court to fill a vacancy. See K.S.A. 58-
18 2410 (court shall appoint successor upon death of sole or surviving trustee); K.S.A. 58-2412 (court
19 may fill all vacancies in express trusts).

20 Subsection (d) is new.

21 Subsection (e) is new.

22 **UTC Comment**

23 This section lists the ways in which a trusteeship becomes vacant and the rules on filling the
24 vacancy. *See also* Sections 701 (accepting or declining trusteeship), 705 (resignation), and 706
25 (removal). Good drafting practice suggests that the terms of the trust deal expressly with the

1 problem of vacancies, naming successors and specifying the procedure for filling vacancies. This
2 section applies only if the terms of the trust fail to specify a procedure.

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

7 Subsection (b) provides that a vacancy in the cotrusteeship must be filled only if the trust has
8 no remaining trustee. If a vacancy in the cotrusteeship is not filled, Section 703 authorizes the
9 remaining cotrustees to continue to administer the trust. However, as provided in subsection (d), the
10 court, exercising its inherent equity authority, may always appoint additional trustees if the
11 appointment would promote better administration of the trust. *See* Restatement (Third) of Trusts
12 § 34 cmt. e (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 108 cmt. e
13 (1959).

14 Absent an effective provision in the terms of the trust, subsection (c)(2) permits a vacancy
15 in the trusteeship to be filled, without the need for court approval, by a person selected by
16 unanimous agreement of the qualified beneficiaries. Pursuant to Section 705(a)(1), the qualified
17 beneficiaries may also receive the trustee's resignation. If a trustee resigns following notice to the
18 qualified beneficiaries as provided in Section 705, the trust may be transferred to a successor
19 appointed pursuant to subsection (c)(2) of this section, all without court involvement. A
20 nonqualified beneficiary who is displeased with the choice of the qualified beneficiaries may petition
21 the court for removal of the trustee under Section 706.

22 If the qualified beneficiaries fail to make an appointment, subsection (c)(3) authorizes the
23 court to fill the vacancy. In making the appointment, the court should consider the objectives and
24 probable intention of the settlor, the promotion of the proper administration of the trust, and the
25 interests and wishes of the beneficiaries. *See* Restatement (Third) of Trusts § 34 cmt. f (Tentative
26 Draft No. 2, approved 1999); Restatement (Second) of Trusts § 108 cmt. d (1959).

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

30 **2001 UTC COMMENT**

31 This section includes the 2001 amendments to the 2000 Uniform Trust Code in subsection
32 (c), (d) and (e). The changes are as follows:

33 "(c) A vacancy in a trusteeship of a noncharitable trust that is
34 required to be filled must be filled in the following order of priority:"

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1 "(d) A vacancy in a trusteeship of a charitable trust that is required to
2 be filled must be filled in the following order of priority:

3 (1) by a person designated in the terms of the trust to act as
4 successor trustee;

5 (2) by a person selected by the charitable organizations
6 expressly designated to receive distributions under the terms of the
7 trust if the [attorney general] concurs in the selection; or

8 (3) by a person appointed by the court. "

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

13 Subsection (d) is added to clarify the procedure for appointing the successor trustee of a
14 charitable trust.

15 **SECTION 705. RESIGNATION OF TRUSTEE.**

16 (a) A trustee may resign:

17 (1) upon at least 30 days' notice to the qualified beneficiaries, the settlor, if
18 living, and all cotrustees; or

19 (2) with the approval of the court.

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

22 (c) Any liability of a resigning trustee or of any sureties on the trustee's bond for acts
23 or omissions of the trustee is not discharged or affected by the trustee's resignation.

24 **Kansas Comment**

25 Subsection (a)(1) is new.

26 Subsection (a)(2) conforms to Kansas law. See K.S.A. 58-2411 (upon petition of any trustee
27 of an express trust, court may accept trustee's resignation and discharge him from the trust); K.S.A.
28 59-1709 (fiduciary may resign his trust at any time, but fiduciary's resignation shall not be effective
29

1 until court has examined and allowed his final account and made an order accepting such
2 resignation).

3
4 Subsection (b) conforms to Kansas law. See K.S.A. 58-2411 (court may accept trustee's
5 resignation and discharge him or her upon such terms as the rights of the persons interested in the
6 execution of the trust may require).

7
8 Subsection (c) conforms to Kansas law. See K.S.A. 59-1710 (acceptance of the resignation
9 of a fiduciary and the appointment of another shall not affect the liability of such former fiduciary,
10 or his or her sureties, previously incurred).

11 **UTC Comment**

12 This section rejects the common law rule that a trustee may resign only with permission of
13 the court, and goes further than the Restatements, which allow a trustee to resign with the consent
14 of the beneficiaries. *See* Restatement (Third) of Trusts § 36 (Tentative Draft No.2, approved 1999);
15 Restatement (Second) of Trusts § 106 (1959). Concluding that the default rule ought to approximate
16 standard drafting practice, the Drafting Committee provided in subsection (a) that a trustee may
17 resign by giving notice to the qualified beneficiaries and any cotrustee. A resigning trustee may also
18 follow the traditional method and resign with approval of the court.

19 Restatement (Third) of Trusts § 36 cmt. d (Tentative Draft No. 2, approved 1999), and
20 Restatement (Second) of Trusts § 106 cmt. b (1959), provide, similar to subsection (c), that a
21 resignation does not release the resigning trustee from potential liabilities for acts or omissions while
22 in office. The act of resignation can give rise to liability if the trustee resigns for the purpose of
23 facilitating a breach of trust by a cotrustee. *See Ream v. Frey*, 107 F.3d 147 (3rd Cir. 1997).

24 Regarding the residual responsibilities of a resigning trustee until the trust property is
25 delivered to a successor trustee, see Section 707.

26 In the case of a revocable trust, because the rights of the qualified beneficiaries are subject
27 to the settlor's control (*see* Section 603), resignation of the trustee is accomplished by giving notice
28 to the settlor instead of the beneficiaries.

29 **2001 UTC Comment**

30 This section includes the 2001 amendments to the 2000 Uniform Trust Code in subsection
31 (a)(1). The change is as follows:

32 "(a)(1) upon at least 30 days' notice to the qualified beneficiaries, the
33 settlor, if living, and all cotrustees; or"

34
35 Subsection (a)(1) was revised to clarify that a living settlor must receive notice of a trustee's

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1 resignation.

2 **SECTION 706. REMOVAL OF TRUSTEE.**

3 (a) The settlor, a cotrustee, or a beneficiary may request the court to remove a trustee,
4 or a trustee may be removed by the court on its own initiative.

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

6 (1) the trustee has committed a serious breach of trust;

7 (2) lack of cooperation among cotrustees substantially impairs the
8 administration of the trust;

9 (3) because of unfitness, unwillingness, or persistent failure of the trustee to
10 administer the trust effectively, the court determines that removal of the trustee best serves the
11 interests of the beneficiaries; or

12 (4) there has been a substantial change of circumstances or removal is
13 requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves
14 the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and
15 a suitable cotrustee or successor trustee is available.

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

19 **Kansas Comment**

20 Subsection (a) modifies Kansas law by allowing the court to remove trustee on its own
21 initiative. Kansas law currently allows the court to remove a trustee upon petition of any person
22 interested. K.S.A. 58-2412.

23
24 Subsection (b)(1) conforms to Kansas law. See K.S.A. 58-2412 (trustee who violates any

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1 express trust may be removed).

2 Subsection (b)(2) is new, although rule has been recognized as applied to conflict between
3 trustee and beneficiaries. See *In re Estate of Osborn*, 179 Kan. 365, 372, 295 P.2d 615 (1956)
4 (where friction exists between fiduciary and beneficiaries, removal may be proper in the interest of
5 the harmony and efficient management of the trust).

6 Subsection (b)(3) generally conforms to Kansas law. See K.S.A. 59-1711 (trustee who is or
7 becomes incapacitated or otherwise incapable of performing duties of trust, or who fails or refuses
8 to perform any duties may be removed); K.S.A. 58-2412 (trustee may be removed for other cause);
9 *Achenbach v. Baker*, 151 Kan. 827, Syl. 3, 101 P.2d 937 (1940) (removal of trustee in best interests
10 of beneficiaries); *In re Estate of Brecklein*, 6 Kan. App. 2d 1001, Syl. 4, 637 P.2d 444 (1981) (court
11 may refuse to appoint or remove trustee under exceptional circumstances where friction and
12 controversy exist between trustee and beneficiary). K.S.A. 58-2412 also specifically allows removal
13 of a trustee who becomes insolvent or whose solvency or that of his sureties is reasonably in doubt.

14 Subsection (b)(4) is new, although consistent with Kansas law. See above parenthetical.

15 Subsection (c) is new, although supported by Kansas law. See *Jennings v. Murdock*, 220
16 Kan. 182, Syl. 12, 553 P.2d 846 (1976) (removal of a trustee is a drastic action which should only
17 be taken when the estate is actually endangered and intervention is necessary to save trust property).
18 See also parentheticals for UTC § 1001(b).

19 **UTC Comment**

20 Subsection (a), contrary to the common law, grants the settlor of an irrevocable trust the right
21 to petition for removal of a trustee. The right to petition for removal does not give the settlor of an
22 irrevocable trust any other rights, such as the right to an annual report or to receive other information
23 concerning administration of the trust. The right of a beneficiary to petition for removal does not
24 apply to a revocable trust while the settlor has capacity. Pursuant to Section 603(a), while a trust is
25 revocable and the settlor has capacity, the rights of the beneficiaries are subject to the settlor's
26 exclusive control.

27 Trustee removal may be regulated by the terms of the trust. See Section 105. In fashioning
28 a removal provision for an irrevocable trust, the drafter should be cognizant of the danger that the
29 trust may be included in the settlor's federal gross estate if the settlor retains the power to be
30 appointed as trustee or to appoint someone who is not independent. See Rev. Rul. 95-58, 1995-2
31 C.B. 191.

32 Subsection (b) lists the grounds for removal of the trustee. The grounds for removal are
33 similar to those found in Restatement (Third) of Trusts § 37 cmt. e (Tentative Draft No. 2, approved
34 1999). A trustee may be removed for untoward action, such as for a serious breach of trust, but the

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1 section is not so limited. A trustee may also be removed under a variety of circumstances in which
2 the court concludes that the trustee is not best serving the interests of the beneficiaries. The term
3 “interests of the beneficiaries” means the beneficial interests as provided in the terms of the trust,
4 not as defined by the beneficiaries. *See* Section 103(7). Removal for conduct detrimental to the
5 interests of the beneficiaries is a well-established standard for removal of a trustee. *See* Restatement
6 (Third) of Trusts § 37 cmt. d (Tentative Draft No. 2, approved 1999); Restatement (Second) of
7 Trusts § 107 cmt. a (1959).

8 Subsection (b)(1), consistent with Restatement (Third) of Trusts § 37 cmt. e and g (Tentative
9 Draft No. 2, approved 1999), makes clear that not every breach of trust justifies removal of the
10 trustee. The breach must be “serious.” A serious breach of trust may consist of a single act that
11 causes significant harm or involves flagrant misconduct. A serious breach of trust may also consist
12 of a series of smaller breaches, none of which individually justify removal when considered alone,
13 but which do so when considered together. A particularly appropriate circumstance justifying
14 removal of the trustee is a serious breach of the trustee’s duty to keep the beneficiaries reasonably
15 informed of the administration of the trust or to comply with a beneficiary’s request for information
16 as required by Section 813. Failure to comply with this duty may make it impossible for the
17 beneficiaries to protect their interests. It may also mask more serious violations by the trustee.

18 The lack of cooperation among trustees justifying removal under subsection (b)(2) need not
19 involve a breach of trust. The key factor is whether the administration of the trust is significantly
20 impaired by the trustees’ failure to agree. Removal is particularly appropriate if the naming of an
21 even number of trustees, combined with their failure to agree, has resulted in deadlock requiring
22 court resolution. The court may remove one or more or all of the trustees. If a cotrustee remains in
23 office following the removal, under Section 704 appointment of a successor trustee is not required.

24 Subsection (b)(2) deals only with lack of cooperation among cotrustees, not with friction
25 between the trustee and beneficiaries. Friction between the trustee and beneficiaries is ordinarily
26 not a basis for removal. However, removal might be justified if a communications breakdown is
27 caused by the trustee or appears to be incurable. *See* Restatement (Third) of Trusts § 37 cmt. e
28 (Tentative Draft No. 2, approved 1999).

29 Subsection (b)(3) authorizes removal for a variety of grounds, including unfitness,
30 unwillingness, or persistent failure to administer the trust effectively. Removal in any of these cases
31 is allowed only if it best serves the interests of the beneficiaries. For the definition of “interests of
32 the beneficiaries,” see Section 103(7). “Unfitness” may include not only mental incapacity but also
33 lack of basic ability to administer the trust. Before removing a trustee for unfitness the court should
34 consider the extent to which the problem might be cured by a delegation of functions the trustee is
35 personally incapable of performing. “Unwillingness” includes not only cases where the trustee
36 refuses to act but also a pattern of indifference to some or all of the beneficiaries. *See* Restatement
37 (Third) of Trusts § 37 cmt. e (Tentative Draft No. 2, approved 1999). A “persistent failure to
38 administer the trust effectively” might include a long-term pattern of mediocre performance, such
39 as consistently poor investment results when compared to comparable trusts.

1 It has traditionally been more difficult to remove a trustee named by the settlor than a trustee
2 named by the court, particularly if the settlor at the time of the appointment was aware of the
3 trustee's failings. See Restatement (Third) of Trusts § 37 cmt. f (Tentative Draft No.2, approved
4 1999); Restatement (Second) of Trusts § 107 cmt. f-g (1959). Because of the discretion normally
5 granted to a trustee, the settlor's confidence in the judgment of the particular person whom the settlor
6 selected to act as trustee is entitled to considerable weight. This deference to the settlor's choice can
7 weaken or dissolve if a substantial change in the trustee's circumstances occurs. To honor a settlor's
8 reasonable expectations, subsection (b)(4) lists a substantial change of circumstances as a possible
9 basis for removal of the trustee. Changed circumstances justifying removal of a trustee might
10 include a substantial change in the character of the service or location of the trustee. A corporate
11 reorganization of an institutional trustee is not itself a change of circumstances if it does not affect
12 the service provided the individual trust account. Before removing a trustee on account of changed
13 circumstances, the court must also conclude that removal is not inconsistent with a material purpose
14 of the trust, that it will best serve the interests of the beneficiaries, and that a suitable cotrustee or
15 successor trustee is available.

16 Subsection (b)(4) also contains a specific but more limited application of Section 411.
17 Section 411 allows the beneficiaries by unanimous agreement to compel modification of a trust if
18 the court concludes that the particular modification is not inconsistent with a material purpose of the
19 trust. Subsection (b)(4) of this section similarly allows the qualified beneficiaries to request removal
20 of the trustee if the designation of the trustee was not a material purpose of the trust. Before
21 removing the trustee the court must also find that removal will best serve the interests of the
22 beneficiaries and that a suitable cotrustee or successor trustee is available.

23 Subsection (c) authorizes the court to intervene pending a final decision on a request to
24 remove a trustee. Among the relief that the court may order under Section 1001(b) is an injunction
25 prohibiting the trustee from performing certain acts and the appointment of a special fiduciary to
26 perform some or all of the trustee's functions. Pursuant to Section 1004, the court may also award
27 attorney's fees as justice and equity may require.

28 SECTION 707. DELIVERY OF PROPERTY BY FORMER TRUSTEE.

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

33 (b) A trustee who has resigned or been removed shall proceed expeditiously to

1 deliver the trust property within the trustee's possession to the cotrustee, successor trustee, or other
2 person entitled to it.

3 **Kansas Comment**

4 Subsection (a) is new, although generally conforms to Kansas law. See K.S.A. 59-1709
5 (fiduciary's resignation not effective until accepted by court); K.S.A. 59-1718 (court discharges
6 trustee when trustee has transferred all of the property of the estate, paid all due taxes, complied with
7 all court orders and has otherwise fully discharged his trust); K.S.A. 59-1713 (termination of
8 fiduciary's authority does not invalidate actions taken as fiduciary).
9

10 Subsection (b) is new, although consistent with Kansas law. See *Dinsmoor v. Hill*, 164 Kan.
11 12, 15, 187 P.2d 338 (1947) (trustee must act in good faith and with due regard to interests of
12 beneficiaries).

13 **UTC Comment**

14 This section addresses the continuing authority and duty of a resigning or removed trustee.
15 Subject to the power of the court to make other arrangements or unless a cotrustee remains in office,
16 a resigning or removed trustee has continuing authority until the trust property is delivered to a
17 successor. If a cotrustee remains in office, there is no reason to grant a resigning or removed trustee
18 any continuing authority, and none is granted under this section. In addition, if a cotrustee remains
19 in office, the former trustee need not submit a final trustee's report. See Section 813(c).

20 There is ample authority in the Uniform Trust Code for the appointment of a special
21 fiduciary, an appointment which can avoid the need for a resigning or removed trustee to exercise
22 residual powers until a successor can take office. See Sections 704(d) (court may appoint additional
23 trustee or special fiduciary whenever court considers appointment necessary for administration of
24 trust), 705(b) (in approving resignation, court may impose conditions necessary for protection of
25 trust property), 706(c) (pending decision on petition for removal, court may order appropriate relief),
26 and 1001(b)(5) (to remedy breach of trust, court may appoint special fiduciary as necessary to protect
27 trust property or interests of beneficiary).

28 If the former trustee has died, the Uniform Trust Code does not require that the trustee's
29 personal representative windup the deceased trustee's administration. Nor is a trustee's conservator
30 or guardian required to complete the former trustee's administration if the trustee's authority
31 terminated due to an adjudication of incapacity. However, to limit the former trustee's liability, the
32 personal representative, conservator or guardian may submit a trustee's report on the former trustee's
33 behalf as authorized by Section 813(c). Otherwise, the former trustee remains liable for actions
34 taken during the trustee's term of office until liability is otherwise barred.

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1 and character of the trust property; the degree of difficulty, responsibility and risk assumed in
2 administering the trust, including in making discretionary distributions; the nature and costs of
3 services rendered by others; and the quality of the trustee's performance. *See* Restatement (Third)
4 of Trusts § 38 cmt. c (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 242
5 cmt. b (1959).

6 In setting compensation, the services actually performed and responsibilities assumed by the
7 trustee should be closely examined. A downward adjustment of fees may be appropriate if a trustee
8 has delegated significant duties to agents, such as the delegation of investment authority to outside
9 managers. *See* Section 807 (delegation by trustee). On the other hand, a trustee with special skills,
10 such as those of a real estate agent, may be entitled to extra compensation for performing services
11 that would ordinarily be delegated. *See* Restatement (Third) of Trusts § 38 cmt. d (Tentative Draft
12 No. 2, approved 1999); Restatement (Second) of Trusts § 242 cmt. d (1959).

13 Because "trustee" as defined in Section 103(19) includes not only an individual trustee but
14 also cotrustees, each trustee, including a cotrustee, is entitled to reasonable compensation under the
15 circumstances. The fact that a trust has more than one trustee does not mean that the trustees
16 together are entitled to more compensation than had either acted alone. Nor does the appointment
17 of more than one trustee mean that the trustees are eligible to receive the compensation in equal
18 shares. The total amount of the compensation to be paid and how it will be divided depend on the
19 totality of the circumstances. Factors to be considered include the settlor's reasons for naming more
20 than one trustee and the level of responsibility assumed and exact services performed by each trustee.
21 Often the fees of cotrustees will be in the aggregate higher than the fees for a single trustee because
22 of the duty of each trustee to participate in administration and not delegate to a cotrustee duties the
23 settlor expected the trustees to perform jointly. *See* Restatement (Third) of Trusts § 38 cmt. i
24 (Tentative Draft No. 2, approved 1999). The trust may benefit in such cases from the enhanced
25 quality of decision-making resulting from the collective deliberations of the trustees.

26 Financial institution trustees normally base their fees on published fee schedules. Published
27 fee schedules are subject to the same standard of reasonableness under the Uniform Trust Code as
28 are other methods for computing fees. The courts have generally upheld published fee schedules but
29 this is not automatic. Among the more litigated topics is the issue of termination fees. Termination
30 fees are charged upon termination of the trust and sometimes upon transfer of the trust to a successor
31 trustee. Factors relevant to whether the fee is appropriate include the actual work performed;
32 whether a termination fee was authorized in the terms of the trust; whether the fee schedule specified
33 the circumstances in which a termination fee would be charged; whether the trustee's overall fees
34 for administering the trust from the date of the trust's creation, including the termination fee, were
35 reasonable; and the general practice in the community regarding termination fees. Because
36 significantly less work is normally involved, termination fees are less appropriate upon transfer to
37 a successor trustee than upon termination of the trust. For representative cases, see *Cleveland Trust*
38 *Co. v. Wilmington Trust Co.*, 258 A.2d 58 (Del. 1969); *In re Trusts Under Will of Dwan*, 371 N.W.
39 2d 641 (Minn. Ct. App. 1985); *Mercer v. Merchants National Bank*, 298 A.2d 736 (N.H. 1972); *In*
40 *re Estate of Payson*, 562 N.Y.S. 2d 329 (Surr. Ct. 1990); *In re Indenture Agreement of Lawson*, 607

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1 A. 2d 803 (Pa. Super. Ct. 1992); *In re Estate of Ischy*, 415 A.2d 37 (Pa. 1980); *Memphis Memorial*
2 *Park v. Planters National Bank*, 1986 Tenn. App. LEXIS 2978 (May 7, 1986); *In re Trust of*
3 *Sensenbrenner*, 252 N.W. 2d 47 (Wis. 1977).

4 This Code does not take a specific position on whether dual fees may be charged when a
5 trustee hires its own law firm to represent the trust. The trend is to authorize dual compensation as
6 long as the overall fees are reasonable. For a discussion, see Ronald C. Link, *Developments*
7 *Regarding the Professional Responsibility of the Estate Administration Lawyer: The Effect of the*
8 *Model Rules of Professional Conduct*, 26 Real Prop. Prob. & Tr. J. 1, 22-38 (1991)

9 Subsection (b) permits the terms of the trust to override the reasonable compensation
10 standard, subject to the court's inherent equity power to make adjustments downward or upward in
11 appropriate circumstances. Compensation provisions should be drafted with care. Common
12 questions include whether a provision in the terms of the trust setting the amount of the trustee's
13 compensation is binding on a successor trustee, whether a dispositive provision for the trustee in the
14 terms of the trust is in addition to or in lieu of the trustee's regular compensation, and whether a
15 dispositive provision for the trustee is conditional on the person performing services as trustee. *See*
16 *Restatement (Third) of Trusts* § 38 cmt. e (Tentative Draft No.2, approved 1999); *Restatement*
17 *(Second) of Trusts* § 242 cmt. f (1959).

18 Compensation may be set by agreement. A trustee may enter into an agreement with the
19 beneficiaries for lesser or increased compensation, although an agreement increasing compensation
20 is not binding on a nonconsenting beneficiary. *See* Section 111(d) (matters that may be resolved
21 by nonjudicial settlement). *See also* *Restatement (Third) of Trusts* § 38 cmt. f (Tentative Draft No.
22 2, approved 1999); *Restatement (Second) of Trusts* § 242 cmt. i (1959). A trustee may also agree
23 to waive compensation and should do so prior to rendering significant services if concerned about
24 possible gift and income taxation of the compensation accrued prior to the waiver. *See* Rev. Rul.
25 66-167, 1966-1 C.B. 20. *See also* *Restatement (Third) of Trusts* § 38 cmt. g (Tentative Draft No.
26 2, approved 1999); *Restatement (Second) of Trusts* § 242 cmt. j (1959).

27 Section 816(15) grants the trustee authority to fix and pay its compensation without the
28 necessity of prior court review, subject to the right of a beneficiary to object to the compensation
29 in a later judicial proceeding. Allowing the trustee to pay its compensation without prior court
30 approval promotes efficient trust administration but does place a significant burden on a beneficiary
31 who believes the compensation is unreasonable. To provide a beneficiary with time to take action,
32 and because of the importance of trustee's fees to the beneficiaries' interests, Section 813(b)(4)
33 requires a trustee to provide the qualified beneficiaries with advance notice of any change in the
34 method or rate of the trustee's compensation. Failure to provide such advance notice constitutes a
35 breach of trust, which, if sufficiently serious, would justify the trustee's removal under Section 706.

36 Under Sections 501-502 of the Uniform Principal and Income Act (1997), one-half of a
37 trustee's regular compensation is charged to income and the other half to principal. Chargeable to
38 principal are fees for acceptance, distribution, or termination of the trust, and fees charged on

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1 disbursements made to prepare property for sale.

2 **SECTION 709. REIMBURSEMENT OF EXPENSES.**

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

- 5 (1) expenses that were properly incurred in the administration of the trust; and
6 (2) to the extent necessary to prevent unjust enrichment of the trust, expenses
7 that were not properly incurred in the administration of the trust.

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

Kansas Comment

11 Subsection (a)(1) conforms to Kansas law. See K.S.A. 59-1717 (trustee shall be
12 allowed his or her necessary expenses incurred in the execution of the trust); *Morrison v. Watkins*,
13 20 Kan. App. 2d 411, Syl. 12, 889 P.2d 140 (1995) (award of costs is mandatory, conditioned upon
14 good faith of trustee).

15
16 Subsection (a)(2) is new. The Kansas Court of Appeals has held that a trustee may
17 recover expenses incurred in successfully defending actions taken while trustee although he is no
18 longer a trustee when the expenses are incurred. *Morrison*, 20 Kan. App. 2d 411, Syl. 11. See also
19 *Jennings v. Murdock*, 220 Kan. 182, Syl. 16, 553 P.2d 846 (1976) (trustee who successfully defends
20 itself against efforts to remove it is entitled to be reimbursed from the trust estate for the expenses
21 of making its defense).

22 Subsection (b) is codified in K.S.A. 58-1203(c)(18).

23 **UTC Comment**

24 A trustee has the authority to expend trust funds as necessary in the administration of the
25 trust, including expenses incurred in the hiring of agents. See Sections 807 (delegation by trustee)
26 and 816(15) (trustee to pay expenses of administration from trust).

1 Subsection (a)(1) clarifies that a trustee is entitled to reimbursement from the trust for
2 incurring expenses within the trustee's authority. The trustee may also withhold appropriate
3 reimbursement for expenses before making distributions to the beneficiaries. *See* Restatement
4 (Third) of Trusts § 38 cmt. b (Tentative Draft No. 2, approved 1999); Restatement (Second) of
5 Trusts § 244 cmt. b (1959). A trustee is ordinarily not entitled to reimbursement for incurring
6 unauthorized expenses. Such expenses are normally the personal responsibility of the trustee.

7 As provided in subsection (a)(2), a trustee is entitled to reimbursement for unauthorized
8 expenses only if the unauthorized expenditures benefitted the trust. The purpose of this provision,
9 which is derived from Restatement (Second) of Trusts § 245 (1959), is not to ratify the unauthorized
10 conduct of the trustee, but to prevent unjust enrichment of the trust. Given this purpose, a court, on
11 appropriate grounds, may delay or even deny reimbursement for expenses which benefitted the trust.
12 Appropriate grounds include: (1) whether the trustee acted in bad faith in incurring the expense; (2)
13 whether the trustee knew that the expense was inappropriate; (3) whether the trustee reasonably
14 believed the expense was necessary for the preservation of the trust estate; (4) whether the expense
15 has resulted in a benefit; and (5) whether indemnity can be allowed without defeating or impairing
16 the purposes of the trust. *See* Restatement (Second) of Trusts § 245 cmt. g (1959).

17 Subsection (b) implements Section 802(h)(5), which creates an exception to the duty of
18 loyalty for advances by the trustee for the protection of the trust if the transaction is fair to the
19 beneficiaries.

20
21 Reimbursement under this section may include attorney's fees and expenses incurred by the
22 trustee in defending an action. However, a trustee is not ordinarily entitled to attorney's fees and
23 expenses if it is determined that the trustee breached the trust. *See* 3A Austin W. Scott & William
24 F. Fratcher, *The Law of Trusts* § 245 (4th ed. 1988).

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1 **ARTICLE 8**

2 **DUTIES AND POWERS OF TRUSTEE**

3 **General Comment**

4 This article states the fundamental duties of a trustee and lists the trustee’s powers. The
5 duties listed are not new, but how the particular duties are formulated and applied has changed over
6 the years. This article was drafted where possible to conform with the 1994 Uniform Prudent
7 Investor Act, which has been enacted in approximately two thirds of the States. The Uniform
8 Prudent Investor Act prescribes a trustee’s responsibilities with respect to the management and
9 investment of trust property. The Uniform Trust Code also addresses a trustee’s duties with respect
10 to distribution to beneficiaries.

11 Because of the widespread adoption of the Uniform Prudent Investor Act, it was decided not
12 to disassemble and fully integrate the Prudent Investor Act into the Uniform Trust Code. Instead,
13 States enacting the Uniform Trust Code are encouraged to recodify their version of the Prudent
14 Investor Act by reenacting it as Article 9 of this Code rather than leaving it elsewhere in their
15 statutes. Where the Uniform Trust Code and Uniform Prudent Investor Act overlap, States should
16 enact the provisions of this article and not enact the duplicative provisions of the Prudent Investor
17 Act. Sections of this article which overlap with the Prudent Investor Act are Sections 802 (duty of
18 loyalty), 803 (impartiality), 805 (costs of administration), 806 (trustee’s skills), and 807 (delegation).
19 For more complete instructions on how to enact the Uniform Prudent Investor Act as part of this
20 Code, see the General Comment to Article 9.

21 All of the provisions of this article may be overridden in the terms of the trust except for
22 certain aspects of the trustee’s duty to keep the beneficiaries informed of administration (*see* Section
23 105(b)(8)-(9)), and the trustee’s fundamental obligation to act in good faith, in accordance with the
24 purposes of the trust, and for the benefit of the beneficiaries (*see* Section 105(b)(2)-(3)).

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

28 **Kansas Comment**

29 This section generally conforms to Kansas law. See K.S.A. 58-1203(b) (trustee has duty to
30 act with due regard to the obligation of fiduciary in the exercise of his powers); *Mark Twain Kansas*
31 *City Bank v. Kroh Bros. Development Co.*, 250 Kan. 754, 765-66, 863 P.2d 355 (1992) (trustee acts
32 as fiduciary to the trust and may only exercise those powers as provided by the trust agreement);

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1 *Dinsmoor v. Hill*, 164 Kan. 12, 15, 187 P.2d 338 (1947) (trustee is held in equity and good
2 conscience to the exercise of good faith which requires him to act with due regard to the interests
3 of the beneficiaries).

4 **UTC Comment**

5 This section confirms that a primary duty of a trustee is to follow the terms and purposes of
6 the trust and to do so in good faith. Only if the terms of a trust are silent or for some reason invalid
7 on a particular issue does this Code govern the trustee's duties. This section also confirms that a
8 trustee does not have a duty to act until the trustee has accepted the trusteeship. For the procedure
9 for accepting a trusteeship, see Section 701.

10 In administering the trust, the trustee must not only comply with this section but also with
11 the other duties specified in this article, particularly the obligation not to place the interests of others
12 above those of the beneficiaries (Section 802), the duty to act with prudence (Section 804), and the
13 duty to keep the qualified beneficiaries reasonably informed about the administration of the trust
14 (Section 813).

15 While a trustee generally must administer a trust in accordance with its terms and purposes,
16 the purposes and particular terms of the trust can on occasion conflict. If such a conflict occurs
17 because of circumstances not anticipated by the settlor, it may be appropriate for the trustee to
18 petition under Section 412 to modify or terminate the trust. Pursuant to Section 404, the trustee is
19 not required to perform a duty prescribed by the terms of the trust if performance would be
20 impossible, illegal or contrary to public policy.

21 For background on the trustee's duty to administer the trust, see Restatement (Second) of
22 Trusts §§ 164-169 (1959).
23

24 **SECTION 802. DUTY OF LOYALTY.**

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

26 (b) Subject to the rights of persons dealing with or assisting the trustee as provided
27 in Section 1012, a sale, encumbrance, or other transaction involving the investment or management
28 of trust property entered into by the trustee for the trustee's own personal account or which is
29 otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by
30 a beneficiary affected by the transaction unless:

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- 1 (1) the transaction was authorized by the terms of the trust;
2 (2) the transaction was approved by the court;
3 (3) the beneficiary did not commence a judicial proceeding within the time
4 allowed by Section 1005;
5 (4) the beneficiary consented to the trustee's conduct, ratified the transaction,
6 or released the trustee in compliance with Section 1009; or
7 (5) the transaction involves a contract entered into or claim acquired by the
8 trustee before the person became or contemplated becoming trustee.

9 (c) A sale, encumbrance, or other transaction involving the investment or
10 management of trust property is presumed to be affected by a conflict between personal and
11 fiduciary interests if it is entered into by the trustee with:

- (1) the trustee's spouse;
13 (2) the trustee's descendants, siblings, parents, or their spouses;
14 (3) an agent or attorney of the trustee; or
15 (4) a corporation or other person or enterprise in which the trustee, or a person
16 that owns a significant interest in the trustee, has an interest that might affect the trustee's best
17 judgment.

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

22 (e) A transaction not concerning trust property in which the trustee engages in the

1 trustee's individual capacity involves a conflict between personal and fiduciary interests if the
2 transaction concerns an opportunity properly belonging to the trust.

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

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

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

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

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

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

22 (4) a deposit of trust money in a regulated financial-service institution

1 operated by the trustee; or

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

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

5 **Kansas Comment**

6 Subsection (a) conforms to Kansas law. See *Gillespie v. Seymour*, 19 Kan.App.2d 754, 766-
7 67, 876 P.2d 193, *rev. denied* 255 Kan. 1001 (1994), quoting Restatement (Second) of Trusts §
8 170(1) (1957) (trustee under duty to beneficiary to administer trust solely in beneficiary's interest);
9 *Merchant v. Foreman*, 182 Kan. 550, 556, 322 P.2d 740 (1958) (trustee has duty of loyalty to
10 beneficiary); K.S.A. 58-1205 (trustee must conduct transactions in best interests of trust and not
11 favor himself or others); K.S.A. 59-1703 (trustee may not profit from trust).

12 Subsections (b) and (c) are apparently new as applied to trustees. K.S.A. 59-1703 contains
13 similar, but not identical, provisions for transactions with personal representatives. Additionally,
14 K.S.A. 58-1205 allows a trustee to exercise a power involving a conflict of interest only by court
15 authorization. The Kansas Supreme Court has recognized that conflicts known to the settlor when
16 naming the trustee are generally regarded as not affording grounds for removal. *Jennings v.*
17 *Murdock*, 220 Kan. 182, 212, 553 P.2d 846 (1976).

18 Subsection (d) generally conforms to Kansas law. See *Nelson v. Gossage*, 152 Kan. 805,
19 808, 107 P.2d 682 (1940) (in dealing with a beneficiary on his own account, a fiduciary has a duty
20 to the beneficiary to deal fairly with him and communicate to him all material facts).

21 Subsection (e) is consistent with Kansas law. See *Rathbun v. Hill*, 187 Kan. 130, 144, 354
22 P.2d 338 (1960) (trustee must not permit his personal interest to conflict in any way with duty to
23 protect interest of trust estate).

24 Subsection (f) is new.

25 Subsection (g) generally conforms to Kansas law. See K.S.A. 58-1203(b) and (c)(13) (trustee
26 has duty to act with due regard to fiduciary obligation in voting securities). The second sentence is
27 new.

28 Subsection (h) generally conforms to Kansas law. See *Nelson*, 152 Kan. at 808-09 (where
29 beneficiary enters into transaction with fiduciary relating to matters within scope of fiduciary
30 relation, transaction is voidable unless it is fair and reasonable and made with consent by beneficiary
31 upon full disclosure).

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1 Subsections (h)(1) and (2) conform to Kansas law. See *Beltz v. Griggs*, 137 Kan. 429, 435,
2 20 P.2d 510 (1933) (no violation of trust where, as part of declaration of trust, compensation of
3 trustee is provided for and fixed); K.S.A. 59-1717 (trustee shall receive reasonable compensation
4 for services).

5 Subsection (h)(3) is new, although K.S.A. 58-1203(4) grants the trustee power "to acquire
6 an undivided interest in a trust asset in which the trustee, in any trust capacity, holds an undivided
7 interest."

8 Subsection (h)(4) conforms to Kansas law. See K.S.A. 58-1203(c)(6) (trustee has authority
9 to deposit trust funds at bank operated by trustee).

10 Subsection (h)(5) conforms to Kansas law. See K.S.A. 58-1203(c)(18) (trustee has power
11 to advance money for the protection of the trust).

12 Subsection (i) is new.

13 UTC Comment

14 This section addresses the duty of loyalty, perhaps the most fundamental duty of the trustee.
15 Subsection (a) states the general principle, which is copied from Restatement (Second) of Trusts
16 § 170(1) (1959). A trustee owes a duty of loyalty to the beneficiaries, a principle which is
17 sometimes expressed as the obligation of the trustee not to place the trustee's own interests over
18 those of the beneficiaries. Most but not all violations of the duty of loyalty concern transactions
19 involving the trust property, but breaches of the duty can take other forms. For a discussion of the
20 different types of violations, see George G. Bogert & George T. Bogert, *The Law of Trusts and*
21 *Trustees* § 543 (Rev. 2d ed. 1993); and 2A Austin W. Scott & William F. Fratcher, *The Law of*
22 *Trusts* §§ 170-170.24 (4th ed. 1987). The "interests of the beneficiaries" to which the trustee must
23 be loyal are the beneficial interests as provided in the terms of the trust. See Section 103(7).

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

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

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1 Subsection (b) states the general rule with respect to transactions involving trust property
2 that are affected by a conflict of interest. A transaction affected by a conflict between the trustee's
3 fiduciary and personal interests is voidable by a beneficiary who is affected by the transaction.
4 Subsection (b) carries out the "no further inquiry" rule by making transactions involving trust
5 property entered into by a trustee for the trustee's own personal account voidable without further
6 proof. Such transactions are irrebuttably presumed to be affected by a conflict between personal and
7 fiduciary interests. It is immaterial whether the trustee acts in good faith or pays a fair consideration.
8 *See* Restatement (Second) of Trusts § 170 cmt. b (1959).

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

18 Even where the presumption under subsection (c) does not apply, a transaction may still be
19 voided by a beneficiary if the beneficiary proves that a conflict between personal and fiduciary
20 interests existed and that the transaction was affected by the conflict. The right of a beneficiary to
21 void a transaction affected by a conflict of interest is optional. If the transaction proves profitable
22 to the trust and unprofitable to the trustee, the beneficiary will likely allow the transaction to stand.
23 For a comparable provision regulating fiduciary investments by national banks, see 12 C.F.R.
24 § 9.12(a).

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

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

1 Subsection (d) creates a presumption that a transaction between a trustee and a beneficiary
2 not involving trust property is an abuse by the trustee of a confidential relationship with the
3 beneficiary. This subsection has limited scope. If the trust has terminated, there must be proof that
4 the trustee's influence with the beneficiary remained. Furthermore, whether or not the trust has
5 terminated, there must be proof that the trustee obtained an advantage from the relationship. The
6 fact the trustee profited is insufficient to show an abuse if a third party would have similarly profited
7 in an arm's length transaction. Subsection (d) is based on Cal. Prob. Code §16004(c). See also 2A
8 Austin W. Scott & William F. Fratcher § 170.25 (4th ed. 1987), which states the same principle in
9 a slightly different form: "Where he deals directly with the beneficiaries, the transaction may stand,
10 but only if the trustee makes full disclosure and takes no advantage of his position and the
11 transaction is in all respects fair and reasonable."

12 Subsection (e), which allows a beneficiary to void a transaction entered into by the trustee
13 that involved an opportunity belonging to the trust, is based on Restatement (Second) of Trusts § 170
14 cmt. k (1959). While normally associated with corporations and with their directors and officers,
15 what is usually referred to as the corporate opportunity doctrine also applies to other types of
16 fiduciary. The doctrine prohibits the trustee's pursuit of certain business activities, such as entering
17 into a business in direct competition with a business owned by the trust, or the purchasing of an
18 investment that the facts suggest the trustee was expected to purchase for the trust. For discussion
19 of the corporate opportunity doctrine, see Kenneth B. Davis, Jr., *Corporate Opportunity and*
20 *Comparative Advantage*, 84 Iowa L. Rev. 211 (1999); and Richard A. Epstein, *Contract and Trust*
21 *in Corporate Law: The Case of Corporate Opportunity*, 21 Del. J. Corp. L. 5 (1996). See also
22 *Principles of Corporate Governance: Analysis and Recommendations* § 5.05 (American Law Inst.
23 1994).

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

35 Mutual fund investment also has a number of potential disadvantages. It adds another layer
36 of expense to the trust, and it causes the trustee to lose control over the nature and timing of
37 transactions in the fund. Trustee investment in mutual funds sponsored by the trustee, its affiliate,
38 or from which the trustee receives extra fees has given rise to litigation implicating the trustee's duty
39 of loyalty, the duty to invest with prudence, and the right to receive only reasonable compensation.
40 Because financial institution trustees ordinarily provide advisory services to and receive

1 compensation from the very funds in which they invest trust assets, the contention is made that
2 investing the assets of individual trusts in these funds is imprudent and motivated by the effort to
3 generate additional fee income. Because the financial institution trustee often will also charge its
4 regular fee for administering the trust, the contention is made that the financial institution trustee's
5 total compensation, both direct and indirect, is excessive.

6 Subsection (f) attempts to retain the advantages of mutual funds while at the same time
7 making clear that such investments are subject to traditional fiduciary responsibilities. Nearly all
8 of the States have enacted statutes authorizing trustees to invest in funds from which the trustee
9 might derive additional compensation. Portions of subsection (f) are based on these statutes.
10 Subsection (f) makes clear that such dual investment-fee arrangements are not automatically
11 presumed to involve a conflict between the trustee's personal and fiduciary interests, but subsection
12 (f) does not otherwise waive or lessen a trustee's fiduciary obligations. The trustee, in deciding
13 whether to invest in a mutual fund, must not place its own interests ahead of those of the
14 beneficiaries. The investment decision must also comply with the enacting jurisdiction's prudent
15 investor rule. To obtain the protection afforded by subsection (f), the trustee must disclose at least
16 annually to the beneficiaries entitled to receive a copy of the trustee's annual report the rate and
17 method by which the additional compensation was determined. Furthermore, the selection of a
18 mutual fund, and the resulting delegation of certain of the trustee's functions, may be taken into
19 account under Section 708 in setting the trustee's regular compensation. *See also* Uniform Prudent
20 Investor Act §§ 7 and 9 and Comments; Restatement (Third) of Trusts: Prudent Investor Rule § 227
21 cmt. m (1992).

22 Subsection (f) applies whether the services to the fund are provided directly by the trustee
23 or by an affiliate. While the term "affiliate" is not used in subsection (c), the individuals and entities
24 listed there are examples of affiliates. The term is also used in the regulations under ERISA. An
25 "affiliate" of a fiduciary includes (1) any person who directly or indirectly, through one or more
26 intermediaries, controls, is controlled by, or is under common control with the fiduciary; (2) any
27 officer, director, partner, employee, or relative of the fiduciary, and any corporation or partnership
28 of which the fiduciary is an officer, director or partner. *See* 29 C.F.R. § 2510.3-21(e).

29 Subsection (g) addresses an overlap between trust and corporate law. It is based on
30 Restatement of Trusts (Second) § 193 cmt. a (1959), which provides that "[i]t is the duty of the
31 trustee in voting shares of stock to use proper care to promote the interest of the beneficiary," and
32 that the fiduciary responsibility of a trustee in voting a control block "is heavier than where he holds
33 only a small fraction of the shares." Similarly, the Department of Labor construes ERISA's duty of
34 loyalty to make share voting a fiduciary function. *See* 29 C.F.R. §2509.94-2. When the trust owns
35 the entirety of the shares of a corporation, the corporate assets are in effect trust assets that the
36 trustee determines to hold in corporate form. The trustee may not use the corporate form to escape
37 the fiduciary duties of trust law. Thus, for example, a trustee whose duty of impartiality would
38 require the trustee to make current distributions for the support of current beneficiaries may not
39 evade that duty by holding assets in corporate form and pleading the discretion of corporate directors
40 to determine dividend policy. Rather, the trustee must vote for corporate directors who will follow

1 a dividend policy consistent with the trustee's trust-law duty of impartiality.

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

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

20 **Kansas Comment**

21 This section conforms to Kansas law. See K.S.A. 58-1201(3) (exercise of trust powers must
22 be "reasonable and equitable in view of the interests of income or principal beneficiaries, or both");
23 K.S.A. 17-5004(a)(1)(E) (trustee has "duty to pursue an investment strategy that considers both the
24 reasonable production of income and safety of capital, consistent with the fiduciary's duty of
25 impartiality and the purposes of the trust"); *In re Breeding Trust*, 21 Kan. App. 2d 351, 356, 899
26 P.2d 511 (1995) (if trust is created for beneficiaries in succession, trustee is under duty to successive
27 beneficiaries to act with due regard to their respective interests).

28 **UTC Comment**

29 The duty of impartiality is an important aspect of the duty of loyalty. This section is identical
30 to Section 6 of the Uniform Prudent Investor Act, except that this section also applies to all aspects
31 of trust administration and to decisions by a trustee with respect to distributions. The Prudent
32 Investor Act is limited to duties with respect to the investment and management of trust property.
33 The differing beneficial interests for which the trustee must act impartially include those of the

1 current beneficiaries versus those of beneficiaries holding interests in the remainder; and among
2 those currently eligible to receive distributions. In fulfilling the duty to act impartially, the trustee
3 should be particularly sensitive to allocation of receipts and disbursements between income and
4 principal and should consider, in an appropriate case, a reallocation of income to the principal
5 account and vice versa, if allowable under local law. For an example of such authority, see Uniform
6 Principal and Income Act § 104 (1997).

7 The duty to act impartially does not mean that the trustee must treat the beneficiaries equally.
8 Rather, the trustee must treat the beneficiaries equitably in light of the purposes and terms of the
9 trust. A settlor who prefers that the trustee, when making decisions, generally favor the interests of
10 one beneficiary over those of others should provide appropriate guidance in the terms of the trust.
11 See Restatement (Second) of § 183 cmt. a (1959).
12

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

17 **Kansas Comment**

18 This section conforms to Kansas law. See K.S.A. 58-1202(c) (unless trust instrument states
19 otherwise, prudent investor rule is standard for exercise of trustee powers); *Pizel v. Whalen*, 252
20 Kan. 384, 390, 845 P.2d 37 (1993) (standard of care, diligence, and skill required of trustee in the
21 administration of the trust estate is that of a prudent man).

22 **UTC Comment**

23 The duty to administer a trust with prudence is a fundamental duty of the trustee. This duty
24 does not depend on whether the trustee receives compensation. The duty may be altered by the
25 terms of the trust. See Section 105. This section is similar to Section 2(a) of the Uniform Prudent
26 Investor Act and Restatement (Third) of Trusts: Prudent Investor Rule § 227 (1992).

27 The language of this section diverges from the language of the previous Restatement. The
28 prior Restatement can be read as applying the same standard – “man of ordinary prudence would
29 exercise in dealing with his own property” – regardless of the type or purposes of the trust. See
30 Restatement (Second) of Trusts § 174 cmt. a (1959). This section appropriately bases the standard
31 on the purposes and other circumstances of the particular trust.

1 A settlor who wishes to modify the standard of care specified in this section is free to do so,
2 but there is a limit. Section 1008 prohibits a settlor from exculpating a trustee from liability for
3 breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or to
4 the interests of the beneficiaries.
5

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

9 **Kansas Comment**

10 This section conforms to Kansas law. See K.S.A. 17-5004(a)(1)(F) (refers to trustee's duty to incur
11 only reasonable and appropriate costs); K.S.A. 59-1717 (trustee allowed his or her "necessary
12 expenses"); *In re Heck*, 22 Kan. App. 2d 135, Syl. 8, 913 P.2d 213 (1996) (fiduciary expenses must
13 be reasonable).

14 **UTC Comment**

15 This section is similar to Section 7 of the Uniform Prudent Investor Act and is consistent
16 with the rules concerning costs in Restatement (Third) of Trusts: Prudent Investor Rule § 227(c)(3)
17 (1992). For related rules concerning compensation and reimbursement of trustees, see Sections 708
18 and 709. The duty not to incur unreasonable costs applies when a trustee decides whether and how
19 to delegate to agents, as well as to other aspects of trust administration. In deciding whether and
20 how to delegate, the trustee must be alert to balancing projected benefits against the likely costs. To
21 protect the beneficiary against excessive costs, the trustee should also be alert to adjusting
22 compensation for functions which the trustee has delegated to others. The obligation to incur only
23 necessary or appropriate costs of administration has long been part of the law of trusts. See
24 Restatement (Second) of Trusts § 188 (1959).
25

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

29 **Kansas Comment**

30 This rule was recognized in *In re Estate of Maxedon*, 24 Kan. App. 2d 427, 434-36, 946 P.2d 104

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1 (1997).

2 The Uniform Transfers to Minors Act contains a similar provision. See K.S.A. 38-1713(b).

3 **UTC Comment**

4 This section is similar to Section 7-302 of the Uniform Probate Code, Restatement (Second)
5 of Trusts § 174 (1959), and Section 2(f) of the Uniform Prudent Investor Act.

6 **SECTION 807. DELEGATION BY TRUSTEE.**

7 (a) A trustee may delegate duties and powers, other than investment and management
8 functions, that a prudent trustee of comparable skills could properly delegate under the
9 circumstances. The trustee shall exercise reasonable care, skill, and caution in:

10 (1) selecting an agent;

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

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

14 (b) A trustee may delegate investment and management functions in accord with
15 K.S.A. 58-24a01 et seq.

16 ~~(b)~~ (c) In performing a delegated function, an agent owes a duty to the trust to
17 exercise reasonable care to comply with the terms of the delegation.

18 ~~(c)~~ (d) A trustee who complies with subsection (a) is not liable to the beneficiaries
19 or to the trust for an action of the agent to whom the function was delegated.

20 ~~(d)~~ (e) By accepting a delegation of powers or duties from the trustee of a trust that
21 is subject to the law of this State, an agent submits to the jurisdiction of the courts of this State.
22

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1 **Kansas Comment**

2 The Kansas drafting committee amended this section of the Uniform Trust Code in
3 subsection (a) by inserting the phrase "other than investment and management functions" and by
4 inserting a new subsection (b) and relettering the subsequent subsections. New subsection (b) states
5 that a trustee may delegate investment and management functions in accord with K.S.A. 58-24a01
6 *et seq.* These changes clarify the committee's position that there may be delegation of investment
7 and management functions and delegation of other than investment and management functions.

8 Subsection (a), prior to its amendment, and subsections (c) through (e) are nearly identical
9 to parts of K.S.A. 58-24a09. The committee is of the opinion that the overlap does not create a
10 problem.

11 K.S.A. 58-24a09 (a)(3) requires notice of intention to begin delegating investment functions.
12 Section 109 is the Kansas Uniform Trust Code section relating to notice.

13 **UTC Comment**

14 This section permits trustees to delegate various aspects of trust administration to agents,
15 subject to the standards of the section. The language is derived from Section 9 of the Uniform
16 Prudent Investor Act. *See also* John H. Langbein, *Reversing the Nondelegation Rule of Trust-*
17 *Investment Law*, 59 Mo. L. Rev. 105 (1994) (discussing prior law).

18 This section encourages and protects the trustee in making delegations appropriate to the
19 facts and circumstances of the particular trust. Whether a particular function is delegable is based
20 on whether it is a function that a prudent trustee might delegate under similar circumstances. For
21 example, delegating some administrative and reporting duties might be prudent for a family trustee
22 but unnecessary for a corporate trustee.

23 This section applies only to delegation to agents, not to delegation to a cotrustee. For the
24 provision regulating delegation to a cotrustee, see Section 703(e).

25 **SECTION 808. POWERS TO DIRECT.**

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

28 (b) If the terms of a trust confer upon a person other than the settlor of a revocable
29 trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise

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1 of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the
2 trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the
3 person holding the power owes to the beneficiaries of the trust.

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

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

10 **Kansas Comment**

11 Subsection (a) generally conforms to Kansas law, although K.S.A. 17-5004(d) requires the
12 directions to be in writing.

13 Subsection (b) is consistent with K.S.A. 58-1206(c), which requires the trustee of any trust
14 instrument to exercise due diligence in the safekeeping of trust property when carrying out a power
15 to direct. On the other hand, this subsection conflicts with K.S.A. 17-5004(b), which authorizes the
16 trustee of a revocable trust to follow a power to direct regardless of any fiduciary duties to which the
17 directing party may be subject.

18 Subsection (c) is new, although K.S.A. 58-1206(c) recognizes that the trust instrument may
19 confer upon another person the authority to direct the management and administration of the trust.

20 Subsection (d) is new.

21 **UTC Comment**

22 Subsection (a) is an application of Section 603(a), which provides that a revocable trust is
23 subject to the settlor's exclusive control as long as the settlor has capacity. Because of the settlor's
24 degree of control, subsection (a) of this section authorizes a trustee to rely on a written direction
25 from the settlor even if it is contrary to the terms of the trust. The written direction of the settlor
26 might be regarded as an amendment of the trust. Subsection (a) has limited application upon a
27 settlor's incapacity. An agent, conservator, or guardian has authority to give the trustee instructions
28 contrary to the terms of the trust only if the agent, conservator, or guardian succeeds to the settlor's

1 powers with respect to revocation, amendment, or distribution as provided in Section 602(e).

2 Subsections (b)-(d) ratify the use of trust protectors and advisers. Subsections (b) and (d) are
3 based in part on Restatement (Second) of Trusts § 185 (1959). Subsection (c) is similar to
4 Restatement (Third) of Trusts § 64(2) (Tentative Draft No. 3, 2001). “Advisers” have long been
5 used for certain trustee functions, such as the power to direct investments or manage a closely-held
6 business. “Trust protector,” a term largely associated with offshore trust practice, is more recent and
7 usually connotes the grant of greater powers, sometimes including the power to amend or terminate
8 the trust. Subsection (c) ratifies the recent trend to grant third persons such broader powers.

9 A power to direct must be distinguished from a veto power. A power to direct involves
10 action initiated and within the control of a third party. The trustee usually has no responsibility other
11 than to carry out the direction when made. But if a third party holds a veto power, the trustee is
12 responsible for initiating the decision, subject to the third party’s approval. A trustee who
13 administers a trust subject to a veto power occupies a position akin to that of a cotrustee and is
14 responsible for taking appropriate action if the third party’s refusal to consent would result in a
15 serious breach of trust. *See* Restatement (Second) of Trusts § 185 cmt. g (1959); Section
16 703(g)(duties of cotrustees).

17 Frequently, the person holding the power is directing the investment of the holder’s own
18 beneficial interest. Such self-directed accounts are particularly prevalent among trusts holding
19 interests in employee benefit plans or individual retirement accounts. *See* ERISA § 404(c) (29
20 U.S.C. § 1104(c)). But for the type of donative trust which is the primary focus of this Code, the
21 holder of the power to direct is frequently acting on behalf of others. In that event and as provided
22 in subsection (d), the holder is presumptively acting in a fiduciary capacity with respect to the
23 powers granted and can be held liable if the holder’s conduct constitutes a breach of trust, whether
24 through action or inaction. Like a trustee, liability cannot be imposed if the holder has not accepted
25 the grant of the power either expressly or informally through exercise of the power. *See* Section 701.

26 Powers to direct are most effective when the trustee is not deterred from exercising the
27 power by fear of possible liability. On the other hand, the trustee does have overall responsibility
28 for seeing that the terms of the trust are honored. For this reason, subsection (b) imposes only
29 minimal oversight responsibility on the trustee. A trustee must generally act in accordance with the
30 direction. A trustee may refuse the direction only if the attempted exercise would be manifestly
31 contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a
32 serious breach of a fiduciary duty owed by the holder of the power to the beneficiaries of the trust.

33 The provisions of this section may be altered in the terms of the trust. *See* Section 105. A
34 settlor can provide that the trustee must accept the decision of the power holder without question.
35 Or a settlor could provide that the holder of the power is not to be held to the standards of a
36 fiduciary. A common technique for assuring that a settlor continues to be taxed on all of the income
37 of an irrevocable trust is for the settlor to retain a nonfiduciary power of administration. *See* I.R.C.
38 § 675(4).

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1 **SECTION 809. CONTROL AND PROTECTION OF TRUST PROPERTY.** A trustee

2 shall take reasonable steps to take control of and protect the trust property.

3 **Kansas Comment**

4 This section generally conforms to Kansas law. See K.S.A. 58-1206(c) (trustee having custody of
5 any asset is required to exercise due diligence in the safekeeping thereof). See also K.S.A. 58-
6 1203(c)(1) (trustee has power to collect and hold trust property).

7 **UTC Comment**

8 This section codifies the substance of Sections 175 and 176 of the Restatement (Second) of
9 Trusts (1959). The duty to take control of and safeguard trust property is an aspect of the trustee's
10 duty of prudent administration as provided in Section 804. *See also* Sections 816(1) (power to
11 collect trust property), 816(11) (power to insure trust property), and 816(12) (power to abandon trust
12 property). The duty to take control normally means that the trustee must take physical possession
13 of tangible personal property and securities belonging to the trust, and must secure payment of any
14 choses in action. *See* Restatement (Second) of Trusts § 175 cmt. a, c and d (1959). This section, like
15 the other sections in this part, is subject to alteration by the terms of the trust. *See* Section 105. For
16 example, the settlor may provide that the spouse may occupy the settlor's former residence rent free,
17 in which event the spouse's occupancy would prevent the trustee from taking possession.

18 **SECTION 810. RECORDKEEPING AND IDENTIFICATION OF TRUST**
19 **PROPERTY.**

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

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

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

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

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1 **Kansas Comment**

2 Subsection (a) conforms to Kansas law. See generally *Boyer v. Day*, 132 Kan. 722, 297 P.
3 432 (1931) (fiduciary must keep such account of funds as will enable him to render account to
4 ultimate beneficiary); K.S.A. 59-1601 *et seq.* (accounting of trustees).

5 Subsection (b) conforms to Kansas law. See *In re Rutherford's Estate*, 154 Kan. 361, 118
6 P.2d 553 (1941) (trustee has duty not to mingle trust funds with his own funds).

7 Subsections (c) and (d) are new.

8 The Uniform Transfers to Minors Act contains a similar provision. See K.S.A. 38-1713(d)
9 and (e).

10 **UTC Comment**

11 The duty to keep adequate records stated in subsection (a) is implicit in the duty to act with
12 prudence (Section 804) and the duty to report to beneficiaries (Section 813). For an application, see
13 *Green v. Lombard*, 343 A. 2d 905, 911 (Md. Ct. Spec. App. 1975). See also Restatement (Second)
14 of Trusts §§ 172, 174 (1959).

15 The duty to earmark trust assets and the duty of a trustee not to mingle the assets of the trust
16 with the trustee's own are closely related. Subsection (b), which addresses the duty not to mingle,
17 is derived from Section 179 of the Restatement (Second) of Trusts (1959). Subsection (c) makes the
18 requirement that assets be earmarked more precise than that articulated in Restatement (Second)
19 § 179 by requiring that the interest of the trust must appear in the records of a third party, such as
20 a bank, brokerage firm, or transfer agent. Because of the serious risk of mistake or misappropriation
21 even if disclosure is made to the beneficiaries, showing the interest of the trust solely in the trustee's
22 own internal records is insufficient. Section 816(7)(B), which allows a trustee to hold securities in
23 nominee form, is not inconsistent with this requirement. While securities held in nominee form are
24 not specifically registered in the name of the trustee, they are properly earmarked because the
25 trustee's holdings are indicated in the records maintained by an independent party, such as in an
26 account at a brokerage firm.

27 Earmarking is not practical for all types of assets. With respect to assets not subject to
28 registration, such as tangible personal property and bearer bonds, arranging for the trust's ownership
29 interest to be reflected on the records of a third-party custodian would not be feasible. For this
30 reason, subsection (c) waives separate recordkeeping for these types of assets. Under subsection (b),
31 however, the duty of the trustee not to mingle these or any other trust assets with the trustee's own
32 remains absolute.

33 Subsection (d), following the lead of a number of state statutes, allows a trustee to use the
34 property of two or more trusts to make joint investments, even though under traditional principles

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1 a joint investment would violate the duty to earmark. A joint investment frequently is more
2 economical than attempting to invest the funds of each trust separately. Also, the risk of
3 misappropriation or mistake is less when the trust property is invested jointly with the property of
4 another trust than when pooled with the property of the trustee or other person.

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

7 **Kansas Comment**

8 This section is new, although consistent with Kansas law. See K.S.A. 58-1203(c)(25)
9 (trustee has power to prosecute and defend claims); K.S.A. 59-1703 (trustee liable for neglect or
10 unreasonable delay in collecting debts); K.S.A. 59-1714 (if in best interests of estate, trustee may,
11 on court order, effect a fair and reasonable compromise with any debtor).

12 **UTC Comment**

13
14
15 This section codifies the substance of Sections 177 and 178 of the Restatement (Second) of
16 Trusts (1959). It may not be reasonable to enforce a claim depending upon the likelihood of
17 recovery and the cost of suit and enforcement. It might also be reasonable to settle an action or
18 suffer a default rather than to defend an action. *See also* Section 816(14) (power to pay, contest,
19 settle, or release claims).

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

23 **Kansas Comment**

24 This specific provision is new, although consistent with Kansas law. K.S.A. 59-1710 provides that
25 the liability of a former trustee previously incurred is not affected by his or her resignation and the
26 appointment of another trustee. K.S.A. 58-1203(c)(25) gives the trustee power to prosecute claims
27 for the protection of trust property.

28 In *In re Trusteeship of Prager*, 106 Kan. 14, 186 P.2d 1015 (1920), the Kansas Supreme
29 Court held the duty to sue a former trustee depends upon the circumstances, such as whether
30 anything may be gained by suit.

1 **UTC Comment**

2 This section is a specific application of Section 811 on the duty to enforce claims, which
3 includes a claim for trust property held by a former trustee or others, and a claim against a
4 predecessor trustee for breach of trust. The duty imposed by this section is not absolute. Pursuit of
5 a claim is not required if the amount of the claim, costs of suit and enforcement, and likelihood of
6 recovery, make such action uneconomic. Unlike Restatement (Second) of Trusts § 223 (1959), this
7 section only requires a successor trustee to redress breaches of trust “known” to have been
8 committed by the predecessor. For the definition of “know,” see Section 104. Limiting the
9 successor’s obligation to known breaches is a common feature of state trust statutes. *See, e.g., Mo.*
10 *Rev. Stat. § 456.187.2.*

11 As authorized by Section 1009, the beneficiaries may relieve the trustee from potential
12 liability for failing to pursue a claim against a predecessor trustee or other person holding trust
13 property. The obligation to pursue a successor trustee can also be addressed in the terms of the trust.
14 *See Section 105.*

15 **SECTION 813. DUTY TO INFORM AND REPORT.**

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

20 (b) A trustee:

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

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

25 (3) within 60 days after the date the trustee acquires knowledge of the creation
26 of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has
27 become irrevocable, whether by the death of the settlor or otherwise, shall notify the qualified

1 beneficiaries of the trust's existence, of the identity of the settlor or settlors, of the right to request
2 a copy of the trust instrument, and of the right to a trustee's report as provided in subsection (c); and

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

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

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

16 **Kansas Comment**

17 Subsection (a) is new, although generally consistent with Kansas law. See K.S.A. 59-1609
18 (nothing shall prevent trustee from accounting voluntarily when reasonably necessary); K.S.A. 59-
19 1609 (court has power to require trustee to give the beneficiaries information or the privilege of
20 inspecting trust records); *In re Rutherford's Estate*, 154 Kan. 361, 118 P.2d 553 (1941) (trustee has
21 duty to keep clear and accurate accounts respecting administration of the trust).

22 Subsection (b) is new. Kansas law requires certain trustees to file an inventory with the court
23 within 30 days after such trustee is required to take possession of the trust property. K.S.A. 59-1601;
24 K.S.A. 59-1605. K.S.A. 59-1605 also requires the trustee of a trust in favor of persons subject to
25 conservatorship to file a notice of appointment as trustee and a list of beneficiaries with the court.

1 Subsection (c) modifies Kansas law. K.S.A. 59-1602 *et seq.* requires the trustee to file
2 accountings with the court unless waived by the testator, settlor or beneficiary. Final reports must
3 also be filed with the court. K.S.A. 59-1709 (trustee must file final account upon resignation);
4 K.S.A. 59-1712 (trustee's personal representative must file final account upon death or incapacity
5 of a sole or last surviving trustee).

6 In subsection (c), the Kansas drafting committee changed the UTC by adding the phrase,
7 "including its rate of return."

8 Subsection (d) is new, although generally consistent with Kansas law. K.S.A. 59-1608
9 allows a beneficiary to waive the statutory accounting requirements subject to court approval.

10 **UTC Comment**

11
12 The duty to keep the beneficiaries reasonably informed of the administration of the trust is
13 a fundamental duty of a trustee. For the common law duty to keep the beneficiaries informed, see
14 Restatement (Second) of Trusts § 173 (1959). This section makes the duty to keep the beneficiaries
15 informed more precise by limiting it to the qualified beneficiaries. For the definition of qualified
16 beneficiary, see Section 103(12). The result of this limitation is that the information need not be
17 furnished to beneficiaries with remote remainder interests unless they have filed a specific request
18 with the trustee. *See* Section 110(a) (request for notice).

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

21 The trustee is under a duty to communicate to a qualified beneficiary information about the
22 administration of the trust that is reasonably necessary to enable the beneficiary to enforce the
23 beneficiary's rights and to prevent or redress a breach of trust. *See* Restatement (Second) of Trusts
24 § 173 cmt. c (1959). Ordinarily, the trustee is not under a duty to furnish information to a
25 beneficiary in the absence of a specific request for the information. *See* Restatement (Second) of
26 Trusts § 173 cmt. d (1959). Thus, the duty articulated in subsection (a) is ordinarily satisfied by
27 providing the beneficiary with a copy of the annual report mandated by subsection (c). However,
28 special circumstances may require that the trustee provide additional information. For example, if
29 the trustee is dealing with the beneficiary on the trustee's own account, the trustee must
30 communicate material facts relating to the transaction that the trustee knows or should know. *See*
31 Restatement (Second) of Trusts § 173 cmt. d (1959). Furthermore, to enable the beneficiaries to take
32 action to protect their interests, the trustee may be required to provide advance notice of transactions
33 involving real estate, closely-held business interests, and other assets that are difficult to value or to
34 replace. *See In re Green Charitable Trust*, 431 N.W. 2d 492 (Mich. Ct. App. 1988); *Allard v.*
35 *Pacific National Bank*, 663 P.2d 104 (Wash. 1983). The trustee is justified in not providing such
36 advance disclosure if disclosure is forbidden by other law, as under federal securities laws, or if
37 disclosure would be seriously detrimental to the interests of the beneficiaries, for example, when
38 disclosure would cause the loss of the only serious buyer.

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

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

1 To enable beneficiaries to protect their interests effectively, it is essential that they know the
2 identity of the trustee. Subsection (b)(2) requires that a trustee inform the qualified beneficiaries
3 within 60 days of the trustee's acceptance of office and of the trustee's name, address and telephone
4 number. Similar to the obligation imposed on a personal representative following admission of the
5 will to probate, subsection (b)(3) requires the trustee of a revocable trust to inform the qualified
6 beneficiaries of the trust's existence within 60 days after the settlor's death. These two duties can
7 overlap. If the death of the settlor happens also to be the occasion for the appointment of a successor
8 trustee, the new trustee of the formerly revocable trust would need to inform the qualified
9 beneficiaries both of the trustee's acceptance and of the trust's existence.

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

14 Subsection (c) requires the trustee to furnish the current beneficiaries and other beneficiaries
15 who request it with a copy of a trustee's report at least annually and upon termination of the trust.
16 Unless a cotrustee remains in office, the former trustee also must provide a report to all of the
17 qualified beneficiaries upon the trustee's resignation or removal. If the vacancy occurred because
18 of the former trustee's death or adjudication of incapacity, a report may, but need not be provided
19 by the former trustee's personal representative, conservator, or guardian.

20 The Uniform Trust Code employs the term "report" instead of "accounting" in order to
21 negate any inference that the report must be prepared in any particular format or with a high degree
22 of formality. The reporting requirement might even be satisfied by providing the beneficiaries with
23 copies of the trust's income tax returns and monthly brokerage account statements if the information
24 on those returns and statements is complete and sufficiently clear. The key factor is not the format
25 chosen but whether the report provides the beneficiaries with the information necessary to protect
26 their interests. For model account forms, together with practical advice on how to prepare reports,
27 see Robert Whitman, *Fiduciary Accounting Guide* (2d ed. 1998).

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

32
33 **SECTION 814. DISCRETIONARY POWERS; TAX SAVINGS.**

34 (a) Notwithstanding the breadth of discretion granted to a trustee in the terms of the
35 trust, including the use of such terms as "absolute", "sole", or "uncontrolled", the trustee shall

1 exercise a discretionary power in good faith and in accordance with the terms and purposes of the
2 trust and the interests of the beneficiaries.

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

5 ~~_____ (1) a person other than a settlor who is a beneficiary and trustee of a trust that~~
6 ~~confers on the trustee a power to make discretionary distributions to or for the trustee's personal~~
7 ~~benefit may exercise the power only in accordance with an ascertainable standard relating to the~~
8 ~~trustee's individual health, education, support, or maintenance within the meaning of Section~~
9 ~~2041(b)(1)(A) or 2514(e)(1) of the Internal Revenue Code of 1986, as in effect on [the effective date~~
10 ~~of this [Code]] [, or as later amended]; and~~

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

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

17 ~~_____ (d) Subsection (b) does not apply to:~~

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

22 ~~_____ (2) any trust during any period that the trust may be revoked or amended by~~

1 ~~its settlor, or~~
2 ~~_____ (3) a trust if contributions to the trust qualify for the annual exclusion under~~
3 ~~Section 2503(e) of the Internal Revenue Code of 1986, as in effect on [the effective date of this~~
4 ~~{Code}] [, or as later amended].~~

5 **Kansas Comment**

6 Subsection (a) conforms to Kansas law. See *Simpson v. State Dept. of Social and Rehabilitation*
7 *Services*, 21 Kan. App. 2d 680, 688, 906 P.2d 174 (1995) (court will not interfere with discretionary
8 powers conferred upon trustee by trust instrument unless trustee acts in bad faith or otherwise abuses
9 his discretion).

10 The Kansas drafting committee struck subsections (b) through (d) of the Uniform Trust Code
11 because there was a difference of views among the committee members on its inclusion. In addition
12 to an incorrect citation in the text of the Uniform Trust Code, numerous questions were raised about
13 subsection (b), (c) and (d), and the committee agreed to not recommend their adoption.

14 **UTC Comment**

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

29 Subsections (b) through (d) rewrite the terms of a trust that might otherwise result in adverse
30 estate and gift tax consequences to a beneficiary-trustee. This Code does not generally address the
31 subject of tax curative provisions. These are provisions that automatically rewrite the terms of trusts
32 that might otherwise fail to qualify for probable intended tax benefits. Such provisions, because
33 they apply to all trusts using or failing to use specified language, are often overbroad, applying not
34 only to trusts intended to qualify for tax benefits but also to smaller trust situations where taxes are

1 not a concern. Enacting tax-curative provisions also requires special diligence by state legislatures
2 to make certain that these provisions are periodically amended to account for the frequent changes
3 in federal tax law. Furthermore, many failures to draft with sufficient care may be correctable by
4 including a tax savings clause in the terms of the trust or by seeking modification of the trust using
5 one or more of the methods authorized by Sections 411-417. Notwithstanding these reasons, the
6 unintended inclusion of the trust in the beneficiary-trustee's gross estate is a frequent enough
7 occurrence that the drafters concluded that it is a topic that this Code should address. It is also a
8 topic on which numerous States have enacted corrective statutes.

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

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

29
30 Subsection (b)(2) addresses a common trap, the trustee who is not a beneficiary but who has
31 power to make discretionary distributions to those to whom the trustee owes a legal obligation of
32 support. Discretion to make distributions to those to whom the trustee owes a legal obligation of
33 support, such as to the trustee's minor children, results in inclusion of the trust in the trustee's gross
34 estate even if the power is limited by an ascertainable standard. The applicable regulation provides
35 that the ascertainable standard exception applies only to distributions for the benefit of the decedent,
36 not to distributions to those to whom the decedent owes a legal obligation of support. *See* Treas.
37 Reg. § 20.2041-1(c)(2).

38 Subsection (c) deals with cotrustees and adopts the common planning technique of granting
39 the broader discretion only to the independent trustee. Cotrustees who are beneficiaries of the trust
40 or who have a legal obligation to support a beneficiary may exercise the power only as limited by

1 subsection (b). If all trustees are so limited, the court may appoint a special fiduciary to make a
2 decision as to whether a broader exercise is appropriate.

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

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

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

22 **SECTION 815. GENERAL POWERS OF TRUSTEE.**

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

24 (1) powers conferred by the terms of the trust; or

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

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

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

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

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

4 **Kansas Comment**

5 Subsection (a) generally conforms to Kansas law. See *In re Estate of Sanders*, 261 Kan. 176
6 Syl. 5, 929 P.2d 153 (1996) (specific provisions of trust required to be followed); K.S.A. 58-1202(a)
7 and 58-1203(a) (trustee has power to perform, without court authorization, every act which a prudent
8 man would perform unless limited in trust instrument).

9
10 Subsection (b) conforms to Kansas law. See K.S.A. 58-1203(b) (trustee has duty to act with due
11 regard to obligation as fiduciary in exercise of powers).

12 The Uniform Transfers to Minors Act contains a provision similar to U.T.C. 815(a)(2)(A).
13 See K.S.A. 38-1714(a).

14 **UTC Comment**

15 This section is intended to grant trustees the broadest possible powers, but to be exercised
16 always in accordance with the duties of the trustee and any limitations stated in the terms of the trust.
17 This broad authority is denoted by granting the trustee the powers of an unmarried competent owner
18 of individually owned property, unlimited by restrictions that might be placed on it by marriage,
19 disability, or cotenancy.

20 The powers conferred elsewhere in this Code that are subsumed under this section include
21 all of the specific powers listed in Section 816 as well as other powers described elsewhere in this
22 Code. See Sections 108(c) (transfer of principal place of administration), 414(a) (termination of
23 uneconomic trust with value less than \$50,000), 417 (combination and division of trusts), 703(e)
24 (delegation to cotrustee), 802(h) (exception to duty of loyalty), 807 (delegation to agent of powers
25 and duties), 810(d) (joint investments), and Article 9 (Uniform Prudent Investor Act). The powers
26 conferred by this Code may be exercised without court approval. If court approval of the exercise
27 of a power is desired, a petition for court approval should be filed.

28 A power differs from a duty. A duty imposes an obligation or a mandatory prohibition. A
29 power, on the other hand, is a discretion, the exercise of which is not obligatory. The existence of
30 a power, however created or granted, does not speak to the question of whether it is prudent under
31 the circumstances to exercise the power.

1 **SECTION 816. SPECIFIC POWERS OF TRUSTEE.** Without limiting the authority

2 conferred by Section 815, a trustee may:

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

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

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

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

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

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

15 (7) with respect to stocks or other securities, exercise the rights of an absolute owner,
16 including the right to:

17 (A) vote, or give proxies to vote, with or without power of substitution, or
18 enter into or continue a voting trust agreement;

19 (B) hold a security in the name of a nominee or in other form without
20 disclosure of the trust so that title may pass by delivery;

21 (C) pay calls, assessments, and other sums chargeable or accruing against the
22 securities, and sell or exercise stock subscription or conversion rights; and

1 (D) deposit the securities with a depository or other regulated financial-service
2 institution;

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

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

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

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

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

18 (13) with respect to possible liability for violation of environmental law:

19 (A) inspect or investigate property the trustee holds or has been asked to hold,
20 or property owned or operated by an organization in which the trustee holds or has been asked to
21 hold an interest, for the purpose of determining the application of environmental law with respect
22 to the property;

1 (B) take action to prevent, abate, or otherwise remedy any actual or potential
2 violation of any environmental law affecting property held directly or indirectly by the trustee,
3 whether taken before or after the assertion of a claim or the initiation of governmental enforcement;

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

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

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

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

12 (15) pay taxes, assessments, compensation of the trustee and of employees and agents
13 of the trust, and other expenses incurred in the administration of the trust;

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

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

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

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

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

5 (21) pay an amount distributable to a beneficiary who is under a legal disability or
6 who the trustee reasonably believes is incapacitated, by paying it directly to the beneficiary or
7 applying it for the beneficiary's benefit, or by:

8 (A) paying it to the beneficiary's [conservator] or, if the beneficiary does not
9 have a [conservator], the beneficiary's [guardian];

10 (B) paying it to the beneficiary's custodian ~~under [the Uniform Transfers to~~
11 ~~Minors Act] or custodial trustee under [the Uniform Custodial Trust Act], and, for that purpose,~~
~~creating a custodianship or custodial trust, attorney-in-fact, custodial trustee or other person with~~
13 legal authority to receive such funds for the benefit of the beneficiary;

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

17 (D) managing it as a separate fund on the beneficiary's behalf, subject to the
18 beneficiary's continuing right to withdraw the distribution;

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

1 (23) resolve a dispute concerning the interpretation of the trust or its administration
2 by mediation, arbitration, or other procedure for alternative dispute resolution;

3 (24) prosecute or defend an action, claim, or judicial proceeding in any jurisdiction
4 to protect trust property and the trustee in the performance of the trustee's duties;

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

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

9 **Kansas Comment**

10 Paragraph (1) is codified in K.S.A. 58-1203(c)(1) and (2), except power to decline additions
11 to trust property is new.

12 Paragraphs (2) and (3) are codified in K.S.A. 58-1203(c)(7).

13 Paragraph (4) is codified in K.S.A. 58-1203(c)(6) and K.S.A. 58-1203(c)(27).

14 Paragraph (5) is codified in K.S.A. 58-1203(c)(7) and (18).

15 Paragraph (6) is codified in K.S.A. 58-1203(c)(3) and (15).

16 Subparagraph (7)(A) is codified in K.S.A. 58-1203(c)(13), except language regarding the
17 power of substitution and voting trust agreement is new.

18 Subparagraph (7)(B) is codified in K.S.A. 58-1203(c)(16), except Kansas provision
19 specifically subjects trustee to liability for any act of the nominee.

20 Subparagraph (7)(C) is codified in K.S.A. 58-1203(c)(14) and (15).

21 Subparagraph (7)(D) is new.

22 Paragraph (8) is codified in K.S.A. 58-1203(c)(8) and (9), although U.T.C. adds specific
23 power to construct and make improvements. U.T.C. also does not include power in K.S.A. 58-
24 1203(c)(9) "to adjust differences in valuation on exchange or partition by giving or receiving
25 consideration." Additionally, K.S.A. 58-1203(c)(9) specifically allows trustee to dedicate easements

1 to public use *without consideration*. Finally, the U.T.C. adds the power to grant private easements.

2 Paragraph (9) is codified in K.S.A. 58-1203(c)(10) and (11), except K.S.A. 58-1203(c)(11)
3 also authorizes trustee to enter into a pooling or unitization agreement.

4 Paragraph (10) is codified in K.S.A. 58-1203(c)(12), except U.T.C. adds that the option may
5 be exercisable beyond the term of the trust.

6 Paragraph (11) is codified in K.S.A. 58-1203(c)(17), except U.T.C. adds power to insure
7 trustee's agents and beneficiaries.

8 Paragraph (12) is codified in K.S.A. 58-1203(c)(1) and (7).

9 Paragraph (13) is new.

10 Paragraph (14) is codified in K.S.A. 58-1203(c)(19), except Kansas provision specifically
11 allows a trustee to release a claim *to the extent it is uncollectible*.

12 Paragraph (15) is codified in K.S.A. 58-1203(c)(20) and (24), except K.S.A. 58-1203(c)(24)
13 specifically gives power to employ persons, even if they are associated with the trustee.

14 Paragraph (16) is new.

15 Paragraph (17) is new.

16 Paragraph (18) is new.

17 Paragraph (19) is codified in K.S.A. 58-1203(c)(7).

18 Paragraph (20) is new.

19 Paragraph (21) is consistent with Kansas law. K.S.A. 58-1203(c)(22) allows trustee, without
20 liability, to make payment to beneficiary or for the use of the beneficiary to either a legal
21 representative appointed by the court, or if none, to a relative.

22 In paragraph (21)(B), the Kansas drafting committee changed the UTC as follows: "(B)
23 paying it to the beneficiary's custodian ~~under [the Uniform Transfers to Minors Act] or custodial~~
24 ~~trustee under [the Uniform Custodial Trust Act], and, for that purpose, creating a custodianship or~~
25 ~~custodial trust, attorney-in-fact, custodial trustee or other person with legal authority to receive such~~
26 funds for the benefit of the beneficiary."

27 Paragraph (22) is codified in K.S.A. 58-1203(c)(23).

1 Paragraph (23) is new.

2 Paragraph (24) is codified in K.S.A. 58-1203(c)(25).

3 Paragraph (25) is codified in K.S.A. 58-1203(c)(26).

4 Paragraph (26) is new.

5 **UTC Comment**

6
7 This section enumerates specific powers commonly included in trust instruments and in
8 trustee powers legislation. All the powers listed are subject to alteration in the terms of the trust.
9 *See* Section 105. The powers listed are also subsumed under the general authority granted in Section
10 815(a)(2) to exercise all powers over the trust property which an unmarried competent owner has
11 over individually owned property, and any other powers appropriate to achieve the proper
12 management, investment, and distribution of the trust property. The powers listed add little of
13 substance not already granted by Section 815 and powers conferred elsewhere in the Code, which
14 are listed in the Comment to Section 815. While the Committee drafting this Code discussed
15 dropping the list of specific powers, it concluded that the demand of third parties to see language
16 expressly authorizing specific transactions justified retention of a detailed list.

17 As provided in Section 815(b), the exercise of a power is subject to fiduciary duties except
18 as modified in the terms of the trust. The fact that the trustee has a power does not imply a duty that
19 the power must be exercised.

20 Many of the powers listed in this section are similar to the powers listed in Section 3 of the
21 Uniform Trustees' Powers Act (1964). Several are new, however, and other powers drawn from that
22 Act have been updated. The powers enumerated in this section may be divided into categories.
23 Certain powers, such as the powers to acquire or sell property, borrow money, and deal with real
24 estate, securities, and business interests, are powers that any individual can exercise. Other powers,
25 such as the power to collect trust property, are by their very nature only applicable to trustees. Other
26 specific powers, particularly those listed in other sections of the Uniform Trust Code, modify a
27 trustee duty that would otherwise apply. *See, e.g.,* Sections 802(h) (exceptions to duty of loyalty)
28 and 810(d) (joint investments as exception to earmarking requirement).

29 Paragraph (1) authorizes a trustee to collect trust property and collect or decline additions
30 to the trust property. The power to collect trust property is an incident of the trustee's duty to
31 administer the trust as provided in Section 801. The trustee has a duty to enforce claims as provided
32 in Section 811, the successful prosecution of which can result in collection of trust property.
33 Pursuant to Section 812, the trustee also has a duty to collect trust property from a former trustee
34 or other person holding trust property. For an application of the power to reject additions to the trust

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1 property, see Section 816(13) (power to decline property with possible environmental liability).

2 Paragraph (2) authorizes a trustee to sell trust property, for cash or on credit, at public or
3 private sale. Under the Restatement, a power of sale is implied unless limited in the terms of the
4 trust. Restatement (Third) of Trusts: Prudent Investor Rule § 190 (1992). In arranging a sale, a
5 trustee must comply with the duty to act prudently as provided in Section 804. This duty may dictate
6 that the sale be made with security.

7 Paragraph (4) authorizes a trustee to deposit funds in an account in a regulated financial-
8 service institution. This includes the right of a financial institution trustee to deposit funds in its own
9 banking department as authorized by Section 802(h)(4).

10 Paragraph (5) authorizes a trustee to borrow money. Under the Restatement, the sole
11 limitation on such borrowing is the general obligation to invest prudently. *See* Restatement (Third)
12 of Trusts: Prudent Investor Rule § 191 (1992). Language clarifying that the loan may extend beyond
13 the duration of the trust was added to negate an older view that the trustee only had power to
14 encumber the trust property for the period that the trust was in existence.

15 Paragraph (6) authorizes the trustee to continue, contribute additional capital to, or change
16 the form of a business. Any such decision by the trustee must be made in light of the standards of
17 prudent investment stated in Article 9.

18 Paragraph (7), regarding powers with respect to securities, codifies and amplifies the
19 principles of Restatement (Second) of Trusts § 193 (1959).

20 Paragraph (9), authorizing the leasing of property, negates the older view, reflected in
21 Restatement (Second) of Trusts § 189 cmt. c (1959), that a trustee could not lease property beyond
22 the duration of the trust. Whether a longer term lease is appropriate is judged by the standards of
23 prudence applicable to all investments.

24 Paragraph (10), authorizing a trustee to grant options with respect to sales, leases or other
25 dispositions of property, negates the older view, reflected in Restatement (Second) of Trusts § 190
26 cmt. k (1959), that a trustee could not grant another person an option to purchase trust property. Like
27 any other investment decision, whether the granting of an option is appropriate is a question of
28 prudence under the standards of Article 9.

29 Paragraph (11), authorizing a trustee to purchase insurance, empowers a trustee to implement
30 the duty to protect trust property. *See* Section 809. The trustee may also insure beneficiaries,
31 agents, and the trustee against liability, including liability for breach of trust.

32 Paragraph (13) is one of several provisions in the Uniform Trust Code designed to address
33 trustee concerns about possible liability for violations of environmental law. This paragraph
34 collects all the powers relating to environmental concerns in one place even though some of the

1 powers, such as the powers to pay expenses, compromise claims, and decline property, overlap with
2 other paragraphs of this section (decline property, paragraph (1); compromise claims, paragraph (14);
3 pay expenses, paragraph (15)). Numerous States have legislated on the subject of environmental
4 liability of fiduciaries. For a representative state statute, see Tex. Prop. Code Ann. § 113.025. *See*
5 *also* Sections 701(c)(2) (designated trustee may inspect property to determine potential violation of
6 environmental or other law or for any purpose) and 1010(b) (trustee not personally liable for
7 violation of environmental law arising from ownership or control of trust property).

8 Paragraph (14) authorizes a trustee to pay, contest, settle, or release claims. Section 811
9 requires that a trustee need take only “reasonable” steps to enforce claims, meaning that a trustee
10 may release a claim not only when it is uncollectible, but also when collection would be
11 uneconomic. *See* Restatement (Second) of Trusts § 192 (1959) (power to compromise, arbitrate and
12 abandon claims).

13 Paragraph (15), among other things, authorizes a trustee to pay compensation to the trustee
14 and agents without prior approval of court. Regarding the standard for setting trustee compensation,
15 see Section 708. *See also* Section 709 (repayment of trustee expenditures). While prior court
16 approval is not required, Section 813(b)(4) requires the trustee to inform the qualified beneficiaries
17 in advance of a change in the method or rate of compensation.

18 Paragraph (16) authorizes a trustee to make elections with respect to taxes. The Uniform
19 Trust Code leaves to other law the issue of whether the trustee, in making such elections, must make
20 compensating adjustments in the beneficiaries’ interests.

21 Paragraph (17) authorizes a trustee to take action with respect to employee benefit or
22 retirement plans, or annuities or life insurance payable to the trustee. Typically, these will be
23 beneficiary designations which the settlor has made payable to the trustee, but this Code also allows
24 the trustee to acquire ownership of annuities or life insurance.

25 Paragraphs (18) and (19) allow a trustee to make loans to a beneficiary or to guarantee loans
26 of a beneficiary upon such terms and conditions as the trustee considers fair and reasonable. The
27 determination of what is fair and reasonable must be made in light of the fiduciary duties of the
28 trustee and the purposes of the trust. Frequently, a trustee will make loans to a beneficiary which
29 might be considered less than prudent in an ordinary commercial sense although of great benefit to
30 the beneficiary and which help carry out the trust purposes. If the trustee requires security for the
31 loan to the beneficiary, adequate security under this paragraph may consist of a charge on the
32 beneficiary’s interest in the trust. *See* Restatement (Second) of Trusts § 255 (1959). However, the
33 interest of a beneficiary subject to a spendthrift restraint may not be pledged as security for a loan.
34 *See* Section 502.

35 Paragraph (20) authorizes the appointment of ancillary trustees in jurisdictions in which the
36 regularly appointed trustee is unable or unwilling to act. Normally, an ancillary trustee will be
37 appointed only when there is a need to manage real estate located in another jurisdiction. This

1 paragraph allows the regularly appointed trustee to select the ancillary trustee and to confer on the
2 ancillary trustee such powers and duties as may be necessary. The appointment of ancillary trustees
3 is a topic which a settlor may wish to address in the terms of the trust.

4 Paragraph (21) authorizes a trustee to make payments to another person for the use or benefit
5 of a beneficiary who is under a legal disability or who the trustee reasonably believes is
6 incapacitated. Although an adult relative or other person receiving funds is required to spend it on
7 the beneficiary's behalf, it is preferable that the trustee make the distribution to a person having more
8 formal fiduciary responsibilities. For this reason, payment may be made to an adult relative only
9 if the trustee does not know of a conservator, guardian, custodian, or custodial trustee capable of
10 acting for the beneficiary.

11 Paragraph (22) authorizes a trustee to make non-pro-rata distributions and allocate particular
12 assets in proportionate or disproportionate shares. This power provides needed flexibility and
13 lessens the risk that a non-pro-rata distribution will be treated as a taxable sale.

14 Paragraph (23) authorizes a trustee to resolve disputes through mediation or arbitration. The
15 drafters of this Code encourage the use of such alternate methods for resolving disputes. Arbitration
16 is a form of nonjudicial settlement agreement authorized by Section 111. In representing
17 beneficiaries and others in connection with arbitration or mediation, the representation principles of
18 Article 3 may be applied. Settlers wishing to encourage use of alternate dispute resolution may draft
19 to provide it. For sample language, see American Arbitration Association, Arbitration Rules for
20 Wills and Trusts (1995).

21 Paragraph (24) authorizes a trustee to prosecute or defend an action. As to the propriety of
22 reimbursement for attorney's fees and other expenses of an action or judicial proceeding, see Section
23 709 and Comment. *See also* Section 811 (duty to defend actions).

24 Paragraph (26), which is similar to Section 344 of the Restatement (Second) of Trusts (1959),
25 clarifies that even though the trust has terminated, the trustee retains the powers needed to wind up
26 the administration of the trust and distribute the remaining trust property.

27 **SECTION 817. DISTRIBUTION UPON TERMINATION.**

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

1 of the time allowed for objection.

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

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

7 (1) it was induced by improper conduct of the trustee; or

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

10 **Kansas Comment**

11 This section is new. The Kansas Supreme Court has held that a fiduciary cannot be
12 compelled to breach his trust merely because he is offered a binding release from liability for such
13 a breach. *In re Murdock's Estate*, 220 Kan. 459, Syl. 7, 553 P.2d 876 (1976).

14 In subsection (c), the Kansas drafting committee changed the UTC by inserting the phrase,
15 "upon termination or partial termination of a trust."

16 **UTC Comment**

17 This section contains several provisions governing distribution upon termination. Other
18 provisions of the Uniform Trust Code relevant to distribution upon termination include Section
19 816(26) (powers upon termination to windup administration and distribution), and 1005 (limitation
20 of action against trustee).

21 Subsection (a) is based on Section 3-906(b) of the Uniform Probate Code. It addresses the
22 dilemma that sometimes arises when the trustee is reluctant to make distribution until the beneficiary
23 approves but the beneficiary is reluctant to approve until the assets are in hand. The procedure made
24 available under subsection (a) facilitates the making of non-pro-rata distributions. However,
25 whenever practicable it is normally better practice to obtain the advance written consent of the
26 beneficiaries to a proposed plan of distribution.

27 Subsection (b) recognizes that upon an event terminating or partially terminating a trust,
28 expeditious distribution should be encouraged to the extent reasonable under the circumstances.

1 However, a trustee is entitled to retain a reasonable reserve for payment of debts, expenses, and
2 taxes. Sometimes these reserves must be quite large, for example, upon the death of the beneficiary
3 of a QTIP trust that is subject to federal estate tax in the beneficiary's estate. Not infrequently, a
4 substantial reserve must be retained until the estate tax audit is concluded several years after the
5 beneficiary's death.

6 Subsection (c) is an application of Section 1009. Section 1009 addresses the validity of any
7 type of release that a beneficiary might give. Subsection (c) is more limited, dealing only with
8 releases given upon termination of the trust. Factors affecting the validity of a release include
9 adequacy of disclosure, whether the beneficiary had a legal incapacity, and whether the trustee
10 engaged in any improper conduct. *See* Restatement (Second) of Trusts § 216 (1959).

1 et seq. shall govern the investment and management of trust assets.

2 **Kansas Comment**

3 The Kansas drafting committee noted that the 2000 Kansas Legislature did extensive work
4 in amending and adopting the latest version of the Uniform Prudent Investor Act. In addition, the
5 Kansas version of the Uniform Prudent Investor Act uses the term "fiduciary" and not "trustee" and
6 thus has broader application.

7 For these reasons, the Kansas drafting committee did not propose repeal of the recently
8 enacted Uniform Prudent Investor Act and its reenactment as part of the Uniform Trust Code. The
9 committee instead chose to leave the Uniform Prudent Investor Act intact and draft a section that
10 clarified its application.

1 **ARTICLE 10**

2 **LIABILITY OF TRUSTEES AND RIGHTS OF PERSONS DEALING WITH TRUSTEE**

3 **General Comment**

4 Sections 1001 through 1009 identify the remedies for breach of trust, describe how money
5 damages are to be determined, and specify potential defenses. Section 1001 lists the remedies for
6 breach of trust and specifies when a breach of trust occurs. A breach of trust occurs when the trustee
7 breaches one of the duties contained in Article 8 or elsewhere in the Code. The remedies for breach
8 of trust in Section 1001 are broad and flexible. Section 1002 provides how money damages for
9 breach of trust are to be determined. The standard for determining money damages rests on two
10 principles: (1) the trust should be restored to the position it would have been in had the harm not
11 occurred; and (2) the trustee should not be permitted to profit from the trustee's own wrong. Section
12 1003 holds a trustee accountable for profits made from the trust even in the absence of a breach of
13 trust. Section 1004 reaffirms the court's power in equity to award costs and attorney's fees as justice
14 requires.

15 Sections 1005 through 1009 deal with potential defenses. Section 1005 provides a statute
16 of limitations on actions against a trustee. Section 1006 protects a trustee who acts in reasonable
17 reliance on the terms of a written trust instrument. Section 1007 protects a trustee who has exercised
18 reasonable care to ascertain the happening of events that might affect distribution, such as a
19 beneficiary's marriage or death. Section 1008 describes the effect and limits on the use of an
20 exculpatory clause. Section 1009 deals with the standards for recognizing beneficiary approval of
21 acts of the trustee that might otherwise constitute a breach of trust.

22 Sections 1010 through 1013 address trustee relations with persons other than beneficiaries.
23 The emphasis is on encouraging third parties to engage in commercial transactions to the same extent
24 as if the property were not held in trust. Section 1010 negates personal liability on contracts entered
25 into by the trustee if the fiduciary capacity was properly disclosed. The trustee is also relieved from
26 liability for torts committed in the course of administration unless the trustee was personally at fault.
27 Section 1011 negates personal liability for contracts entered into by partnerships in which the trustee
28 is a general partner as long as the fiduciary capacity was disclosed in the contract or partnership
29 certificate. Section 1012 protects persons other than beneficiaries who deal with a trustee in good
30 faith and without knowledge that the trustee is exceeding or improperly exercising a power. Section
31 1013 permits a third party to rely on a certification of trust, thereby reducing the need for a third
32 party to request a copy of the complete trust instrument.

33 Much of this article is not subject to override in the terms of the trust. The settlor may not
34 limit the rights of persons other than beneficiaries as provided in Sections 1010 through 1013, nor
35 interfere with the court's ability to take such action to remedy a breach of trust as may be necessary
36 in the interests of justice. See Section 105.

1 **SECTION 1001. REMEDIES FOR BREACH OF TRUST.**

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

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

5 (1) compel the trustee to perform the trustee's duties;

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

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

9 (4) order a trustee to account;

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

12 (6) suspend the trustee;

13 (7) remove the trustee as provided in Section 706;

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

15 (9) subject to Section 1012, void an act of the trustee, impose a lien or a
16 constructive trust on trust property, or trace trust property wrongfully disposed of and recover the
17 property or its proceeds; or

18 (10) order any other appropriate relief.

19 **Kansas Comment**

20 Subsection (a) conforms to Kansas law. See *Kline v. Orebaugh*, 214 Kan. 207, 211, 519 P.2d
21 691 (1974) (trustee who violates any duty which he owes to beneficiary is guilty of breach of trust
22 and is liable to beneficiary to redress breach).

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1 Subsection (b)(1) conforms to Kansas law. See *Fry v. McCormick*, 170 Kan. 741, 744, 228
2 P.2d 727 (1951) (court may compel performance if trustee fails to perform duties).

3 Subsection (b)(2) conforms to Kansas law. See *Jennings v. Murdock*, 220 Kan. 182, 553
4 P.2d 846 (1976) (action to enjoin trustee from certain action based on alleged breach of trust).

5 Subsection (b)(3) conforms to Kansas law. See K.S.A. 59-2255 (court may surcharge trustee
6 for any loss caused by breach of trust); *Jennings v. Murdock*, 220 Kan. 182, 214, 553 P.2d 846
7 (1976) (surcharge is remedy designed to make trust estate whole upon breach of trust by trustee);
8 *Goben v. Barry*, 237 Kan. 822, 825, 828, 703 P.2d 1378 (1985) (equity will compel restitution upon
9 breach of fiduciary duty if circumstances require); *Capitol Federal Sav. & Loan Ass'n v. Hohman*,
10 9 Kan. App. 2d 217, 675 P.2d 384, aff'd 235 Kan. 815, 682 P.2d 1309 (1984) (trial court could have
11 awarded money damages for breach of trust if necessary to make victim whole).

12 Subsection (b)(4) conforms to Kansas Law. See K.S.A. 59-1609 (court has power to require
13 trustee to account).

14
15 Subsection (b)(5) conforms to Kansas law. See K.S.A. 60-1301 (court has power to appoint
16 a receiver if necessary to keep, preserve and manage property pending determination of any
17 proceeding in which such property may be affected by the final judgment); *Seal v. Seal*, 212 Kan.
18 55, 56, 510 P.2d 167 (1973) (court of equity has power to appoint receiver); *Goben v. Barry*, 237
19 Kan. 822, 825, 703 P.2d 1378 (1985) (trial court appointed receiver upon finding breach of fiduciary
20 duty).

21 Subsection (b)(6) is new.

22 Subsection (b)(7) conforms to Kansas law. See *Jennings v. Murdock*, 220 Kan. 182, Syl. 11,
23 12, 553 P.2d 846 (1976) (court may remove trustee when intervention is necessary to save trust
24 property); K.S.A. 59-1711 (court may remove trustee upon failure to perform duties).

25 Subsection (b)(8) conforms to Kansas law. See *Bessman v. Bessman*, 214 Kan. 510, 521, 520
26 P.2d 1210 (1974) (if trustee commits breach of trust, court may deny him all or part of his
27 compensation); K.S.A. 59-1711 (court may reduce or deny compensation to trustee when he fails
28 to perform duties).

29 Subsection (b)(9) conforms to Kansas law. See K.S.A. 58-2405 (any act of a trustee in
30 contravention of a trust shall be void); *Kline v. Orebaugh*, 214 Kan. 207, 519 P.2d 691 (1974) (upon
31 wrongful disposition of trust property, court may impose constructive trust or equitable lien as long
32 as product of trust property is held by trustee and can be traced).

33 Subsection (b)(10) conforms to Kansas law. See *Kline*, 214 Kan. at 211 (upon breach of
34 trust, court of equity may mold judgment to furnish relief suitable to circumstances of case).

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UTC Comment

This section codifies the remedies available to rectify or to prevent a breach of trust for violation of a duty owed to a beneficiary. The duties that a trust might breach include those contained in Article 8 in addition to those specified elsewhere in the Code.

This section identifies the available remedies but does not attempt to cover the refinements and exceptions developed in case law. The availability of a remedy in a particular circumstance will be determined not only by this Code but also by the common law of trusts and principles of equity. *See* Section 106.

Beneficiaries and cotrustees have standing to bring a petition to remedy a breach of trust. Following a successor trustee's acceptance of office, a successor trustee has standing to sue a predecessor for breach of trust. *See* Restatement (Second) of Trusts § 200 (1959). A person who may represent a beneficiary's interest under Article 3 would have standing to bring a petition on behalf of the person represented. In the case of a charitable trust, those with standing include the state attorney general, a charitable organization expressly entitled to receive benefits under the terms of the trust, and other persons with a special interest. *See* Section 110 & Restatement (Second) of Trusts § 391 (1959). A person appointed to enforce a trust for an animal or a trust for a noncharitable purpose would have standing to sue for a breach of trust. *See* Sections 110(b), 408, 409.

Traditionally, remedies for breach of trust at law were limited to suits to enforce unconditional obligations to pay money or deliver chattels. *See* Restatement (Second) of Trusts § 198 (1959). Otherwise, remedies for breach of trust were exclusively equitable, and as such, punitive damages were not available and findings of fact were made by the judge and not a jury. *See* Restatement (Second) of Trusts § 197 (1959). The Uniform Trust Code does not preclude the possibility that a particular enacting jurisdiction might not follow these norms.

The remedies identified in this section are derived from Restatement (Second) of Trusts § 199 (1959). The reference to payment of money in subsection (b)(3) includes liability that might be characterized as damages, restitution, or surcharge. For the measure of liability, see Section 1002. Subsection (b)(5) makes explicit the court's authority to appoint a special fiduciary, also sometimes referred to as a receiver. *See* Restatement (Second) of Trusts § 199(d) (1959). The authority of the court to appoint a special fiduciary is not limited to actions alleging breach of trust but is available whenever the court, exercising its equitable jurisdiction, concludes that an appointment would promote administration of the trust. *See* Section 704(d) (special fiduciary may be appointed whenever court considers such appointment necessary for administration).

Subsection (b)(8), which allows the court to reduce or deny compensation, is in accord with Restatement (Second) of Trusts § 243 (1959). For the factors to consider in setting a trustee's compensation absent breach of trust, see Section 708 and Comment. In deciding whether to reduce or deny a trustee compensation, the court may wish to consider (1) whether the trustee acted in good

1 faith; (2) whether the breach of trust was intentional; (3) the nature of the breach and the extent of
2 the loss; (4) whether the trustee has restored the loss; and (5) the value of the trustee's services to
3 the trust. See Restatement (Second) of Trusts § 243 cmt. c (1959).

4 The authority under subsection (b)(9) to set aside wrongful acts of the trustee is a corollary
5 of the power to enjoin a threatened breach as provided in subsection (b)(2). However, in setting
6 aside the wrongful acts of the trustee the court may not impair the rights of bona fide purchasers
7 protected under

8 **SECTION 1002. DAMAGES FOR BREACH OF TRUST.**

9 (a) A trustee who commits a breach of trust is liable to the beneficiaries affected for
10 the greater of:

11 (1) the amount required to restore the value of the trust property and trust
12 distributions to what they would have been had the breach not occurred; ~~or~~

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

14 (3) if the trustee embezzles or knowingly converts to his or her own use any
15 of the personal property of the trust, the trustee shall be liable for double the value of the property
16 so embezzled or converted.

17 (b) Except as otherwise provided in this subsection, if more than one trustee is liable
18 to the beneficiaries for a breach of trust, a trustee is entitled to contribution from the other trustee
19 or trustees. A trustee is not entitled to contribution if the trustee was substantially more at fault than
20 another trustee or if the trustee committed the breach of trust in bad faith or with reckless
21 indifference to the purposes of the trust or the interests of the beneficiaries. A trustee who received
22 a benefit from the breach of trust is not entitled to contribution from another trustee to the extent of
23 the benefit received.

24 (c) The provisions of this section shall not exclude an award of punitive damages.

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1 **Kansas Comment**

2 Subsection (a) generally conforms to Kansas law, although specific provision is new.
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4 Subsection (a)(1) conforms to Kansas law. See K.S.A. 59-2255 (court may surcharge trustee
5 for any loss caused by breach of trust); *Jennings v. Murdock*, 220 Kan. 182, 213-14, 553 P.2d 846
6 (1976) (surcharge is remedy designed to make trust estate whole, primarily where losses have been
7 incurred through negligence or bad faith of trustee).

8 Subsection (a)(2) conforms to Kansas law. See K.S.A. 59-1703 (fiduciary shall not profit
9 from trust estate); *Bessman v. Bessman*, 214 Kan. 510, 520 P.2d 1210 (1974) (fiduciary who realizes
10 secret profit through dealings on behalf of principal must disgorge profit); *Woodrum v. Bank*, 60
11 Kan. 44, 48-49 (1898) (where trustee makes unauthorized exchange of trust property, beneficiary
12 may affirm the bargain and take the benefit).

13 The Kansas drafting committee changed the UTC by inserting new subsection (a)(3). That
14 subsection is consistent with Kansas law although the specific damage provision for breach of trust
15 is new.

16 Subsection (b) conforms to Kansas law. See *Gillespie v. Seymour*, 250 Kan. 123, 147, 823
17 P.2d 782 (1991) (where two trustees are liable for breach of trust, each is entitled to contribution
18 from the other, except that if one is substantially more at fault than the other, the other is entitled to
indemnity from him).

20 The Kansas drafting committee changed the Uniform Trust Code by inserting new subsection
21 (c) relating to punitive damages. The Kansas Supreme Court has allowed punitive damages pursuant
22 to K.S.A. 60-3702 for breach of trust. *Gillespie v. Seymour*, 255 Kan. 774, 877 P.2d 409 (1994).
23

24 **UTC Comment**

25 Subsection (a) is based on Restatement (Third) of Trusts: Prudent Investor Rule § 205
26 (1992). If a trustee commits a breach of trust, the beneficiaries may either affirm the transaction or,
27 if a loss has occurred, hold the trustee liable for the amount necessary to compensate fully for the
28 consequences of the breach. This may include recovery of lost income, capital gain, or appreciation
29 that would have resulted from proper administration. Even if a loss has not occurred, the trustee may
30 not benefit from the improper action and is accountable for any profit the trustee made by reason of
31 the breach.

32 For extensive commentary on the determination of damages, traditionally known as trustee
33 surcharge, with numerous specific applications, see Restatement (Third) of Trusts: Prudent Investor
34 Rule §§ 205-213 (1992). For the use of benchmark portfolios to determine damages, see
35 Restatement (Third) of Trusts: Prudent Investor Rule Reporter's Notes to §§ 205 and 208-211

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1 (1992). On the authority of a court of equity to reduce or excuse damages for breach of trust, see
2 Restatement (Second) of Trusts § 205 cmt. g (1959).

3 For purposes of this section and Section 1003, “profit” does not include the trustee’s
4 compensation. A trustee who has committed a breach of trust is entitled to reasonable compensation
5 for administering the trust unless the court reduces or denies the trustee compensation pursuant to
6 Section 1001(b)(8).

7 Subsection (b) is based on Restatement (Second) of Trusts § 258 (1959). Cotrustees are
8 jointly and severally liable for a breach of trust if there was joint participation in the breach. Joint
9 and several liability also is imposed on a nonparticipating cotrustee who, as provided in Section
10 703(g), failed to exercise reasonable care (1) to prevent a cotrustee from committing a serious breach
11 of trust, or (2) to compel a cotrustee to redress a serious breach of trust. Joint and several liability
12 normally carries with it a right in any trustee to seek contribution from a cotrustee to the extent the
13 trustee has paid more than the trustee’s proportionate share of the liability. Subsection (b),
14 consistent with Restatement (Second) of Trusts § 258 (1959), creates an exception. A trustee who
15 was substantially more at fault or committed the breach of trust in bad faith or with reckless
16 indifference to the purposes of the trust or the interests of the beneficiaries is not entitled to
17 contribution from the other trustees.

18 Determining degrees of comparative fault is a question of fact. The fact that one trustee was
19 more culpable or more active than another does not necessarily establish that this trustee was
20 substantially more at fault. Nor is a trustee substantially less at fault because the trustee did not
21 actively participate in the breach. *See* Restatement (Second) of Trusts § 258 cmt. e (195). Among
22 the factors to consider: (1) Did the trustee fraudulently induce the other trustee to join in the breach?
23 (2) Did the trustee commit the breach intentionally while the other trustee was at most negligent?
24 (3) Did the trustee, because of greater experience or expertise, control the actions of the other
25 trustee? (4) Did the trustee alone commit the breach with liability imposed on the other trustee only
26 because of an improper delegation or failure to properly monitor the actions of the cotrustee? *See*
27 Restatement (Second) of Trusts § 258 cmt. d (1959).

28 **SECTION 1003. DAMAGES IN ABSENCE OF BREACH.**

29 (a) A trustee is accountable to an affected beneficiary for any profit made by the
30 trustee, other than compensation earned, arising from the administration of the trust, even absent a
31 breach of trust.

32 (b) Absent a breach of trust, a trustee is not liable to a beneficiary for a loss or

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1 depreciation in the value of trust property or for not having made a profit.

2 **Kansas Comment**

3 This section generally conforms to K.S.A. 59-1703.

4 The Kansas drafting committee changed the UTC by adding the phrase, "other than
5 compensation earned."

6 **UTC Comment**

7
8 The principle on which a trustee's duty of loyalty is premised is that a trustee should not be
9 allowed to use the trust as a means for personal profit other than for routine compensation earned.
10 While most instances of personal profit involve situations where the trustee has breached the duty
11 of loyalty, not all cases of personal profit involve a breach of trust. Subsection (a), which holds a
12 trustee accountable for any profit made, even absent a breach of trust, is based on Restatement
13 (Second) of Trusts § 203 (1959). A typical example of a profit is receipt by the trustee of a
14 commission or bonus from a third party for actions relating to the trust's administration. See
15 Restatement (Second) of Trusts § 203 cmt. a (1959).

16 A trustee is not an insurer. Similar to Restatement (Second) of Trusts § 204 (1959),
17 subsection (b) provides that absent a breach of trust a trustee is not liable for a loss or depreciation
in the value of the trust property or for failure to make a profit.

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

23 **Kansas Comment**

24 This section conforms to Kansas law. See K.S.A. 59-1717 (trustee shall be allowed
25 necessary expenses incurred in the execution of trust, including reasonable attorney fees); *Moore v.*
26 *Adkins*, 2 Kan. App. 2d 139, 576 P.2d 245 (1978) (when the efforts of a party to the action, not the
27 trustee, prove beneficial to the trust estate, reasonable attorney fees to be paid from the trust estate
28 are allowable); *Jennings v. Murdock*, 220 Kan. 182, 553 P.2d 846 (1976) (attorney fees payable out
29 of trust pursuant to K.S.A. 59-1504 in action brought by beneficiaries to construe will and trust).

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1 The Kansas Court of Appeals has also held that a trustee may recover expenses incurred in
2 successfully defending actions taken while a trustee, although the trustee may no longer be a trustee
3 when the expenses are incurred. *Morrison v. Watkins*, 20 Kan. App. 2d 411, 889 P.2d 140 (1995).

4 **UTC Comment**

5 This section, which is based on Massachusetts General Laws chapter 215, § 45, codifies the
6 court's historic authority to award costs and fees, including reasonable attorney's fees, in judicial
7 proceedings grounded in equity. The court may award a party its own fees and costs from the trust.
8 The court may also charge a party's costs and fees against another party to the litigation. Generally,
9 litigation expenses were at common law chargeable against another party only in the case of
10 egregious conduct such as bad faith or fraud. With respect to a party's own fees, Section 709
11 authorizes a trustee to recover expenditures properly incurred in the administration of the trust. The
12 court may award a beneficiary litigation costs if the litigation is deemed beneficial to the trust.
13 Sometimes, litigation brought by a beneficiary involves an allegation that the trustee has committed
14 a breach of trust. On other occasions, the suit by the beneficiary is brought because of the trustee's
15 failure to take action against a third party, such as to recover property properly belonging to the trust.
16 For the authority of a beneficiary to bring an action when the trustee fails to take action against a
17 third party, see Restatement (Second) of Trusts §§ 281-282 (1959). For the case law on the award
18 of attorney's fees and other litigation costs, see 3 Austin W. Scott & William F. Fratcher, *The Law*
19 *of Trusts* §§ 188.4 (4th ed. 1988).

22 **SECTION 1005. LIMITATION OF ACTION AGAINST TRUSTEE.**

23 (a) A beneficiary may not commence a proceeding against a trustee for breach of
24 trust more than ~~one year~~ two years after the date the beneficiary or a representative of the beneficiary
25 was sent a report that adequately disclosed the existence of a potential claim for breach of trust and
26 informed the beneficiary of the time allowed for commencing a proceeding.

27 (b) A report adequately discloses the existence of a potential claim for breach of trust
28 if it provides sufficient information so that the beneficiary or representative knows of the potential
29 claim or should have inquired into its existence.

30 (c) If subsection (a) does not apply, a judicial proceeding by a beneficiary against
31 a trustee for breach of trust must be commenced within five years after the first to occur of:

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

4 **Kansas Comment**

5 Subsections (a) and (b) modify Kansas law. K.S.A. 59-2256 relieves a trustee from liability
6 to beneficiaries upon court approval of a trustee's account in which all the trustee's acts and
7 omissions are fully described and upon due notice and representation.

8 In subsection (a), the Kansas drafting committee changed the UTC by striking the phrase
9 "one year" and inserting in lieu thereof "two years."

10 Subsection (c) is new. K.S.A. 60-513 requires actions for fraud to be brought within two
11 years, although the cause of action does not accrue until the fraud is discovered. The ten-year
12 limitation contained in K.S.A. 60-513(b) does not apply to actions based on fraud. *Jennings v.*
13 *Jennings*, 211 Kan. 515, Syl. 12, 507 P.2d 241 (1973) (trustee who repudiates trust agreement
14 commits act which necessarily encompasses fraud).

15 **UTC Comment**

16 The one-year and five-year limitations periods under this section are not the only means for
17 barring an action by a beneficiary. A beneficiary may be foreclosed by consent, release, or
18 ratification as provided in Section 1009. Claims may also be barred by principles such as estoppel
19 and laches arising in equity under the common law of trusts. *See* Section 106.

20 The representative referred to in subsection (a) is the person who may represent and bind a
21 beneficiary as provided in Article 3. During the time that a trust is revocable and the settlor has
22 capacity, the person holding the power to revoke is the one who must receive the report. *See* Section
23 603(a) (rights of settlor of revocable trust).

24 This section addresses only the issue of when the clock will start to run for purposes of the
25 statute of limitations. If the trustee wishes to foreclose possible claims immediately, a consent to
26 the report or other information may be obtained pursuant to Section 1009. For the provisions
27 relating to the duty to report to beneficiaries, see Section 813.

28 Subsection (a) applies only if the trustee has furnished a report. The one-year statute of
29 limitations does not begin to run against a beneficiary who has waived the furnishing of a report as
30 provided in Section 813(d).

31 Subsection (c) is intended to provide some ultimate repose for actions against a trustee. It

1 applies to cases in which the trustee has failed to report to the beneficiaries or the report did not meet
2 the disclosure requirements of subsection (b). It also applies to beneficiaries who did not receive
3 notice of the report, whether personally or through representation. While the five-year limitations
4 period will normally begin to run on termination of the trust, it can also begin earlier. If a trustee
5 leaves office prior to the termination of the trust, the limitations period for actions against that
6 particular trustee begins to run on the date the trustee leaves office. If a beneficiary receives a final
7 distribution prior to the date the trust terminates, the limitations period for actions by that particular
8 beneficiary begins to run on the date of final distribution.

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

13 This section does not specifically provide that the statutes of limitations under this section
14 are tolled for fraud or other misdeeds, the drafters preferring to leave the resolution of this question
15 to other law of the State.

16 **SECTION 1006. RELIANCE ON TRUST INSTRUMENT.** A trustee who acts in
17 reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a
18 beneficiary for a breach of trust to the extent the breach resulted from the reliance.

19 **Kansas Comment**

20 This section conforms to Kansas law. A trustee is not liable to a beneficiary for the trustee's
21 reasonable and good faith reliance on the express provisions of a trust instrument. K.S.A. 17-
22 5004(a)(2).

23 **UTC Comment**

24 It sometimes happens that the intended terms of the trust differ from the apparent meaning
25 of the trust instrument. This can occur because the court, in determining the terms of the trust, is
26 allowed to consider evidence extrinsic to the trust instrument. *See* Section 103(17) (definition of
27 "terms of a trust"). Furthermore, if a trust is reformed on account of mistake of fact or law, as
28 authorized by Section 415, provisions of a trust instrument can be deleted or contradicted and
29 provisions not in the trust instrument may be added. The concept of the "terms of a trust," both as
30 defined in this Code and as used in the doctrine of reformation, is intended to effectuate the principle
31 that a trust should be administered and distributed in accordance with the settlor's intent. However,
32 a trustee should also be able to administer a trust with some dispatch and without concern that a

1 reasonable reliance on the terms of the trust instrument is misplaced. This section protects a trustee
2 who so relies on a trust instrument but only to the extent the breach of trust resulted from such
3 reliance. This section is similar to Section 1(b) of the Uniform Prudent Investor Act, which protects
4 a trustee from liability to the extent that the trustee acted in reasonable reliance on the provisions of
5 the trust.

6 This section protects a trustee only if the trustee's reliance is reasonable. For example, a
7 trustee's reliance on the trust instrument would not be justified if the trustee is aware of a prior court
8 decree or binding nonjudicial settlement agreement clarifying or changing the terms of the trust.

9 SECTION 1007. EVENT AFFECTING ADMINISTRATION OR DISTRIBUTION.

10 If the happening of an event, including marriage, divorce, performance of educational requirements,
11 or death, affects the administration or distribution of a trust, a trustee who has exercised reasonable
12 care to ascertain the happening of the event is not liable for a loss resulting from the trustee's lack
13 of knowledge.

Kansas Comment

15 This section modifies Kansas law. See *Moore v. Adkins*, 2 Kan. App. 2d 139, 151, 576 P.2d
16 245 (1978) (imposes absolute liability against trustee for misdelivery of trust property).

UTC Comment

17 This section, which is based on Washington Revised Code § 11.98.100, is designed to
18 encourage trustees to administer trusts expeditiously and without undue concern about liability for
19 failure to ascertain external facts, often of a personal nature, that might affect administration or
20 distribution of the trust. The common law, contrary to this section, imposed absolute liability against
21 a trustee for misdelivery regardless of the trustee's level of care. See Restatement (Second) of Trusts
22 § 226 (1959). The events listed in this section are not exclusive. A trustee who has exercised
23 reasonable care to ascertain the occurrence of other events, such as the attainment by a beneficiary
24 of a certain age, is also protected from liability.
25
26

1 **SECTION 1008. EXCULPATION OF TRUSTEE.**

2 (a) A term of a trust relieving a trustee of liability for breach of trust is unenforceable
3 to the extent that it:

4 (1) relieves the trustee of liability for breach of trust committed in bad faith
5 or with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or

6 (2) was inserted as the result of an abuse by the trustee of a fiduciary or
7 confidential relationship to the settlor.

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

12 **Kansas Comment**

13 This section is new.

14 **UTC Comment**

15 Even if the terms of the trust attempt to completely exculpate a trustee for the trustee's acts,
16 the trustee must always comply with a certain minimum standard. As provided in subsection (a),
17 a trustee must always act in good faith with regard to the purposes of the trust and the interests of
18 the beneficiaries. Subsection (a) is consistent with the standards expressed in Sections 105 and
19 814(a), which, similar to this section, place limits on the power of a settlor to negate trustee duties.
20 This section is also similar to Section 222 of the Restatement (Second) of Trusts (1959), except that
21 this Code, unlike the Restatement, allows a settlor to exculpate a trustee for a profit that the trustee
22 made from the trust.

23 Subsection (b) disapproves of cases such as *Marsman v. Nasca*, 573 N.E.2d 1025 (Mass.
24 App. Ct. 1991), which held that an exculpatory clause in a trust instrument drafted by the trustee was
25 valid because the beneficiary could not prove that the clause was inserted as a result of an abuse of
26 a fiduciary relationship. For a later case where sufficient proof of abuse was present, see *Rutanan*
27 *v. Ballard*, 678 N.E.2d 133 (Mass. 1997). Subsection (b) responds to the danger that the insertion
28 of such a clause by the fiduciary or its agent may have been undisclosed or inadequately understood

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1 by the settlor. To overcome the presumption of abuse in subsection (b), the trustee must establish
2 that the clause was fair and that its existence and contents were adequately communicated to the
3 settlor. In determining whether the clause was fair, the court may wish to examine: (1) the extent
4 of the prior relationship between the settlor and trustee; (2) whether the settlor received independent
5 advice; (3) the sophistication of the settlor with respect to business and fiduciary matters; (4) the
6 trustee's reasons for inserting the clause; and (5) the scope of the particular provision inserted. *See*
7 Restatement (Second) of Trusts § 222 cmt. d (1959).

8 The requirements of subsection (b) are satisfied if the settlor was represented by independent
9 counsel. If the settlor was represented by independent counsel, the settlor's attorney is considered
10 the drafter of the instrument even if the attorney used the trustee's form. Because the settlor's
11 attorney is an agent of the settlor, disclosure of an exculpatory term to the settlor's attorney is
12 disclosure to the settlor.

13
14 **SECTION 1009. BENEFICIARY'S CONSENT, RELEASE, OR RATIFICATION.**

15 A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct
16 constituting the breach, released the trustee from liability for the breach, or ratified the transaction
17 constituting the breach, unless:

18 (1) the consent, release, or ratification of the beneficiary was induced by improper
19 conduct of the trustee; or

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

22 **Kansas Comment**

23 Although the general rule has apparently never been applied in Kansas, the Kansas Supreme
24 Court has stated it has no quarrel with the doctrine. *See Gillespie v. Seymour*, 250 Kan. 123, 130,
25 823 P.2d 782 (1991) (doctrine cited at length but inapplicable to facts of case).

26 **UTC Comment**

27 This section is based on Sections 216 through 218 of the Restatement (Second) of Trusts
28 (1959). A consent, release, or affirmance under this section may occur either before or after the
29 approved conduct. This section requires an affirmative act by the beneficiary. A failure to object is
30 not sufficient. *See* Restatement (Second) of Trusts § 216 cmt. a (1959). A consent is binding on a

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1 consenting beneficiary although other beneficiaries have not consented. *See* Restatement (Second)
2 of Trusts § 216 cmt. g (1959). To constitute a valid consent, the beneficiary must know of the
3 beneficiary's rights and of the material facts relating to the breach. *See* Restatement (Second) of
4 Trusts § 216 cmt. k (1959). If the beneficiary's approval involves a self-dealing transaction, the
5 approval is binding only if the transaction was fair and reasonable. *See* Restatement (Second) of
6 Trusts §§ 170(2), 216(3) and cmt. n (1959).

7 An approval by the settlor of a revocable trust or by the holder of a presently exercisable
8 power of withdrawal binds all the beneficiaries. *See* Section 603. A beneficiary is also bound to the
9 extent an approval is given by a person authorized to represent the beneficiary as provided in Article
10 3.

11 2001 UTC Comment

12 This section includes the 2001 amendments to the 2000 Uniform Trust Code. The change
13 is as follows:

14 "Section 1009. Beneficiary's Consent, Release, or Ratification. A
15 trustee is not liable to a beneficiary for breach of trust if the
16 beneficiary, ~~while having capacity,~~ consented to the conduct
17 constituting the breach, released the trustee from liability for the
18 breach, or ratified the transaction constituting the breach, unless:"

19 The lead-in language is revised to avoid implication that Article 3 representation rules cannot
20 be applied to represent an incapacitated beneficiary with respect to a beneficiary consent.

21 SECTION 1010. LIMITATION ON PERSONAL LIABILITY OF TRUSTEE.

22 (a) Except as otherwise provided in the contract, a trustee is not personally liable on
23 a contract properly entered into in the trustee's fiduciary capacity in the course of administering the
24 trust if the trustee in the contract disclosed the fiduciary capacity.

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

28 (c) A claim based on a contract entered into by a trustee in the trustee's fiduciary

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1 capacity, on an obligation arising from ownership or control of trust property, or on a tort committed
2 in the course of administering a trust, may be asserted in a judicial proceeding against the trustee in
3 the trustee's fiduciary capacity, whether or not the trustee is personally liable for the claim.

4 **Kansas Comment**

5 Subsection (a) is apparently new as applied to trustees. The Kansas Supreme Court has
6 applied a similar rule for agents acting in a representative capacity. See *Lentz Plumbing Co. v. Fee*,
7 235 Kan. 266 Syl. 2, 679 P.2d 736 (1984). The Kansas Uniform Transfers to Minors Act contains
8 a substantially identical provision. See K.S.A. 38-1718(b)(1). The Kansas Supreme Court has
9 recognized that the failure to register stocks "as trustee" rather than individually may subject the
10 trustee personally to liability for any resulting losses. *Taliaferro v. Taliaferro*, 260 Kan. 573, 921
11 P.2d 803 (1996). Additionally, the Kansas Supreme Court has held that in order to absolve a trustee
12 from personal liability upon his contract, an express agreement to that effect is necessary. *Austin*
13 *v. Prudential Trust Co.*, 112 Kan. 545, 212 P. 77 (1923).

14 Subsection (b) generally conforms to Kansas law, although provisions regarding
15 environmental law and imposing personal liability on trustee only if he is personally at fault is new.
16 See *Gillespie v. Seymour*, 250 Kan. 123, 145, 823 P.2d 782 (1991) (co-trustee personally liable for
17 failure to perform duties); *Kline v. Orebaugh*, 214 Kan. 207, 210-11, 519 P.2d 691 (1974) (trustee
18 who violates any duty owed to beneficiary is liable to beneficiary to redress breach of trust); *Moore*
19 *v. Adkins*, 2 Kan. App. 2d 139, 151, 576 P.2d 245 (1978) (trustee who pays or conveys trust property
20 to one who is not a beneficiary in violation of the trust is liable to beneficiary even though trustee
21 acts in good faith and under reasonable mistake of law or fact); *Wilcox v. Gentry*, 254 Kan. 411, 413-
22 14, 867 P.2d 281 (1994) (unless trust contains valid restraint on alienation, trustee who pays or
23 applies for the beneficiary any part of trust property with knowledge of a transfer or after he has been
24 served with process is liable to the transferee or creditor); *Carson v. Davidson*, 248 Kan. 543, 547-
25 48, 808 P.2d 1377 (1991) (court recognized trustee is personally liable for trust property used for
26 trustee's own purposes or disposed of by trustee); *Holderman v. Hood*, 70 Kan. 267, 78 P. 838
27 (1904) (action in tort for damages may be maintained against a trustee who fraudulently conspires
28 to make sale of trust property at less than its value to the injury of beneficiaries). The Kansas
29 Uniform Transfers to Minors Act contains a substantially similar provision. See K.S.A. 38-
30 1718(b)(2).

31 Subsection (c) is new, although consistent with Kansas law. See K.S.A. 60-217(a) (action
32 may be prosecuted in trustee's name). The Kansas Uniform Transfers to Minors Act contains an
33 identical provision. See K.S.A. 38-1718(a).

34
35 The U.T.A. does not address the liability of a third person who joins with the trustee in a
36 breach of trust. See *Gillespie v. Seymour*, 14 Kan. App. 2d 563, 796 P.2d 1060 (1990).

1 **UTC Comment**

2 This section is based on Section 7-306 of the Uniform Probate Code. However, unlike the
3 Uniform Probate Code, which requires that the contract both disclose the representative capacity and
4 identify the trust, subsection (a) protects a trustee who reveals the fiduciary relationship either by
5 indicating a signature as trustee or by simply referring to the trust. The protection afforded the
6 trustee by this section applies only to contracts that are properly entered into in the trustee's fiduciary
7 capacity, meaning that the trustee is exercising an available power and is not violating a duty. This
8 section does not excuse any liability the trustee may have for breach of trust.

9 Subsection (b) addresses trustee liability arising from ownership or control of trust property
10 and for torts occurring incident to the administration of the trust. Liability in such situations is
11 imposed on the trustee personally only if the trustee was personally at fault, either intentionally or
12 negligently. This is contrary to Restatement (Second) of Trusts § 264 (1959), which imposes
13 liability on a trustee regardless of fault, including liability for acts of agents under respondeat
14 superior. Responding to a particular concern of trustees, subsection (b) specifically protects a trustee
15 from personal liability for violations of environmental law such as CERCLA (42 U.S.C. § 9607)
16 or its state law counterparts, unless the trustee was personally at fault. *See also* Sections 701(c)(2)
17 (nominated trustee may investigate trust property to determine potential violation of environmental
18 law without having accepted trusteeship) and 816(13) (trustee powers with respect to possible
19 liability for violation of environmental law).

20 Subsection (c) alters the common law rule that a trustee could not be sued in a representative
21 capacity if the trust estate was not liable.

22 **{SECTION 1011. INTEREST AS GENERAL PARTNER.**

23 (a) Except as otherwise provided in subsection (c) or unless personal liability is
24 imposed in the contract, a trustee who holds an interest as a general partner in a general or limited
25 partnership is not personally liable on a contract entered into by the partnership after the trust's
26 acquisition of the interest if the fiduciary capacity was disclosed in the contract or in a statement
27 previously filed pursuant to the {Kansas Uniform Partnership Act, K.S.A. 56a-101 et seq. or the
28 Revised Uniform Limited Partnership Act~~}, K.S.A. 56-1a101 et seq.~~

29 (b) Except as otherwise provided in subsection (c), a trustee who holds an interest
30 as a general partner is not personally liable for torts committed by the partnership or for obligations

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1 arising from ownership or control of the interest unless the trustee is personally at fault.

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

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

8 **Kansas Comment**

9 This section is new.

10 The Kansas drafting committee inserted the proper Kansas titles and cites for the Kansas
11 Uniform Partnership Act and the Revised Uniform Limited Partnership Act.

12 **UTC Comment**

13 Section 1010 protects a trustee from personal liability on contracts that the trustee enters into
14 on behalf of the trust. Section 1010 also absolves a trustee from liability for torts committed in
15 administering the trust unless the trustee was personally at fault. It does not protect a trustee from
16 personal liability for contracts entered into or torts committed by a general or limited partnership of
17 which the trustee was a general partner. That is the purpose of this section, which is modeled after
18 Ohio Revised Code § 1339.65. Subsection (a) protects the trustee from personal liability for such
19 partnership obligations whether the trustee signed the contract or it was signed by another general
20 partner. Subsection (b) protects a trustee from personal liability for torts committed by the
21 partnership unless the trustee was personally at fault. Protection from the partnership's contractual
22 obligations is available under subsection (a) only if the other party is on notice of the fiduciary
23 relationship, either in the contract itself or in the partnership certificate on file.

24 Special protection is not needed for other business interests that the trustee may own, such
25 as an interest as a limited partner, a membership interest in an LLC, or an interest as a corporate
26 shareholder. In these cases the nature of the entity or the interest owned by the trustee carries with
27 it its own limitation on liability.

28 Certain exceptions apply. The section is not intended to be used as a device for individuals
29 or their families to shield assets from creditor claims. Consequently, subsection (c) excludes from
30 the protections provided by this section trustees who own an interest in the partnership in another

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1 capacity or if an interest is owned by the trustee's spouse or the trustee's descendants, siblings,
2 parents, or the spouse of any of them.

3 Nor can a revocable trust be used as a device for avoiding claims against the partnership.
4 Subsection (d) imposes personal liability on the settlor for partnership contracts and other obligations
5 of the partnership the same as if the settlor were a general partner.

6 This section has been placed in brackets to alert enacting jurisdictions to consider modifying
7 the section to conform it to the State's specific laws on partnerships and other forms of
8 unincorporated businesses.

9 **SECTION 1012. PROTECTION OF PERSON DEALING WITH TRUSTEE.**

10 (a) A person other than a beneficiary who in good faith assists a trustee, or who in
11 good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or
12 improperly exercising the trustee's powers is protected from liability as if the trustee properly
13 exercised the power.

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

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

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

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

24 **Kansas Comment**

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1
3 Subsection (a) is codified in K.S.A. 58-1207 (third persons, without actual knowledge that
4 trustee is exceeding powers or improperly exercising them, are fully protected in dealing with trustee
5 as if trustee possessed and properly exercised such powers) and K.S.A. 58-2409 (any right or title
6 derived by third person dealing with trustee in good faith shall not be called in question). The
7 Kansas Supreme Court has held that, if a trustee in breach of trust transfers trust property to a person
8 who takes for value and without notice of the breach and who is not knowingly taking part in an
9 illegal transaction, the latter holds the property free of trust and is under no liability to the
10 beneficiary. *Kline v. Orebaugh*, 214 Kan. 207, Syl. 4, 519 P.2d 691 (1974). The court in *Kline* did
11 not address K.S.A. 58-2405, which voids every sale, conveyance or act of a trustee in contravention
of a trust.

12 Subsection (b) is codified in K.S.A. 58-1207 except uniform code adds good faith
13 requirement.

14 Subsection (c) is codified in K.S.A. 58-1207 except uniform code adds good faith
15 requirement. Also, K.S.A. 58-2409 contains a similar provision to the good faith requirement.

16 The Uniform Transfers to Minors Act contains a provision similar to subsections (a), (b) and
17 (c). See K.S.A. 38-1717.

18 Subsections (d) and (e) are new.

UTC Comment

20 This section is derived from Section 7 of the Uniform Trustee Powers Act.

21 Subsection (a) protects two different classes; persons other than beneficiaries who assist a
22 trustee with a transaction, and persons other than beneficiaries who deal with the trustee for value.
23 As long as the assistance was provided or the transaction was entered into in good faith and without
24 knowledge, third persons in either category are protected in the transaction even if the trustee was
25 exceeding or improperly exercising the power. For the definition of “know,” see Section 104. This
26 Code does not define “good faith” for purposes of this and the next section. Defining good faith with
27 reference to the definition used in the State’s commercial statutes would be consistent with the
28 purpose of this section, which is to treat commercial transactions with trustees similar to other
29 commercial transactions.

30 Subsection (b) confirms that a third party who is acting in good faith is not charged with a
31 duty to inquire into the extent of a trustee’s powers or the propriety of their exercise. The third party
32 may assume that the trustee has the necessary power. Consequently, there is no need to request or
33 examine a copy of the trust instrument. A third party who wishes assurance that the trustee has the
34 necessary authority instead should request a certification of trust as provided in Section 1013.
35 Subsection (b), and the comparable provisions enacted in numerous States, are intended to negate

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1 the rule, followed by some courts, that a third party is charged with constructive notice of the trust
2 instrument and its contents. The cases are collected in George G. Bogert & George T. Bogert, The
3 Law of Trusts and Trustees § 897 (Rev. 2d ed. 1995); and 4 Austin W. Scott & William F. Fratcher,
4 The Law of Trusts § 297 (4th ed. 1989).

5 Subsection (c) protects any person, including a beneficiary, who in good faith delivers
6 property to a trustee. The standard of protection in the Restatement is phrased differently although
7 the result is similar. Under Restatement (Second) of Trusts § 321 (1959), the person delivering
8 property to a trustee is liable if at the time of the delivery the person had notice that the trustee was
9 misapplying or intending to misapply the property.

10 Subsection (d) extends the protections afforded by the section to assistance provided to or
11 dealings for value with a former trustee. The third party is protected the same as if the former trustee
12 still held the office.

13 Subsection (e) clarifies that a statute relating to commercial transactions controls whenever
14 both it and this section could apply to a transaction. Consequently, the protections provided by this
15 section are superseded by comparable protective provisions of these other laws. The principal
16 statutes in question are the various articles of the Uniform Commercial Code, including Article 8
17 on the transfer of securities, as well as the Uniform Simplification of Fiduciary Securities Transfer
18 Act.

19 SECTION 1013. CERTIFICATION OF TRUST.

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

- 23 (1) that the trust exists and the date the trust instrument was executed;
- 24 (2) the identity of the settlor;
- 25 (3) the identity and address of the currently acting trustee;
- 26 (4) the powers of the trustee;
- 27 (5) the revocability or irrevocability of the trust and the identity of any person

28 holding a power to revoke the trust;

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

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

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

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

6 (c) A certification of trust must state that the trust has not been revoked, modified,
7 or amended in any manner that would cause the representations contained in the certification of trust
8 to be incorrect.

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

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

13 (f) A person who acts in reliance upon a certification of trust without knowledge that
14 the representations contained therein are incorrect is not liable to any person for so acting and may
15 assume without inquiry the 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 all or part of the trust
17 instrument is held by the person relying upon the certification.

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

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

1 faith in demanding the trust instrument.

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

4 **Kansas Comment**

5 This section is new.

6 **UTC Comment**

7 This section, derived from California Probate Code § 18100.5, is designed to protect the
8 privacy of a trust instrument by discouraging requests from persons other than beneficiaries for
9 complete copies of the instrument in order to verify a trustee's authority. Even absent this section,
10 such requests are usually unnecessary. Pursuant to Section 1012(b), a third person proceeding in
11 good faith is not required to inquire into the extent of the trustee's powers or the propriety of their
12 exercise. This section adds another layer of protection.

13 Third persons frequently insist on receiving a copy of the complete trust instrument solely
14 to verify a specific and narrow authority of the trustee to engage in a particular transaction. While
15 a testamentary trust, because it is created under a will, is a matter of public record, an inter vivos
16 trust instrument is private. Such privacy is compromised, however, if the trust instrument must be
17 distributed to third persons. A certification of trust is a document signed by a currently acting trustee
18 that may include excerpts from the trust instrument necessary to facilitate the particular transaction.
19 A certification provides the third party with an assurance of authority without having to disclose the
20 trust's dispositive provisions. Nor is there a need for third persons who may already have a copy
21 of the instrument to pry into its provisions. Persons acting in reliance on a certification may assume
22 the truth of the certification even if they have a complete copy of the trust instrument in their
23 possession.

24 Subsections (a) through (c) specify the required contents of a certification. Subsection (d)
25 clarifies that the certification need not include the trust's dispositive terms. A certification, however,
26 normally will contain the administrative terms of the trust relevant to the transaction. Subsection
27 (e) provides that the third party may make this a condition of acceptance. Subsections (f) and (g)
28 protect a third party who relies on the certification. The third party may assume that the certification
29 is true, and is not charged with constructive knowledge of the terms of the trust instrument even if
30 the third party has a copy.

31 To encourage compliance with this section, a person demanding a trust instrument after
32 already being offered a certification may be liable under subsection (h) for damages if the refusal to
33 accept the certification is determined not to have been in good faith. A person acting in good faith
34 would include a person required to examine a complete copy of the trust instrument pursuant to due

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1 diligence standards or as required by other law. Examples of such due diligence and legal
2 requirements include (1) in connection with transactions to be executed in the capital markets where
3 documentary standards have been established in connection with underwriting concerns; (2) to
4 satisfy documentary requirements established by state or local government or regulatory agency; (3)
5 to satisfy documentary requirements established by a state or local government or regulatory agency;
6 and (4) where the insurance rates or premiums or other expenses of the party would be higher absent
7 the availability of the documentation.

8 The Uniform Trust Code leaves to other law the issue of how damages for a bad faith refusal
9 are to be computed and whether attorney's fees might be recoverable. For a discussion of the
10 meaning of "good faith," see Section 1012 Comment.

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1 **ARTICLE 11**

2 **MISCELLANEOUS PROVISIONS**

3 **SECTION 1101. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In

4 applying and construing this Uniform Act , consideration must be given to the need to promote
5 uniformity of the law with respect to its subject matter among States that enact it.

6 **Kansas Comment**

7 This section is new.

8 **SECTION 1102. ELECTRONIC RECORDS AND SIGNATURES.** The provisions of

9 this [Code] governing the legal effect, validity, or enforceability of electronic records or electronic
10 signatures, and of contracts formed or performed with the use of such records or signatures, conform
11 to the requirements of Section 102 of the Electronic Signatures in Global and National Commerce
12 Act (15 U.S.C. § 7002) and supersede, modify, and limit the requirements of the Electronic
13 Signatures in Global and National Commerce Act.

14 **Kansas Comment**

15 This section is new.

16 **UTC Comment**

17 This section, which is being inserted in all Uniform Acts approved in 2000 or later, preempts
18 the federal Electronic Signatures in Global and National Commerce Act. Section 102(a)(2)(B) of
19 that Act provides that the federal law can be preempted by a later statute of the State that specifically
20 refers to the federal law. The effect of this section, when enacted as part of this Code, is to leave to
21 state law the procedures for obtaining and validating an electronic signature. The Uniform Trust
22 Code does not require that any document be in paper form, allowing all documents under this Code
23 to be transmitted in electronic form. A properly directed electronic message is a valid method of
24 notice under the Code as long as it is reasonably suitable under the circumstances and likely to result
25 in receipt of the notice or document. *See* Section 109(a).

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1 **UTC Comment**

2
3 For the reasons why the above Uniform Acts should be repealed upon enactment of the
4 Uniform Trust Code, see the Prefatory Note. Enacting jurisdictions that have not enacted one or
5 more of the specified Uniform Acts should repeal their comparable legislation. Because of the
6 comprehensive scope of the Uniform Trust Code, many States will have trust provisions not based
7 on any Uniform Act that will need to be repealed upon enactment of this Code. This section does
8 not attempt to list the types of conforming amendments, whether in the enacting State's probate code
9 or elsewhere, that need to be made upon enactment of this Code.

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

11 (a) Except as otherwise provided in this Act, on the effective date of this Act:

12 (1) this Act applies to all trusts created before, on, or after its effective date;

13 (2) this Act applies to all judicial proceedings concerning trusts commenced
14 on or after its effective date;

15 (3) this Act applies to judicial proceedings concerning trusts commenced
16 before its effective date unless the court finds that application of a particular provision of this Act
17 would substantially interfere with the effective conduct of the judicial proceedings or prejudice the
18 rights of the parties, in which case the particular provision of this Act does not apply and the
19 superseded law applies;

20 (4) any rule of construction or presumption provided in this Act applies to
21 trust instruments executed before the effective date of the Act unless there is a clear indication of a
22 contrary intent in the terms of the trust; and

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

24 (b) If a right is acquired, extinguished, or barred upon the expiration of a prescribed
25 period that has commenced to run under any other statute before the effective date of the Act, that

1 statute continues to apply to the right even if it has been repealed or superseded.

2 **Kansas Comment**

3 This section is new.

4 **UTC Comment**

5 The Uniform Trust Code is intended to have the widest possible effect within constitutional
6 limitations. Specifically, the Code applies to all trusts whenever created, to judicial proceedings
7 concerning trusts commenced on or after its effective date, and unless the court otherwise orders, to
8 judicial proceedings in progress on the effective date. In addition, any rules of construction or
9 presumption provided in the Code apply to preexisting trusts unless there is a clear indication of a
10 contrary intent in the trust's terms. By applying the Code to preexisting trusts, the need to know two
11 bodies of law will quickly lessen.

12 This Code cannot be fully retroactive, however. Constitutional limitations preclude
13 retroactive application of rules of construction to alter property rights under trusts that became
14 irrevocable prior to the effective date. Also, rights already barred by a statute of limitation or rule
15 under former law are not revived by a possibly longer statute or more liberal rule under this Code.
16 Nor is an act done before the effective date of the Code affected by the Code's enactment.

17 The Uniform Trust Code contains an additional effective date provision. Pursuant to Section
18 602(a), prior law will determine whether a trust executed prior to the effective date of the Code is
19 presumed to be revocable or irrevocable.

20 For a comparable uniform law effective date provision, see Uniform Probate Code § 8-101.

THE 2000 UNIFORM TRUST CODE

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(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

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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.

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Legislative Testimony

James L. Bush
President, Kansas Bar Association

Re: Senate Bill 297 – Uniform Trust Code

My name is Jim Bush and I appear this morning on behalf of the more than 6,000 members of the Kansas Bar Association to testify in opposition to Senate Bill 297, commonly referred to as the Uniform Trust Code.

Kansas lawyers have been drafting wills and trusts for many years based upon a body of common law that developed over the years consistent with the values, practices and customs of our communities. A basic and fundamental aspect of the Kansas common law on wills and trusts is the right of Kansans to dispose of their assets as they see fit, subject only to certain protections for the benefit of spouses and minor children. Up to this point the State has not injected itself into the private affairs of the family. Kansas law clearly makes the desires and intent of the Grantors of Trusts paramount over the wishes of beneficiaries. Because certain provisions of Senate Bill 297 drastically change that common law and move the emphasis from determining the intent of Grantors to seeking the wishes of beneficiaries, we strongly oppose the adoption of Senate Bill 297.

The Kansas Bar Association is not opposed to Uniform Laws and for that matter would not be opposed to a codification of the Kansas common law as it pertains to trusts and the duties of Trustees. However, we oppose this bill not because it's a Uniform Law, but because it contains provisions that drastically change the existing common law and, even more importantly, it governs trusts executed prior to its enactment. In other words, trusts in existence for many years and based upon the current common law would now be subject to this law, something that could not have been anticipated by the Grantors or the attorneys that advised them.

Among the many concerns we have about this bill are those provisions that permit beneficiaries to enter into agreements, **without approval of the courts**, to change the terms of the trust, including agreements that interpret or construe the terms of the trust. As a Trust Officer and Attorney who has been involved in estate planning and who has drafted many trusts while in private practice, this provision causes me grave concern. It operates on the presumption that all beneficiaries (such as family members) are capable of negotiating at arms length, free of

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influence and coercion. I assure you that nothing could be further from the truth. Does a parent and an eighteen year old child stand on equal footing when it comes to entering into an agreement interpreting Grandma's trust that contains benefits for the grandchild and contrary to the wishes of the parent? Under existing law, any such agreement would be subject to approval by the Courts. We believe that allowing trusts to be materially altered without court approval creates the strong likelihood that the Grantor's intent will be undermined.

Another serious concern we have with this bill is the drastic revisions it makes to the enforceability of "spendthrift" provisions. Under this bill, a valid spendthrift provision included in trust pertaining to the interest of a child, could be attached by the former spouse of that child to enforce a court award of spousal maintenance. Section 43 of this bill opens the door to former spouses and minor children for even discretionary distributions by Trustees. The KBA has a long-standing history of supporting legislation enforcing the obligations of parents to provide for the support of their minor children. However, other individuals, such as grandparents have no such legal obligation and are currently free to dispose of their property without state intervention. If they want to protect their property from the claims of a former spouse of a child, they should continue to have the right to do so. This bill drastically changes that right.

Most trusts empower Trustees with significant discretion. Without discretion, the Trustee is powerless to carry out the intentions of the Grantor well into the future, as times and conditions change. In most instances, the Grantor selects a particular Trustee based upon the Grantor's familiarity with the Trustee and confidence in the Trustee's ability to carry out those discretionary responsibilities in accordance with the Grantor's wishes. Many times the Trustee, in carrying out the intentions of the Grantor, must make decisions that are contrary to the wishes of the Beneficiary. A classic example would be a trust created by a grandparent for the benefit of a grandchild where the Trustee has discretion to make distributions of principal for the health, education and support of the grandchild. From the grandchild's perspective, a distribution of principal to buy a new Corvette might be an appropriate form of "support". Most corporate Trustees would feel otherwise. To the extent that the law is changed, making it easier to remove trustees, an environment of "Trustee shopping" is created. To the extent that beneficiaries are given greater authority to remove trustees, except for cause, the greater control over the trust is given to beneficiaries, thereby further undermining the intent of Grantors.

In conclusion, the Kansas Bar Association believes as currently drafted, SB 297 constitutes a drastic retroactive change in Kansas law that undermines the historic right of Kansas residents to dispose of their estates in such manner as they see fit, without the intervention of the state. Except for enforcing the rule against perpetuities and providing certain protections for widows and minor children, both of which are supported by sound and longstanding public policy, the state has been reticent to intrude itself into family and personal matters. We believe the state should continue that policy.

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January 22, 2002

To: Senate Judiciary Committee
Hon. Sen. John Vratil

Re: Senate Bill 297

Good morning:

My name is Royce Nelson. I am an attorney at law and a member of the firm of Hampton & Royce (formerly Hampton, Royce, Engleman & Nelson), Salina, Kansas. I am a member of the Executive Committee of the Tax Section of the Kansas Bar Association (the "KBA") and have served on that Executive Committee since the mid-1980's. I have served as Secretary and President of the Tax Section. I am actively involved with the KBA and its activities, having made presentations at KBA Continuing Legal Education seminars, co-authoring a section of the Kansas Corporation Law and Practice Manual of the KBA, and serving on various committees over the years. My appearance today is at the request of and on behalf of the KBA as a member of its Uniform Trust Code Review Committee.

My law practice is primarily involved in working with Kansas families and their businesses and estate planning. Most of my day at the office is spent dealing with trusts and their settlors, trustees and beneficiaries, corporations, limited liability companies, limited partnerships, partnerships and other business and estate planning entities. Another significant part of my practice involves the establishment and operation of exempt organizations.

Senate Bill 297 is what is commonly referred to as the Uniform Trust Code. The Kansas version of the Uniform Trust Code embodied in Senate Bill 297 has been considered by

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members of the Executive Committee of the Tax Section of the KBA, members of the Executive Committee of the Real Estate, Probate and Trust Section of the KBA, and the Legislative Committee of the KBA. These sections and committees of the KBA oppose adoption of the Senate Bill 297 version of the Uniform Trust Code with very little, if any, dissension among the attorneys who have been involved. These sections and committees of the KBA feel that current Kansas trust law is preferable to the Senate Bill 297 version of the Uniform Trust Code and that we can provide a much better trust law for those citizens of the State of Kansas who desire to use trusts in their business planning, estate planning and other family endeavors.

A Trust is More than a Will Substitute or a Tax Reducing Device

To many, a trust is simply a will substitute utilized to avoid probate or a vehicle utilized to reduce income or estate taxes. Although these are characteristics of some trusts and are not immaterial characteristics, it would certainly not be wise to adopt a trust code based on the narrow and often short-term perception that the trust code needs to deal with trusts which are utilized to avoid probate or accomplish desired tax objectives. In most cases with trusts created for such limited purposes, the terms and provisions of a trust code will not be important because of the limited duration and limited purposes for which the trusts were created.

Many trusts are multi-generational legal entities used for the purpose of holding, investing, administering and handling family assets with a view to utilizing those assets to benefit several generations. A very important and crucial characteristic of trusts of this nature is that in a large percentage of the cases, the management function with respect to a trust is totally different and separate and apart from those holding the beneficial ownership interests in the trust (commonly known as the "beneficiaries"). This is similar to limited partnerships where in most cases management is vested in general partners having a relatively small economic interest and the vast majority of economic interests are held by limited partners having little or no management rights. The separation of trust management from trust ownership or benefits occurs for many reasons, including but not limited to a desire to protect the family properties held in the trust from the claims of beneficiaries, from claims of spouses of beneficiaries, from claims of creditors of beneficiaries, to provide management assistance to beneficiaries who are not otherwise able to manage properties, to save estate or income taxes, or any number of reasons deemed desirable by the person who desires to create the trust (herein referred to as the "Settlor"). It is extremely important that any trust code allow the Settlor of the trust to accomplish his or her objectives, otherwise, it is a waste of time and money for the Settlor to create the trust. The Settlor may attempt to find another type of legal entity to utilize which will accomplish those purposes or will establish a trust under more Settlor friendly laws that he may find in another state or a foreign country.

A Trust Code Should Be “Settlor Friendly”

A trust code should allow Settlers to accomplish all lawful objectives, and not sacrifice that characteristic for political or private agendas, betterment of professionals or greedy desires of beneficiaries. The Settlor will decide [1] whether a trust will be utilized to accomplish his or her objectives; and [2] if a trust is to be utilized, the state or foreign country whose law will govern the trust. Therefore, a good trust code is a code that professionals can market to Settlers who are the consumers insofar as trusts are concerned.

What Type of Trust Law is Desired By a Person Who Creates a Trust?

A person who desires to establish a trust desires that applicable trust laws have the following characteristics:

1. Settlor Friendly. By far the most important characteristic of trust law from the standpoint of a person creating a trust is that the trust law gives highest priority to the desires and intentions of the Settlor as opposed to what beneficiaries may perceive to be in their best interests. When the situation gets to the point where a beneficiary of a trust is looking at applicable trust law, it is common to see that beneficiary has hands out, palms up, fingers twitching and screaming “where’s the money” or “moooooore money”. Remember that in many cases, one of the primary reasons a trust is utilized is to separate control from the equitable ownership interests. Remember also that if the applicable trust law gives a beneficiary or beneficiaries control over the trust with powers to amend trusts, terminate trusts and remove and appoint trustees, there is really no reason whatsoever for creating the trust in the first place since one would simply transfer the property to the beneficiaries as opposed to placing it in trust for their benefit. (NOTE: Insofar as this characteristic is concerned, the KBA Review Committee feels current law is preferable when compared to the Senate Bill 297 version of the Uniform Trust Code.)

2. Economic Administration. A person creating a trust desires a trust law which allows for economical and efficient administration of the trust and which is designed to minimize paperwork, hearings and bureaucratic red tape. This results in a trust that is less costly to administer, thereby providing more family benefits, a situation where competent persons and entities are willing to serve as trustees, and a much better perception of the trust as an entity from the perspective of all persons involved. Minimal requirements should be made in the trust code in this regard. If these types of provisions, rules and procedures are desired, the person creating the trust can draft those provisions into the trust document to the extent they are desired. (NOTE: Insofar as this characteristic is concerned, the KBA Review Committee feels that the Senate Bill 297 version of the Uniform Trust Code increases this administrative cost.)

3. Defined Body of Law. The Settlor of a trust desires a trust law which is unambiguous, creates a solid and defined framework for carrying out the desires and intentions of the Settlor, and does not include open-ended phrases which would tend to create family disharmony and litigation. (NOTE: Insofar as this characteristic is concerned, the KBA Review Committee feels the Senate Bill 297 version of the Uniform Trust Code has terms and phrases which are ambiguous and will encourage litigation.)

What Are the Trends Insofar as Trusts are Concerned?

Trust law has been relatively stagnant from a developmental perspective over the 30 year period that I have practiced law. However, things are now changing and trust law is one of the most rapidly changing areas of the law at this time. Among others, rapid development is occurring in these areas of trust laws:

1. Settlors and estate planners are looking out-of-state for better trust laws. States and foreign countries are engaged in rigorous competition to encourage Settlor and estate planners to use their respective trust laws to:

- Avoid the rule against perpetuities;
- Provide asset protection;
- Provide the type of trust law which insures the Settlor that the Settlor's desires and intentions will be fulfilled even if flexible types of trusts are being used.

2. Asset protection is one of the top priorities in this day and age. Settlor are funding off shore trusts to protect assets. Four states, Alaska, Delaware, Rhode Island and Nevada, allow self-settled trusts which even protect the grantor's assets from future creditors. As we turn out more and more lawyers, as society becomes more and more litigious, people are crazed about liability. Settlor and estate planners will be forced to choose state laws which protect trust assets from premature claims of beneficiaries, claims of spouses of beneficiaries, governmental intrusions and claims, and claims of creditors of beneficiaries. Existing Kansas law appears to be "middle of the road" in this area but the Senate Bill 297 version of the Uniform Trust Code is a disaster in that it severely limits the asset protecting effects of spendthrift clauses and discretionary trusts.

3. Flexible Trusts. The use of "flexible trusts" is a rapidly developing trend. Flexible trusts are used to maximize income and estate tax savings, benefit multiple generations and protect trust assets from the claims of beneficiaries, their spouses, their governmental problems and their creditors. A large percentage of estate planners are now recommending flexible trusts because of uncertainties as to future estate and gift tax laws which now provide for a decreasing tax burden, to no tax burden and then backwards to where we were last year. There is corresponding uncertainty as to whether or not step-up

basis will be available for income tax purposes in the future. To combat this, trusts need to be flexible to allow for trustee discretion concerning the timing of distribution of properties, concerning to which generation assets should be distributed and so on. Wide open classes of beneficiaries are needed to include several generations and, in many cases, even their spouses. Flexible trusts won't work as well where beneficiaries are given significant power and control over issues such as the timing of distributions, the termination of the trust and the removal and appointment of trustees. Once beneficiaries have the right to control these issues, particularly the removal and appointment of trustees, we really no longer have a meaningful trust. The KBA Review Committee feels the Senate Bill 297 version of the Uniform Trust Code will severely discourage the use of flexible trusts because of its relative ambivalence to the desires and intentions of the Settlor, because of the provisions making reference to "interests of the beneficiaries" and because of the beneficiary's significant power and control over trusts. Furthermore, the provisions of the Senate Bill 297 version of the Uniform Trust Code will severely restrict and discourage the use of flexible trusts because of its lack of asset protection from the claims of beneficiaries, spouses beneficiaries (married and divorced) governmental claims and the claims of creditors of discretionary beneficiaries.

The Trust Code Which Kansas Adopts Can Be an Economic Development Tool.

Delaware has the best corporate code in existence and that corporate code has significantly increased the visibility and esteem for that state. It has created a very substantial favorable economic impact on that state. It would behoove Kansas to adopt a "better" trust code which distinguishes it from the masses of other states and which encourages Kansas and out-of-state Settlers, lawyers, estate planners and the like to use the Kansas law, and perhaps use Kansas lawyers, brokers, trustees, and others. This is certainly not a case where a uniform act is necessarily good because of uniformity as is the case with the Uniform Commercial Code. We can do better than a uniform code if we are willing to throw out the desire for uniformity, are willing to be creative in adopting a trust code, and adopt a trust code that is marketable to both Kansas and out-of-state Settlers and their estate planning professionals.

Analysis of Senate Bill 297 Version of the Uniform Trust Code

The KBA Review Committee is of the opinion that an analysis of the Senate Bill 297 version of the Uniform Trust Code indicates that it is deficient from the standpoint of providing citizens of the great state of Kansas and their professionals with a trust code that will allow them to accomplish their lawful desires and intentions. Following is a general discussion of what the KBA Review Committee concluded upon its review of the Senate 297 bill version of the Uniform Trust Code.

Strong Points: The following aspects of the Senate Bill 297 version of the Uniform Trust Code are positives:

1. Procedures. There are definitive procedural provisions, administrative rules and the like which govern the administration of trusts which are lacking under current law. We felt this was a positive since it will provide more guidance in connection with the day-to-day administration of trusts. However, we did note that practitioners have for years been able to accomplish procedural objectives with the assistance of drafting, trustees, beneficiaries and courts. We felt that the substantive provisions of trust law are probably far more important than the procedural aspects of trust law.

2. Ability to Choose Applicable Law. The KBA Review Committee felt that one of the best provisions in the Senate Bill 297 version of the Uniform Trust Code is Sec. 7 (UTC 107), which allows the Settlor to designate the law of a specific jurisdiction to govern and control the trust unless the designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue. The committee felt that the term "strong public policy" was ambiguous and a litigator's delight. We recommended that the words "the law" be substituted for "a strong public policy". Most of us felt that the public policy of a jurisdiction was best embodied by its laws, and with that in mind, had great concern as to what various opinions would be insofar as the meaning of "strong public policy" is concerned. We are also concerned as to what will constitute the "jurisdiction having the most significant relationship to the matter at issue". Although the KBA Review Committee definitely thinks this provision is necessary and that Settlers should be free to choose the laws which they want to apply to their trusts, it is sad to think that many Settlers and their professionals in Kansas will shop and find better trust laws than those embodied in the Senate Bill 297 version of the Uniform Trust Code. We feel this trust code will definitely cause a leakage of trust business from the State of Kansas to more progressive states.

Weak Points.

Following is a list of some of the major aspects of the Senate Bill 297 version of the Uniform Trust Code that the KBA Review Committee feels are weak:

1. Failure to Respect and Place of First Priority the Desires, Intentions and Purposes of the Donor.
 - (a) Provisions of Construction and Interpretation Giving Priority to "Interests of Beneficiaries".
 - (1) [Sec. 56(b)(3) and (4) (UTC 706(b)(31) and (41)]

- (2) [Sec. 60 (UTC 801)]
- (3) [Sec. 62 (UTC 803)]
- (4) [Sec. 73 (UTC 814)]
- (5) Others

All of these references should be eliminated and replaced with standards referring to the desires and intentions of the Settlor and the purposes for which the Settlers established the trust. References to “interests of the beneficiaries” may be “Gimme More Money–Fast”.

(b) Provisions Tending to Allow Beneficiaries Greater Control in Modifying or Terminating a Trust, Allowing Beneficiaries to Accelerate Benefits from the Trust and Allowing Beneficiaries Power in Removing and Appointing Trustees.

- (1) [Sec. 73 (UTC 814)] May destroy discretionary power of trustees.
- (2) [Section 56 (UTC 706)]
- (3) Reduction of Asset Protecting Rights (See 2 below)

2. Provisions Allowing Beneficiaries, Spouses (Married and Divorced) of Beneficiaries, Creditors of Beneficiaries (Including Governments) and Others to Reach Assets That They Cannot Reach Under Current Law.

- (a) [Sec. 40 (UTC Sec. 501)] Protection of this provision should be applicable to discretionary trusts as well as spendthrift trusts.
- (b) [Sec. 41 (UTC Sec. 502)] Spendthrift provisions should be totally effective if it restrains either voluntary or involuntary transfers. Otherwise, this will serve as a trap for the unwary.
- (c) [Sec. 42 (UTC 503)] There should be no exceptions. This makes Kansas law very undesirable from a Settlor’s perspective, and forces a Settlor to support, maintain and benefit persons that the Settlor would not otherwise have been liable to support and maintain. Non-exposure of trust assets to these very persons and their problems are a principal reason for establishing a trust in the first place.
- (d) Exceptions to Creditor Protection of Discretionary Trust. [Sec. 43 (UTC 504)] Only sub-section (b) should be retained. This makes Kansas law very undesirable from a Settlor’s perspective, and forces a Settlor to support, maintain and benefit those persons that the Settlor would otherwise not have

been liable to support and maintain. Non-exposure of trust assets to these very persons are a principal reason for establishing a trust in the first place.

3. Virtual Representation (Allowing One Beneficiary of a Class to Involuntarily Represent All in the Class) [Sec. 18 and Sec. 20 (UTC Sec. 302 and Sec. 304)] I have not met anyone who has any idea what Sec. 18 means or what it is designed to accomplish other than confusion. Both Sec. 18 and 20 are inadvisable and should be eliminated. Virtual representation must mean representation by those who won't represent you. This idea is incomprehensible from the standpoint of fairness. Combine the effects of Sec. 18 and Sec. 20 with Sec. 11 and the family sharks will have a field day. Existing Kansas law is fairer and preferable and Kansas Court systems can handle the minimal case load this will create.
4. Family Settlement Agreements Without Court Approval. [Sec. 11 (UTC 111)] The KBA Review Committee felt this provision is abhorrent and should be eliminated. Our courts are easily accessible and judicial oversight would not result in an unreasonable burden on our court system. Will attorneys allow a client to rely on this provision? Probably Not! We like to have statutes of limitation run and appeal periods expired. We will not want our clients litigating whether this provision was applicable in fact, five years later. What will we do? Create a controversy so we can get to Court. Families will love this! Existing Kansas law is preferable.
5. Effective Date of Senate Bill 297. KBA Review Committee believes it would be unjust to make this new trust code applicable to existing trusts, particularly those that are irrevocable. Families cannot change these to make other state laws applicable or otherwise protect themselves from the dramatic changes in trust law and procedure brought on by this new law.
6. Prohibition of "Draft Around Rights". [Sec. 105 (UTC 105)] Subsections (4) through (12) should be omitted. The Settlor should be allowed to draft around ill conceived provisions contained in Senate Bill 297 and any other provisions the Settlor desires to change. If not, the Settlor should make another state's law applicable so that there will be a chance to accomplish objectives. Note that the KBA Review Committee feels the better rules should be contained in Kansas trust law and that a Settlor be allowed to draft around those if that is desired. This provision is unconscionable as it imposes other peoples' political and personal agendas upon the Settlor and the Settlor's family.
7. Ambiguous Terms and Phrases.
 - (a) "interests of Beneficiaries" [Sec. 3(7) (UTC 103(7))]

- (b) “jurisdiction having the most significant relationship to the matter at issue” [Sec. 7(1) (UTC 107(1))]
- (c) “presently Exercisable Powers of Appointment [Sec. 3(10) (UTC 103(10))]
- (d) “strong public policy” [Sec. 7(1) (UTC 107(1))]
- (e) “successor in interest” should be defined. [Sec. 29(c) (UTC Sec. 408(c)) [Sec. __ (UTC Sec. 413)]
- (f) others

These will only create substantial litigation.

On behalf of the Kansas Bar Association, I am opposed to the enactment of Senate Bill 297.

Respectfully submitted,



N. Royce Nelson

Testimony on Senate Bill 297
Senate Judiciary Committee
January 22, 2002

Mark Knackendoffel, President - The Trust Company of Manhattan, Kansas
Representing: Kansas Bankers Association Trust Division

As you know, SB 297 would create a Uniform Trust Code for Kansas. The Bill is a result of extensive efforts by the Kansas Judicial Council's Probate Law Advisory Committee, of which I am also a member.

In December, the KBA Trust Division was invited by the Probate Law Advisory Committee to review the Bill, as submitted last session, and make suggestions for changes. The Trust Division is grateful for the opportunity to have input, which resulted in several meaningful changes to the language. We are here this morning to ask you to consider two things: the totality of the bill and one of those meaningful changes.

First, we want to emphasize the overall importance of passing this legislation. The Kansas version of the UTC will be helpful for consumers, trustees, lawyers and our legal system. It should also streamline the administration of commerce in our State. Although there are still a few provisions of the bill that are subject to debate among interested parties, please keep in mind the totality of the benefits from its adoption. Perhaps 98% of the substance of the bill is endorsed by all parties, including the Judicial Council, the KBA Trust Division and the Kansas Bar Association. So, as you consider aspects of the bill, please don't allow debate about several limited issues to cause the entire bill to be rejected.

My second point this morning is to alert you to one of those provisions that falls within that 2% of the bill that is subject to debate.

Section 111 of the Code deals with Non-Judicial Settlement Agreements. Under current Kansas law, a party to a trust may petition the court to make changes to the terms of a trust. If the court finds the requested changes to be reasonable and consistent with the intent of the Grantor, the court may order the changes. An example might be a beneficiary of an irrevocable trust who desires to replace one corporate trustee with another corporate trustee. In this example, the beneficiary may have moved from one part of the state to another, and now desires to work with a trustee close to where he lives. If the court finds that such a change would not violate the intent of the Grantor, the Court can approve the change under current law.

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Section 111 of the Uniform Trust Code would allow "interested persons" to a trust to make changes to the trust without the oversight of a court. The Section does attempt to protect the intent of the Grantor by requiring that no change can be made that would "violate a material purpose of the trust," and it also allows a party to request a judicial review. The Trust Division believes that without mandatory judicial review, the "interested persons" may not have the legal knowledge to recognize that they have impaired the rights of an unprotected beneficiary, or materially changed the purpose of the trust. And, an unscrupulous beneficiary might pressure other "interested persons" into making a change to the trust that would benefit one or more beneficiaries unfairly. As mentioned earlier, the Code does provide for an "interested person" to request judicial approval, but if that person does not have the expertise to recognize the need for such approval, serious harm to the intent of the trust or the rights of beneficiaries is possible.

Section 111 may have been added to the Code because of the difficulty, experienced in some states, of obtaining a timely court hearing for trust matters. Kansas courts have an excellent record of speedy resolutions of such matters. Therefore, the Trust Division believes that the interests of Kansas resident trusts are best served by leaving the current law intact, and striking Section 111 from the Code.

Thank you for allowing me the time to speak with you today.

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