

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
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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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UNIFORM TRUST CODE

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1 **UNIFORM TRUST CODE**

2 **PREFATORY NOTE**

3 The Uniform Trust Code (2000) is the first national codification of the law of trusts. The
4 primary stimulus to the Commissioners’ drafting of the Uniform Trust Code is the greater use of
5 trusts in recent years, both in family estate planning and in commercial transactions, both in the
6 United States and internationally. This greater use of the trust, and consequent rise in the number
7 of day-to-day questions involving trusts, has led to a recognition that the trust law in many States
8 is thin. It has also led to a recognition that the existing Uniform Acts relating to trusts, while
9 numerous, are fragmentary. The Uniform Trust Code will provide States with precise,
10 comprehensive, and easily accessible guidance on trust law questions. On issues on which States
11 diverge or on which the law is unclear or unknown, the Code will for the first time provide a
12 uniform rule. The Code also contains a number of innovative provisions.

13 **Default Rule:** Most of the Uniform Trust Code consists of default rules that apply only if
14 the terms of the trust fail to address or insufficiently cover a particular issue. Pursuant to Section
15 105, a drafter is free to override a substantial majority of the Code’s provisions. The exceptions are
16 scheduled in Section 105(b).

17 **Innovative Provisions:** Much of the Uniform Trust Code is a codification of the common
18 law of trusts. But the Code does contain a number of innovative provisions. Among the more
19 significant are specification of the rules of trust law that are not subject to override in the trust’s
20 terms (Section 105), the inclusion of a comprehensive article on representation of beneficiaries
21 (Article 3), rules on trust modification and termination that will enhance flexibility (Sections
22 410-417), and the inclusion of an article collecting the special rules pertaining to revocable trusts
23 (Article 6).

24 **Models for Drafting:** While the Uniform Trust Code is the first comprehensive Uniform
25 Act on the subject of trusts, comprehensive trust statutes are already in effect in several States.
26 Notable examples include the statutes in California, Georgia, Indiana, Texas, and Washington, all
27 of which were referred to in the drafting process. Most influential was the 1986 California statute,
28 found at Division 9 of the California Probate Code (Sections 15000 *et seq.*), which was used by the
29 Drafting Committee as its initial model.

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

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

35 Uniform Probate Code Article VII – Originally approved in 1969, Article VII has been
36 enacted in about 15 jurisdictions. Article VII, although titled “Trust Administration,” is a modest

1 statute, addressing only a limited number of topics. Except for its provisions on trust registration,
2 Article VII is superseded by the Uniform Trust Code. Its provisions on jurisdiction are incorporated
3 into Article 2 of the Code, and its provision on trustee liability to persons other than beneficiaries
4 are replaced by Section 1010.

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

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

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

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

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

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

31 Uniform Management of Institutional Funds Act (1972) – This Act has been enacted in 47
32 jurisdictions. It governs the administration of endowment funds held by charitable, religious, and
33 other eleemosynary institutions. The Uniform Management of Institutional Funds Act establishes
34 a standard of prudence for use of appreciation on assets, provides specific authority for the making
35 of investments, authorizes the delegation of this authority, and specifies a procedure, through either
36 donor consent or court approval, for removing restrictions on the use of donated funds.

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

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

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

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

29 Uniform Testamentary Additions to Trusts Act – This Act is available in two versions: the
30 1960 Act, with 24 enactments; and the 1991 Act, with 20 enactments through 1999. As its name
31 suggests, this Act validates pourover devises to trusts. Because it validates provisions in wills, it
32 is incorporated into the Uniform Probate Code, not into the Uniform Trust Code.

33 **Role of Restatement of Trusts:** The Restatement (Second) of Trusts was approved by the
34 American Law Institute in 1957. Work on the Restatement Third began in the late 1980s. The
35 portion of Restatement Third relating to the prudent investor rule and other investment topics was
36 completed and approved in 1990. A tentative draft of the portion of Restatement Third relating to
37 the rules on the creation and validity of trusts was approved in 1996, and the portion relating to the
38 office of trustee, trust purposes, spendthrift provisions and the rights of creditors was approved in
39 1999. The Uniform Trust Code was drafted in close coordination with the writing of the

1 Restatement Third.

2 **Overview of Uniform Trust Code**

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

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

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

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

32 **Article 4 – Creation, Validity, Modification and Termination of Trust** – This article
33 specifies the requirements for creating, modifying and terminating trusts. Most of the requirements
34 relating to creation of trusts (Sections 401 through 409) track traditional doctrine, including
35 requirements of intent, capacity, property, and valid trust purpose. The Uniform Trust Code
36 articulates a three-part classification system for trusts: noncharitable, charitable, and honorary.

1 Noncharitable trusts, the most common type, require an ascertainable beneficiary and a valid
2 purpose. Charitable trusts, on the other hand, by their very nature are created to benefit the public
3 at large. The so called honorary or purposes trust, although unenforceable at common law, is valid
4 and enforceable under this Code despite the absence of an ascertainable beneficiary. The most
5 common example is a trust for the care of an animal.

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

16
17 **Article 5 – Creditor's Claims; Spendthrift and Discretionary Trusts** – This article
18 addresses the validity of a spendthrift provision and other issues relating to the rights of creditors
19 to reach the trust to collect a debt. To the extent a trust is protected by a spendthrift provision, a
20 beneficiary's creditor may not reach the beneficiary's interest until distribution is made by the
21 trustee. To the extent not protected by a spendthrift provision, a creditor can reach the beneficiary's
22 interest, subject to the court's power to limit the award. Certain categories of claims are exempt
23 from a spendthrift restriction, including certain governmental claims and claims for child support
24 or alimony. Other issues addressed in this article include creditor claims against discretionary trusts;
25 creditor claims against a settlor, whether the trust is revocable or irrevocable; and the rights of
26 creditors when a trustee fails to make a required distribution within a reasonable time.

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

33 **Article 7 – Office of Trustee** – This article contains a series of default rules dealing with
34 the office of trustee, all of which may be modified in the terms of the trust. Rules are provided on
35 acceptance of office and bonding. The role of the cotrustee is addressed, including the extent that
36 one cotrustee may delegate to another, and the extent to which one cotrustee can be held liable for
37 actions of another trustee. Also covered are changes in trusteeship, including the circumstances
38 when a vacancy must be filled, the procedure for resignation, the grounds for removal, and the
39 process for appointing a successor trustee. Finally, standards are provided for trustee compensation
40 and reimbursement for expenses.

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

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

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

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

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

1 obtaining consents. Also, a nonjudicial settlement may include only terms and conditions a court
2 could properly approve.

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

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

10 **Kansas Comment**

11 This section is new.

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

15 **Kansas Comment**

16 This section is new.

17 **UTC Comment**

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

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26 from the Code’s coverage are resulting and constructive trusts, which are not express trusts but
27 remedial devices imposed by law. For the requirements for creating an express trust and the
28 methods by which express trusts are created, see Sections 401-402. The Code does not attempt to
29 distinguish express trusts from other legal relationships with respect to property, such as agencies
30 and contracts for the benefit of third parties. For the distinctions, see Restatement (Third) of Trusts
31 §§ 2, 5 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts §§ 2, 5-16C (1959).

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

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

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

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

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

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

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

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

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

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

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

19 (9) “Person” means an individual, corporation, business trust, estate, trust, partnership,
20 limited liability company, association, joint venture, government; governmental subdivision, agency,
21 or instrumentality; public corporation, or any other legal or commercial entity.

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

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

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

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

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

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

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

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

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

21 (16) "State" means a State of the United States, the District of Columbia, Puerto Rico, the
22 United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the

1 United States. The term includes an Indian tribe or band recognized by federal law or formally
2 acknowledged by a State.

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

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

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

9 **Kansas Comment**

10 This section is new.

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

13 **UTC Comment**

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

17 “Beneficiary” (paragraph (2)) refers only to a beneficiary of a trust as defined in the Uniform
18 Trust Code. In addition to living and ascertained individuals, beneficiaries may be unborn or
19 unascertained. Pursuant to Section 402(b), a trust is valid only if a beneficiary can be ascertained
20 now or in the future. The term “beneficiary” includes not only beneficiaries who received their
21 interests under the terms of the trust but also beneficiaries who received their interests by other
22 means, including by assignment, exercise of a power of appointment, resulting trust upon the failure
23 of an interest, gap in a disposition, operation of an antilapse statute upon the predecease of a named
24 beneficiary, or upon termination of the trust. The fact that a person incidentally benefits from the
25 trust does not mean that the person is a beneficiary. For example, neither a trustee nor persons hired
26 by the trustee become beneficiaries merely because they receive compensation from the trust. *See*
27 Restatement (Third) of Trusts § 48 cmt. c (Tentative Draft No. 2, approved 1999); Restatement
28 (Second) of Trusts § 126 cmt. c (1959).

29 While the holder of a power of appointment is not considered a trust beneficiary under the
30 common law of trusts, holders of powers are classified as beneficiaries under the Uniform Trust

1 Code. Holders of powers are included on the assumption that their interests are significant enough
2 that they should be afforded the rights of beneficiaries. A power of appointment as used in state
3 trust law and this Code is as defined in state property law and not federal tax law although there is
4 considerable overlap between the two definitions.

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

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

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

31 The Uniform Trust Code leaves certain issues concerning beneficiaries to the common law.
32 Any person with capacity to take and hold legal title to intended trust property has capacity to be
33 a beneficiary. *See* Restatement (Third) of Trusts § 43 (Tentative Draft No. 2, approved 1999);
34 Restatement (Second) of Trusts §§ 116-119 (1959). Except as limited by public policy, the extent
35 of a beneficiary's interest is determined solely by the settlor's intent. *See* Restatement (Third) of
36 Trusts § 49 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts §§ 127-128
37 (1959). While most beneficial interests terminate upon a beneficiary's death, the interest of a
38 beneficiary may devolve by will or intestate succession the same as a corresponding legal interest.
39 *See* Restatement (Third) of Trusts § 55(1) (Tentative Draft No. 2, approved 1999); Restatement
40 (Second) of Trusts §§ 140, 142 (1959).

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

11 For discussion of the definition of “conservator” (paragraph (4)), see the definition of
12 “guardian” (paragraph (6)).

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

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

30 The phrase “interests of the beneficiaries” (paragraph (7)) is used with some frequency in
31 the Uniform Trust Code. The definition clarifies that the interests are as provided in the terms of
32 the trust and not as determined by the beneficiaries. Absent authority to do so in the terms of the
33 trust, Section 108 prohibits a trustee from changing a trust’s principal place of administration if the
34 transfer would violate the trustee’s duty to administer the trust at a place appropriate to the interests
35 of the beneficiaries. Section 706(b) conditions certain of the grounds for removing a trustee on the
36 court’s finding that removal of the trustee will best serve the interests of the beneficiaries. Section
37 801 requires the trustee to administer the trust in the interests of the beneficiaries, and Section 802
38 makes clear that a trustee may not place its own interests above those of the beneficiaries. Section
39 808(d) requires the holder of a power to direct who is subject to a fiduciary obligation to act with
40 regard to the interests of the beneficiaries. Section 1002(b) may impose greater liability on a

1 cotrustee who commits a breach of trust with reckless indifference to the interests of the
2 beneficiaries. Section 1008 invalidates an exculpatory term to the extent it relieves a trustee of
3 liability for breach of trust committed with reckless indifference to the interests of the beneficiaries.

4 “Jurisdiction” (paragraph (8)), when used with reference to a geographic area, includes a
5 State or country but is not necessarily so limited. Its precise scope will depend on the context in
6 which it is used. “Jurisdiction” is used in Sections 107 and 403 to refer to the place whose law will
7 govern the trust. The term is used in Section 108 to refer to the trust’s principal place of
8 administration. The term is used in Section 816 to refer to the place where the trustee may appoint
9 an ancillary trustee and to the place in whose courts the trustee can bring and defend legal
10 proceedings.

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

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

27 The qualified beneficiaries consist of the beneficiaries currently eligible to receive a
28 distribution from the trust together with those who might be termed the first-line remaindermen.
29 These are the beneficiaries who would become eligible to receive distributions were the event
30 triggering the termination of a beneficiary’s interest or of the trust itself to occur on the date in
31 question. Such a terminating event will typically be the death or deaths of the beneficiaries currently
32 eligible to receive the income. Should a qualified beneficiary be a minor, incapacitated, or
33 unknown, or a beneficiary whose identity or location is not reasonably ascertainable, the
34 representation and virtual representation principles of Article 3 may be employed, including the
35 possible appointment by the court of a representative to represent the beneficiary’s interest.

36 The qualified beneficiaries who take upon termination of the beneficiary’s interest or of the
37 trust can include takers in default of the exercise of a power of appointment. The term can also
38 include the persons entitled to receive the trust property pursuant to the exercise of a power of
39 appointment. Because the exercise of a testamentary power of appointment is not effective until the

1 testator's death and probate of the will, the qualified beneficiaries do not include appointees under
2 the will of a living person.

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

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

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

24 The definition of "settlor" (paragraph (14)) refers to the person who creates, or contributes
25 property to, a trust, whether by will, self-declaration, transfer of property to another person as
26 trustee, or exercise of a power of appointment. For the requirements for creating a trust, see Section
27 401. Determining the identity of the "settlor" is usually not an issue. The same person will both
28 sign the trust instrument and fund the trust. Ascertaining the identity of the settlor becomes more
29 difficult when more than one person signs the trust instrument or funds the trust. The fact that a
30 person is designated as the "settlor" by the terms of the trust is not necessarily determinative. For
31 example, the person who executes the trust instrument may be acting as the agent for the person who
32 will be funding the trust. In that case, the person funding the trust, and not the person signing the
33 trust instrument, will be the settlor. Should more than one person contribute to a trust, all of the
34 contributors will ordinarily be treated as settlors in proportion to their respective contributions,
35 regardless of which one signed the trust instrument. *See* Section 602(b).

36 In the case of a revocable trust employed as a will substitute, gifts to the trust's creator are
37 sometimes made by placing the gifted property directly into the trust. To recognize that such a
38 donor is not intended to be treated as a settlor, the definition of "settlor" excludes a contributor to
39 a trust that is revocable by another person or over which another person has a power of withdrawal.

1 Thus, a parent who contributes to a child’s revocable trust would not be treated as one of the trust’s
2 settlors. The definition of settlor would treat the child as the sole settlor of the trust to the extent of
3 the child’s proportionate contribution. Pursuant to Section 603(d), the child’s power of withdrawal
4 over the trust would also result in the child being treated as the settlor with respect to the portion of
5 the trust attributable to the parent’s contribution.

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

16 “Spendthrift provision” (paragraph (15)) means a term of a trust which restrains the transfer
17 of a beneficiary’s interest, whether by a voluntary act of the beneficiary or by an action of a
18 beneficiary’s creditor or assignee, which at least as far as the beneficiary is concerned, would be
19 involuntary. A spendthrift provision is valid under the Uniform Trust Code only if it restrains both
20 voluntary and involuntary transfer. For a discussion of this requirement and the effect of a
21 spendthrift provision in general, see Section 502. The insertion of a spendthrift provision in the
22 terms of the trust may also constitute a material purpose sufficient to prevent termination of the trust
23 by agreement of the beneficiaries under Section 411, although the Code does not presume this result.

24 “Terms of a trust” (paragraph (17)) is a defined term used frequently in the Uniform Trust
25 Code. While the wording of a written trust instrument is almost always the most important
26 determinant of a trust’s terms, the definition is not so limited. Oral statements, the situation of the
27 beneficiaries, the purposes of the trust, the circumstances under which the trust is to be administered,
28 and, to the extent the settlor was otherwise silent, rules of construction, all may have a bearing on
29 determining a trust’s meaning. *See* Restatement (Third) of Trusts § 4 cmt. a (Tentative Draft No.
30 1, approved 1996); Restatement (Second) of Trusts § 4 cmt. a (1959). If a trust established by order
31 of court is to be administered as an express trust, the terms of the trust are determined from the court
32 order as interpreted in light of the general rules governing interpretation of judgments. *See*
33 Restatement (Third) of Trusts § 4 cmt. f (Tentative Draft No. 1, approved 1996).

34 A manifestation of a settlor’s intention does not constitute evidence of a trust’s terms if it
35 would be inadmissible in a judicial proceeding in which the trust’s terms are in question. *See*
36 Restatement (Third) of Trusts § 4 cmt. b (Tentative Draft No. 1, approved 1996); Restatement
37 (Second) of Trusts § 4 cmt. b (1959). *See also* Restatement (Third) Property: Donative Transfers
38 §§ 10.2, 11.1-11.3 (Tentative Draft No. 1, approved 1995). For example, in many States a trust of
39 real property is unenforceable unless evidenced by a writing, although Section 407 of this Code does
40 not so require, leaving this issue to be covered by separate statute if the enacting jurisdiction so

1 elects. Evidence otherwise relevant to determining the terms of a trust may also be excluded under
2 other principles of law, such as the parol evidence rule.

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

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

25 **SECTION 104. KNOWLEDGE.**

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

27 (1) has actual knowledge of it;

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

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

30 has reason to know it.

31 (b) An organization that conducts activities through employees has notice or knowledge of
32 a fact involving a trust only from the time the information was received by an employee having
33 responsibility to act for the trust, or would have been brought to the employee’s attention if the

1 organization had exercised reasonable diligence. An organization exercises reasonable diligence
2 if it maintains reasonable routines for communicating significant information to the employee having
3 responsibility to act for the trust and there is reasonable compliance with the routines. Reasonable
4 diligence does not require an employee of the organization to communicate information unless the
5 communication is part of the individual’s regular duties or the individual knows a matter involving
6 the trust would be materially affected by the information.

7 **Kansas Comment**

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

10 **UTC Comment**

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

21 “Know” is used in its defined sense in Sections 109 (methods and waiver of notice), 305
22 (appointment of representative), 604(b) (limitation on contest of revocable trust), 812 (collecting
23 trust property), 1009 (nonliability of trustee upon beneficiary’s consent, release, or ratification), and
24 1012 (protection of person dealing with trustee). But as to certain actions, a person is charged with
25 knowledge of facts the person would have discovered upon reasonable inquiry. See Section 1005
26 (limitation of action against trustee following report of trustee).

27 This section is based on Uniform Commercial Code § 1-202 (2000 Annual Meeting Draft).
28

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

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

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

4 (1) the requirements for creating a trust;

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

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

9 (4) the power of the court to modify or terminate a trust under Sections 410 through
10 416;

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

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

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

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

1 (9) the duty under section 813 (a) to respond to the request of a beneficiary of an
2 irrevocable trust for trustee’s reports and other information reasonably related to the administration
3 of a trust;

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

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

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

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

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

12 (c) Notwithstanding any provisions of the Kansas Uniform Trust Code to the contrary, any
13 trust created by will and admitted to probate shall be subject to the requirements of K.S.A. Chapter
14 59.

15 **Kansas Comment**

16 This section is new.

17 In subsection (b)(8), the Kansas drafting committee changed the UTC as follows: “(8) ~~with~~
18 ~~respect to the qualified beneficiaries of an irrevocable trust who have attained 25 years of age; the~~
19 ~~duty under Section 813(b)(2)-(3) to notify them~~ the qualified beneficiaries of an irrevocable trust
20 of the existence of the trust, of the identity of the trustee, and of their right to request trustee’s
21 reports and other information reasonably related to the administration of the trust and to furnish upon
22 request of a qualified beneficiary a copy of the trust instrument.”

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

25 **UTC Comment**

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

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

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

26 The terms of a trust may not deny a court authority to take such action as necessary in the
27 interests of justice, including requiring that a trustee furnish bond. Subsection (b)(6), (13).
28 Additionally, should the jurisdiction adopting this Code enact the optional provisions on subject-
29 matter jurisdiction and venue, subsection (b)(14) similarly provides that such provisions cannot be
30 altered in the terms of the trust. The power of the court to modify or terminate a trust under Sections
31 410 through 416 is not subject to variation in the terms of the trust. Subsection (b)(4). However,
32 all of these Code sections involve situations which the settlor could have addressed had the settlor
33 had sufficient foresight. These include situations where the purpose of the trust has been achieved,
34 a mistake was made in the trust's creation, or circumstances have arisen that were not anticipated
35 by the settlor.

36 Section 813 imposes a general obligation to keep the beneficiaries informed as well as
37 several specific notice requirements. Subsections (b)(8) and (b)(9) specify limits on the settlor's
38 ability to waive these information requirements. With respect to beneficiaries age 25 or older, a
39 settlor may dispense with all of the requirements of Section 813 except for the duties to inform the
40 beneficiaries of the existence of the trust, to provide a beneficiary upon request with such reports

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

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

6 "(8) with respect to the qualified beneficiaries of an irrevocable trust
7 who have attained 25 years of age, the duty under Section 813(b)(2)-
8 (3) to notify the qualified beneficiaries of an irrevocable trust who
9 have attained 25 years of age them of the existence of the trust, of the
10 identity of the trustee, and of their right to request trustee's reports
11 and other information reasonably related to the administration of the
12 trust;"

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

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

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

22 **Kansas Comment**

23 This section is new.

24 **UTC Comment**

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

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

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

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

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

14 **Kansas Comment**

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

17
18 Subsection (2) generally conforms to Kansas law. *See In re Estate of Ingram*, 212 Kan. 218,
19 225, 510 P.2d 597 (1973) (choice of law determined by significant factors).

20 **UTC Comment**

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

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

1 Paragraph (2) provides a rule for trusts without governing law provisions – the meaning and
2 effect of the trust’s terms are to be determined by the law of the jurisdiction having the most
3 significant relationship to the matter at issue. Factors to consider in determining the governing law
4 include the place of the trust’s creation, the location of the trust property, and the domicile of the
5 settlor, the trustee, and the beneficiaries. *See* Restatement (Second) of Conflict of Laws §§ 270 cmt.
6 c and 272 cmt. d (1971). Other more general factors that may be pertinent in particular cases include
7 the relevant policies of the forum, the relevant policies of other interested jurisdictions and degree
8 of their interest, the protection of justified expectations and certainty, and predictability and
9 uniformity of result. *See* Restatement (Second) of Conflict of Laws § 6 (1971). Usually, the law
10 of the trust’s principal place of administration will govern administrative matters and the law of the
11 place having the most significant relationship to the trust’s creation will govern the dispositive
12 provisions.

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

23 For the authority of a settlor to designate a trust’s principal place of administration, see
24 Section 108(a).

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

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

29 (1) a trustee’s principal place of business is located in or a trustee is a resident of the
30 designated jurisdiction; or

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

32 (b) A trustee is under a continuing duty to administer the trust at a place appropriate to its

1 purposes, its administration, and the interests of the beneficiaries.

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

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

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

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

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

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

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

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

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

22 **Kansas Comment**

1 This section is new.

2
3 **UTC Comment**

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

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

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

20 Under the Uniform Trust Code, the fixing of a trust’s principal place of administration will
21 determine where the trustee and beneficiaries have consented to suit (Section 202), and the rules for
22 locating venue within a particular State (Section 204). It may also be considered by a court in
23 another jurisdiction in determining whether it has jurisdiction, and if so, whether it is a convenient
24 forum.

25 A settlor expecting to name a trustee or cotrustees with significant contacts in more than one
26 State may eliminate possible uncertainty about the location of the trust’s principal place of
27 administration by specifying the jurisdiction in the terms of the trust. Under subsection (a), a
28 designation in the terms of the trust is controlling if (1) a trustee is a resident of or has its principal
29 place of business in the designated jurisdiction, or (2) all or part of the administration occurs in the
30 designated jurisdiction. Designating the principal place of administration should be distinguished
31 from designating the law to determine the meaning and effect of the trust’s terms, as authorized by
32 Section 107. A settlor is free to designate one jurisdiction as the principal place of administration
33 and another to govern the meaning and effect of the trust’s provisions.

34 Subsection (b) provides that a trustee is under a continuing duty to administer the trust at a
35 place appropriate to its purposes, its administration, and the interests of the beneficiaries. “Interests
36 of the beneficiaries,” defined in Section 103(7), means the beneficial interests provided in the terms
37 of the trust. Ordinarily, absent a substantial change or circumstances, the trustee may assume that

1 the original place of administration is also the appropriate place of administration. The duty to
2 administer the trust at an appropriate place may also dictate that the trustee not move the trust.

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

17 In connection with a transfer of the principal place of administration, the trustee may transfer
18 some or all of the trust property to a new trustee located outside of the State. The appointment of
19 a new trustee may also be essential if the current trustee is ineligible to administer the trust in the
20 new place. Subsection (f) clarifies that the appointment of the new trustee must comply with the
21 provisions on appointment of successor trustees as provided in the terms of the trust or under Section
22 704. Absent an order of succession in the terms of the trust, Section 704(c) provides for an
23 appointment if approved by all of the qualified beneficiaries or by the court.

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

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

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

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

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

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

8 **Kansas Comment**

9 This section is new.

10 In subsection (d), the Kansas drafting committee changed the UTC by striking “applicable
11 rules” and inserting in lieu thereof the word “code.”

12 **UTC Comment**

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

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

28 To facilitate administration, subsection (c) allows waiver of notice by the person to be
29 notified or sent the document. Among the notices and documents to which this subsection can be
30 applied are notice of a proposed transfer of principal place of administration (Section 108(d)) or of

1 a trustee’s report (Section 813(c)). This subsection also applies to notice to qualified beneficiaries
2 of a proposed trust combination or division (Section 417), of a temporary assumption of duties
3 without accepting trusteeship (Section 701(c)(1)), and of a trustee’s resignation (Section 705(a)(1)).

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

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

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

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

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

15 **Kansas Comment**

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

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

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

23 **UTC Comment**

24 Under the Uniform Trust Code, certain notices need be given only to the “qualified”
25 beneficiaries. For the definition of “qualified beneficiary,” see Section 103(12). Among these

1 notices are notice of a transfer of the trust's principal place of administration (Section 108(d)), notice
2 of a trust division or combination (Section 417), notice of a trustee resignation (Section 705(a)(1)),
3 and notice of a trustee's annual report (Section 813(c)). Subsection (a) of this section authorizes
4 other beneficiaries to receive one or more of these notices by filing a request for notice with the
5 trustee.

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

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

18 Subsection (b) similarly grants the rights of qualified beneficiaries to persons appointed by
19 the terms of the trust or by the court to enforce a trust created for an animal or other trust with a
20 valid purpose but no ascertainable beneficiary. For the requirements for creating such trusts, see
21 Sections 408 and 409.

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

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

26 **2001 UTC Comment**

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

29 "(b) A charitable organization expressly ~~entitled~~ mandated to receive
30 ~~benefits~~ distributions under the terms of a charitable trust or a person
31 appointed to enforce a trust created for the care of an animal or
32 another noncharitable purpose as provided in Section 408 or 409 has
33 the rights of a qualified beneficiary under this [Code]."
34

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

1 **SECTION 111. NONJUDICIAL SETTLEMENT AGREEMENTS.**

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

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

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

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

10 (1) the interpretation or construction of the terms of the trust;

11 (2) the approval of a trustee’s report or accounting;

12 (3) direction to a trustee to refrain from performing a particular act or the grant to a
13 trustee of any necessary or desirable power;

14 (4) the resignation or appointment of a trustee and the determination of a trustee’s
15 compensation;

16 (5) transfer of a trust’s principal place of administration; and

17 (6) liability of a trustee for an action relating to the trust.

18 (e) Any interested person may request the court to approve a nonjudicial settlement
19 agreement, to determine whether the representation as provided in [Article] 3 was adequate, and to
20 determine whether the agreement contains terms and conditions the court could have properly
21 approved.

1 **Kansas Comment**

2 This section is new. The Kansas Probate Code sets out requirements for family settlement
3 agreements at K.S.A. 59-102(8).

4 **UTC Comment**

5 While the Uniform Trust Code recognizes that a court may intervene in the administration
6 of a trust to the extent its jurisdiction is invoked by interested persons or otherwise provided by law
7 (*see* Section 201(a)), resolution of disputes by nonjudicial means is encouraged. This section
8 facilitates the making of such agreements by giving them the same effect as if approved by the court.
9 To achieve such certainty, however, subsection (c) requires that the nonjudicial settlement must
10 contain terms and conditions that a court could properly approve. Under this section, a nonjudicial
11 settlement cannot be used to produce a result not authorized by law, such as to terminate a trust in
12 an impermissible manner.

13 Trusts ordinarily have beneficiaries who are minors, incapacitated, unborn or unascertained.
14 Because such beneficiaries cannot signify their consent to an agreement, binding settlements can
15 ordinarily be achieved only through the application of doctrines such as virtual representation or
16 appointment of a guardian ad litem, doctrines traditionally available only in the case of judicial
17 settlements. The effect of this section and the Uniform Trust Code more generally is to allow for
18 such binding representation even if the agreement is not submitted for approval to a court. For the
19 rules on representation, including appointments of representatives by the court to approve particular
20 settlements, *see* Article 3.

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

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

33 **[SECTION 112. RULES OF CONSTRUCTION.** The rules of construction that apply in
34 this State to the interpretation of and disposition of property by will also apply as appropriate to the

1 interpretation of the terms of a trust and the disposition of the trust property.]

2 **Kansas Comment**

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

5 **UTC Comment**

6 This section is patterned after Restatement (Third) of Trusts § 25(2) and comment e
7 (Tentative Draft No. 1, approved 1996), although this section, unlike the Restatement, also applies
8 to irrevocable trusts. The revocable trust is used primarily as a will substitute, with its key
9 provision being the determination of the persons to receive the trust property upon the settlor's
10 death. Given this functional equivalence between the revocable trust and a will, the rules for
11 interpreting the disposition of property at death should be the same whether the individual has
12 chosen a will or revocable trust as the individual's primary estate planning instrument. Over the
13 years, the legislatures of the States and the courts have developed a series of rules of construction
14 reflecting the legislative or judicial understanding of how the average testator would wish to dispose
15 of property in cases where the will is silent or insufficiently clear. Few legislatures have yet to
16 extend these rules of construction to revocable trusts, and even fewer to irrevocable trusts, although
17 a number of courts have done so as a matter of judicial construction. See Restatement (Third) of
18 Trusts § 25, Reporter's Notes to cmt. d and e (Tentative Draft No. 1, approved 1996).

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

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

30 Rules of construction attribute intention to individual donors based on assumptions of
31 common intention. Rules of construction are found both in enacted statutes and in judicial decisions.
32 Rules of construction can involve the meaning to be given to particular language in the document,
33 such as the meaning to be given to "heirs" or "issue." Rules of construction also address situations
34 the donor failed to anticipate. These include the failure to anticipate the predecease of a beneficiary
35 or to specify the source from which expenses are to be paid. Rules of construction can also concern
36 assumptions as to how a donor would have revised donative documents in light of certain events
37 occurring after execution. These include rules dealing with the effect of a divorce and whether a

1 specific devisee will receive a substitute gift if the subject matter of the devise is disposed of during
2 the testator's lifetime.

3 Instead of enacting this section, a jurisdiction enacting this Code may wish to enact detailed
4 rules on the construction of trusts, either in addition to its rules on the construction of wills or as part
5 of one comprehensive statute applicable to both wills and trusts. For this reason and to encourage
6 this alternative, the section has been made optional. For possible models, see Uniform Probate
7 Code, Article 2, Parts 7 and 8, which was added to the UPC in 1990, and California Probate Code
8 §§ 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
30 from the terms of a trust or to take any action regarding investments); K.S.A 58-1205(a) (court has

1 power to relieve trustee from any restrictions on trustee’s power).

2 Subsection (b) is new.

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

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

9 **UTC Comment**

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

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

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

1 the modification or termination of a trust; approving or directing the combination or division of
2 trusts; and authorizing or directing transfer of a trust or trust property to or from another jurisdiction.

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

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

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

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

13
14 **Kansas Comment**

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

18 Subsection (b) is new.

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

20 **UTC Comment**

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

26 It also seems reasonable to require beneficiaries to go to the seat of the trust when
27 litigation has been instituted there concerning a trust in which they claim beneficial

1 interests, much as the rights of shareholders of a corporation can be determined at
2 a corporate seat. The settlor has indicated a principal place of administration by its
3 selection of a trustee or otherwise, and it is reasonable to subject rights under the
4 trust to the jurisdiction of the Court where the trust is properly administered.

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

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

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

18 **§SECTION 203. SUBJECT-MATTER JURISDICTION.**

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

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

23 **Kansas Comment**

24 This section is consistent with the Kansas probate code. See K.S.A. 59-103 (K.S.A. Chapter
25 59 may be used to supervise the administration of trusts created by wills and other trusts created in
26 favor of persons subject to conservatorship).

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

30 **UTC Comment**
31

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

8 **§SECTION 204. VENUE.**

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

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

18 **Kansas Comment**

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

29 In subsection (a), the Kansas drafting committee changed the UTC by inserting the phrases,
30 "has been," and "or in the county in which any real property in which the trust has an interest is
31 located."

1 Provision in subsection (b) designating county of beneficiary's residence is new.

2 **UTC Comment**

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4 This optional, bracketed section is made available for jurisdictions that conclude that venue
5 for a judicial proceeding involving a trust is not adequately addressed in local rules of civil
6 procedure. For jurisdictions enacting this section, general rules governing venue continue to apply
7 in cases not covered by this section. This includes most proceedings where jurisdiction over a trust,
8 trust property, or parties to a trust is based on a factor other than the trust's principal place of
9 administration. The general rules governing venue also apply when the principal place of
10 administration of a trust is in another locale, but jurisdiction is proper in the enacting State.

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
7 States. Representation is addressed in the Restatement (First) of Property §§ 180-186 (1936), but
8 the 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
18 to 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
33 on behalf of the trust beneficiaries, such consent would not be binding on a trust beneficiary who

1 registers an objection. Subsection (b) implements cases such as *Barber v. Barber*, 837 P.2d 714
2 (Alaska 1992), which held that the a refusal to allow an objection by an adult competent remainder
3 beneficiary violated due process.

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

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

12 **Kansas Comment**

13 This section is new.

14 **UTC Comment**

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

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

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

28 (2) a [guardian] may represent and bind the ward ~~if a [conservator] of the ward's estate has~~

1 ~~not been appointed~~ within the scope of the guardian's powers and duties;

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

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

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

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

9 **Kansas Comment**

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

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

20 **UTC Comment**

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

29 Paragraph (2) authorizes a guardian to bind and represent a ward if a conservator of the
30 ward's estate has not been appointed. Granting a guardian authority to represent the ward with
31 respect to interests in the trust can avoid the need to seek appointment of a conservator. This grant
32 of authority to act with respect to the ward's trust interest may broaden the authority of a guardian

1 in some States although not in States that have adopted the Section 1-403 of the Uniform Probate
2 Code, from which this section was derived. Under the Uniform Trust Code, a “conservator” is
3 appointed by the court to manage the ward’s property, a “guardian” to make decisions with respect
4 to the ward’s personal affairs. *See* Section 103.

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

18 **Kansas Comment**

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

22 **UTC Comment**

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

32 Restatement (First) of Property §§ 181 and 185 (1936) provide that virtual representation is

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

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

18 **SECTION 305. APPOINTMENT OF REPRESENTATIVE.**

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

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

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

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

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General Comment

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).

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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 elapsed since the date of the trust’s creation.

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

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

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

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

11 or

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

13 **Kansas Comment**

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

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

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

24 **UTC Comment**

25 This section is based on Restatement (Third) of Trusts § 10 (Tentative Draft No. 1, approved
26 1996), and Restatement (Second) of Trusts § 17 (1959). Under the methods specified for creating
27 a trust in this section, a trust is not created until it receives property. For what constitutes an
28 adequate property interest, see Restatement (Third) of Trusts §§ 40-41 (Tentative Draft No. 2,
29 approved 1999); Restatement (Second) of Trusts §§ 74-86 (1959). The property interest necessary
30 to fund and create a trust need not be substantial. A revocable designation of the trustee as

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

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

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

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

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

38 While a trust created by will may come into existence immediately at the testator’s death and
39 not necessarily only upon the later transfer of title from the personal representative, Section 701

1 makes clear that the nominated trustee does not have a duty to act until there is an acceptance of the
2 trusteeship, express or implied. To avoid an implied acceptance, a nominated testamentary trustee
3 who is monitoring the actions of the personal representative but who has not yet made a final
4 decision on acceptance should inform the beneficiaries that the nominated trustee has assumed only
5 a limited role. The failure so to inform the beneficiaries could result in liability if misleading
6 conduct by the nominated trustee causes harm to the trust beneficiaries. *See* Restatement (Third)
7 of Trusts § 35 cmt. b (Tentative Draft No. 2, approved 1999).

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

16
17 **SECTION 402. REQUIREMENTS FOR CREATION.**

18 (a) A trust is created only if:

19 (1) the settlor has capacity to create a trust;

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

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

22 (A) a charitable trust;

23 (B) a trust for the care of an animal, as provided in Section 408; or

24 (C) a trust for a noncharitable purpose, as provided in Section 409;

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

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

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

29 (c) A power in a trustee to select a beneficiary from an indefinite class is valid. If the power
30 is not exercised within a reasonable time, the power fails and the property subject to the power

1 passes to the persons who would have taken the property had the power not been conferred.

3 **Kansas Comment**

4 Subsection (a)(1) conforms to Kansas law. See *Peterson v. Peterson*, 10 Kan. App. 2d 437,
5 700 P.2d 585 (1985) (equity will set aside a trust where it is not the pure, voluntary, well understood
6 act of the grantor’s mind); 59-601 (person must be of sound mind to dispose of property by will).

7 Subsection (a)(2) conforms to Kansas law. See *Taliaferro v. Taliaferro*, 260 Kan. 573, Syl.
8 1, 921 P.2d 803 (1996) (express trust requires intention by settlor to create a trust).

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

13 Subsection (a)(4) conforms to Kansas law. See generally *Shumway v. Shumway*, 141 Kan.
14 835, 44 P.2d 247 (1935) (requirement for valid trust is that trustee must accept and handle subject
15 matter of trust as a trust); K.S.A. 58-1201 *et seq.* (Uniform Trustees’ Powers Act).

16 Subsection (a)(5) conforms to Kansas law. See *Matthews v. Salvage*, 195 Kan. 501, 407 P.2d
17 559 (1965) (same person cannot at the same time be sole trustee and sole beneficiary of the same
18 identical interest and trust cannot exist where legal and sole beneficial interests are in the same
19 person).

20 Subsection (b) generally conforms to Kansas law. See parenthetical above for *Freshours*,
21 185 Kan. 434.

22 Subsection (c) is new.

23 **UTC Comment**

24 Subsection (a) codifies the basic requirements for the creation of a trust. To create a valid
25 trust, the settlor must indicate an intention to create a trust. See Restatement (Third) of Trusts § 13
26 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts § 23 (1959). But only such
27 manifestations of intent as are admissible as proof in a judicial proceeding may be considered. See
28 Section 103(17) (“terms of a trust” defined).

29 To create a trust, a settlor must have the requisite mental capacity. To create a revocable or
30 testamentary trust, the settlor must have the capacity to make a will. To create an irrevocable trust,
31 the settlor must have capacity during lifetime to transfer the property free of trust. See Section 601
32 (capacity of settlor to create revocable trust), and *see generally* Restatement (Third) of Trusts § 11

1 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts §§ 18-22 (1959); and
2 Restatement (Third) of Property: Wills and Other Donative Transfers §8.1 (Tentative Draft No. 3,
3 2001).

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

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

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

31 Subsection (c) allows a settlor to empower the trustee to select the beneficiaries even if the
32 class from whom the selection may be made cannot be ascertained. Such a provision would fail
33 under traditional doctrine; it is an imperative power with no designated beneficiary capable of
34 enforcement. Such a provision is valid, however, under both this Code and the Restatement, if there
35 is at least one person who can meet the description. If the trustee does not exercise the power within
36 a reasonable time, the power fails and the property will pass by resulting trust. See Restatement
37 (Third) of Trusts § 46 (Tentative Draft No. 2, approved 1999). See also Restatement (Second) of
38 Trusts § 122 (1959); Restatement (Second) of Property: Donative Transfers § 12.1 cmt. e (1986).

1 **UTC Comment**

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

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

27 Section 412(b), which allows the court to modify administrative terms that are
28 impracticable, wasteful, or impair the trust's administration, is a specific application of the
29 requirement that a trust and its terms be for the benefit of the beneficiaries. The fact that a settlor
30 suggests or directs an unlawful or other inappropriate means for performing a trust does not
31 invalidate the trust if the trust has a substantial purpose that can be achieved by other methods. *See*
32 Restatement (Third) of Trusts § 28 cmt. e (Tentative Draft No. 2, approved 1999).

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

34 (a) A charitable trust may be created for the relief of poverty, the advancement of education
35 or religion, the promotion of health, governmental or municipal purposes, or other purposes the

1 achievement of which is beneficial to the community.

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

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

7 **Kansas Comment**

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

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

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

20 **UTC Comment**

21 The required purposes of a charitable trust specified in subsection (a) restate the well-
22 established categories of charitable purposes listed in Restatement (Third) of Trusts § 28 (Tentative
23 Draft No. 3, 2001), and Restatement (Second) of Trusts § 368 (1959), which ultimately derive from
24 the Statute of Charitable Uses, 43 Eliz. I, c.4 (1601). The directive to the courts to validate purposes
25 the achievement of which are beneficial to the community has proved to be remarkably adaptable
26 over the centuries. The drafters concluded that it should not be disturbed.

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

30 Under subsection (b), a trust that states a general charitable purpose does not fail if the settlor
31 neglected to specify a particular charitable purpose or organization to receive distributions. The

1 court may instead validate the trust by specifying particular charitable purposes or recipients, or
2 delegate to the trustee the framing of an appropriate scheme. *See* Restatement (Second) of Trusts
3 § 397 cmt. d (1959). Subsection (b) of this section is a corollary to Section 413, which states the
4 doctrine of cy pres. Under Section 413(a), a trust failing to state a general charitable purpose does
5 not fail upon failure of the particular means specified in the terms of the trust. The court must
6 instead apply the trust property in a manner consistent with the settlor's charitable purposes to the
7 extent they can be ascertained.

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

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

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

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

31 **Kansas Comment**

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

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

10 UTC Comment

11
12 This section is a specific application of Restatement (Third) of Trusts § 12 (Tentative Draft
13 No. 1, approved 1996), and Restatement (Second) of Trusts § 333 (1959), which provide that a trust
14 can be set aside or reformed on the same grounds as those which apply to a transfer of property not
15 in trust, among which include undue influence, duress, and fraud, and mistake. This section
16 addresses undue influence, duress, and fraud. For reformation of a trust on grounds of mistake, see
17 Section 415. See also Restatement (Third) of Property: Wills and Other Donative Transfers § 8.3
18 (Tentative Draft No. 3, 2001), which closely tracks the language above. Similar to a will, the
19 invalidity of a trust on grounds of undue influence, duress, or fraud may be in whole or in part.

20 **SECTION 407. EVIDENCE OF ORAL TRUST.** Except as required by ~~a statute other~~
21 ~~than this [Code] K.S.A. 59-606 with respect to testamentary trusts or K.S.A. 33-105, 33-106 and 58-~~
22 ~~2401~~, a trust need not be evidenced by a trust instrument, but the creation of an oral trust and its
23 terms may be established only by clear and convincing evidence.

24 Kansas Comment

25 This section conforms to Kansas law. See *Diller v. Kilgore*, 135 Kan. 200, 9 P.2d 643
26 (1932) (express trust in personal property may be created by parol agreement); *Kampschroeder v.*
27 *Kampschroeder*, 20 Kan. App. 2d 361, 887 P.2d 1152 (1995) (clear and convincing evidence
28 required to establish an oral trust).

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

32 UTC Comment

1 While it is always advisable for a settlor to reduce a trust to writing, the Uniform Trust Code
2 follows established law in recognizing oral trusts. Such trusts are viewed with caution, however.
3 The requirement of this section that an oral trust can be established only by clear and convincing
4 evidence is a higher standard than is in effect in many States. *See* Restatement (Third) of Trusts
5 § 20 Reporter’s Notes (Tentative Draft No. 1, approved 1996).

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

10 For the Statute of Frauds generally, see Restatement (Second) of Trusts §§ 40-52 (1959).
11 For a description of what the writing must contain, assuming that a writing is required, see
12 Restatement (Third) of Trusts § 22 (Tentative Draft No. 1, approved 1996); Restatement (Second)
13 of Trusts § 46-49 (1959). For a discussion of when the writing must be signed, see Restatement
14 (Third) of Trusts § 23 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts
15 § 41-42 (1959). For the law of oral trusts, see Restatement (Third) of Trusts § 20 (Tentative Draft
16 No. 1, approved 1996); Restatement (Second) of Trusts §§ 43-45 (1959).

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

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

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

26 (c) Property of a trust authorized by this section may be applied only to its intended use,
27 except to the extent the court determines that the value of the trust property exceeds the amount
28 required for the intended use. Except as otherwise provided in the terms of the trust, property not

1 required for the intended use ~~must~~ may be distributed to the settlor, if then living, otherwise to the
2 settlor's successors in interest.

3 **Kansas Comment**

4 This section is new.

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

7 **UTC Comment**

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

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

21 Subsection (b) addresses enforcement. Noncharitable trusts ordinarily may be enforced by
22 their beneficiaries. Charitable trusts may be enforced by the State's attorney general or by a person
23 deemed to have a special interest. *See* Restatement (Second) of Trusts § 391 (1959). But at
24 common law, a trust for the care of an animal or a trust without an ascertainable beneficiary created
25 for a noncharitable purpose was unenforceable because there was no person authorized to enforce
26 the trustee's obligations.

27 Sections 408 and 409 close this gap. The intended use of a trust authorized by either section
28 may be enforced by a person designated in the terms of the trust or, if none, by a person appointed
29 by the court. In either case, Section 110(b) grants to the person appointed the rights of a qualified
30 beneficiary for the purpose of receiving notices and providing consents. If the trust is created for
31 the care of an animal, a person with an interest in the welfare of the animal has standing to petition
32 for an appointment. The person appointed by the court to enforce the trust should also be a person
33 who has exhibited an interest in the animal's welfare. The concept of granting standing to a person
34 with a demonstrated interest in the animal's welfare is derived from the Uniform Guardianship and
35 Protective Proceedings Act, which allows a person interested in the welfare of a ward or protected

1 person to file petitions on behalf of the ward or protected person. *See, e.g.*, Uniform Probate Code
2 §§ 5-210(b), 5-414(a).

3 Subsection (c) addresses the problem of excess funds. If the court determines that the trust
4 property exceeds the amount needed for the intended purpose and that the terms of the trust do not
5 direct the disposition, a resulting trust is ordinarily created in the settlor or settlor’s successors in
6 interest. *See* Restatement (Third) of Trusts § 47 (Tentative Draft No. 2, approved 1999);
7 Restatement (Second) of Trusts § 124 (1959). Successors in interest include the beneficiaries under
8 the settlor’s will, if the settlor has a will, or in the absence of an effective will provision, the settlor’s
9 heirs. The settlor may also anticipate the problem of excess funds by directing their disposition in
10 the terms of the trust. The disposition of excess funds is within the settlor’s control. *See* Section
11 105(a). While a trust for an animal is usually not created until the settlor’s death, subsection (a)
12 allows such a trust to be created during the settlor’s lifetime. Accordingly, if the settlor is still
13 living, subsection (c) provides for distribution of excess funds to the settlor, and not to the settlor’s
14 successors in interest.

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

19 This section and the next section are suggested by Section 2-907 of the Uniform Probate
20 Code, but much of this and the following section is new.
21

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

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

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

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

6 **Kansas Comment**

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

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

11 **UTC Comment**

12 This section authorizes two types of trusts without ascertainable beneficiaries; trusts for
13 general but noncharitable purposes, and trusts for a specific noncharitable purpose other than the
14 care of an animal, on which see Section 408. Examples of trusts for general noncharitable purposes
15 include a bequest of money to be distributed to such objects of benevolence as the trustee might
16 select. Unless such attempted disposition was interpreted as charitable, at common law the
17 disposition was honorary only and did not create a trust. Under this section, however, the
18 disposition is enforceable as a trust for a period of up to 21 years, although that number is placed
19 in brackets to indicate that States may wish to select a different time limit.

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

25 For the requirement that a trust, particularly the type of trust authorized by this section, must
26 have a purpose that is not capricious, see Section 404 Comment. For examples of the types of trusts
27 authorized by this section, see Restatement (Third) of Trusts § 47 (Tentative Draft No. 2, approved
28 1999), and Restatement (Second) of Trusts § 62 cmt. w and § 124 (1959). The case law on
29 capricious purposes is collected in 2 Austin W. Scott & William F. Fratcher, *The Law of Trusts*
30 § 124.7 (4th ed. 1987).

31 This section is similar to Section 408, although less detailed. Much of the Comment to
32 Section 408 also applies to this section.

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

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

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

Kansas Comment

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

Subsection (b) is new.

UTC Comment

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

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

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

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

15 (a) A noncharitable irrevocable trust may be modified or terminated upon consent of the
16 settlor and all beneficiaries, even if the modification or termination is inconsistent with a material
17 purpose of the trust. A settlor's power to consent to a trust's termination may be exercised by an
18 agent under a power of attorney only to the extent expressly authorized by the power of attorney or
19 the terms of the trust; by the settlor's [conservator] with the approval of the court supervising the
20 [conservatorship] if an agent is not so authorized; or by the settlor's [guardian] with the approval
21 of the court supervising the [guardianship] if an agent is not so authorized and a conservator has not
22 been appointed.

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

1 purpose of the trust.

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

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

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

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

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

12 **Kansas Comment**

13 The first sentence of subsection (a) generally conforms to Kansas law. In *Diller v. Kilgore*,
14 135 Kan. 200, Syl. 6, 9 P.2d 643 (1932), the Kansas Supreme Court recognized that if no power of
15 revocation has been reserved, a trust cannot be revoked by the creator without consent of the
16 beneficiaries. See also *Neeley v. Neeley*, 26 Kan. App. 2d 924, Syl. 2, 996 P.2d 346 (2000) (court
17 recognized general rule that an irrevocable spendthrift trust can be modified if settlor and all
18 beneficiaries consent). The second sentence of subsection (a) is new, although the Kansas Court of
19 Appeals has held that a settlor's right to revoke is personal to the settlor and nondelegable unless
20 the settlor expressly states otherwise in a power of attorney or the trust document. *Muller v. Bank*
21 *of America, N.A.*, ___ Kan. App. 2d ___, ___ P.3d ___ (2000).

22 The first sentence of subsection (b) conforms to Kansas law. See *McClary v. Harbaugh*, 231
23 Kan. 564, 566, 646 P.2d 498 (1982) (beneficiaries may not compel termination of trust if
24 continuance is necessary to carry out a material purpose of trust). The second sentence clarifies
25 Kansas law regarding modification, which apparently has not been addressed by Kansas courts.
26

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

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

2 **UTC Comment**

3 This section describes the circumstances in which termination or modification of a
4 noncharitable irrevocable trust may be compelled by the beneficiaries, with or without the
5 concurrence of the settlor. For provisions governing modification or termination of trusts without
6 the need to seek beneficiary consent, see Sections 412 (modification or termination due to
7 unanticipated circumstances or inability to administer trust effectively), 414 (termination or
8 modification of uneconomic noncharitable trust), and 416 (modification to achieve settlor's tax
9 objectives). If the trust is revocable by the settlor, the method of revocation specified in Section 602
10 applies.

11 Subsection (a) states the test for termination or modification by the beneficiaries with the
12 concurrence of the settlor. Subsection (b) states the test for termination or modification by
13 unanimous consent of the beneficiaries without the concurrence of the settlor. The rules on trust
14 termination in Subsections (a)-(b) carries forward the *Claflin* rule, first stated in the famous case of
15 *Claflin v. Claflin*, 20 N.E. 454 (Mass. 1889). Subsection (c) addresses the effect of a spendthrift
16 provision. Subsection (d) directs how the trust property is to be distributed following a termination
17 under either subsection (a) or (b). Subsection (e) creates a procedure for judicial approval of a
18 proposed termination or modification when the consent of less than all of the beneficiaries is
19 available.

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

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

27 The provisions of Article 3 on representation, virtual representation and the appointment and
28 approval of representatives appointed by the court apply to the determination of whether all
29 beneficiaries have signified consent under this section. The authority to consent on behalf of
30 another person, however, does not include authority to consent over the other person's objection.
31 *See* Section 301(b). Regarding the persons who may consent on behalf of a beneficiary, see Sections
32 302 through 305. A consent given by a representative is invalid to the extent there is a conflict of
33 interest between the representative and the person represented. Given this limitation, virtual
34 representation of a beneficiary's interest by another beneficiary pursuant to Section 304 will rarely
35 be available in a trust termination case, although it should be routinely available in cases involving
36 trust modification, such as a grant to the trustee of additional powers. If virtual or other form of
37 representation is unavailable, Section 305 of the Code permits the court to appoint a representative
38 who may give the necessary consent to the proposed modification or termination on behalf of the
39 minor, incapacitated, unborn, or unascertained beneficiary. The ability to use virtual and other

1 forms of representation to consent on a beneficiary’s behalf to a trust termination or modification
2 has not traditionally been part of the law, although there are some notable exceptions. *Compare*
3 Restatement (Second) § 337(1) (1959) (beneficiary must not be under incapacity), *with Hatch v.*
4 *Riggs National Bank*, 361 F.2d 559 (D.C. Cir. 1966) (guardian ad litem authorized to consent on
5 beneficiary’s behalf).

6 Subsection (a) also addresses the authority of an agent, conservator, or guardian to act on a
7 settlor’s behalf. Consistent with Section 602 on revocation or modification of a revocable trust, the
8 section assumes that a settlor, in granting an agent general authority, did not intend for the agent to
9 have authority to consent to the termination or modification of a trust, authority that could be
10 exercised to radically alter the settlor’s estate plan. In order for an agent to validly consent to a
11 termination or modification of the settlor’s revocable trust, such authority must be expressly
12 conveyed either in the power or in the terms of the trust.

13 Subsection (a), however, does not impose restrictions on consent by a conservator or
14 guardian, other than prohibiting such action if the settlor is represented by an agent. The section
15 instead leaves the issue of a conservator’s or guardian’s authority to local law. Many
16 conservatorship statutes recognize that termination or modification of the settlor’s trust is a
17 sufficiently important transaction that a conservator should first obtain the approval of the court
18 supervising the conservatorship. *See, e.g.*, Uniform Probate Code § 5-411(a)(4). Because the
19 Uniform Trust Code uses the term “conservator” to refer to the person appointed by the court to
20 manage an individual’s property (*see* Section 103(6)), a guardian may act on behalf of a settlor under
21 this section only if a conservator has not been appointed.

22 Subsection (a) is similar to Restatement (Third) of Trusts § 65(2) (Tentative Draft No. 3,
23 2001), and Restatement (Second) of Trusts § 338(2) (1959), both of which permit termination upon
24 joint action of the settlor and beneficiaries. Unlike termination by the beneficiaries alone under
25 subsection (b), termination with the concurrence of the settlor does not require a finding that the
26 trust no longer serves a material purpose. No finding of failure of material purpose is required
27 because all parties with a possible interest in the trust’s continuation, both the settlor and
28 beneficiaries, agree there is no further need for the trust. Restatement Third goes further than
29 subsection (b) of this section and Restatement Second, however, in also allowing the beneficiaries
30 to compel termination of a trust that still serves a material purpose if the reasons for termination
31 outweigh the continuing material purpose.

32 Subsection (b), similar to Restatement Third but not Restatement Second, allows
33 modification by beneficiary action. The beneficiaries may modify any term of the trust if the
34 modification is not inconsistent with a material purpose of the trust. Restatement Third, though,
35 goes further than this Code in also allowing the beneficiaries to use trust modification as a basis for
36 removing the trustee if removal would not be inconsistent with a material purpose of the trust.
37 Under the Code, however, Section 706 is the exclusive provision on removal of trustees. Section
38 706(b)(4) recognizes that a request for removal upon unanimous agreement of the qualified
39 beneficiaries is a factor for the court to consider, but before removing the trustee the court must also
40 find that such action best serves the interests of all the beneficiaries, that removal is not inconsistent

1 with a material purpose of the trust, and that a suitable cotrustee or successor trustee is available.
2 *Compare* Section 706(b)(4), *with* Restatement (Third) § 65 cmt. f (Tentative Draft No. 3, 2001).

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

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

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

15 Subsection (c) of this section deals with the effect of a spendthrift provision on the right of
16 a beneficiary to concur in a trust termination or modification. Spendthrift terms have sometimes
17 been construed to constitute a material purpose without inquiry into the intention of the particular
18 settlor. For examples, see Restatement (Second) of Trusts § 337 (1959); George G. Bogert &
19 George T. Bogert, *The Law of Trusts and Trustees* § 1008 (Rev. 2d ed. 1983); and 4 Austin W. Scott
20 & William F. Fratcher, *The Law of Trusts* § 337 (4th ed. 1989). This result is troublesome because
21 spendthrift provisions are often added to instruments with little thought. Subsection (c), similar to
22 Restatement (Third) of Trusts § 65 cmt. e (Tentative Draft No. 3, 2001), does not negate the
23 possibility that continuation of a trust to assure spendthrift protection might have been a material
24 purpose of the particular settlor. The question of whether that was the intent of a particular settlor
25 is instead a matter of fact to be determined on the totality of the circumstances.

26
27 Subsection (d) recognizes that the beneficiaries' power to compel termination of the trust
28 includes the right to direct how the trust property is to be distributed. While subsection (a) requires
29 the settlor's consent to terminate an irrevocable trust, the settlor does not control the subsequent
30 distribution of the trust property. Once termination has been approved, how the trust property is to
31 be distributed is solely for the beneficiaries to decide.

32 Subsection (e), similar to Restatement (Third) of Trusts § 65 cmt. c (Tentative Draft No. 3,
33 2001), and Restatement (Second) of Trusts §§ 338(2) and 340(2) (1959), addresses situations in
34 which a termination or modification is requested by less than all the beneficiaries, either because a
35 beneficiary objects, the consent of a beneficiary cannot be obtained, or representation is either
36 unavailable or its application uncertain. Subsection (e) allows the court to fashion an appropriate
37 order protecting the interests of the nonconsenting beneficiaries while at the same time permitting
38 the remainder of the trust property to be distributed without restriction. The order of protection for
39 the nonconsenting beneficiaries might include partial continuation of the trust, the purchase of an

1 to disregard the settlor’s intent but to modify inopportune details to effectuate better the settlor’s
2 broader purposes. Among other things, equitable deviation may be used to modify administrative
3 or dispositive terms due to the failure to anticipate economic change or the incapacity of a
4 beneficiary. For numerous illustrations, see Restatement (Third) of Trusts § 66 cmt. b (Tentative
5 Draft No. 3, 2001). While it is necessary that there be circumstances not anticipated by the settlor
6 before the court may grant relief under subsection (a), the circumstances may have been in existence
7 when the trust was created. This section thus complements Section 415, which allows for
8 reformation of a trust based on mistake of fact or law at the creation of the trust.

9 Subsection (b) broadens the court’s ability to modify the administrative terms of a trust. The
10 standard under subsection (b) is similar to the standard for applying cy pres to a charitable trust. *See*
11 Section 413(a). Just as a charitable trust may be modified if its particular charitable purpose
12 becomes impracticable or wasteful, so can the administrative terms of any trust, charitable or
13 noncharitable. Subsections (a) and (b) are not mutually exclusive. Many situations justifying
14 modification of administrative terms under subsection (a) will also justify modification under
15 subsection (b). Subsection (b) is also an application of the requirement in Section 404 that a trust
16 and its terms must be for the benefit of its beneficiaries. *See also* Restatement (Third) of Trusts
17 § 27(2) and cmt. b (Tentative Draft No. 2, approved 1999). Although the settlor is granted
18 considerable latitude in defining the purposes of the trust, the principle that a trust have a purpose
19 which is for the benefit of its beneficiaries precludes unreasonable restrictions on the use of trust
20 property. An owner’s freedom to be capricious about the use of the owner’s own property ends when
21 the property is impressed with a trust for the benefit of others. *See* Restatement (Second) of Trusts
22 § 124 cmt. g (1959). Thus, attempts to impose unreasonable restrictions on the use of trust property
23 will fail. *See* Restatement (Third) of Trusts § 27 Reporter’s Notes to cmt. b (Tentative Draft No. 2,
24 approved 1999). Subsection (b), unlike subsection (a), does not have a direct precedent in the
25 common law, but various States have insisted on such a measure by statute. *See, e.g.,* Mo. Rev. Stat.
26 §456.590.1.

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

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

36 **SECTION 413. CY PRES.**

37 (a) ~~Except as otherwise provided in subsection (b), if a particular charitable purpose~~

1 ~~becomes unlawful, impracticable, impossible to achieve, or wasteful:~~

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

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

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

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

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

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

13 If a charitable trust is or becomes illegal or impossible or impracticable of fulfillment or if
14 a devise or bequest for charity, at the time it was intended to become effective is illegal or
15 impossible or impracticable of fulfillment, and if the settlor, manifested a general intention to devote
16 the property to charity, any judge, on application of any trustee, any interested party or the attorney
17 general, may order an administration of the trust, as nearly as possible to fulfill the manifested
18 general charitable intention of the settlor. In every such proceeding, the attorney general, as
19 representative of the public interest, shall be notified and given an opportunity to be heard. The
20 provisions of this act shall not be applicable if the settlor has provided, either directly or indirectly,
21 for an alternative plan in the event the charitable trust is or becomes illegal or impossible or
22 impracticable of fulfillment. If the alternative plan is also a charitable trust, the intention shown in

1 the original plan shall prevail in the application of this act.

2 (b) If a federal estate tax deduction is not allowable at the time of a decedent's death because of the
3 failure of an interest in property which passes from the decedent to a person, or for a use, described
4 in section 2055(a) of the internal revenue code of 1986, to meet the requirements of section
5 170(f)(3)(B) or 2055(e)(2) of the internal revenue code of 1986, then in order that such deduction
6 shall nevertheless be allowable under section 2055(a) of the internal revenue code of 1986, any
7 judge, on application of any trustee, or any interested party may:

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

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

16 (c) As used in this act "Impracticable of fulfillment" includes, but is not limited to, the failure of any
17 charitable trust, testamentary or inter vivos, including, without limitation, trusts described in section
18 509 of the internal revenue code of 1986 and charitable remainder trusts described in section 664
19 of the internal revenue code of 1986, to include, if required to do so by section 508(e) or section
20 4947(a) of the internal revenue code of 1986, the provisions relating to governing instruments set
21 forth in section 508(e) of the internal revenue code of 1986.

22 (d) The provisions of this section shall be effective as to all trusts not construed prior to the effective

1 date of this act.

2 **Kansas Comment**

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

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

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

12 **UTC Comment**

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

29 The settlor, with one exception, may mandate that the trust property pass to a noncharitable
30 beneficiary upon failure of a particular charitable purpose. Responding to concerns about the
31 clogging of title and other administrative problems caused by remote default provisions upon failure
32 of a charitable purpose, subsection (b) invalidates a gift over to a noncharitable beneficiary upon
33 failure of a particular charitable purpose unless the trust property is to revert to a living settlor or
34 fewer than 21 years have elapsed since the trust's creation. Subsection (b) will not apply to a
35 charitable lead trust, under which a charity receives payments for a term certain with a remainder
36 to a noncharity. In the case of a charitable lead trust, the settlor's particular charitable purpose does
37 not fail upon completion of the specified trust term and distribution of the remainder to the

1 noncharity. Upon completion of the specified trust term, the settlor's particular charitable purpose
2 has instead been fulfilled. For a discussion of the reasons for a provision such as subsection (b), see
3 Ronald R. Chester, *Cy Pres of Gift Over: The Search for Coherence in Judicial Reform of Failed*
4 *Charitable Trusts*, 23 Suffolk U. L. Rev. 41 (1989).

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

9 For the definition of charitable purpose, see Section 405(a). Pursuant to Sections 405(c) and
10 410(b), a petition requesting a court to enforce a charitable trust or to apply cy pres may be
11 maintained by a settlor. Such actions can also be maintained by a cotrustee, the state attorney
12 general, or by a person having a special interest in the charitable disposition. *See* Restatement
13 (Second) of Trusts § 391 (1959).

14 **SECTION 414. TERMINATION OF UNECONOMIC TRUST.**

15 (a) After notice to the qualified beneficiaries, the trustee of a trust consisting of trust
16 property having a total value less than ~~[\$50,000]~~ \$100,000 may terminate the trust if the trustee
17 concludes that the value of the trust property is insufficient to justify the cost of administration.

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

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

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

24 **Kansas Comment**

25 Subsection (a) is new.

26 Subsection (b) expands Kansas law which is limited to allowing the court to terminate a trust
27 when the costs of administration defeat or substantially impair the purposes of the trust. K.S.A. 59-

1 2295.

2 Subsection (c) is consistent with K.S.A. 59-2295, which requires distribution of trust
3 property in accordance with the intention of the testator or settlor.

4 Subsection (d) is new. The Uniform Conservation Easement Act is codified at K.S.A. 58-
5 3810 *et seq.*

6 **UTC Comment**

7 Subsection (a) assumes that a trust with a value of \$50,000 or less is sufficiently likely to be
8 inefficient to administer that a trustee should be able to terminate it without the expense of a judicial
9 termination proceeding. The amount has been placed in brackets to signal to enacting jurisdictions
10 that they may wish to designate a higher or lower figure. Because subsection (a) is a default rule,
11 a settlor is free to set a higher or lower figure or to specify different procedures or to prohibit
12 termination without a court order. *See* Section 105 and Article 4 General Comment.

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

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

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

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

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

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

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

9 **Kansas Comment**

10 This section generally conforms to Kansas law. *See Collins v. Richardson*, 168 Kan. 203,
11 209, 212 P.2d 302 (1949) (cause of action for reformation of trust based on mistake proper);
12 *Taliaferro v. Taliaferro*, 260 Kan. 573, Syl. 13, 921 P.2d 803 (1996) (extrinsic evidence admissible
13 to establish settlor's intention in written trust agreement upon showing of fraud, duress, mistake or
14 other ground for reformation or rescission).

15 **UTC Comment**

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

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

27 Reformation is different from clarification of an ambiguity. Clarification of an ambiguity
28 involves the interpretation of language already in the instrument. Reformation, on the other hand,
29 involves the addition of language not originally in the instrument, or the deletion of language
30 originally included by mistake. Because reformation involves the addition of language to the
31 instrument, or deletion of language in an instrument that may appear clear on its face, reliance on
32 extrinsic evidence is essential. To guard against the possibility of unreliable or contrived evidence

1 in such circumstance, the higher standard of clear and convincing proof is required. See
2 Restatement (Third) of Property: Wills and Other Donative Transfers § 12.1 cmt. e (Tentative Draft
3 No. 1, 1995).

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

11 **SECTION 416. MODIFICATION TO ACHIEVE SETTLOR’S TAX OBJECTIVES.**

12 To achieve the settlor’s tax objectives, the court may modify the terms of a trust in a manner that
13 is not contrary to the settlor’s probable intention. The court may provide that the modification has
14 retroactive effect.

15 **Kansas Comment**

16 This section is new. K.S.A. 59-22a01 allows modification of a charitable trust if necessary
17 to qualify for a federal estate tax deduction. K.S.A. 58-2420 allows division or merger of trusts if
18 necessary for tax purposes.

19 **UTC Comment**

20 This section is copied from Restatement (Third) of Property: Donative Transfers § 12.2
21 (Tentative Draft No. 1, approved 1995). “Modification” under this section is to be distinguished
22 from the “reformation” authorized by Section 415. Reformation under Section 415 is available
23 when the terms of a trust fail to reflect the donor’s original, particularized intention. The mistaken
24 terms are then reformed to conform to this specific intent. The modification authorized here allows
25 the terms of the trust to be changed to meet the settlor’s tax-saving objective as long as the resulting
26 terms, particularly the dispositive provisions, are not inconsistent with the settlor’s probable intent.
27 The modification allowed by this subsection is similar in concept to the *cy pres* doctrine for
28 charitable trusts (*see* Section 413), and the deviation doctrine for unanticipated circumstances (*see*
29 Section 412).

30 Whether a modification made by the court under this section will be recognized under federal

1 tax law is a matter of federal law. Absent specific statutory or regulatory authority, binding
2 recognition is normally given only to modifications made prior to the taxing event, for example, the
3 death of the testator or settlor in the case of the federal estate tax. *See* Rev. Rul. 73-142, 1973-1
4 C.B. 405. Among the specific modifications authorized by the Internal Revenue Code or Service
5 include the revision of split-interest trusts to qualify for the charitable deduction, modification of
6 a trust for a noncitizen spouse to become eligible as a qualified domestic trust, and the splitting of
7 a trust to utilize better the exemption from generation-skipping tax.

8 For further discussion of the rule of this section and the relevant case law, see Restatement
9 (Third) of Property: Donative Transfers § 12.2 cmts. and Reporter’s Notes (Tentative Draft No. 1,
10 approved 1995).

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

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

21 (b) A trustee, in the written instrument dividing a trust, shall allocate trust property among
22 the separate trusts on a fractional basis by identifying the assets and liabilities passing to each
23 separate trust, or on any other reasonable basis. The trustee shall allocate undesignated trust
24 property received after the trustee has divided the trust into separate trusts in the manner provided
25 by the written instrument dividing the trust, or, in the absence of a provision in the written

1 instrument, in a manner determined by the trustee.

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

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

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

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

13 **Kansas Comment**

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

16 **UTC Comment**

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

23 This section allows a trustee to combine two or more trusts even though their terms are not
24 identical. Typically the trusts to be combined will have been created by different members of the
25 same family and will vary on only insignificant details, such as the presence of different perpetuities
26 savings periods. The more the dispositive provisions of the trusts to be combined differ from each
27 other the more likely it is that a combination would impair some beneficiary's interest, hence the
28 less likely that the combination can be approved. Combining trusts may prompt more efficient trust

1 administration and is sometimes an alternative to terminating an uneconomic trust as authorized by
2 Section 414. Administrative economies promoted by combining trusts include a potential reduction
3 in trustees' fees, particularly if the trustee charges a minimum fee per trust, the ability to file one
4 trust income tax return instead of multiple returns, and the ability to invest a larger pool of capital
5 more effectively. Particularly if the terms of the trust are identical, available administrative
6 economies may suggest that the trustee has a responsibility to pursue a combination. *See* Section
7 805 (duty to incur only reasonable costs).

8 Division of trusts is often beneficial and, in certain circumstances, almost routine. Division
9 of trusts is frequently undertaken due to a desire to obtain maximum advantage of exemptions
10 available under the federal generation-skipping tax. While the terms of the trusts which result from
11 such a division are identical, the division will permit differing investment objectives to be pursued
12 and allow for discretionary distributions to be made from one trust and not the other. Given the
13 substantial tax benefits often involved, a failure by the trustee to pursue a division might in certain
14 cases be a breach of fiduciary duty. The opposite could also be true if the division is undertaken to
15 increase fees or to fit within the small trust termination provision. *See* Section 414.

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

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

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

33 Numerous States have enacted statutes authorizing division of trusts, either by trustee action
34 or upon court order. For a list of these statutes, see Restatement (Third) Property: Donative
35 Transfers § 12.2 Statutory Note (Tentative Draft No. 1, approved 1995). Combination or division
36 has also been authorized by the courts in the absence of authorizing statute. *See, e.g., In re Will of*
37 *Marcus*, 552 N.Y.S. 2d 546 (Surr. Ct.1990) (combination); *In re Heller Inter Vivos Trust*, 613
38 N.Y.S. 2d 809 (Surr. Ct. 1994) (division); and *BankBoston v. Marlow*, 701 N.E. 2d 304 (Mass.
39 1998) (division).

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

3 **SECTION 418. REFERENCE TO WRITTEN STATEMENT OR LIST.** A trust instrument
4 which establishes an inter vivos trust and which directs the trustee to distribute trust assets upon the
5 death of the settlor may refer to a separate written statement or list of items of personal property,
6 other than money, evidences of debt, documents of title, securities, and properties used in trade or
7 business, which are assets of the trust estate, and may direct the trustee to make distribution of such
8 items as indicated in the written statement or list. The trustee may distribute such items upon death
9 of the settlor in accordance with the written statement or list. Such written statement or list either
10 must be in the handwriting of the settlor or be signed by the settlor, and must describe the items with
11 reasonable certainty. The writing may be referred to in the trust instrument as one to be in existence
12 at the time of the settlor's death, prepared before or after execution of the trust instrument, and
13 altered by the settlor after its preparation. Transfer of items of personal property pursuant to this
14 section shall not be considered testamentary or be invalidated due to nonconformity with the
15 provisions of chapter 59 of the Kansas Statutes Annotated.

16 **Kansas Comment**

17 This section was not a part of the Uniform Trust Code as recommended by the Uniform Law
18 Commissioners. The source of the section is K.S.A. 59-2296, which is recommended for repeal.
19 The Kansas drafting committee is of the opinion this section should be included in the Kansas
20 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
27 a creditor or assignee of the beneficiary to reach the beneficiary’s interest by attachment of present
28 or future distributions to or for the benefit of the beneficiary or other means. The court may limit
29 the award to such relief as is appropriate under the circumstances.

30 **Kansas Comment**

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

4 **UTC Comment**

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

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

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

25 **SECTION 502. SPENDTHRIFT PROVISION.**

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

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

31 (c) A beneficiary may not transfer an interest in a trust in violation of a valid

1 spendthrift provision and, except as otherwise provided in this [article], a creditor or assignee of the
2 beneficiary may not reach the interest or a distribution by the trustee before its receipt by the
3 beneficiary.

4 **Kansas Comment**

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

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

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

16 **UTC Comment**

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

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

30 Subsection (b), which is derived from Texas Property Code § 112.035(b), allows a settlor
31 to provide maximum spendthrift protection simply by stating in the instrument that all interests are
32 held subject to a "spendthrift trust" or words of similar effect.

33 A disclaimer, because it is a refusal to accept ownership of an interest and not a transfer of

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

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

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

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

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

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

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

28 **Kansas Comment**

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

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

6 **UTC Comment**

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

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

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

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

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

36 Subsection (c), which is similar to Restatement (Third) of Trusts § 59 cmt. a (Tentative Draft

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

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

23
24 **SECTION 504. DISCRETIONARY TRUSTS; EFFECT OF STANDARD.**

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

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

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

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

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

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

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

10
11 **Kansas Comment**

12 Subsection (a) is new.

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

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

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

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

4 **UTC Comment**

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

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

16 For a discussion of the definition of “child” in subsection (a), see Section 503 Comment.

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

23 Subsection (c) creates an exception for support claims of a child, spouse, or former spouse
24 who has a judgment or order against a beneficiary for support or maintenance. While a creditor of
25 a beneficiary generally may not assert that a trustee has abused a discretion or failed to comply with
26 a standard of distribution, such a claim may be asserted by the beneficiary’s child, spouse, or former
27 spouse enforcing a judgment or court order against the beneficiary for unpaid support or
28 maintenance. The court must direct the trustee to pay the child, spouse or former spouse such
29 amount as is equitable under the circumstances but not in excess of the amount the trustee was
30 otherwise required to distribute to or for the benefit of the beneficiary. Before fixing this amount,
31 the court having jurisdiction over the trust should consider that in setting the respective support
32 award, the family court has already considered the respective needs and assets of the family. The
33 Uniform Trust Code does not prescribe a particular procedural method for enforcing a judgment or
34 order against the trust, leaving that matter to local collection law.
35

1 **SECTION 505. CREDITOR’S CLAIM AGAINST SETTLOR.**

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

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

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

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

17 (b) For purposes of this section:

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

21 (2) upon the lapse, release, or waiver of the power, the holder is treated as the
22 settlor of the trust only to the extent the value of the property affected by the lapse, release, or

1 waiver exceeds the greater of the amount specified in Section 2041(b)(2) or 2514(e) of the Internal
2 Revenue Code of 1986, or Section 2503(b) of the Internal Revenue Code of 1986, ~~in each case as~~
3 ~~in effect on [the effective date of this [Code]] [, or as later amended].~~

4 **Kansas Comment**

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

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

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

26 Subsection (b) is new.

27 In subsection (b), the drafting committee changed the UTC by striking the phrase, "in each
28 case as in effect on [the effective date of this [Code]] [, or as later amended]."

29 **UTC Comment**

30 Subsection (a)(1) states what is now a well accepted conclusion, that a revocable trust is
31 subject to the claims of the settlor's creditors while the settlor is living. See Restatement (Third) of
32 Trusts § 25 cmt. e (Tentative Draft No. 1, approved 1996). Such claims were not allowed at
33 common law, however. See Restatement (Second) of Trusts § 330 cmt. o (1959). Because a settlor
34 usually also retains a beneficial interest that a creditor may reach under subsection (a)(2), the

1 common law rule, were it retained in this Code, would be of little significance. *See* Restatement
2 (Second) of Trusts § 156(2) (1959).

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

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

21 Subsection (a)(3) recognizes that a revocable trust is usually employed as a will substitute.
22 As such, the trust assets, following the death of the settlor, should be subject to the settlor’s debts
23 and other charges. However, in accordance with traditional doctrine, the assets of the settlor’s
24 probate estate must normally first be exhausted before the assets of the revocable trust can be
25 reached. This section does not attempt to address the procedural issues raised by the need first to
26 exhaust the decedent’s probate estate before reaching the assets of the revocable trust. Nor does this
27 section address the priority of creditor claims or liability of the decedent’s other nonprobate assets
28 for the decedent’s debts and other charges. Subsection (a)(3), however, does ratify the typical
29 pourover will, revocable trust plan. As long as the rights of the creditor or family member claiming
30 a statutory allowance are not impaired, the settlor is free to shift liability from the probate estate to
31 the revocable trust. Regarding other issues associated with potential liability of nonprobate assets
32 for unpaid claims, see Section 6-102 of the Uniform Probate Code, which was added to that Code
33 in 1998.

34 Subsection (b)(1) treats a power of withdrawal as the equivalent of a power of revocation
35 because the two powers are functionally identical. This is also the approach taken in Restatement
36 (Third) of Trusts § 56 cmt. b (Tentative Draft No. 2, approved 1999). If the power is unlimited, the
37 property subject to the power will be fully subject to the claims of the power holder’s creditors, the
38 same as the power holder’s other assets. If the power holder retains the power until death, the
39 property subject to the power may be liable for claims and statutory allowances to the extent the
40 power holder’s probate estate is insufficient to satisfy those claims and allowances. For powers

1 limited either in time or amount, such as a right to withdraw a \$10,000 annual exclusion contribution
2 within 30 days, this subsection would limit the creditor to the \$10,000 contribution and require the
3 creditor to take action prior to the expiration of the 30-day period.

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

15 The Uniform Trust Code does not address creditor issues with respect to property subject to
16 a special power of appointment or a testamentary general power of appointment. For creditor rights
17 against such interests, see Restatement (Property) Second: Donative Transfers §§ 13.1-13.7 (1986).
18

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

24 **Kansas Comment**

25 This section is new.

26 **UTC Comment**

27
28 The effect of a spendthrift provision is generally to insulate totally a beneficiary's interest
29 until a distribution is made and received by the beneficiary. *See* Section 502. But this section,
30 along with several other sections in this article, recognizes exceptions to this general rule. Whether
31 a trust contains a spendthrift provision or not, a trustee should not be able to avoid creditor claims
32 against a beneficiary by refusing to make a distribution required to be made by the express terms
33 of the trust. On the other hand, a spendthrift provision would become largely a nullity were a

1 beneficiary's creditors able to attach all required payments as soon as they became due. This
2 section reflects a compromise between these two competing principles. A creditor can reach a
3 mandatory distribution, including a distribution upon termination, if the trustee has failed to make
4 the payment within a reasonable time after the required distribution date. Following this reasonable
5 period, payments mandated by the express terms of the trust are in effect being held by the trustee
6 as agent for the beneficiary and should be treated as part of the beneficiary's personal assets.

7 This section is similar to Restatement (Third) of Trusts § 58 cmt. d (Tentative Draft No. 2,
8 1999).

9 **2001 UTC Comment**

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

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

16 The section was revised to assure consistent use of language.
17

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

20 **Kansas Comment**

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

23 **UTC Comment**

24 Because the beneficiaries of the trust hold the beneficial interest in the trust property and the
25 trustee holds only legal title without the benefits of ownership, the creditors of the trustee have only
26 a personal claim against the trustee. *See* Restatement (Third) § 5 cmt. k (Tentative Draft No.1,
27 approved 1996); Restatement (Second) of Trusts § 12 cmt. a (1959). Similarly, a personal creditor
28 of the trustee who attaches trust property to satisfy the debt does not acquire title as a bona fide
29 purchaser even if the creditor is unaware of the trust. *See* Restatement (Second) of Trusts § 308
30 (1959). The protection afforded by this section is consistent with that provided by the Bankruptcy
31 Code. Property in which the trustee holds legal title as trustee is not part of the trustee's bankruptcy
32 estate. 11 U.S.C. § 541(d).

1 The exemption of the trust property from the personal obligations of the trustee is the most
2 significant feature of Anglo-American trust law by comparison with the devices available in civil
3 law countries. A principal objective of the Hague Convention on the Law Applicable to Trusts and
4 on their Recognition is to protect the Anglo-American trust with respect to transactions in civil law
5 countries. *See* Hague Convention art. 11. *See also* Henry Hansmann & Ugo Mattei, *The Functions*
6 *of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. Rev. 434 (1998); John
7 H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 Yale L.J.
8 165, 179-80 (1997).

1 **ARTICLE 6**

2 **REVOCABLE TRUSTS**

3 **General Comment**

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

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

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

20 **Kansas Comment**

21 Kansas law apparently contains no clear statement of rule. In *Giblin v. Giblin*, 253 Kan. 240,
22 854 P.2d 816 (1993), requirement that settlor needed testamentary capacity to execute an
23 amendment to her revocable trust was not an issue.

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

26 **UTC Comment**

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

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

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

1 or

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

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

6 or

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

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

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

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

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

21 **Kansas Comment**

22 Subsection (a) changes current law which provides that a trust is irrevocable unless authority

1 to revoke is reserved in the trust instrument. K.S.A. 58-2417.

2
3 Subsection (b) is new.

4
5 Subsection (c)(1) arguably expands current law by allowing substantial compliance. Kansas
6 law requires specific provisions in a trust document to be followed. *In re Estate of Sanders*, 261
7 Kan. 176, Syl. 5 and 6, 929 P.2d 153 (1996) (if settlor reserves power to revoke trust only in a
8 particular manner and under particular circumstances, settlor can revoke trust only in that manner
9 or under those circumstances).

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

15 Subsection (d) is new.

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

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

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

24 UTC Comment

25 Subsection (a), which provides that a settlor may revoke or modify a trust unless the terms
26 of the trust expressly state that the trust is irrevocable, changes the common law. Most States follow
27 the rule that a trust is presumed irrevocable absent evidence of contrary intent. See Restatement
28 (Second) of Trusts § 330 (1959). California, Iowa, Montana, Oklahoma, and Texas presume that
29 a trust is revocable. The Uniform Trust Code endorses this minority approach, but only for trusts
30 created after its effective date. This Code presumes revocability when the instrument is silent
31 because the instrument was likely drafted by a nonprofessional, who intended the trust as a will
32 substitute. The most recent revision of the Restatement of Trusts similarly reverses the former
33 approach. A trust is presumed revocable if the settlor has retained a beneficial interest. See
34 Restatement (Third) of Trusts § 63 cmt. c (Tentative Draft No. 3, 2001). Because professional
35 drafters habitually spell out whether or not a trust is revocable, subsection (a) will have limited
36 application.

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

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

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

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

38 This section does not explicitly require that the other settlor or settlors be notified if a joint
39 trust is revoked by less than all of the settlors, but such notice would be required pursuant to Section
40 603. While a trust is revocable and the settlor has capacity, Section 603(a) provides that the duties

1 of the trustee, including the duty to keep the beneficiaries informed of administrative developments,
2 are owed exclusively to the settlor. With respect to trusts having several settlors, Section 603(c)
3 clarifies that the trustee's duties, including the duty to keep the beneficiaries informed of
4 developments, are owed to *all* settlors having capacity. Notifying the other settlor or settlors of the
5 revocation or amendment will place them in a better position to protect their interests. If the
6 revocation or amendment by less than all of the settlors breaches an implied agreement not to
7 revoke or amend the trust, those harmed by the action can sue for breach of contract. If the trustee
8 fails to notify the other settlor or settlors of the revocation or amendment, the parties aggrieved by
9 the trustee's failure can sue the trustee for breach of trust.

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

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

33 Under subsection (c), the settlor may revoke or amend a revocable trust by substantially
34 complying with the method specified in the terms of the trust or by a later executed will or codicil
35 or any other method manifesting clear and convincing evidence of the settlor's intent. Only if the
36 method specified in the terms of the trust is made exclusive is use of the other methods prohibited.
37 Even then, a failure to comply with a technical requirement, such as required notarization, may be
38 excused as long as compliance with the method specified in the terms of the trust is otherwise
39 substantial.

40 While revocation of a trust will ordinarily continue to be accomplished by signing and

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

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

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

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

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

27 Subsection (e), which is similar to Restatement (Third) of Trusts § 63 cmt. l (Tentative Draft
28 No. 3, 2001), authorizes an agent under a power of attorney to revoke or modify a revocable trust
29 only to the extent the terms of the trust or power of attorney expressly so permit. An express
30 provision is required because most settlors usually intend that the revocable trust, and not the power
31 of attorney, to function as the settlor’s principal property management device. The power of
32 attorney is usually intended as a backup for assets not transferred to the revocable trust or to address
33 specific topics, such as the power to sign tax returns or apply for government benefits, which may
34 be beyond the authority of a trustee or are not customarily granted to a trustee.

35 Subsection (f) addresses the authority of a conservator or guardian to revoke or amend a
36 revocable trust. Under the Uniform Trust Code, a “conservator” is appointed by the court to manage
37 the ward’s party, a “guardian” to make decisions with respect to the ward’s personal affairs. *See*
38 Section 103. Consequently, subsection (f) authorizes a guardian to exercise a settlor’s power to

1 revoke or amend a trust only if a conservator has not been appointed.

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

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

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

23 **2001 UTC Comment**

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

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

28 "(c)(2)(A) ~~executing~~ a later will or codicil that expressly refers to the
29 trust or specifically devises property that would otherwise have
30 passed according to the terms of the trust; or".

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

33 34 **SECTION 603. SETTLOR'S POWERS; POWERS OF WITHDRAWAL.**

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

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

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

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

11 **Kansas Comment**

12 This section is new.

13 **UTC Comment**

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

18 Pursuant to this section, the duty under Section 813 to inform and report to beneficiaries is
19 owed to the settlor of a revocable trust as long as the settlor has capacity. In the case of a trust
20 having several settlors, subsection (c) clarifies that this duty extends to all settlors having capacity.
21 Should fewer than all settlors revoke or modify their portion of the trust, the trustee must notify the
22 other settlor or settlors of the action. *See* Section 602 Comment.

23 If the settlor loses capacity, subsection (b) clarifies that the rights of the beneficiaries are no
24 longer subject to the settlor's control. The beneficiaries are entitled to request information
25 concerning the trust and the trustee must provide the beneficiaries with annual trustee reports and
26 whatever other information may be required under Section 813. However, because this section may
27 be freely overridden in the terms of the trust, a settlor is free to deny the beneficiaries these rights,
28 even to the point of directing the trustee not to inform them of the existence of the trust. Also,
29 should an incapacitated settlor later regain capacity, the beneficiaries' rights will again be subject

1 to the settlor's control. The cessation of the settlor's control upon the settlor's incapacity or death
2 does not mean that the beneficiaries may reopen transactions the settlor approved while having
3 capacity.

4
5 Typically, the settlor of a revocable trust will also be the sole or primary beneficiary of the
6 trust. Upon the settlor's incapacity, any right of action the settlor-trustee may have against the
7 trustee for breach of fiduciary duty will pass to the settlor's agent or conservator.

8 Subsection (d) makes clear that a holder of a power of withdrawal has the same powers over
9 the trust as the settlor of a revocable trust. Equal treatment is warranted due to the holder's
10 equivalent power to control the trust. For the definition of power of withdrawal, see Section
11 103(10).

12 **2001 UTC Comment**

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

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

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

21
22 ~~(c)~~ If a revocable trust has more than one settlor, the duties of the
23 trustee are owed to all of the settlors having capacity to revoke the
24 trust.

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

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

30 **SECTION 604. LIMITATION ON ACTION CONTESTING VALIDITY OF** 31 **REVOCABLE TRUST; DISTRIBUTION OF TRUST PROPERTY.**

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

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

4 (2) ~~[120] days~~ four months after the trustee sent the person a copy of the trust
5 instrument and a notice informing the person of the trust's existence, of the trustee's name and
6 address, and of the time allowed for commencing a proceeding.

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

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

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

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

17 **Kansas Comment**

18 This section is new.

19 In subsection (a)(1), the Kansas drafting committee changed the UTC by striking "[three]
20 years" and inserting in lieu thereof "one year." In subsection (a)(2), the committee struck "[120]
21 days" and inserted in lieu thereof "four months."

22 **UTC Comment**

23 This section provides finality to the question of when a contest of a revocable trust may be
24 brought. The section is designed to allow an adequate time in which to bring a contest while at the

1 same time permitting the expeditious distribution of the trust property following the settlor's death.

2 A trust can be contested on a variety of grounds. For example, the contestant may allege that
3 no trust was created due to lack of intent to create a trust or lack of capacity (*see* Section 402), that
4 undue influence, duress, or fraud was involved in the trust's creation (*see* Section 406), or that the
5 trust had been revoked or modified (*see* Section 602). A "contest" is an action to invalidate all or
6 part of the terms of the trust or of property transfers to the trustee. An action against a beneficiary
7 or other person for intentional interference with an inheritance or gift, not being a contest, is not
8 subject to this section. For the law on intentional interference, see Restatement (Second) of Torts
9 § 774B (1979). Nor does this section preclude an action to determine the validity of a trust that is
10 brought during the settlor's lifetime, such as a petition for a declaratory judgment, if such action is
11 authorized by other law. *See* Section 106 (Uniform Trust Code supplemented by common law of
12 trusts and principles of equity).

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

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

27 A trustee who wishes to shorten the contest period may do so by giving notice. Drawing
28 from California Probate Code § 16061.7, subsection (a)(2) bars a contest by a potential contestant
29 120 days after the date the trustee sent that person a copy of the trust instrument and informed the
30 person of the trust's existence, of the trustee's name and address, and of the time allowed for
31 commencing a contest. The reference to "120" days is placed in brackets to suggest to the enacting
32 jurisdiction that it substitute its statutory time period for contesting a will following notice of
33 probate. The 120 day period in subsection (a)(2) is subordinate to the three-year bar in subsection
34 (a)(1). A contest is automatically barred three years after the settlor's death even if notice is sent
35 by the trustee less than 120 days prior to the end of that period.

36 Because only a small minority of trusts are actually contested, trustees should not be
37 restrained from making distributions because of concern about possible liability should a contest
38 later be filed. Absent a protective statute, a trustee is ordinarily absolutely liable for misdelivery of
39 the trust assets, even if the trustee reasonably believed that the distribution was proper. *See*

1 Restatement (Second) of Trusts § 226 (1959). Subsection (b) addresses liability concerns by
2 allowing the trustee, upon the settlor's death, to proceed expeditiously to distribute the trust
3 property. The trustee may distribute the trust property in accordance with the terms of the trust until
4 and unless the trustee receives notice of a pending judicial proceeding contesting the validity of the
5 trust, or until notified by a potential contestant of a possible contest, followed by its filing within 60
6 days.

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

12
13 For purposes of notices under this section, the substitute representation principles of Article
14 3 are applicable. The notice by the trustee under subsection (a)(2) or by a potential contestant under
15 subsection (b)(2) must be given in a manner reasonably suitable under the circumstances and likely
16 to result in its receipt. *See* Section 109(a).

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

1 **ARTICLE 7**

2 **OFFICE OF TRUSTEE**

3 **General Comment**

4 This article contains a series of default rules dealing with the office of trustee. Sections 701
5 and 702 address the process for getting a trustee into office, including the procedures for indicating
6 an acceptance and whether bond will be required. Section 703 addresses cotrustees, permitting the
7 cotrustees to act by majority action and specifying the extent to which one trustee may delegate to
8 another. Sections 704 through 707 address changes in the office of trustee, specifying the
9 circumstances when a vacancy must be filled, the procedure for resignation, the grounds for
10 removal, and the process for appointing a successor. Sections 708 and 709 prescribe the standards
11 for determining trustee compensation and reimbursement for expenses advanced.

12 Except for the court's authority to order bond, all of the provisions of this article are subject
13 to modification in the terms of the trust. *See* Section 105.

14 **SECTION 701. ACCEPTING OR DECLINING TRUSTEESHIP.**

15 (a) Except as otherwise provided in subsection (c), a person designated as trustee
16 accepts the trusteeship:

17 (1) by substantially complying with a method of acceptance provided in the
18 terms of the trust; or

19 (2) if the terms of the trust do not provide a method or the method provided
20 in the terms is not expressly made exclusive, by accepting delivery of the trust property, exercising
21 powers or performing duties as trustee, or otherwise indicating acceptance of the trusteeship.

22 (b) A person designated as trustee who has not yet accepted the trusteeship may
23 reject the trusteeship. A designated trustee who does not accept the trusteeship within a reasonable
24 time after knowing of the designation is deemed to have rejected the trusteeship.

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

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
17 rejecting the trust). The second sentence is new.

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
5 possible harm that might occur if a vacancy in a trusteeship is not filled in a timely manner. A
6 trustee's rejection normally precludes a later acceptance but does not cause the trust to fail. *See*
7 Restatement (Third) of Trusts § 35 cmt. c (Tentative Draft No. 2, approved 1999). Regarding the
8 filling of a 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
10 a 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,
26 42 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
33 are necessary. The court may modify or terminate a bond at any time.

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

3 Kansas Comment

4 Subsection (a) changes Kansas law which requires every fiduciary to give bond,
5 K.S.A. 59-1101, unless expressly waived by the trust agreement or the beneficiaries, or the fiduciary
6 is a trust bank or Kansas company with trust authority, K.S.A. 59-1104. The court may, however,
7 at any time require bond to be given. K.S.A. 59-1104. Kansas law does not require bond from a
8 public, religious, charitable or educational corporation or society or certain nonprofit corporation
9 trustees. K.S.A. 59-1105.

10
11 Subsection (b) changes Kansas law which sets a minimum amount of the bond.
12 K.S.A. 59-1101 (“not less than 125 percent of the value of the personal property and the probable
13 annual income from real estate”); K.S.A. 78-109 (“not less than 125 percentum of the amount
14 involved in the trust, or the actual value of the property . . . coming into the hands of and under the
15 control and management of such . . . trustee”). This subsection conforms to Kansas law by giving
16 the court discretion as to the sureties. K.S.A. 59-1102. The last sentence of subsection (b) is
17 consistent with Kansas law which allows the court to modify or cancel bond at any time. K.S.A. 59-
18 1106.

19
20 Subsection (c) modifies Kansas law which requires specific provisions in trust
21 document to be followed. *In re Estate of Sanders*, 261 Kan. 176, Syl 5, 929 P.2d 153 (1996).
22 Otherwise, this subsection conforms to Kansas law. K.S.A. 59-1104(4).

23 UTC Comment

24 This provision is consistent with the Restatement Third and with the bonding provisions of
25 the Uniform Probate Code. *See* Restatement (Third) of Trusts § 34(3) and cmt. a (Tentative Draft
26 No. 2, approved 1999); Uniform Probate Code §§ 3-604 (personal representatives), 5-415
27 (conservators), and 7-304 (trustees). Because a bond is required only if the terms of the trust require
28 bond or a bond is found by the court to be necessary to protect the interests of beneficiaries, bond
29 should rarely be required under this Code.

30 Despite the ability of the court pursuant to Section 105(b)(6) to override a term of the trust
31 waiving bond, the court should order bond in such cases only for good reasons. Similarly, the court
32 should rarely dispense with bond if the settlor directed that the trustee give bond.

33 This section does not attempt to detail all of the technical bonding requirements that the court
34 may impose. Typical requirements are listed in the Uniform Probate Code sections cited above. The
35 amount of a bond otherwise required may be reduced by the value of trust property deposited in a
36 manner that prevents its unauthorized disposition, and by the value of real property which the
37 trustee, by express limitation of power, lacks power to convey without court authorization. Also,

1 the court may excuse or otherwise modify a requirement of a bond, reduce or increase the amount
2 of a bond, release a surety, or permit the substitution of another bond with the same or different
3 sureties.

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

11
12 **SECTION 703. COTRUSTEES.**

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

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

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

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

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

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

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

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

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

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

9 **Kansas Comment**

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

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

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

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

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

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

25 Subsection (g)(1) conforms to Kansas law. See K.S.A. 58-1206(d) (cotrustee liable for
26 failure to attempt to prevent a breach of trust). See also *Gillespie v. Seymour*, 250 Kan. 123, 150,
27 823 P.2d 782 (1991) (dissenting opinion) (trustee has duty to guard trust estate against breaches of
28 trust by cotrustees).

1 Subsection (g)(2) is new.

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

5 UTC Comment

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

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

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

24 Much of this section is based on comparable provisions of the Restatement of Trusts,
25 although with extensive modifications. Reference should also be made to ERISA § 405 (29 U.S.C.
26 § 1105), which in recent years has been the statutory base for the most significant case law on the
27 powers and duties of cotrustees.

28 Subsection (a) is in accord with Restatement (Third) of Trusts § 39 (Tentative Draft No. 2,
29 approved 1999), which rejects the common law rule, followed in earlier Restatements, requiring
30 unanimity among the trustees of a private trust. *See* Restatement (Second) of Trusts § 194 (1959).
31 This section is consistent with the prior Restatement rule applicable to charitable trusts, which
32 allowed for action by a majority of trustees. *See* Restatement (Second) of Trusts § 383 (1959).

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

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

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

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

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

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

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

- 1 (2) a person designated as trustee cannot be identified or does not exist;
- 2 (3) a trustee resigns;
- 3 (4) a trustee is disqualified or removed;
- 4 (5) a trustee dies; or
- 5 (6) a ~~f~~guardian or ~~f~~conservator is appointed for an individual serving as
- 6 trustee.

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

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

- 11 (1) by a person designated in the terms of the trust to act as successor trustee;
- 12 (2) by a person appointed by unanimous agreement of the qualified
- 13 beneficiaries; or
- 14 (3) by a person appointed by the court.

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

- 17 (1) by a person designated in the terms of the trust to act as successor trustee;
- 18 (2) by a person selected by the charitable organizations expressly designated
- 19 to receive distributions under the terms of the trust if the [attorney general] concurs in the selection;
- 20 or
- 21 (3) by a person appointed by the court.

22 (e) Whether or not a vacancy in a trusteeship exists or is required to be filled, the

1 court may appoint an additional trustee or special fiduciary whenever the court considers the
2 appointment necessary for the administration of the trust.

3 **Kansas Comment**

4 Subsection (a)(1) was recognized in *Rathbun v. Hill*, 187 Kan. 130, Syl. 3, 354 P.2d 338
5 (1960) (person may reject trust).

6 Subsection (a)(2) is new.

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

8 Subsection (a)(4) is recognized in K.S.A. 58-2412 (removal of trustee).

9 Subsection (a)(5) is recognized in K.S.A. 58-2410 (death of trustee).

10 Subsection (a)(6) is recognized in K.S.A. 59-1711 (incapacity of trustee).

11 Subsection (b) conforms to Kansas law. See K.S.A. 58-1206(b) (if trust has two or more
12 trustees and if any of them declines or ceases to serve, surviving or remaining trustees shall perform
13 the trust).

14 Subsection (c) modifies Kansas law which allows the court to fill a vacancy. See K.S.A. 58-
15 2410 (court shall appoint successor upon death of sole or surviving trustee); K.S.A. 58-2412 (court
16 may fill all vacancies in express trusts).

17 Subsection (d) is new.

18 Subsection (e) is new.

19 **UTC Comment**

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

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

1 Subsection (b) provides that a vacancy in the cotrusteeship must be filled only if the trust has
2 no remaining trustee. If a vacancy in the cotrusteeship is not filled, Section 703 authorizes the
3 remaining cotrustees to continue to administer the trust. However, as provided in subsection (d), the
4 court, exercising its inherent equity authority, may always appoint additional trustees if the
5 appointment would promote better administration of the trust. *See* Restatement (Third) of Trusts
6 § 34 cmt. e (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 108 cmt. e
7 (1959).

8 Absent an effective provision in the terms of the trust, subsection (c)(2) permits a vacancy
9 in the trusteeship to be filled, without the need for court approval, by a person selected by
10 unanimous agreement of the qualified beneficiaries. Pursuant to Section 705(a)(1), the qualified
11 beneficiaries may also receive the trustee's resignation. If a trustee resigns following notice to the
12 qualified beneficiaries as provided in Section 705, the trust may be transferred to a successor
13 appointed pursuant to subsection (c)(2) of this section, all without court involvement. A
14 nonqualified beneficiary who is displeased with the choice of the qualified beneficiaries may petition
15 the court for removal of the trustee under Section 706.

16 If the qualified beneficiaries fail to make an appointment, subsection (c)(3) authorizes the
17 court to fill the vacancy. In making the appointment, the court should consider the objectives and
18 probable intention of the settlor, the promotion of the proper administration of the trust, and the
19 interests and wishes of the beneficiaries. *See* Restatement (Third) of Trusts § 34 cmt. f (Tentative
20 Draft No. 2, approved 1999); Restatement (Second) of Trusts § 108 cmt. d (1959).

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

24 2001 UTC COMMENT

25 This section includes the 2001 amendments to the 2000 Uniform Trust Code in subsection
26 (c), (d) and (e). The changes are as follows:

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

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

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

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

36 (3) by a person appointed by the court. "

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

5 Subsection (d) is added to clarify the procedure for appointing the successor trustee of a
6 charitable trust.

7 **SECTION 705. RESIGNATION OF TRUSTEE.**

8 (a) A trustee may resign:

9 (1) upon at least 30 days' notice to the qualified beneficiaries, the settlor, if
10 living, and all cotrustees; or

11 (2) with the approval of the court.

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

14 (c) Any liability of a resigning trustee or of any sureties on the trustee's bond for acts
15 or omissions of the trustee is not discharged or affected by the trustee's resignation.

16 **Kansas Comment**

17 Subsection (a)(1) is new.

18
19 Subsection (a)(2) conforms to Kansas law. See K.S.A. 58-2411 (upon petition of any trustee
20 of an express trust, court may accept trustee's resignation and discharge him from the trust); K.S.A.
21 59-1709 (fiduciary may resign his trust at any time, but fiduciary's resignation shall not be effective
22 until court has examined and allowed his final account and made an order accepting such
23 resignation).

24
25 Subsection (b) conforms to Kansas law. See K.S.A. 58-2411 (court may accept trustee's
26 resignation and discharge him or her upon such terms as the rights of the persons interested in the
27 execution of the trust may require).

28
29 Subsection (c) conforms to Kansas law. See K.S.A. 59-1710 (acceptance of the resignation
30 of a fiduciary and the appointment of another shall not affect the liability of such former fiduciary,

1 or his or her sureties, previously incurred).

2 **UTC Comment**

3 This section rejects the common law rule that a trustee may resign only with permission of
4 the court, and goes further than the Restatements, which allow a trustee to resign with the consent
5 of the beneficiaries. *See* Restatement (Third) of Trusts § 36 (Tentative Draft No.2, approved 1999);
6 Restatement (Second) of Trusts § 106 (1959). Concluding that the default rule ought to approximate
7 standard drafting practice, the Drafting Committee provided in subsection (a) that a trustee may
8 resign by giving notice to the qualified beneficiaries and any cotrustee. A resigning trustee may also
9 follow the traditional method and resign with approval of the court.

10 Restatement (Third) of Trusts § 36 cmt. d (Tentative Draft No. 2, approved 1999), and
11 Restatement (Second) of Trusts § 106 cmt. b (1959), provide, similar to subsection (c), that a
12 resignation does not release the resigning trustee from potential liabilities for acts or omissions while
13 in office. The act of resignation can give rise to liability if the trustee resigns for the purpose of
14 facilitating a breach of trust by a cotrustee. *See Ream v. Frey*, 107 F.3d 147 (3rd Cir. 1997).

15 Regarding the residual responsibilities of a resigning trustee until the trust property is
16 delivered to a successor trustee, see Section 707.

17 In the case of a revocable trust, because the rights of the qualified beneficiaries are subject
18 to the settlor's control (*see* Section 603), resignation of the trustee is accomplished by giving notice
19 to the settlor instead of the beneficiaries.

20 **2001 UTC Comment**

21 This section includes the 2001 amendments to the 2000 Uniform Trust Code in subsection
22 (a)(1). The change is as follows:

23 "(a)(1) upon at least 30 days' notice to the qualified beneficiaries, the
24 settlor, if living, and all cotrustees; or"
25

26 Subsection (a)(1) was revised to clarify that a living settlor must receive notice of a trustee's
27 resignation.

28 **SECTION 706. REMOVAL OF TRUSTEE.**

29 (a) The settlor, a cotrustee, or a beneficiary may request the court to remove a
30 trustee, or a trustee may be removed by the court on its own initiative.

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

1 (1) the trustee has committed a serious breach of trust;

2 (2) lack of cooperation among cotrustees substantially impairs the
3 administration of the trust;

4 (3) because of unfitness, unwillingness, or persistent failure of the trustee to
5 administer the trust effectively, the court determines that removal of the trustee best serves the
6 interests of the beneficiaries; or

7 (4) there has been a substantial change of circumstances or removal is
8 requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves
9 the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust,
10 and a suitable cotrustee or successor trustee is available.

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

14 **Kansas Comment**

15 Subsection (a) modifies Kansas law by allowing the court to remove trustee on its own
16 initiative. Kansas law currently allows the court to remove a trustee upon petition of any person
17 interested. K.S.A. 58-2412.

18 Subsection (b)(1) conforms to Kansas law. See K.S.A. 58-2412 (trustee who violates any
19 express trust may be removed).

20 Subsection (b)(2) is new, although rule has been recognized as applied to conflict between
21 trustee and beneficiaries. See *In re Estate of Osborn*, 179 Kan. 365, 372, 295 P.2d 615 (1956)
22 (where friction exists between fiduciary and beneficiaries, removal may be proper in the interest of
23 the harmony and efficient management of the trust).
24

25 Subsection (b)(3) generally conforms to Kansas law. See K.S.A. 59-1711 (trustee who is
26 or becomes incapacitated or otherwise incapable of performing duties of trust, or who fails or refuses
27 to perform any duties may be removed); K.S.A. 58-2412 (trustee may be removed for other cause);
28 *Achenbach v. Baker*, 151 Kan. 827, Syl. 3, 101 P.2d 937 (1940) (removal of trustee in best interests

1 of beneficiaries); *In re Estate of Brecklein*, 6 Kan. App. 2d 1001, Syl. 4, 637 P.2d 444 (1981) (court
2 may refuse to appoint or remove trustee under exceptional circumstances where friction and
3 controversy exist between trustee and beneficiary). K.S.A. 58-2412 also specifically allows removal
4 of a trustee who becomes insolvent or whose solvency or that of his sureties is reasonably in doubt.

5 Subsection (b)(4) is new, although consistent with Kansas law. See above parenthetical.

6 Subsection (c) is new, although supported by Kansas law. See *Jennings v. Murdock*, 220
7 Kan. 182, Syl. 12, 553 P.2d 846 (1976) (removal of a trustee is a drastic action which should only
8 be taken when the estate is actually endangered and intervention is necessary to save trust property).
9 See also parentheticals for UTC § 1001(b).

10 UTC Comment

11 Subsection (a), contrary to the common law, grants the settlor of an irrevocable trust the right
12 to petition for removal of a trustee. The right to petition for removal does not give the settlor of an
13 irrevocable trust any other rights, such as the right to an annual report or to receive other information
14 concerning administration of the trust. The right of a beneficiary to petition for removal does not
15 apply to a revocable trust while the settlor has capacity. Pursuant to Section 603(a), while a trust
16 is revocable and the settlor has capacity, the rights of the beneficiaries are subject to the settlor's
17 exclusive control.

18 Trustee removal may be regulated by the terms of the trust. See Section 105. In fashioning
19 a removal provision for an irrevocable trust, the drafter should be cognizant of the danger that the
20 trust may be included in the settlor's federal gross estate if the settlor retains the power to be
21 appointed as trustee or to appoint someone who is not independent. See Rev. Rul. 95-58, 1995-2
22 C.B. 191.

23 Subsection (b) lists the grounds for removal of the trustee. The grounds for removal are
24 similar to those found in Restatement (Third) of Trusts § 37 cmt. e (Tentative Draft No. 2, approved
25 1999). A trustee may be removed for untoward action, such as for a serious breach of trust, but the
26 section is not so limited. A trustee may also be removed under a variety of circumstances in which
27 the court concludes that the trustee is not best serving the interests of the beneficiaries. The term
28 "interests of the beneficiaries" means the beneficial interests as provided in the terms of the trust,
29 not as defined by the beneficiaries. See Section 103(7). Removal for conduct detrimental to the
30 interests of the beneficiaries is a well-established standard for removal of a trustee. See Restatement
31 (Third) of Trusts § 37 cmt. d (Tentative Draft No. 2, approved 1999); Restatement (Second) of
32 Trusts § 107 cmt. a (1959).

33 Subsection (b)(1), consistent with Restatement (Third) of Trusts § 37 cmt. e and g (Tentative
34 Draft No. 2, approved 1999), makes clear that not every breach of trust justifies removal of the
35 trustee. The breach must be "serious." A serious breach of trust may consist of a single act that
36 causes significant harm or involves flagrant misconduct. A serious breach of trust may also consist

1 of a series of smaller breaches, none of which individually justify removal when considered alone,
2 but which do so when considered together. A particularly appropriate circumstance justifying
3 removal of the trustee is a serious breach of the trustee's duty to keep the beneficiaries reasonably
4 informed of the administration of the trust or to comply with a beneficiary's request for information
5 as required by Section 813. Failure to comply with this duty may make it impossible for the
6 beneficiaries to protect their interests. It may also mask more serious violations by the trustee.

7 The lack of cooperation among trustees justifying removal under subsection (b)(2) need not
8 involve a breach of trust. The key factor is whether the administration of the trust is significantly
9 impaired by the trustees' failure to agree. Removal is particularly appropriate if the naming of an
10 even number of trustees, combined with their failure to agree, has resulted in deadlock requiring
11 court resolution. The court may remove one or more or all of the trustees. If a cotrustee remains
12 in office following the removal, under Section 704 appointment of a successor trustee is not
13 required.

14 Subsection (b)(2) deals only with lack of cooperation among cotrustees, not with friction
15 between the trustee and beneficiaries. Friction between the trustee and beneficiaries is ordinarily
16 not a basis for removal. However, removal might be justified if a communications breakdown is
17 caused by the trustee or appears to be incurable. *See* Restatement (Third) of Trusts § 37 cmt. e
18 (Tentative Draft No. 2, approved 1999).

19 Subsection (b)(3) authorizes removal for a variety of grounds, including unfitness,
20 unwillingness, or persistent failure to administer the trust effectively. Removal in any of these cases
21 is allowed only if it best serves the interests of the beneficiaries. For the definition of "interests of
22 the beneficiaries," see Section 103(7). "Unfitness" may include not only mental incapacity but also
23 lack of basic ability to administer the trust. Before removing a trustee for unfitness the court should
24 consider the extent to which the problem might be cured by a delegation of functions the trustee is
25 personally incapable of performing. "Unwillingness" includes not only cases where the trustee
26 refuses to act but also a pattern of indifference to some or all of the beneficiaries. *See* Restatement
27 (Third) of Trusts § 37 cmt. e (Tentative Draft No. 2, approved 1999). A "persistent failure to
28 administer the trust effectively" might include a long-term pattern of mediocre performance, such
29 as consistently poor investment results when compared to comparable trusts.

30 It has traditionally been more difficult to remove a trustee named by the settlor than a trustee
31 named by the court, particularly if the settlor at the time of the appointment was aware of the
32 trustee's failings. *See* Restatement (Third) of Trusts § 37 cmt. f (Tentative Draft No.2, approved
33 1999); Restatement (Second) of Trusts § 107 cmt. f-g (1959). Because of the discretion normally
34 granted to a trustee, the settlor's confidence in the judgment of the particular person whom the
35 settlor selected to act as trustee is entitled to considerable weight. This deference to the settlor's
36 choice can weaken or dissolve if a substantial change in the trustee's circumstances occurs. To
37 honor a settlor's reasonable expectations, subsection (b)(4) lists a substantial change of
38 circumstances as a possible basis for removal of the trustee. Changed circumstances justifying
39 removal of a trustee might include a substantial change in the character of the service or location of
40 the trustee. A corporate reorganization of an institutional trustee is not itself a change of

1 circumstances if it does not affect the service provided the individual trust account. Before
2 removing a trustee on account of changed circumstances, the court must also conclude that removal
3 is not inconsistent with a material purpose of the trust, that it will best serve the interests of the
4 beneficiaries, and that a suitable cotrustee or successor trustee is available.

5 Subsection (b)(4) also contains a specific but more limited application of Section 411.
6 Section 411 allows the beneficiaries by unanimous agreement to compel modification of a trust if
7 the court concludes that the particular modification is not inconsistent with a material purpose of the
8 trust. Subsection (b)(4) of this section similarly allows the qualified beneficiaries to request removal
9 of the trustee if the designation of the trustee was not a material purpose of the trust. Before
10 removing the trustee the court must also find that removal will best serve the interests of the
11 beneficiaries and that a suitable cotrustee or successor trustee is available.

12 Subsection (c) authorizes the court to intervene pending a final decision on a request to
13 remove a trustee. Among the relief that the court may order under Section 1001(b) is an injunction
14 prohibiting the trustee from performing certain acts and the appointment of a special fiduciary to
15 perform some or all of the trustee's functions. Pursuant to Section 1004, the court may also award
16 attorney's fees as justice and equity may require.

17 **SECTION 707. DELIVERY OF PROPERTY BY FORMER TRUSTEE.**

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

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

25 **Kansas Comment**

26 Subsection (a) is new, although generally conforms to Kansas law. See K.S.A. 59-1709
27 (fiduciary's resignation not effective until accepted by court); K.S.A. 59-1718 (court discharges
28 trustee when trustee has transferred all of the property of the estate, paid all due taxes, complied with

1 all court orders and has otherwise fully discharged his trust); K.S.A. 59-1713 (termination of
2 fiduciary's authority does not invalidate actions taken as fiduciary).

3
4 Subsection (b) is new, although consistent with Kansas law. See *Dinsmoor v. Hill*, 164 Kan.
5 12, 15, 187 P.2d 338 (1947) (trustee must act in good faith and with due regard to interests of
6 beneficiaries).

7 **UTC Comment**

8 This section addresses the continuing authority and duty of a resigning or removed trustee.
9 Subject to the power of the court to make other arrangements or unless a cotrustee remains in office,
10 a resigning or removed trustee has continuing authority until the trust property is delivered to a
11 successor. If a cotrustee remains in office, there is no reason to grant a resigning or removed trustee
12 any continuing authority, and none is granted under this section. In addition, if a cotrustee remains
13 in office, the former trustee need not submit a final trustee's report. See Section 813(c).

14 There is ample authority in the Uniform Trust Code for the appointment of a special
15 fiduciary, an appointment which can avoid the need for a resigning or removed trustee to exercise
16 residual powers until a successor can take office. See Sections 704(d) (court may appoint additional
17 trustee or special fiduciary whenever court considers appointment necessary for administration of
18 trust), 705(b) (in approving resignation, court may impose conditions necessary for protection of
19 trust property), 706(c) (pending decision on petition for removal, court may order appropriate relief),
20 and 1001(b)(5) (to remedy breach of trust, court may appoint special fiduciary as necessary to
21 protect trust property or interests of beneficiary).

22 If the former trustee has died, the Uniform Trust Code does not require that the trustee's
23 personal representative windup the deceased trustee's administration. Nor is a trustee's conservator
24 or guardian required to complete the former trustee's administration if the trustee's authority
25 terminated due to an adjudication of incapacity. However, to limit the former trustee's liability, the
26 personal representative, conservator or guardian may submit a trustee's report on the former
27 trustee's behalf as authorized by Section 813(c). Otherwise, the former trustee remains liable for
28 actions taken during the trustee's term of office until liability is otherwise barred.

29 **SECTION 708. COMPENSATION OF TRUSTEE.**

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

32 (b) If the terms of a trust specify the trustee's compensation, the trustee is entitled to
33 be compensated as provided, except as such compensation may be increased or decreased upon

1 approval by the trustee and by unanimous consent of the qualified beneficiaries who do not have a
2 conflict of interest.

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

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

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

9 **Kansas Comment**

10 Subsection (a) conforms to Kansas law. See K.S.A. 59-1717 (trustee shall have such
11 compensation for services as is just and reasonable).

12
13 The Kansas drafting committee changed the UTC by adding new subsection (b). Former
14 subsection (b) was relettered as subsection (c).

15 Subsection (c) is new, although consistent with K.S.A. 59-1717.

16 **UTC Comment**

17 Subsection (a) establishes a standard of reasonable compensation. Relevant factors in
18 determining this compensation, as specified in the Restatement, include the custom of the
19 community; the trustee's skill, experience, and facilities; the time devoted to trust duties; the amount
20 and character of the trust property; the degree of difficulty, responsibility and risk assumed in
21 administering the trust, including in making discretionary distributions; the nature and costs of
22 services rendered by others; and the quality of the trustee's performance. See Restatement (Third)
23 of Trusts § 38 cmt. c (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 242
24 cmt. b (1959).

25 In setting compensation, the services actually performed and responsibilities assumed by the
26 trustee should be closely examined. A downward adjustment of fees may be appropriate if a trustee
27 has delegated significant duties to agents, such as the delegation of investment authority to outside
28 managers. See Section 807 (delegation by trustee). On the other hand, a trustee with special skills,
29 such as those of a real estate agent, may be entitled to extra compensation for performing services
30 that would ordinarily be delegated. See Restatement (Third) of Trusts § 38 cmt. d (Tentative Draft
31 No. 2, approved 1999); Restatement (Second) of Trusts § 242 cmt. d (1959).

1 Because “trustee” as defined in Section 103(19) includes not only an individual trustee but
2 also cotrustees, each trustee, including a cotrustee, is entitled to reasonable compensation under the
3 circumstances. The fact that a trust has more than one trustee does not mean that the trustees
4 together are entitled to more compensation than had either acted alone. Nor does the appointment
5 of more than one trustee mean that the trustees are eligible to receive the compensation in equal
6 shares. The total amount of the compensation to be paid and how it will be divided depend on the
7 totality of the circumstances. Factors to be considered include the settlor’s reasons for naming more
8 than one trustee and the level of responsibility assumed and exact services performed by each
9 trustee. Often the fees of cotrustees will be in the aggregate higher than the fees for a single trustee
10 because of the duty of each trustee to participate in administration and not delegate to a cotrustee
11 duties the settlor expected the trustees to perform jointly. *See* Restatement (Third) of Trusts § 38
12 cmt. i (Tentative Draft No. 2, approved 1999). The trust may benefit in such cases from the
13 enhanced quality of decision-making resulting from the collective deliberations of the trustees.

14 Financial institution trustees normally base their fees on published fee schedules. Published
15 fee schedules are subject to the same standard of reasonableness under the Uniform Trust Code as
16 are other methods for computing fees. The courts have generally upheld published fee schedules
17 but this is not automatic. Among the more litigated topics is the issue of termination fees.
18 Termination fees are charged upon termination of the trust and sometimes upon transfer of the trust
19 to a successor trustee. Factors relevant to whether the fee is appropriate include the actual work
20 performed; whether a termination fee was authorized in the terms of the trust; whether the fee
21 schedule specified the circumstances in which a termination fee would be charged; whether the
22 trustee’s overall fees for administering the trust from the date of the trust’s creation, including the
23 termination fee, were reasonable; and the general practice in the community regarding termination
24 fees. Because significantly less work is normally involved, termination fees are less appropriate
25 upon transfer to a successor trustee than upon termination of the trust. For representative cases, see
26 *Cleveland Trust Co. v. Wilmington Trust Co.*, 258 A.2d 58 (Del. 1969); *In re Trusts Under Will of*
27 *Dwan*, 371 N.W. 2d 641 (Minn. Ct. App. 1985); *Mercer v. Merchants National Bank*, 298 A.2d 736
28 (N.H. 1972); *In re Estate of Payson*, 562 N.Y.S. 2d 329 (Surr. Ct. 1990); *In re Indenture Agreement*
29 *of Lawson*, 607 A. 2d 803 (Pa. Super. Ct. 1992); *In re Estate of Ischy*, 415 A.2d 37 (Pa. 1980);
30 *Memphis Memorial Park v. Planters National Bank*, 1986 Tenn. App. LEXIS 2978 (May 7, 1986);
31 *In re Trust of Sensenbrenner*, 252 N.W. 2d 47 (Wis. 1977).

32 This Code does not take a specific position on whether dual fees may be charged when a
33 trustee hires its own law firm to represent the trust. The trend is to authorize dual compensation as
34 long as the overall fees are reasonable. For a discussion, see Ronald C. Link, *Developments*
35 *Regarding the Professional Responsibility of the Estate Administration Lawyer: The Effect of the*
36 *Model Rules of Professional Conduct*, 26 Real Prop. Prob. & Tr. J. 1, 22-38 (1991)

37 Subsection (b) permits the terms of the trust to override the reasonable compensation
38 standard, subject to the court’s inherent equity power to make adjustments downward or upward
39 in appropriate circumstances. Compensation provisions should be drafted with care. Common
40 questions include whether a provision in the terms of the trust setting the amount of the trustee’s
41 compensation is binding on a successor trustee, whether a dispositive provision for the trustee in the

1 terms of the trust is in addition to or in lieu of the trustee's regular compensation, and whether a
2 dispositive provision for the trustee is conditional on the person performing services as trustee. *See*
3 Restatement (Third) of Trusts § 38 cmt. e (Tentative Draft No.2, approved 1999); Restatement
4 (Second) of Trusts § 242 cmt. f (1959).

5 Compensation may be set by agreement. A trustee may enter into an agreement with the
6 beneficiaries for lesser or increased compensation, although an agreement increasing compensation
7 is not binding on a nonconsenting beneficiary. *See* Section 111(d) (matters that may be resolved
8 by nonjudicial settlement). *See also* Restatement (Third) of Trusts § 38 cmt. f (Tentative Draft No.
9 2, approved 1999); Restatement (Second) of Trusts § 242 cmt. i (1959). A trustee may also agree
10 to waive compensation and should do so prior to rendering significant services if concerned about
11 possible gift and income taxation of the compensation accrued prior to the waiver. *See* Rev. Rul.
12 66-167, 1966-1 C.B. 20. *See also* Restatement (Third) of Trusts § 38 cmt. g (Tentative Draft No.
13 2, approved 1999); Restatement (Second) of Trusts § 242 cmt. j (1959).

14 Section 816(15) grants the trustee authority to fix and pay its compensation without the
15 necessity of prior court review, subject to the right of a beneficiary to object to the compensation
16 in a later judicial proceeding. Allowing the trustee to pay its compensation without prior court
17 approval promotes efficient trust administration but does place a significant burden on a beneficiary
18 who believes the compensation is unreasonable. To provide a beneficiary with time to take action,
19 and because of the importance of trustee's fees to the beneficiaries' interests, Section 813(b)(4)
20 requires a trustee to provide the qualified beneficiaries with advance notice of any change in the
21 method or rate of the trustee's compensation. Failure to provide such advance notice constitutes a
22 breach of trust, which, if sufficiently serious, would justify the trustee's removal under Section 706.

23 Under Sections 501-502 of the Uniform Principal and Income Act (1997), one-half of a
24 trustee's regular compensation is charged to income and the other half to principal. Chargeable to
25 principal are fees for acceptance, distribution, or termination of the trust, and fees charged on
26 disbursements made to prepare property for sale.

27 **SECTION 709. REIMBURSEMENT OF EXPENSES.**

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

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

31 (2) to the extent necessary to prevent unjust enrichment of the trust, expenses

1 that were not properly incurred in the administration of the trust.

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

4 **Kansas Comment**

5 Subsection (a)(1) conforms to Kansas law. See K.S.A. 59-1717 (trustee shall be
6 allowed his or her necessary expenses incurred in the execution of the trust); *Morrison v. Watkins*,
7 20 Kan. App. 2d 411, Syl. 12, 889 P.2d 140 (1995) (award of costs is mandatory, conditioned upon
8 good faith of trustee).
9

10 Subsection (a)(2) is new. The Kansas Court of Appeals has held that a trustee may
11 recover expenses incurred in successfully defending actions taken while trustee although he is no
12 longer a trustee when the expenses are incurred. *Morrison*, 20 Kan. App. 2d 411, Syl. 11. See also
13 *Jennings v. Murdock*, 220 Kan. 182, Syl. 16, 553 P.2d 846 (1976) (trustee who successfully defends
14 itself against efforts to remove it is entitled to be reimbursed from the trust estate for the expenses
15 of making its defense).

16 Subsection (b) is codified in K.S.A. 58-1203(c)(18).

17 **UTC Comment**

18 A trustee has the authority to expend trust funds as necessary in the administration of the
19 trust, including expenses incurred in the hiring of agents. See Sections 807 (delegation by trustee)
20 and 816(15) (trustee to pay expenses of administration from trust).

21 Subsection (a)(1) clarifies that a trustee is entitled to reimbursement from the trust for
22 incurring expenses within the trustee's authority. The trustee may also withhold appropriate
23 reimbursement for expenses before making distributions to the beneficiaries. See Restatement
24 (Third) of Trusts § 38 cmt. b (Tentative Draft No. 2, approved 1999); Restatement (Second) of
25 Trusts § 244 cmt. b (1959). A trustee is ordinarily not entitled to reimbursement for incurring
26 unauthorized expenses. Such expenses are normally the personal responsibility of the trustee.

27 As provided in subsection (a)(2), a trustee is entitled to reimbursement for unauthorized
28 expenses only if the unauthorized expenditures benefitted the trust. The purpose of this provision,
29 which is derived from Restatement (Second) of Trusts § 245 (1959), is not to ratify the unauthorized
30 conduct of the trustee, but to prevent unjust enrichment of the trust. Given this purpose, a court, on
31 appropriate grounds, may delay or even deny reimbursement for expenses which benefitted the trust.
32 Appropriate grounds include: (1) whether the trustee acted in bad faith in incurring the expense; (2)
33 whether the trustee knew that the expense was inappropriate; (3) whether the trustee reasonably
34 believed the expense was necessary for the preservation of the trust estate; (4) whether the expense
35 has resulted in a benefit; and (5) whether indemnity can be allowed without defeating or impairing

1 the purposes of the trust. *See* Restatement (Second) of Trusts § 245 cmt. g (1959).

2 Subsection (b) implements Section 802(h)(5), which creates an exception to the duty of
3 loyalty for advances by the trustee for the protection of the trust if the transaction is fair to the
4 beneficiaries.

5
6 Reimbursement under this section may include attorney's fees and expenses incurred by the
7 trustee in defending an action. However, a trustee is not ordinarily entitled to attorney's fees and
8 expenses if it is determined that the trustee breached the trust. *See* 3A Austin W. Scott & William
9 F. Fratcher, *The Law of Trusts* § 245 (4th ed. 1988).

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);
33 *Dinsmoor v. Hill*, 164 Kan. 12, 15, 187 P.2d 338 (1947) (trustee is held in equity and good

1 conscience to the exercise of good faith which requires him to act with due regard to the interests
2 of the beneficiaries).

3 **UTC Comment**

4 This section confirms that a primary duty of a trustee is to follow the terms and purposes of
5 the trust and to do so in good faith. Only if the terms of a trust are silent or for some reason invalid
6 on a particular issue does this Code govern the trustee's duties. This section also confirms that a
7 trustee does not have a duty to act until the trustee has accepted the trusteeship. For the procedure
8 for accepting a trusteeship, see Section 701.

9 In administering the trust, the trustee must not only comply with this section but also with
10 the other duties specified in this article, particularly the obligation not to place the interests of others
11 above those of the beneficiaries (Section 802), the duty to act with prudence (Section 804), and the
12 duty to keep the qualified beneficiaries reasonably informed about the administration of the trust
13 (Section 813).

14 While a trustee generally must administer a trust in accordance with its terms and purposes,
15 the purposes and particular terms of the trust can on occasion conflict. If such a conflict occurs
16 because of circumstances not anticipated by the settlor, it may be appropriate for the trustee to
17 petition under Section 412 to modify or terminate the trust. Pursuant to Section 404, the trustee is
18 not required to perform a duty prescribed by the terms of the trust if performance would be
19 impossible, illegal or contrary to public policy.

20 For background on the trustee's duty to administer the trust, see Restatement (Second) of
21 Trusts §§ 164-169 (1959).
22

23 **SECTION 802. DUTY OF LOYALTY.**

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

25 (b) Subject to the rights of persons dealing with or assisting the trustee as provided
26 in Section 1012, a sale, encumbrance, or other transaction involving the investment or management
27 of trust property entered into by the trustee for the trustee's own personal account or which is
28 otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by
29 a beneficiary affected by the transaction unless:

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

- 1 (2) the transaction was approved by the court;
- 2 (3) the beneficiary did not commence a judicial proceeding within the time
- 3 allowed by Section 1005;
- 4 (4) the beneficiary consented to the trustee's conduct, ratified the transaction,
- 5 or released the trustee in compliance with Section 1009; or
- 6 (5) the transaction involves a contract entered into or claim acquired by the
- 7 trustee before the person became or contemplated becoming trustee.

8 (c) A sale, encumbrance, or other transaction involving the investment or

9 management of trust property is presumed to be affected by a conflict between personal and

10 fiduciary interests if it is entered into by the trustee with:

- 11 (1) the trustee's spouse;
- 12 (2) the trustee's descendants, siblings, parents, or their spouses;
- 13 (3) an agent or attorney of the trustee; or
- 14 (4) a corporation or other person or enterprise in which the trustee, or a person
- 15 that owns a significant interest in the trustee, has an interest that might affect the trustee's best
- 16 judgment.

17 (d) A transaction between a trustee and a beneficiary that does not concern trust

18 property but that occurs during the existence of the trust or while the trustee retains significant

19 influence over the beneficiary and from which the trustee obtains an advantage is voidable by the

20 beneficiary unless the trustee establishes that the transaction was fair to the beneficiary.

21 (e) A transaction not concerning trust property in which the trustee engages in the

22 trustee's individual capacity involves a conflict between personal and fiduciary interests if the

1 transaction concerns an opportunity properly belonging to the trust.

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

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

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

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

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

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

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

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

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

4 **Kansas Comment**

5 Subsection (a) conforms to Kansas law. See *Gillespie v. Seymour*, 19 Kan.App.2d 754, 766-
6 67, 876 P.2d 193, *rev. denied* 255 Kan. 1001 (1994), quoting Restatement (Second) of Trusts §
7 170(1) (1957) (trustee under duty to beneficiary to administer trust solely in beneficiary's interest);
8 *Merchant v. Foreman*, 182 Kan. 550, 556, 322 P.2d 740 (1958) (trustee has duty of loyalty to
9 beneficiary); K.S.A. 58-1205 (trustee must conduct transactions in best interests of trust and not
10 favor himself or others); K.S.A. 59-1703 (trustee may not profit from trust).

11 Subsections (b) and (c) are apparently new as applied to trustees. K.S.A. 59-1703 contains
12 similar, but not identical, provisions for transactions with personal representatives. Additionally,
13 K.S.A. 58-1205 allows a trustee to exercise a power involving a conflict of interest only by court
14 authorization. The Kansas Supreme Court has recognized that conflicts known to the settlor when
15 naming the trustee are generally regarded as not affording grounds for removal. *Jennings v.*
16 *Murdock*, 220 Kan. 182, 212, 553 P.2d 846 (1976).

17 Subsection (d) generally conforms to Kansas law. See *Nelson v. Gossage*, 152 Kan. 805,
18 808, 107 P.2d 682 (1940) (in dealing with a beneficiary on his own account, a fiduciary has a duty
19 to the beneficiary to deal fairly with him and communicate to him all material facts).

20 Subsection (e) is consistent with Kansas law. See *Rathbun v. Hill*, 187 Kan. 130, 144, 354
21 P.2d 338 (1960) (trustee must not permit his personal interest to conflict in any way with duty to
22 protect interest of trust estate).

23 Subsection (f) is new.

24 Subsection (g) generally conforms to Kansas law. See K.S.A. 58-1203(b) and (c)(13)
25 (trustee has duty to act with due regard to fiduciary obligation in voting securities). The second
26 sentence is new.

27 Subsection (h) generally conforms to Kansas law. See *Nelson*, 152 Kan. at 808-09 (where
28 beneficiary enters into transaction with fiduciary relating to matters within scope of fiduciary
29 relation, transaction is voidable unless it is fair and reasonable and made with consent by beneficiary
30 upon full disclosure).

31 Subsections (h)(1) and (2) conform to Kansas law. See *Beltz v. Griggs*, 137 Kan. 429, 435,
32 20 P.2d 510 (1933) (no violation of trust where, as part of declaration of trust, compensation of
33 trustee is provided for and fixed); K.S.A. 59-1717 (trustee shall receive reasonable compensation

1 for services).

2 Subsection (h)(3) is new, although K.S.A. 58-1203(4) grants the trustee power “to acquire
3 an undivided interest in a trust asset in which the trustee, in any trust capacity, holds an undivided
4 interest.”

5 Subsection (h)(4) conforms to Kansas law. See K.S.A. 58-1203(c)(6) (trustee has authority
6 to deposit trust funds at bank operated by trustee).

7 Subsection (h)(5) conforms to Kansas law. See K.S.A. 58-1203(c)(18) (trustee has power
8 to advance money for the protection of the trust).

9 Subsection (i) is new.

10 **UTC Comment**

11 This section addresses the duty of loyalty, perhaps the most fundamental duty of the trustee.
12 Subsection (a) states the general principle, which is copied from Restatement (Second) of Trusts
13 § 170(1) (1959). A trustee owes a duty of loyalty to the beneficiaries, a principle which is
14 sometimes expressed as the obligation of the trustee not to place the trustee’s own interests over
15 those of the beneficiaries. Most but not all violations of the duty of loyalty concern transactions
16 involving the trust property, but breaches of the duty can take other forms. For a discussion of the
17 different types of violations, see George G. Bogert & George T. Bogert, *The Law of Trusts and*
18 *Trustees* § 543 (Rev. 2d ed. 1993); and 2A Austin W. Scott & William F. Fratcher, *The Law of*
19 *Trusts* §§ 170-170.24 (4th ed. 1987). The “interests of the beneficiaries” to which the trustee must
20 be loyal are the beneficial interests as provided in the terms of the trust. *See* Section 103(7).

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

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

33 Subsection (b) states the general rule with respect to transactions involving trust property
34 that are affected by a conflict of interest. A transaction affected by a conflict between the trustee’s
35 fiduciary and personal interests is voidable by a beneficiary who is affected by the transaction.

1 Subsection (b) carries out the “no further inquiry” rule by making transactions involving trust
2 property entered into by a trustee for the trustee’s own personal account voidable without further
3 proof. Such transactions are irrebuttably presumed to be affected by a conflict between personal and
4 fiduciary interests. It is immaterial whether the trustee acts in good faith or pays a fair
5 consideration. *See* Restatement (Second) of Trusts § 170 cmt. b (1959).

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

15 Even where the presumption under subsection (c) does not apply, a transaction may still be
16 voided by a beneficiary if the beneficiary proves that a conflict between personal and fiduciary
17 interests existed and that the transaction was affected by the conflict. The right of a beneficiary to
18 void a transaction affected by a conflict of interest is optional. If the transaction proves profitable
19 to the trust and unprofitable to the trustee, the beneficiary will likely allow the transaction to stand.
20 For a comparable provision regulating fiduciary investments by national banks, see 12 C.F.R.
21 § 9.12(a).

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

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

36 Subsection (d) creates a presumption that a transaction between a trustee and a beneficiary
37 not involving trust property is an abuse by the trustee of a confidential relationship with the
38 beneficiary. This subsection has limited scope. If the trust has terminated, there must be proof that
39 the trustee’s influence with the beneficiary remained. Furthermore, whether or not the trust has

1 terminated, there must be proof that the trustee obtained an advantage from the relationship. The
2 fact the trustee profited is insufficient to show an abuse if a third party would have similarly profited
3 in an arm's length transaction. Subsection (d) is based on Cal. Prob. Code §16004(c). *See also* 2A
4 Austin W. Scott & William F. Fratcher § 170.25 (4th ed. 1987), which states the same principle in
5 a slightly different form: "Where he deals directly with the beneficiaries, the transaction may stand,
6 but only if the trustee makes full disclosure and takes no advantage of his position and the
7 transaction is in all respects fair and reasonable."

8 Subsection (e), which allows a beneficiary to void a transaction entered into by the trustee
9 that involved an opportunity belonging to the trust, is based on Restatement (Second) of Trusts § 170
10 cmt. k (1959). While normally associated with corporations and with their directors and officers,
11 what is usually referred to as the corporate opportunity doctrine also applies to other types of
12 fiduciary. The doctrine prohibits the trustee's pursuit of certain business activities, such as entering
13 into a business in direct competition with a business owned by the trust, or the purchasing of an
14 investment that the facts suggest the trustee was expected to purchase for the trust. For discussion
15 of the corporate opportunity doctrine, see Kenneth B. Davis, Jr., *Corporate Opportunity and*
16 *Comparative Advantage*, 84 Iowa L. Rev. 211 (1999); and Richard A. Epstein, *Contract and Trust*
17 *in Corporate Law: The Case of Corporate Opportunity*, 21 Del. J. Corp. L. 5 (1996). *See also*
18 *Principles of Corporate Governance: Analysis and Recommendations* § 5.05 (American Law Inst.
19 1994).

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

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

1 Subsection (f) attempts to retain the advantages of mutual funds while at the same time
2 making clear that such investments are subject to traditional fiduciary responsibilities. Nearly all
3 of the States have enacted statutes authorizing trustees to invest in funds from which the trustee
4 might derive additional compensation. Portions of subsection (f) are based on these statutes.
5 Subsection (f) makes clear that such dual investment-fee arrangements are not automatically
6 presumed to involve a conflict between the trustee's personal and fiduciary interests, but subsection
7 (f) does not otherwise waive or lessen a trustee's fiduciary obligations. The trustee, in deciding
8 whether to invest in a mutual fund, must not place its own interests ahead of those of the
9 beneficiaries. The investment decision must also comply with the enacting jurisdiction's prudent
10 investor rule. To obtain the protection afforded by subsection (f), the trustee must disclose at least
11 annually to the beneficiaries entitled to receive a copy of the trustee's annual report the rate and
12 method by which the additional compensation was determined. Furthermore, the selection of a
13 mutual fund, and the resulting delegation of certain of the trustee's functions, may be taken into
14 account under Section 708 in setting the trustee's regular compensation. *See also* Uniform Prudent
15 Investor Act §§ 7 and 9 and Comments; Restatement (Third) of Trusts: Prudent Investor Rule § 227
16 cmt. m (1992).

17 Subsection (f) applies whether the services to the fund are provided directly by the trustee
18 or by an affiliate. While the term "affiliate" is not used in subsection (c), the individuals and entities
19 listed there are examples of affiliates. The term is also used in the regulations under ERISA. An
20 "affiliate" of a fiduciary includes (1) any person who directly or indirectly, through one or more
21 intermediaries, controls, is controlled by, or is under common control with the fiduciary; (2) any
22 officer, director, partner, employee, or relative of the fiduciary, and any corporation or partnership
23 of which the fiduciary is an officer, director or partner. *See* 29 C.F.R. § 2510.3-21(e).

24 Subsection (g) addresses an overlap between trust and corporate law. It is based on
25 Restatement of Trusts (Second) § 193 cmt. a (1959), which provides that "[i]t is the duty of the
26 trustee in voting shares of stock to use proper care to promote the interest of the beneficiary," and
27 that the fiduciary responsibility of a trustee in voting a control block "is heavier than where he holds
28 only a small fraction of the shares." Similarly, the Department of Labor construes ERISA's duty of
29 loyalty to make share voting a fiduciary function. *See* 29 C.F.R. §2509.94-2. When the trust owns
30 the entirety of the shares of a corporation, the corporate assets are in effect trust assets that the
31 trustee determines to hold in corporate form. The trustee may not use the corporate form to escape
32 the fiduciary duties of trust law. Thus, for example, a trustee whose duty of impartiality would
33 require the trustee to make current distributions for the support of current beneficiaries may not
34 evade that duty by holding assets in corporate form and pleading the discretion of corporate directors
35 to determine dividend policy. Rather, the trustee must vote for corporate directors who will follow
36 a dividend policy consistent with the trustee's trust-law duty of impartiality.

37 Subsection (h) contains several exceptions to the general duty of loyalty, which apply if the
38 transaction was fair to the beneficiaries. Subsection (h)(1)-(2) clarify that a trustee is free to contract
39 about the terms of appointment and rate of compensation. Consistent with Restatement (Second)
40 of Trusts § 170 cmt. r (1959), subsection (h)(3) authorizes a trustee to engage in a transaction

1 The duty to act impartially does not mean that the trustee must treat the beneficiaries equally.
2 Rather, the trustee must treat the beneficiaries equitably in light of the purposes and terms of the
3 trust. A settlor who prefers that the trustee, when making decisions, generally favor the interests of
4 one beneficiary over those of others should provide appropriate guidance in the terms of the trust.
5 *See* Restatement (Second) of § 183 cmt. a (1959).
6

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

11 **Kansas Comment**

12 This section conforms to Kansas law. See K.S.A. 58-1202(c) (unless trust instrument states
13 otherwise, prudent investor rule is standard for exercise of trustee powers); *Pizel v. Whalen*, 252
14 Kan. 384, 390, 845 P.2d 37 (1993) (standard of care, diligence, and skill required of trustee in the
15 administration of the trust estate is that of a prudent man).

16 **UTC Comment**

17 The duty to administer a trust with prudence is a fundamental duty of the trustee. This duty
18 does not depend on whether the trustee receives compensation. The duty may be altered by the
19 terms of the trust. *See* Section 105. This section is similar to Section 2(a) of the Uniform Prudent
20 Investor Act and Restatement (Third) of Trusts: Prudent Investor Rule § 227 (1992).

21 The language of this section diverges from the language of the previous Restatement. The
22 prior Restatement can be read as applying the same standard – “man of ordinary prudence would
23 exercise in dealing with his own property” – regardless of the type or purposes of the trust. *See*
24 Restatement (Second) of Trusts § 174 cmt. a (1959). This section appropriately bases the standard
25 on the purposes and other circumstances of the particular trust.

26 A settlor who wishes to modify the standard of care specified in this section is free to do so,
27 but there is a limit. Section 1008 prohibits a settlor from exculpating a trustee from liability for
28 breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or
29 to the interests of the beneficiaries.
30

31 **SECTION 805. COSTS OF ADMINISTRATION.** In administering a trust, the trustee

1 may incur only costs that are reasonable in relation to the trust property, the purposes of the trust,
2 and the skills of the trustee.

3 **Kansas Comment**

4 This section conforms to Kansas law. See K.S.A. 17-5004(a)(1)(F) (refers to trustee’s duty to incur
5 only reasonable and appropriate costs); K.S.A. 59-1717 (trustee allowed his or her “necessary
6 expenses”); *In re Heck*, 22 Kan. App. 2d 135, Syl. 8, 913 P.2d 213 (1996) (fiduciary expenses must
7 be reasonable).

8 **UTC Comment**

9 This section is similar to Section 7 of the Uniform Prudent Investor Act and is consistent
10 with the rules concerning costs in Restatement (Third) of Trusts: Prudent Investor Rule § 227(c)(3)
11 (1992). For related rules concerning compensation and reimbursement of trustees, see Sections 708
12 and 709. The duty not to incur unreasonable costs applies when a trustee decides whether and how
13 to delegate to agents, as well as to other aspects of trust administration. In deciding whether and
14 how to delegate, the trustee must be alert to balancing projected benefits against the likely costs.
15 To protect the beneficiary against excessive costs, the trustee should also be alert to adjusting
16 compensation for functions which the trustee has delegated to others. The obligation to incur only
17 necessary or appropriate costs of administration has long been part of the law of trusts. *See*
18 *Restatement (Second) of Trusts* § 188 (1959).

19
20 **SECTION 806. TRUSTEE’S SKILLS.** A trustee who has special skills or expertise, or
21 is named trustee in reliance upon the trustee’s representation that the trustee has special skills or
22 expertise, shall use those special skills or expertise.

23 **Kansas Comment**

24 This rule was recognized in *In re Estate of Maxedon*, 24 Kan. App. 2d 427, 434-36, 946 P.2d 104
25 (1997).

26 The Uniform Transfers to Minors Act contains a similar provision. See K.S.A. 38-1713(b).

27 **UTC Comment**

28 This section is similar to Section 7-302 of the Uniform Probate Code, Restatement (Second)
29 of Trusts § 174 (1959), and Section 2(f) of the Uniform Prudent Investor Act.

1 Subsection (a), prior to its amendment, and subsections (c) through (e) are nearly identical
2 to parts of K.S.A. 58-24a09. The committee is of the opinion that the overlap does not create a
3 problem.

4 K.S.A. 58-24a09 (a)(3) requires notice of intention to begin delegating investment functions.
5 Section 109 is the Kansas Uniform Trust Code section relating to notice.

6 **UTC Comment**

7 This section permits trustees to delegate various aspects of trust administration to agents,
8 subject to the standards of the section. The language is derived from Section 9 of the Uniform
9 Prudent Investor Act. *See also* John H. Langbein, *Reversing the Nondelegation Rule of Trust-*
10 *Investment Law*, 59 Mo. L. Rev. 105 (1994) (discussing prior law).

11 This section encourages and protects the trustee in making delegations appropriate to the
12 facts and circumstances of the particular trust. Whether a particular function is delegable is based
13 on whether it is a function that a prudent trustee might delegate under similar circumstances. For
14 example, delegating some administrative and reporting duties might be prudent for a family trustee
15 but unnecessary for a corporate trustee.

16 This section applies only to delegation to agents, not to delegation to a cotrustee. For the
17 provision regulating delegation to a cotrustee, see Section 703(e).

18 **SECTION 808. POWERS TO DIRECT.**

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

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

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

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

5 **Kansas Comment**

6 Subsection (a) generally conforms to Kansas law, although K.S.A. 17-5004(d) requires the
7 directions to be in writing.

8 Subsection (b) is consistent with K.S.A. 58-1206(c), which requires the trustee of any trust
9 instrument to exercise due diligence in the safekeeping of trust property when carrying out a power
10 to direct. On the other hand, this subsection conflicts with K.S.A. 17-5004(b), which authorizes the
11 trustee of a revocable trust to follow a power to direct regardless of any fiduciary duties to which
12 the directing party may be subject.

13 Subsection (c) is new, although K.S.A. 58-1206(c) recognizes that the trust instrument may
14 confer upon another person the authority to direct the management and administration of the trust.

15 Subsection (d) is new.

16 **UTC Comment**

17 Subsection (a) is an application of Section 603(a), which provides that a revocable trust is
18 subject to the settlor's exclusive control as long as the settlor has capacity. Because of the settlor's
19 degree of control, subsection (a) of this section authorizes a trustee to rely on a written direction
20 from the settlor even if it is contrary to the terms of the trust. The written direction of the settlor
21 might be regarded as an amendment of the trust. Subsection (a) has limited application upon a
22 settlor's incapacity. An agent, conservator, or guardian has authority to give the trustee instructions
23 contrary to the terms of the trust only if the agent, conservator, or guardian succeeds to the settlor's
24 powers with respect to revocation, amendment, or distribution as provided in Section 602(e).

25 Subsections (b)-(d) ratify the use of trust protectors and advisers. Subsections (b) and (d)
26 are based in part on Restatement (Second) of Trusts § 185 (1959). Subsection (c) is similar to
27 Restatement (Third) of Trusts § 64(2) (Tentative Draft No. 3, 2001). "Advisers" have long been
28 used for certain trustee functions, such as the power to direct investments or manage a closely-held
29 business. "Trust protector," a term largely associated with offshore trust practice, is more recent and
30 usually connotes the grant of greater powers, sometimes including the power to amend or terminate
31 the trust. Subsection (c) ratifies the recent trend to grant third persons such broader powers.

32 A power to direct must be distinguished from a veto power. A power to direct involves

1 action initiated and within the control of a third party. The trustee usually has no responsibility other
2 than to carry out the direction when made. But if a third party holds a veto power, the trustee is
3 responsible for initiating the decision, subject to the third party's approval. A trustee who
4 administers a trust subject to a veto power occupies a position akin to that of a cotrustee and is
5 responsible for taking appropriate action if the third party's refusal to consent would result in a
6 serious breach of trust. *See* Restatement (Second) of Trusts § 185 cmt. g (1959); Section
7 703(g)(duties of cotrustees).

8 Frequently, the person holding the power is directing the investment of the holder's own
9 beneficial interest. Such self-directed accounts are particularly prevalent among trusts holding
10 interests in employee benefit plans or individual retirement accounts. *See* ERISA § 404(c) (29
11 U.S.C. § 1104(c)). But for the type of donative trust which is the primary focus of this Code, the
12 holder of the power to direct is frequently acting on behalf of others. In that event and as provided
13 in subsection (d), the holder is presumptively acting in a fiduciary capacity with respect to the
14 powers granted and can be held liable if the holder's conduct constitutes a breach of trust, whether
15 through action or inaction. Like a trustee, liability cannot be imposed if the holder has not accepted
16 the grant of the power either expressly or informally through exercise of the power. *See* Section
17 701.

18 Powers to direct are most effective when the trustee is not deterred from exercising the
19 power by fear of possible liability. On the other hand, the trustee does have overall responsibility
20 for seeing that the terms of the trust are honored. For this reason, subsection (b) imposes only
21 minimal oversight responsibility on the trustee. A trustee must generally act in accordance with the
22 direction. A trustee may refuse the direction only if the attempted exercise would be manifestly
23 contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a
24 serious breach of a fiduciary duty owed by the holder of the power to the beneficiaries of the trust.

25 The provisions of this section may be altered in the terms of the trust. *See* Section 105. A
26 settlor can provide that the trustee must accept the decision of the power holder without question.
27 Or a settlor could provide that the holder of the power is not to be held to the standards of a
28 fiduciary. A common technique for assuring that a settlor continues to be taxed on all of the income
29 of an irrevocable trust is for the settlor to retain a nonfiduciary power of administration. *See* I.R.C.
30 § 675(4).

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

33 **Kansas Comment**

34 This section generally conforms to Kansas law. *See* K.S.A. 58-1206(c) (trustee having custody of
35 any asset is required to exercise due diligence in the safekeeping thereof). *See* also K.S.A. 58-
36 1203(c)(1) (trustee has power to collect and hold trust property).

37 **UTC Comment**

1 This section codifies the substance of Sections 175 and 176 of the Restatement (Second) of
2 Trusts (1959). The duty to take control of and safeguard trust property is an aspect of the trustee's
3 duty of prudent administration as provided in Section 804. See also Sections 816(1) (power to
4 collect trust property), 816(11) (power to insure trust property), and 816(12) (power to abandon trust
5 property). The duty to take control normally means that the trustee must take physical possession
6 of tangible personal property and securities belonging to the trust, and must secure payment of any
7 choses in action. See Restatement (Second) of Trusts § 175 cmt. a, c and d (1959). This section,
8 like the other sections in this part, is subject to alteration by the terms of the trust. See Section 105.
9 For example, the settlor may provide that the spouse may occupy the settlor's former residence rent
10 free, in which event the spouse's occupancy would prevent the trustee from taking possession.

11 **SECTION 810. RECORDKEEPING AND IDENTIFICATION OF TRUST**
12 **PROPERTY.**

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

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

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

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

20 **Kansas Comment**

21 Subsection (a) conforms to Kansas law. See generally *Boyer v. Day*, 132 Kan. 722, 297 P.
22 432 (1931) (fiduciary must keep such account of funds as will enable him to render account to
23 ultimate beneficiary); K.S.A. 59-1601 *et seq.* (accounting of trustees).

24 Subsection (b) conforms to Kansas law. See *In re Rutherford's Estate*, 154 Kan. 361, 118
25 P.2d 553 (1941) (trustee has duty not to mingle trust funds with his own funds).

26 Subsections (c) and (d) are new.

27 The Uniform Transfers to Minors Act contains a similar provision. See K.S.A. 38-1713(d)
28 and (e).

1 **UTC Comment**

2 The duty to keep adequate records stated in subsection (a) is implicit in the duty to act with
3 prudence (Section 804) and the duty to report to beneficiaries (Section 813). For an application,
4 see *Green v. Lombard*, 343 A. 2d 905, 911 (Md. Ct. Spec. App. 1975). See also Restatement
5 (Second) of Trusts §§ 172, 174 (1959).

6 The duty to earmark trust assets and the duty of a trustee not to mingle the assets of the trust
7 with the trustee's own are closely related. Subsection (b), which addresses the duty not to mingle,
8 is derived from Section 179 of the Restatement (Second) of Trusts (1959). Subsection (c) makes
9 the requirement that assets be earmarked more precise than that articulated in Restatement (Second)
10 § 179 by requiring that the interest of the trust must appear in the records of a third party, such as
11 a bank, brokerage firm, or transfer agent. Because of the serious risk of mistake or misappropriation
12 even if disclosure is made to the beneficiaries, showing the interest of the trust solely in the trustee's
13 own internal records is insufficient. Section 816(7)(B), which allows a trustee to hold securities in
14 nominee form, is not inconsistent with this requirement. While securities held in nominee form are
15 not specifically registered in the name of the trustee, they are properly earmarked because the
16 trustee's holdings are indicated in the records maintained by an independent party, such as in an
17 account at a brokerage firm.

18 Earmarking is not practical for all types of assets. With respect to assets not subject to
19 registration, such as tangible personal property and bearer bonds, arranging for the trust's ownership
20 interest to be reflected on the records of a third-party custodian would not be feasible. For this
21 reason, subsection (c) waives separate recordkeeping for these types of assets. Under subsection (b),
22 however, the duty of the trustee not to mingle these or any other trust assets with the trustee's own
23 remains absolute.

24 Subsection (d), following the lead of a number of state statutes, allows a trustee to use the
25 property of two or more trusts to make joint investments, even though under traditional principles
26 a joint investment would violate the duty to earmark. A joint investment frequently is more
27 economical than attempting to invest the funds of each trust separately. Also, the risk of
28 misappropriation or mistake is less when the trust property is invested jointly with the property of
29 another trust than when pooled with the property of the trustee or other person.

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

32 **Kansas Comment**

33 This section is new, although consistent with Kansas law. See K.S.A. 58-1203(c)(25)
34 (trustee has power to prosecute and defend claims); K.S.A. 59-1703 (trustee liable for neglect or
35 unreasonable delay in collecting debts); K.S.A. 59-1714 (if in best interests of estate, trustee may,

1 on court order, effect a fair and reasonable compromise with any debtor).

2
3 **UTC Comment**
4

5 This section codifies the substance of Sections 177 and 178 of the Restatement (Second) of
6 Trusts (1959). It may not be reasonable to enforce a claim depending upon the likelihood of
7 recovery and the cost of suit and enforcement. It might also be reasonable to settle an action or
8 suffer a default rather than to defend an action. *See also* Section 816(14) (power to pay, contest,
9 settle, or release claims).

10 **SECTION 812. COLLECTING TRUST PROPERTY.** A trustee shall take reasonable

11 steps to compel a former trustee or other person to deliver trust property to the trustee, and to redress
12 a breach of trust known to the trustee to have been committed by a former trustee.

13 **Kansas Comment**

14 This specific provision is new, although consistent with Kansas law. K.S.A. 59-1710 provides that
15 the liability of a former trustee previously incurred is not affected by his or her resignation and the
16 appointment of another trustee. K.S.A. 58-1203(c)(25) gives the trustee power to prosecute claims
17 for the protection of trust property.

18 In *In re Trusteeship of Prager*, 106 Kan. 14, 186 P.2d 1015 (1920), the Kansas Supreme
19 Court held the duty to sue a former trustee depends upon the circumstances, such as whether
20 anything may be gained by suit.

21 **UTC Comment**

22 This section is a specific application of Section 811 on the duty to enforce claims, which
23 includes a claim for trust property held by a former trustee or others, and a claim against a
24 predecessor trustee for breach of trust. The duty imposed by this section is not absolute. Pursuit of
25 a claim is not required if the amount of the claim, costs of suit and enforcement, and likelihood of
26 recovery, make such action uneconomic. Unlike Restatement (Second) of Trusts § 223 (1959), this
27 section only requires a successor trustee to redress breaches of trust “known” to have been
28 committed by the predecessor. For the definition of “know,” see Section 104. Limiting the
29 successor’s obligation to known breaches is a common feature of state trust statutes. *See, e.g.,* Mo.
30 Rev. Stat. § 456.187.2.

31 As authorized by Section 1009, the beneficiaries may relieve the trustee from potential
32 liability for failing to pursue a claim against a predecessor trustee or other person holding trust
33 property. The obligation to pursue a successor trustee can also be addressed in the terms of the trust.

1 *See* Section 105.

2 **SECTION 813. DUTY TO INFORM AND REPORT.**

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

7 (b) A trustee:

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

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

12 (3) within 60 days after the date the trustee acquires knowledge of the creation
13 of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has
14 become irrevocable, whether by the death of the settlor or otherwise, shall notify the qualified
15 beneficiaries of the trust's existence, of the identity of the settlor or settlors, of the right to request
16 a copy of the trust instrument, and of the right to a trustee's report as provided in subsection (c); and

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

19 (c) A trustee shall send to the distributees or permissible distributees of trust income
20 or principal, and to other qualified or nonqualified beneficiaries who request it, at least annually and
21 at the termination of the trust, a report of the trust property including its rate of return, liabilities,
22 receipts, and disbursements, including the source and amount of the trustee's compensation, a listing

1 of the trust assets and, if feasible, their respective market values. Upon a vacancy in a trusteeship,
2 unless a cotrustee remains in office, a report must be sent to the qualified beneficiaries by the former
3 trustee. A personal representative, [conservator], or [guardian] may send the qualified beneficiaries
4 a report on behalf of a deceased or incapacitated trustee.

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

8 **Kansas Comment**

9 Subsection (a) is new, although generally consistent with Kansas law. See K.S.A. 59-1609
10 (nothing shall prevent trustee from accounting voluntarily when reasonably necessary); K.S.A. 59-
11 1609 (court has power to require trustee to give the beneficiaries information or the privilege of
12 inspecting trust records); *In re Rutherford’s Estate*, 154 Kan. 361, 118 P.2d 553 (1941) (trustee has
13 duty to keep clear and accurate accounts respecting administration of the trust).

14 Subsection (b) is new. Kansas law requires certain trustees to file an inventory with the court
15 within 30 days after such trustee is required to take possession of the trust property. K.S.A. 59-
16 1601; K.S.A. 59-1605. K.S.A. 59-1605 also requires the trustee of a trust in favor of persons subject
17 to conservatorship to file a notice of appointment as trustee and a list of beneficiaries with the court.

18 Subsection (c) modifies Kansas law. K.S.A. 59-1602 *et seq.* requires the trustee to file
19 accountings with the court unless waived by the testator, settlor or beneficiary. Final reports must
20 also be filed with the court. K.S.A. 59-1709 (trustee must file final account upon resignation);
21 K.S.A. 59-1712 (trustee’s personal representative must file final account upon death or incapacity
22 of a sole or last surviving trustee).

23 In subsection (c), the Kansas drafting committee changed the UTC by adding the phrase,
24 “including its rate of return.”

25 Subsection (d) is new, although generally consistent with Kansas law. K.S.A. 59-1608
26 allows a beneficiary to waive the statutory accounting requirements subject to court approval.
27

28 **UTC Comment**

29 The duty to keep the beneficiaries reasonably informed of the administration of the trust is
30 a fundamental duty of a trustee. For the common law duty to keep the beneficiaries informed, see
31 Restatement (Second) of Trusts § 173 (1959). This section makes the duty to keep the beneficiaries

1 informed more precise by limiting it to the qualified beneficiaries. For the definition of qualified
2 beneficiary, see Section 103(12). The result of this limitation is that the information need not be
3 furnished to beneficiaries with remote remainder interests unless they have filed a specific request
4 with the trustee. *See* Section 110(a) (request for notice).

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

7 The trustee is under a duty to communicate to a qualified beneficiary information about the
8 administration of the trust that is reasonably necessary to enable the beneficiary to enforce the
9 beneficiary's rights and to prevent or redress a breach of trust. *See* Restatement (Second) of Trusts
10 § 173 cmt. c (1959). Ordinarily, the trustee is not under a duty to furnish information to a
11 beneficiary in the absence of a specific request for the information. *See* Restatement (Second) of
12 Trusts § 173 cmt. d (1959). Thus, the duty articulated in subsection (a) is ordinarily satisfied by
13 providing the beneficiary with a copy of the annual report mandated by subsection (c). However,
14 special circumstances may require that the trustee provide additional information. For example, if
15 the trustee is dealing with the beneficiary on the trustee's own account, the trustee must
16 communicate material facts relating to the transaction that the trustee knows or should know. *See*
17 Restatement (Second) of Trusts § 173 cmt. d (1959). Furthermore, to enable the beneficiaries to take
18 action to protect their interests, the trustee may be required to provide advance notice of transactions
19 involving real estate, closely-held business interests, and other assets that are difficult to value or
20 to replace. *See In re Green Charitable Trust*, 431 N.W. 2d 492 (Mich. Ct. App. 1988); *Allard v.*
21 *Pacific National Bank*, 663 P.2d 104 (Wash. 1983). The trustee is justified in not providing such
22 advance disclosure if disclosure is forbidden by other law, as under federal securities laws, or if
23 disclosure would be seriously detrimental to the interests of the beneficiaries, for example, when
24 disclosure would cause the loss of the only serious buyer.

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

36 The drafters of this Code decided to leave open for further consideration by the courts the
37 extent to which a trustee may claim attorney-client privilege against a beneficiary seeking discovery
38 of attorney-client communications between the trustee and the trustee's attorney. The courts are
39 split because of the important values that are in tension on this question. "The [attorney-client]
40 privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or

1 advocacy depends upon the lawyer’s being fully informed by the client.” *Upjohn Co. v. United*
2 *States*, 449 U.S. 383 (1981). On the other hand, subsection (a) of this section requires that a trustee
3 keep the qualified beneficiaries reasonably informed about the administration of the trust and of the
4 material facts necessary for them to protect their interests, which could include facts that the trustee
5 has revealed only to the trustee’s attorney. There is authority for the view that the trustee is
6 estopped from pleading attorney-client privilege in such circumstances. In the leading case, *Riggs*
7 *National Bank v. Zimmer*, 355 A.2d 709, 713 (Del. Ch. 1976), the court reasoned that the
8 beneficiary, not the trustee, is the attorney’s client: “As a representative for the beneficiaries of the
9 trust which he is administering, the trustee is not the real client” This beneficiary-as-client
10 theory has been criticized on the ground that it conflicts with the trustee’s fiduciary duty to
11 implement the intentions of the settlor, which are sometimes in tension with the wishes of one or
12 more beneficiaries. See Louis H. Hamel, Jr., *Trustee’s Privileged Counsel: A Rebuttal*, 21 ACTEC
13 Notes 156 (1995); Charles F. Gibbs & Cindy D. Hanson, *The Fiduciary Exception to a Trustee’s*
14 *Attorney/Client Privilege*, 21 ACTEC Notes 236 (1995). Prominent decisions in California and
15 Texas have refused to follow Delaware in recognizing an exception for the beneficiary against the
16 trustee’s attorney-client privilege. *Wells Fargo Bank v. Superior Court (Boltwood)*, 990 P.2d 591
17 (Cal. 2000); *Huie v. De Shazo*, 922 S.W. 2d 920 (Tex. 1996). The beneficiary-as-client theory
18 continues to be applied to ERISA trusts. See, e.g., *United States v. Mett*, 178 F.3d 1058, 1062-64
19 (9th Cir. 1999). However, in a pension trust the beneficiaries are the settlors of their own trust
20 because the trust is funded with their own earnings. Accordingly, in ERISA attorney-client cases
21 “[t]here are no competing interests such as other stockholders or the intentions of the Settlor.” Gibbs
22 & Hanson, 21 ACTEC Notes at 238. For further discussion of the attorney-client privilege and
23 whether there is a duty to disclose to the beneficiaries, see ACTEC Commentaries on the Model
24 Rules of Professional Conduct, Commentary on MRPC 1.2 (3d ed. 1999); Rust E. Reid et al.,
25 *Privilege and Confidentiality Issues When a Lawyer Represents a Fiduciary*, 30 Real Prop. Prob.
26 & Tr. J. 541 (1996).

27 To enable beneficiaries to protect their interests effectively, it is essential that they know
28 the identity of the trustee. Subsection (b)(2) requires that a trustee inform the qualified beneficiaries
29 within 60 days of the trustee’s acceptance of office and of the trustee’s name, address and telephone
30 number. Similar to the obligation imposed on a personal representative following admission of the
31 will to probate, subsection (b)(3) requires the trustee of a revocable trust to inform the qualified
32 beneficiaries of the trust’s existence within 60 days after the settlor’s death. These two duties can
33 overlap. If the death of the settlor happens also to be the occasion for the appointment of a successor
34 trustee, the new trustee of the formerly revocable trust would need to inform the qualified
35 beneficiaries both of the trustee’s acceptance and of the trust’s existence.

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

40 Subsection (c) requires the trustee to furnish the current beneficiaries and other beneficiaries
41 who request it with a copy of a trustee’s report at least annually and upon termination of the trust.

1 Unless a cotrustee remains in office, the former trustee also must provide a report to all of the
2 qualified beneficiaries upon the trustee’s resignation or removal. If the vacancy occurred because
3 of the former trustee’s death or adjudication of incapacity, a report may, but need not be provided
4 by the former trustee’s personal representative, conservator, or guardian.

5 The Uniform Trust Code employs the term “report” instead of “accounting” in order to
6 negate any inference that the report must be prepared in any particular format or with a high degree
7 of formality. The reporting requirement might even be satisfied by providing the beneficiaries with
8 copies of the trust’s income tax returns and monthly brokerage account statements if the information
9 on those returns and statements is complete and sufficiently clear. The key factor is not the format
10 chosen but whether the report provides the beneficiaries with the information necessary to protect
11 their interests. For model account forms, together with practical advice on how to prepare reports,
12 see Robert Whitman, *Fiduciary Accounting Guide* (2d ed. 1998).

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

17
18 **SECTION 814. DISCRETIONARY POWERS; TAX SAVINGS.**

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

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

25 ~~_____ (1) a person other than a settlor who is a beneficiary and trustee of a trust that~~
26 ~~confers on the trustee a power to make discretionary distributions to or for the trustee’s personal~~
27 ~~benefit may exercise the power only in accordance with an ascertainable standard relating to the~~
28 ~~trustee’s individual health, education, support, or maintenance within the meaning of Section~~
29 ~~2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code of 1986, as in effect on [the effective date~~

1 of this [Code]] [, or as later amended]; and

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

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

8 ~~_____ (d) Subsection (b) does not apply to:~~

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

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

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

18 **Kansas Comment**

19 Subsection (a) conforms to Kansas law. See *Simpson v. State Dept. of Social and Rehabilitation*
20 *Services*, 21 Kan. App. 2d 680, 688, 906 P.2d 174 (1995) (court will not interfere with discretionary
21 powers conferred upon trustee by trust instrument unless trustee acts in bad faith or otherwise abuses
22 his discretion).

23 The Kansas drafting committee struck subsections (b) through (d) of the Uniform Trust Code
24 because there was a difference of views among the committee members on its inclusion. In addition
25 to an incorrect citation in the text of the Uniform Trust Code, numerous questions were raised about

1 subsection (b), (c) and (d), and the committee agreed to not recommend their adoption.

2 **UTC Comment**

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

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

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

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

12
13 Subsection (b)(2) addresses a common trap, the trustee who is not a beneficiary but who has
14 power to make discretionary distributions to those to whom the trustee owes a legal obligation of
15 support. Discretion to make distributions to those to whom the trustee owes a legal obligation of
16 support, such as to the trustee's minor children, results in inclusion of the trust in the trustee's gross
17 estate even if the power is limited by an ascertainable standard. The applicable regulation provides
18 that the ascertainable standard exception applies only to distributions for the benefit of the decedent,
19 not to distributions to those to whom the decedent owes a legal obligation of support. *See* Treas.
20 Reg. § 20.2041-1(c)(2).

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

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

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

40 The exclusion of the Section 2503(c) minors trust is necessary to avoid loss of gift tax

1 benefits. While preventing a trustee from distributing trust funds in discharge of a legal obligation
2 of support would keep the trust out of the trustee's gross estate, such a restriction might result in loss
3 of the gift tax annual exclusion for contributions to the trust, even if the trustee were otherwise
4 granted unlimited discretion. See Rev. Rul. 69-345, 1969-1 C.B. 226.

5 **SECTION 815. GENERAL POWERS OF TRUSTEE.**

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

7 (1) powers conferred by the terms of the trust; or

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

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

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

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

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

16 **Kansas Comment**

17 Subsection (a) generally conforms to Kansas law. See *In re Estate of Sanders*, 261 Kan. 176
18 Syl. 5, 929 P.2d 153 (1996) (specific provisions of trust required to be followed); K.S.A. 58-1202(a)
19 and 58-1203(a) (trustee has power to perform, without court authorization, every act which a prudent
20 man would perform unless limited in trust instrument).

21
22 Subsection (b) conforms to Kansas law. See K.S.A. 58-1203(b) (trustee has duty to act with due
23 regard to obligation as fiduciary in exercise of powers).

24 The Uniform Transfers to Minors Act contains a provision similar to U.T.C. 815(a)(2)(A).
25 See K.S.A. 38-1714(a).

26 **UTC Comment**

1 This section is intended to grant trustees the broadest possible powers, but to be exercised
2 always in accordance with the duties of the trustee and any limitations stated in the terms of the
3 trust. This broad authority is denoted by granting the trustee the powers of an unmarried competent
4 owner of individually owned property, unlimited by restrictions that might be placed on it by
5 marriage, disability, or cotenancy.

6 The powers conferred elsewhere in this Code that are subsumed under this section include
7 all of the specific powers listed in Section 816 as well as other powers described elsewhere in this
8 Code. *See* Sections 108(c) (transfer of principal place of administration), 414(a) (termination of
9 uneconomic trust with value less than \$50,000), 417 (combination and division of trusts), 703(e)
10 (delegation to cotrustee), 802(h) (exception to duty of loyalty), 807 (delegation to agent of powers
11 and duties), 810(d) (joint investments), and Article 9 (Uniform Prudent Investor Act). The powers
12 conferred by this Code may be exercised without court approval. If court approval of the exercise
13 of a power is desired, a petition for court approval should be filed.

14 A power differs from a duty. A duty imposes an obligation or a mandatory prohibition. A
15 power, on the other hand, is a discretion, the exercise of which is not obligatory. The existence of
16 a power, however created or granted, does not speak to the question of whether it is prudent under
17 the circumstances to exercise the power.

18
19 **SECTION 816. SPECIFIC POWERS OF TRUSTEE.** Without limiting the authority
20 conferred by Section 815, a trustee may:

- 21 (1) collect trust property and accept or reject additions to the trust property from a
22 settlor or any other person;
- 23 (2) acquire or sell property, for cash or on credit, at public or private sale;
- 24 (3) exchange, partition, or otherwise change the character of trust property;
- 25 (4) deposit trust money in an account in a regulated financial-service institution;
- 26 (5) borrow money, with or without security, and mortgage or pledge trust property
27 for a period within or extending beyond the duration of the trust;
- 28 (6) with respect to an interest in a proprietorship, partnership, limited liability
29 company, business trust, corporation, or other form of business or enterprise, continue the business

1 or other enterprise and take any action that may be taken by shareholders, members, or property
2 owners, including merging, dissolving, or otherwise changing the form of business organization or
3 contributing additional capital;

4 (7) with respect to stocks or other securities, exercise the rights of an absolute owner,
5 including the right to:

6 (A) vote, or give proxies to vote, with or without power of substitution, or
7 enter into or continue a voting trust agreement;

8 (B) hold a security in the name of a nominee or in other form without
9 disclosure of the trust so that title may pass by delivery;

10 (C) pay calls, assessments, and other sums chargeable or accruing against the
11 securities, and sell or exercise stock subscription or conversion rights; and

12 (D) deposit the securities with a depository or other regulated financial-service
13 institution;

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

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

22 (10) grant an option involving a sale, lease, or other disposition of trust property or

1 acquire an option for the acquisition of property, including an option exercisable beyond the
2 duration of the trust, and exercise an option so acquired;

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

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

7 (13) with respect to possible liability for violation of environmental law:

8 (A) inspect or investigate property the trustee holds or has been asked to hold,
9 or property owned or operated by an organization in which the trustee holds or has been asked to
10 hold an interest, for the purpose of determining the application of environmental law with respect
11 to the property;

12 (B) take action to prevent, abate, or otherwise remedy any actual or potential
13 violation of any environmental law affecting property held directly or indirectly by the trustee,
14 whether taken before or after the assertion of a claim or the initiation of governmental enforcement;

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

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

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

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

1 (15) pay taxes, assessments, compensation of the trustee and of employees and agents
2 of the trust, and other expenses incurred in the administration of the trust;

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

4 (17) select a mode of payment under any employee benefit or retirement plan,
5 annuity, or life insurance payable to the trustee, exercise rights thereunder, including exercise of the
6 right to indemnification for expenses and against liabilities, and take appropriate action to collect
7 the proceeds;

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

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

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

16 (21) pay an amount distributable to a beneficiary who is under a legal disability or
17 who the trustee reasonably believes is incapacitated, by paying it directly to the beneficiary or
18 applying it for the beneficiary's benefit, or by:

19 (A) paying it to the beneficiary's [conservator] or, if the beneficiary does not
20 have a [conservator], the beneficiary's [guardian];

21 (B) paying it to the beneficiary's custodian ~~under [the Uniform Transfers to~~
22 ~~Minors Act] or custodial trustee under [the Uniform Custodial Trust Act], and, for that purpose,~~

1 ~~creating a custodianship or custodial trust, attorney-in-fact, custodial trustee or other person with~~
2 ~~legal authority to receive such funds for the benefit of the beneficiary;~~

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

6 (D) managing it as a separate fund on the beneficiary's behalf, subject to the
7 beneficiary's continuing right to withdraw the distribution;

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

12 (23) resolve a dispute concerning the interpretation of the trust or its administration
13 by mediation, arbitration, or other procedure for alternative dispute resolution;

14 (24) prosecute or defend an action, claim, or judicial proceeding in any jurisdiction
15 to protect trust property and the trustee in the performance of the trustee's duties;

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

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

20 **Kansas Comment**

21 Paragraph (1) is codified in K.S.A. 58-1203(c)(1) and (2), except power to decline additions
22 to trust property is new.

23 Paragraphs (2) and (3) are codified in K.S.A. 58-1203(c)(7).

1 Paragraph (4) is codified in K.S.A. 58-1203(c)(6) and K.S.A. 58-1203(c)(27).

2 Paragraph (5) is codified in K.S.A. 58-1203(c)(7) and (18).

3 Paragraph (6) is codified in K.S.A. 58-1203(c)(3) and (15).

4 Subparagraph (7)(A) is codified in K.S.A. 58-1203(c)(13), except language regarding the
5 power of substitution and voting trust agreement is new.

6 Subparagraph (7)(B) is codified in K.S.A. 58-1203(c)(16), except Kansas provision
7 specifically subjects trustee to liability for any act of the nominee.

8 Subparagraph (7)(C) is codified in K.S.A. 58-1203(c)(14) and (15).

9 Subparagraph (7)(D) is new.

10 Paragraph (8) is codified in K.S.A. 58-1203(c)(8) and (9), although U.T.C. adds specific
11 power to construct and make improvements. U.T.C. also does not include power in K.S.A. 58-
12 1203(c)(9) "to adjust differences in valuation on exchange or partition by giving or receiving
13 consideration." Additionally, K.S.A. 58-1203(c)(9) specifically allows trustee to dedicate easements
14 to public use *without consideration*. Finally, the U.T.C. adds the power to grant private easements.

15 Paragraph (9) is codified in K.S.A. 58-1203(c)(10) and (11), except K.S.A. 58-1203(c)(11)
16 also authorizes trustee to enter into a pooling or unitization agreement.

17 Paragraph (10) is codified in K.S.A. 58-1203(c)(12), except U.T.C. adds that the option may
18 be exercisable beyond the term of the trust.

19 Paragraph (11) is codified in K.S.A. 58-1203(c)(17), except U.T.C. adds power to insure
20 trustee's agents and beneficiaries.

21 Paragraph (12) is codified in K.S.A. 58-1203(c)(1) and (7).

22 Paragraph (13) is new.

23 Paragraph (14) is codified in K.S.A. 58-1203(c)(19), except Kansas provision specifically
24 allows a trustee to release a claim *to the extent it is uncollectible*.

25 Paragraph (15) is codified in K.S.A. 58-1203(c)(20) and (24), except K.S.A. 58-1203(c)(24)
26 specifically gives power to employ persons, even if they are associated with the trustee.

27 Paragraph (16) is new.

28 Paragraph (17) is new.

1 Paragraph (18) is new.

2 Paragraph (19) is codified in K.S.A. 58-1203(c)(7).

3 Paragraph (20) is new.

4 Paragraph (21) is consistent with Kansas law. K.S.A. 58-1203(c)(22) allows trustee, without
5 liability, to make payment to beneficiary or for the use of the beneficiary to either a legal
6 representative appointed by the court, or if none, to a relative.

7 In paragraph (21)(B), the Kansas drafting committee changed the UTC as follows: “(B)
8 paying it to the beneficiary’s custodian ~~under [the Uniform Transfers to Minors Act] or custodial~~
9 ~~trustee under [the Uniform Custodial Trust Act], and, for that purpose, creating a custodianship or~~
10 ~~custodial trust, attorney-in-fact, custodial trustee or other person with legal authority to receive such~~
11 ~~funds for the benefit of the beneficiary.”~~

12 Paragraph (22) is codified in K.S.A. 58-1203(c)(23).

13 Paragraph (23) is new.

14 Paragraph (24) is codified in K.S.A. 58-1203(c)(25).

15 Paragraph (25) is codified in K.S.A. 58-1203(c)(26).

16 Paragraph (26) is new.

17 **UTC Comment**

18
19 This section enumerates specific powers commonly included in trust instruments and in
20 trustee powers legislation. All the powers listed are subject to alteration in the terms of the trust.
21 See Section 105. The powers listed are also subsumed under the general authority granted in Section
22 815(a)(2) to exercise all powers over the trust property which an unmarried competent owner has
23 over individually owned property, and any other powers appropriate to achieve the proper
24 management, investment, and distribution of the trust property. The powers listed add little of
25 substance not already granted by Section 815 and powers conferred elsewhere in the Code, which
26 are listed in the Comment to Section 815. While the Committee drafting this Code discussed
27 dropping the list of specific powers, it concluded that the demand of third parties to see language
28 expressly authorizing specific transactions justified retention of a detailed list.

29 As provided in Section 815(b), the exercise of a power is subject to fiduciary duties except
30 as modified in the terms of the trust. The fact that the trustee has a power does not imply a duty that
31 the power must be exercised.

1 Many of the powers listed in this section are similar to the powers listed in Section 3 of the
2 Uniform Trustees' Powers Act (1964). Several are new, however, and other powers drawn from that
3 Act have been updated. The powers enumerated in this section may be divided into categories.
4 Certain powers, such as the powers to acquire or sell property, borrow money, and deal with real
5 estate, securities, and business interests, are powers that any individual can exercise. Other powers,
6 such as the power to collect trust property, are by their very nature only applicable to trustees. Other
7 specific powers, particularly those listed in other sections of the Uniform Trust Code, modify a
8 trustee duty that would otherwise apply. *See, e.g.*, Sections 802(h) (exceptions to duty of loyalty)
9 and 810(d) (joint investments as exception to earmarking requirement).

10 Paragraph (1) authorizes a trustee to collect trust property and collect or decline additions
11 to the trust property. The power to collect trust property is an incident of the trustee's duty to
12 administer the trust as provided in Section 801. The trustee has a duty to enforce claims as provided
13 in Section 811, the successful prosecution of which can result in collection of trust property.
14 Pursuant to Section 812, the trustee also has a duty to collect trust property from a former trustee
15 or other person holding trust property. For an application of the power to reject additions to the trust
16 property, see Section 816(13) (power to decline property with possible environmental liability).

17 Paragraph (2) authorizes a trustee to sell trust property, for cash or on credit, at public or
18 private sale. Under the Restatement, a power of sale is implied unless limited in the terms of the
19 trust. Restatement (Third) of Trusts: Prudent Investor Rule § 190 (1992). In arranging a sale, a
20 trustee must comply with the duty to act prudently as provided in Section 804. This duty may dictate
21 that the sale be made with security.

22 Paragraph (4) authorizes a trustee to deposit funds in an account in a regulated financial-
23 service institution. This includes the right of a financial institution trustee to deposit funds in its own
24 banking department as authorized by Section 802(h)(4).

25 Paragraph (5) authorizes a trustee to borrow money. Under the Restatement, the sole
26 limitation on such borrowing is the general obligation to invest prudently. *See* Restatement (Third)
27 of Trusts: Prudent Investor Rule § 191 (1992). Language clarifying that the loan may extend beyond
28 the duration of the trust was added to negate an older view that the trustee only had power to
29 encumber the trust property for the period that the trust was in existence.

30 Paragraph (6) authorizes the trustee to continue, contribute additional capital to, or change
31 the form of a business. Any such decision by the trustee must be made in light of the standards of
32 prudent investment stated in Article 9.

33 Paragraph (7), regarding powers with respect to securities, codifies and amplifies the
34 principles of Restatement (Second) of Trusts § 193 (1959).

35 Paragraph (9), authorizing the leasing of property, negates the older view, reflected in
36 Restatement (Second) of Trusts § 189 cmt. c (1959), that a trustee could not lease property beyond
37 the duration of the trust. Whether a longer term lease is appropriate is judged by the standards of

1 prudence applicable to all investments.

2 Paragraph (10), authorizing a trustee to grant options with respect to sales, leases or other
3 dispositions of property, negates the older view, reflected in Restatement (Second) of Trusts § 190
4 cmt. k (1959), that a trustee could not grant another person an option to purchase trust property.
5 Like any other investment decision, whether the granting of an option is appropriate is a question
6 of prudence under the standards of Article 9.

7 Paragraph (11), authorizing a trustee to purchase insurance, empowers a trustee to
8 implement the duty to protect trust property. *See* Section 809. The trustee may also insure
9 beneficiaries, agents, and the trustee against liability, including liability for breach of trust.

10 Paragraph (13) is one of several provisions in the Uniform Trust Code designed to address
11 trustee concerns about possible liability for violations of environmental law. This paragraph
12 collects all the powers relating to environmental concerns in one place even though some of the
13 powers, such as the powers to pay expenses, compromise claims, and decline property, overlap with
14 other paragraphs of this section (decline property, paragraph (1); compromise claims, paragraph
15 (14); pay expenses, paragraph (15)). Numerous States have legislated on the subject of
16 environmental liability of fiduciaries. For a representative state statute, see Tex. Prop. Code Ann.
17 § 113.025. *See also* Sections 701(c)(2) (designated trustee may inspect property to determine
18 potential violation of environmental or other law or for any purpose) and 1010(b) (trustee not
19 personally liable for violation of environmental law arising from ownership or control of trust
20 property).

21 Paragraph (14) authorizes a trustee to pay, contest, settle, or release claims. Section 811
22 requires that a trustee need take only “reasonable” steps to enforce claims, meaning that a trustee
23 may release a claim not only when it is uncollectible, but also when collection would be
24 uneconomic. *See* Restatement (Second) of Trusts § 192 (1959) (power to compromise, arbitrate and
25 abandon claims).

26 Paragraph (15), among other things, authorizes a trustee to pay compensation to the trustee
27 and agents without prior approval of court. Regarding the standard for setting trustee compensation,
28 see Section 708. *See also* Section 709 (repayment of trustee expenditures). While prior court
29 approval is not required, Section 813(b)(4) requires the trustee to inform the qualified beneficiaries
30 in advance of a change in the method or rate of compensation.

31 Paragraph (16) authorizes a trustee to make elections with respect to taxes. The Uniform
32 Trust Code leaves to other law the issue of whether the trustee, in making such elections, must make
33 compensating adjustments in the beneficiaries’ interests.

34 Paragraph (17) authorizes a trustee to take action with respect to employee benefit or
35 retirement plans, or annuities or life insurance payable to the trustee. Typically, these will be
36 beneficiary designations which the settlor has made payable to the trustee, but this Code also allows
37 the trustee to acquire ownership of annuities or life insurance.

1 Paragraphs (18) and (19) allow a trustee to make loans to a beneficiary or to guarantee loans
2 of a beneficiary upon such terms and conditions as the trustee considers fair and reasonable. The
3 determination of what is fair and reasonable must be made in light of the fiduciary duties of the
4 trustee and the purposes of the trust. Frequently, a trustee will make loans to a beneficiary which
5 might be considered less than prudent in an ordinary commercial sense although of great benefit to
6 the beneficiary and which help carry out the trust purposes. If the trustee requires security for the
7 loan to the beneficiary, adequate security under this paragraph may consist of a charge on the
8 beneficiary's interest in the trust. *See* Restatement (Second) of Trusts § 255 (1959). However, the
9 interest of a beneficiary subject to a spendthrift restraint may not be pledged as security for a loan.
10 *See* Section 502.

11 Paragraph (20) authorizes the appointment of ancillary trustees in jurisdictions in which the
12 regularly appointed trustee is unable or unwilling to act. Normally, an ancillary trustee will be
13 appointed only when there is a need to manage real estate located in another jurisdiction. This
14 paragraph allows the regularly appointed trustee to select the ancillary trustee and to confer on the
15 ancillary trustee such powers and duties as may be necessary. The appointment of ancillary trustees
16 is a topic which a settlor may wish to address in the terms of the trust.

17 Paragraph (21) authorizes a trustee to make payments to another person for the use or benefit
18 of a beneficiary who is under a legal disability or who the trustee reasonably believes is
19 incapacitated. Although an adult relative or other person receiving funds is required to spend it on
20 the beneficiary's behalf, it is preferable that the trustee make the distribution to a person having
21 more formal fiduciary responsibilities. For this reason, payment may be made to an adult relative
22 only if the trustee does not know of a conservator, guardian, custodian, or custodial trustee capable
23 of acting for the beneficiary.

24 Paragraph (22) authorizes a trustee to make non-pro-rata distributions and allocate particular
25 assets in proportionate or disproportionate shares. This power provides needed flexibility and
26 lessens the risk that a non-pro-rata distribution will be treated as a taxable sale.

27 Paragraph (23) authorizes a trustee to resolve disputes through mediation or arbitration. The
28 drafters of this Code encourage the use of such alternate methods for resolving disputes. Arbitration
29 is a form of nonjudicial settlement agreement authorized by Section 111. In representing
30 beneficiaries and others in connection with arbitration or mediation, the representation principles
31 of Article 3 may be applied. Settlers wishing to encourage use of alternate dispute resolution may
32 draft to provide it. For sample language, see American Arbitration Association, Arbitration Rules
33 for Wills and Trusts (1995).

34 Paragraph (24) authorizes a trustee to prosecute or defend an action. As to the propriety of
35 reimbursement for attorney's fees and other expenses of an action or judicial proceeding, see Section
36 709 and Comment. *See also* Section 811 (duty to defend actions).

37 Paragraph (26), which is similar to Section 344 of the Restatement (Second) of Trusts
38 (1959), clarifies that even though the trust has terminated, the trustee retains the powers needed to

1 wind up the administration of the trust and distribute the remaining trust property.

2 **SECTION 817. DISTRIBUTION UPON TERMINATION.**

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

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

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

13 (1) it was induced by improper conduct of the trustee; or

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

16 **Kansas Comment**

17 This section is new. The Kansas Supreme Court has held that a fiduciary cannot be
18 compelled to breach his trust merely because he is offered a binding release from liability for such
19 a breach. *In re Murdock's Estate*, 220 Kan. 459, Syl. 7, 553 P.2d 876 (1976).

20 In subsection (c), the Kansas drafting committee changed the UTC by inserting the phrase,
21 "upon termination or partial termination of a trust."

22 **UTC Comment**

23 This section contains several provisions governing distribution upon termination. Other

1 provisions of the Uniform Trust Code relevant to distribution upon termination include Section
2 816(26) (powers upon termination to windup administration and distribution), and 1005 (limitation
3 of action against trustee).

4 Subsection (a) is based on Section 3-906(b) of the Uniform Probate Code. It addresses the
5 dilemma that sometimes arises when the trustee is reluctant to make distribution until the beneficiary
6 approves but the beneficiary is reluctant to approve until the assets are in hand. The procedure made
7 available under subsection (a) facilitates the making of non-pro-rata distributions. However,
8 whenever practicable it is normally better practice to obtain the advance written consent of the
9 beneficiaries to a proposed plan of distribution.

10 Subsection (b) recognizes that upon an event terminating or partially terminating a trust,
11 expeditious distribution should be encouraged to the extent reasonable under the circumstances.
12 However, a trustee is entitled to retain a reasonable reserve for payment of debts, expenses, and
13 taxes. Sometimes these reserves must be quite large, for example, upon the death of the beneficiary
14 of a QTIP trust that is subject to federal estate tax in the beneficiary's estate. Not infrequently, a
15 substantial reserve must be retained until the estate tax audit is concluded several years after the
16 beneficiary's death.

17 Subsection (c) is an application of Section 1009. Section 1009 addresses the validity of any
18 type of release that a beneficiary might give. Subsection (c) is more limited, dealing only with
19 releases given upon termination of the trust. Factors affecting the validity of a release include
20 adequacy of disclosure, whether the beneficiary had a legal incapacity, and whether the trustee
21 engaged in any improper conduct. *See* Restatement (Second) of Trusts § 216 (1959).

1 **ARTICLE 9**
2 **UNIFORM PRUDENT INVESTOR ACT**

3 **General Comment**

4 Because of the widespread adoption of the Uniform Prudent Investor Act, no effort has been
5 made to disassemble and integrate the Uniform Prudent Investor Act into the Uniform Trust Code.
6 States adopting the Uniform Trust Code that have previously enacted the Prudent Investor Act are
7 encouraged to reenact their version of the Prudent Investor Act as Article 9 of the Uniform Trust
8 Code. Reenacting the Uniform Prudent Investor Act as a unit will preserve uniformity with States
9 that have enacted the Uniform Prudent Investor Act in free-standing form.

10 The Uniform Prudent Investor Act prescribes a series of duties relevant to the
11 *investment* and *management* of trust property. The Uniform Trust Code, Article 8 contains duties
12 and powers of a trustee relevant to the *investment, administration, and distribution* of trust property.
13 There is therefore significant overlap between Article 8 and the Prudent Investor Act. Where the
14 Uniform Prudent Investor Act and Uniform Trust Code are duplicative, enacting jurisdictions are
15 encouraged to enact the Uniform Prudent Investor Act in this article but *without* the provisions
16 already addressed in Article 8 of the Uniform Trust Code. The duplicative provisions of the
17 Uniform Prudent Investor Act and Article 8 of this Code are as follows:

18 **Prudent Investor Act** **Article 8**

19 Special skills	2(f)	806
20 Loyalty	5	802
21 Impartiality	6	803
22 Investment costs	7	805
23 Delegation	9	807

24 Deleting these duplicative provisions leaves the following sections of the Uniform
25 Prudent Investor Act for enactment in this article:

26 Section 1	Prudent Investor Rule
27 Section 2 (a)-(e)	Standard of Care; Portfolio Strategy; Risk and 28 Return Objectives
29 Section 3	Diversification
30 Section 4	Duties at Inception of Trusteeship
31 Section 8	Reviewing Compliance
32 Section 10	Language Invoking Standard of [Act]

33 **SECTION 901. APPLICATION OF UNIFORM PRUDENT INVESTOR ACT.**

34 **Notwithstanding any provisions of the Kansas Uniform Trust Act to the contrary, K.S.A. 59-24a01**

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
24 extent as if the property were not held in trust. Section 1010 negates personal liability on contracts
25 entered into by the trustee if the fiduciary capacity was properly disclosed. The trustee is also
26 relieved from liability for torts committed in the course of administration unless the trustee was
27 personally at fault. Section 1011 negates personal liability for contracts entered into by partnerships
28 in which the trustee is a general partner as long as the fiduciary capacity was disclosed in the
29 contract or partnership certificate. Section 1012 protects persons other than beneficiaries who deal
30 with a trustee in good faith and without knowledge that the trustee is exceeding or improperly
31 exercising a power. Section 1013 permits a third party to rely on a certification of trust, thereby
32 reducing the need for a third 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.

37 **SECTION 1001. REMEDIES FOR BREACH OF TRUST.**

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

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

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

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

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

8 (4) order a trustee to account;

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

11 (6) suspend the trustee;

12 (7) remove the trustee as provided in Section 706;

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

14 (9) subject to Section 1012, void an act of the trustee, impose a lien or a
15 constructive trust on trust property, or trace trust property wrongfully disposed of and recover the
16 property or its proceeds; or

17 (10) order any other appropriate relief.

18 **Kansas Comment**

19 Subsection (a) conforms to Kansas law. See *Kline v. Orebaugh*, 214 Kan. 207, 211, 519 P.2d
20 691 (1974) (trustee who violates any duty which he owes to beneficiary is guilty of breach of trust
21 and is liable to beneficiary to redress breach).

22 Subsection (b)(1) conforms to Kansas law. See *Fry v. McCormick*, 170 Kan. 741, 744, 228
23 P.2d 727 (1951) (court may compel performance if trustee fails to perform duties).

1 Subsection (b)(2) conforms to Kansas law. See *Jennings v. Murdock*, 220 Kan. 182, 553
2 P.2d 846 (1976) (action to enjoin trustee from certain action based on alleged breach of trust).

3 Subsection (b)(3) conforms to Kansas law. See K.S.A. 59-2255 (court may surcharge trustee
4 for any loss caused by breach of trust); *Jennings v. Murdock*, 220 Kan. 182, 214, 553 P.2d 846
5 (1976) (surcharge is remedy designed to make trust estate whole upon breach of trust by trustee);
6 *Goben v. Barry*, 237 Kan. 822, 825, 828, 703 P.2d 1378 (1985) (equity will compel restitution upon
7 breach of fiduciary duty if circumstances require); *Capitol Federal Sav. & Loan Ass'n v. Hohman*,
8 9 Kan. App. 2d 217, 675 P.2d 384, aff'd 235 Kan. 815, 682 P.2d 1309 (1984) (trial court could have
9 awarded money damages for breach of trust if necessary to make victim whole).

10 Subsection (b)(4) conforms to Kansas Law. See K.S.A. 59-1609 (court has power to require
11 trustee to account).

12
13 Subsection (b)(5) conforms to Kansas law. See K.S.A. 60-1301 (court has power to appoint
14 a receiver if necessary to keep, preserve and manage property pending determination of any
15 proceeding in which such property may be affected by the final judgment); *Seal v. Seal*, 212 Kan.
16 55, 56, 510 P.2d 167 (1973) (court of equity has power to appoint receiver); *Goben v. Barry*, 237
17 Kan. 822, 825, 703 P.2d 1378 (1985) (trial court appointed receiver upon finding breach of fiduciary
18 duty).

19 Subsection (b)(6) is new.

20 Subsection (b)(7) conforms to Kansas law. See *Jennings v. Murdock*, 220 Kan. 182, Syl. 11,
21 12, 553 P.2d 846 (1976) (court may remove trustee when intervention is necessary to save trust
22 property); K.S.A. 59-1711 (court may remove trustee upon failure to perform duties).

23 Subsection (b)(8) conforms to Kansas law. See *Bessman v. Bessman*, 214 Kan. 510, 521,
24 520 P.2d 1210 (1974) (if trustee commits breach of trust, court may deny him all or part of his
25 compensation); K.S.A. 59-1711 (court may reduce or deny compensation to trustee when he fails
26 to perform duties).

27 Subsection (b)(9) conforms to Kansas law. See K.S.A. 58-2405 (any act of a trustee in
28 contravention of a trust shall be void); *Kline v. Orebaugh*, 214 Kan. 207, 519 P.2d 691 (1974) (upon
29 wrongful disposition of trust property, court may impose constructive trust or equitable lien as long
30 as product of trust property is held by trustee and can be traced).

31 Subsection (b)(10) conforms to Kansas law. See *Kline*, 214 Kan. at 211 (upon breach of
32 trust, court of equity may mold judgment to furnish relief suitable to circumstances of case).

33 **UTC Comment**

34 This section codifies the remedies available to rectify or to prevent a breach of trust for
35 violation of a duty owed to a beneficiary. The duties that a trust might breach include those

1 contained in Article 8 in addition to those specified elsewhere in the Code.

2 This section identifies the available remedies but does not attempt to cover the refinements
3 and exceptions developed in case law. The availability of a remedy in a particular circumstance will
4 be determined not only by this Code but also by the common law of trusts and principles of equity.
5 *See* Section 106.

6 Beneficiaries and cotrustees have standing to bring a petition to remedy a breach of trust.
7 Following a successor trustee's acceptance of office, a successor trustee has standing to sue a
8 predecessor for breach of trust. *See* Restatement (Second) of Trusts § 200 (1959). A person who
9 may represent a beneficiary's interest under Article 3 would have standing to bring a petition on
10 behalf of the person represented. In the case of a charitable trust, those with standing include the
11 state attorney general, a charitable organization expressly entitled to receive benefits under the terms
12 of the trust, and other persons with a special interest. *See* Section 110 & Restatement (Second) of
13 Trusts § 391 (1959). A person appointed to enforce a trust for an animal or a trust for a
14 noncharitable purpose would have standing to sue for a breach of trust. *See* Sections 110(b), 408,
15 409.

16 Traditionally, remedies for breach of trust at law were limited to suits to enforce
17 unconditional obligations to pay money or deliver chattels. *See* Restatement (Second) of Trusts
18 § 198 (1959). Otherwise, remedies for breach of trust were exclusively equitable, and as such,
19 punitive damages were not available and findings of fact were made by the judge and not a jury.
20 *See* Restatement (Second) of Trusts § 197 (1959). The Uniform Trust Code does not preclude the
21 possibility that a particular enacting jurisdiction might not follow these norms.

22 The remedies identified in this section are derived from Restatement (Second) of Trusts
23 § 199 (1959). The reference to payment of money in subsection (b)(3) includes liability that might
24 be characterized as damages, restitution, or surcharge. For the measure of liability, see Section
25 1002. Subsection (b)(5) makes explicit the court's authority to appoint a special fiduciary, also
26 sometimes referred to as a receiver. *See* Restatement (Second) of Trusts § 199(d) (1959). The
27 authority of the court to appoint a special fiduciary is not limited to actions alleging breach of trust
28 but is available whenever the court, exercising its equitable jurisdiction, concludes that an
29 appointment would promote administration of the trust. *See* Section 704(d) (special fiduciary may
30 be appointed whenever court considers such appointment necessary for administration).

31 Subsection (b)(8), which allows the court to reduce or deny compensation, is in accord with
32 Restatement (Second) of Trusts § 243 (1959). For the factors to consider in setting a trustee's
33 compensation absent breach of trust, see Section 708 and Comment. In deciding whether to reduce
34 or deny a trustee compensation, the court may wish to consider (1) whether the trustee acted in good
35 faith; (2) whether the breach of trust was intentional; (3) the nature of the breach and the extent of
36 the loss; (4) whether the trustee has restored the loss; and (5) the value of the trustee's services to
37 the trust. *See* Restatement (Second) of Trusts § 243 cmt. c (1959).

38 The authority under subsection (b)(9) to set aside wrongful acts of the trustee is a corollary

1 of the power to enjoin a threatened breach as provided in subsection (b)(2). However, in setting
2 aside the wrongful acts of the trustee the court may not impair the rights of bona fide purchasers
3 protected under

4 **SECTION 1002. DAMAGES FOR BREACH OF TRUST.**

5 (a) A trustee who commits a breach of trust is liable to the beneficiaries affected for
6 the greater of:

7 (1) the amount required to restore the value of the trust property and trust
8 distributions to what they would have been had the breach not occurred; ~~or~~

9 (2) the profit the trustee made by reason of the breach; ~~or~~
10 (3) if the trustee embezzles or knowingly converts to his or her own use any
11 of the personal property of the trust, the trustee shall be liable for double the value of the property
12 so embezzled or converted.

13 (b) Except as otherwise provided in this subsection, if more than one trustee is liable
14 to the beneficiaries for a breach of trust, a trustee is entitled to contribution from the other trustee
15 or trustees. A trustee is not entitled to contribution if the trustee was substantially more at fault than
16 another trustee or if the trustee committed the breach of trust in bad faith or with reckless
17 indifference to the purposes of the trust or the interests of the beneficiaries. A trustee who received
18 a benefit from the breach of trust is not entitled to contribution from another trustee to the extent of
19 the benefit received.

20 (c) The provisions of this section shall not exclude an award of punitive damages.

21 **Kansas Comment**

22 Subsection (a) generally conforms to Kansas law, although specific provision is new.

23
24 Subsection (a)(1) conforms to Kansas law. See K.S.A. 59-2255 (court may surcharge trustee
25 for any loss caused by breach of trust); *Jennings v. Murdock*, 220 Kan. 182, 213-14, 553 P.2d 846

1 (1976) (surcharge is remedy designed to make trust estate whole, primarily where losses have been
2 incurred through negligence or bad faith of trustee).

3 Subsection (a)(2) conforms to Kansas law. See K.S.A. 59-1703 (fiduciary shall not profit
4 from trust estate); *Bessman v. Bessman*, 214 Kan. 510, 520 P.2d 1210 (1974) (fiduciary who realizes
5 secret profit through dealings on behalf of principal must disgorge profit); *Woodrum v. Bank*, 60
6 Kan. 44, 48-49 (1898) (where trustee makes unauthorized exchange of trust property, beneficiary
7 may affirm the bargain and take the benefit).

8 The Kansas drafting committee changed the UTC by inserting new subsection (a)(3). That
9 subsection is consistent with K.S.A. 59-1704 which relates to all estates, although the specific
10 damage provision for breach of trust is new.

11 Subsection (b) conforms to Kansas law. See *Gillespie v. Seymour*, 250 Kan. 123, 147, 823
12 P.2d 782 (1991) (where two trustees are liable for breach of trust, each is entitled to contribution
13 from the other, except that if one is substantially more at fault than the other, the other is entitled to
14 indemnity from him).

15 The Kansas drafting committee changed the Uniform Trust Code by inserting new subsection
16 (c) relating to punitive damages. The Kansas Supreme Court has allowed punitive damages pursuant
17 to K.S.A. 60-3702 for breach of trust. *Gillespie v. Seymour*, 255 Kan. 774, 877 P.2d 409 (1994).
18

19 **UTC Comment**

20 Subsection (a) is based on Restatement (Third) of Trusts: Prudent Investor Rule § 205
21 (1992). If a trustee commits a breach of trust, the beneficiaries may either affirm the transaction or,
22 if a loss has occurred, hold the trustee liable for the amount necessary to compensate fully for the
23 consequences of the breach. This may include recovery of lost income, capital gain, or appreciation
24 that would have resulted from proper administration. Even if a loss has not occurred, the trustee
25 may not benefit from the improper action and is accountable for any profit the trustee made by
26 reason of the breach.

27 For extensive commentary on the determination of damages, traditionally known as trustee
28 surcharge, with numerous specific applications, see Restatement (Third) of Trusts: Prudent Investor
29 Rule §§ 205-213 (1992). For the use of benchmark portfolios to determine damages, see
30 Restatement (Third) of Trusts: Prudent Investor Rule Reporter's Notes to §§ 205 and 208-211
31 (1992). On the authority of a court of equity to reduce or excuse damages for breach of trust, see
32 Restatement (Second) of Trusts § 205 cmt. g (1959).

33 For purposes of this section and Section 1003, "profit" does not include the trustee's
34 compensation. A trustee who has committed a breach of trust is entitled to reasonable compensation
35 for administering the trust unless the court reduces or denies the trustee compensation pursuant to
36 Section 1001(b)(8).

1 Subsection (b) is based on Restatement (Second) of Trusts § 258 (1959). Cotrustees are
2 jointly and severally liable for a breach of trust if there was joint participation in the breach. Joint
3 and several liability also is imposed on a nonparticipating cotrustee who, as provided in Section
4 703(g), failed to exercise reasonable care (1) to prevent a cotrustee from committing a serious breach
5 of trust, or (2) to compel a cotrustee to redress a serious breach of trust. Joint and several liability
6 normally carries with it a right in any trustee to seek contribution from a cotrustee to the extent the
7 trustee has paid more than the trustee’s proportionate share of the liability. Subsection (b),
8 consistent with Restatement (Second) of Trusts § 258 (1959), creates an exception. A trustee who
9 was substantially more at fault or committed the breach of trust in bad faith or with reckless
10 indifference to the purposes of the trust or the interests of the beneficiaries is not entitled to
11 contribution from the other trustees.

12 Determining degrees of comparative fault is a question of fact. The fact that one trustee was
13 more culpable or more active than another does not necessarily establish that this trustee was
14 substantially more at fault. Nor is a trustee substantially less at fault because the trustee did not
15 actively participate in the breach. *See* Restatement (Second) of Trusts § 258 cmt. e (195). Among
16 the factors to consider: (1) Did the trustee fraudulently induce the other trustee to join in the breach?
17 (2) Did the trustee commit the breach intentionally while the other trustee was at most negligent?
18 (3) Did the trustee, because of greater experience or expertise, control the actions of the other
19 trustee? (4) Did the trustee alone commit the breach with liability imposed on the other trustee only
20 because of an improper delegation or failure to properly monitor the actions of the cotrustee? *See*
21 Restatement (Second) of Trusts § 258 cmt. d (1959).

22 SECTION 1003. DAMAGES IN ABSENCE OF BREACH.

23 (a) A trustee is accountable to an affected beneficiary for any profit made by the
24 trustee, other than compensation earned, arising from the administration of the trust, even absent a
25 breach of trust.

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

28 Kansas Comment

29 This section generally conforms to K.S.A. 59-1703.

30 The Kansas drafting committee changed the UTC by adding the phrase, “other than
31 compensation earned.”

1
2
3 **UTC Comment**

4 The principle on which a trustee’s duty of loyalty is premised is that a trustee should not be
5 allowed to use the trust as a means for personal profit other than for routine compensation earned.
6 While most instances of personal profit involve situations where the trustee has breached the duty
7 of loyalty, not all cases of personal profit involve a breach of trust. Subsection (a), which holds a
8 trustee accountable for any profit made, even absent a breach of trust, is based on Restatement
9 (Second) of Trusts § 203 (1959). A typical example of a profit is receipt by the trustee of a
10 commission or bonus from a third party for actions relating to the trust’s administration. *See*
Restatement (Second) of Trusts § 203 cmt. a (1959).

11 A trustee is not an insurer. Similar to Restatement (Second) of Trusts § 204 (1959),
12 subsection (b) provides that absent a breach of trust a trustee is not liable for a loss or depreciation
13 in the value of the trust property or for failure to make a profit.

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

18 **Kansas Comment**

19 This section conforms to Kansas law. See K.S.A. 59-1717 (trustee shall be allowed
20 necessary expenses incurred in the execution of trust, including reasonable attorney fees); *Moore*
21 *v. Adkins*, 2 Kan. App. 2d 139, 576 P.2d 245 (1978) (when the efforts of a party to the action, not
22 the trustee, prove beneficial to the trust estate, reasonable attorney fees to be paid from the trust
23 estate are allowable); *Jennings v. Murdock*, 220 Kan. 182, 553 P.2d 846 (1976) (attorney fees
24 payable out of trust pursuant to K.S.A. 59-1504 in action brought by beneficiaries to construe will
25 and trust). The Kansas Court of Appeals has also held that a trustee may recover expenses incurred
26 in successfully defending actions taken while a trustee, although the trustee may no longer be a
27 trustee when the expenses are incurred. *Morrison v. Watkins*, 20 Kan. App. 2d 411, 889 P.2d 140
28 (1995).

29 **UTC Comment**

30 This section, which is based on Massachusetts General Laws chapter 215, § 45, codifies the
31 court’s historic authority to award costs and fees, including reasonable attorney’s fees, in judicial
32 proceedings grounded in equity. The court may award a party its own fees and costs from the trust.

1 The court may also charge a party's costs and fees against another party to the litigation. Generally,
2 litigation expenses were at common law chargeable against another party only in the case of
3 egregious conduct such as bad faith or fraud. With respect to a party's own fees, Section 709
4 authorizes a trustee to recover expenditures properly incurred in the administration of the trust. The
5 court may award a beneficiary litigation costs if the litigation is deemed beneficial to the trust.
6 Sometimes, litigation brought by a beneficiary involves an allegation that the trustee has committed
7 a breach of trust. On other occasions, the suit by the beneficiary is brought because of the trustee's
8 failure to take action against a third party, such as to recover property properly belonging to the
9 trust. For the authority of a beneficiary to bring an action when the trustee fails to take action
10 against a third party, see Restatement (Second) of Trusts §§ 281-282 (1959). For the case law on
11 the award of attorney's fees and other litigation costs, see 3 Austin W. Scott & William F. Fratcher,
12 The Law of Trusts §§ 188.4 (4th ed. 1988).

13
14
15 **SECTION 1005. LIMITATION OF ACTION AGAINST TRUSTEE.**

16 (a) A beneficiary may not commence a proceeding against a trustee for breach of
17 trust more than ~~one year~~ two years after the date the beneficiary or a representative of the beneficiary
18 was sent a report that adequately disclosed the existence of a potential claim for breach of trust and
19 informed the beneficiary of the time allowed for commencing a proceeding.

20 (b) A report adequately discloses the existence of a potential claim for breach of trust
21 if it provides sufficient information so that the beneficiary or representative knows of the potential
22 claim or should have inquired into its existence.

23 (c) If subsection (a) does not apply, a judicial proceeding by a beneficiary against
24 a trustee for breach of trust must be commenced within five years after the first to occur of:

25 (1) the removal, resignation, or death of the trustee;

26 (2) the termination of the beneficiary's interest in the trust; or

27 (3) the termination of the trust.

28 **Kansas Comment**

29 Subsections (a) and (b) modify Kansas law. K.S.A. 59-2256 relieves a trustee from liability

1 to beneficiaries upon court approval of a trustee’s account in which all the trustee’s acts and
2 omissions are fully described and upon due notice and representation.

3 In subsection (a), the Kansas drafting committee changed the UTC by striking the phrase
4 “one year” and inserting in lieu thereof “two years.”

5 Subsection (c) is new. K.S.A. 60-513 requires actions for fraud to be brought within two
6 years, although the cause of action does not accrue until the fraud is discovered. The ten-year
7 limitation contained in K.S.A. 60-513(b) does not apply to actions based on fraud. *Jennings v.*
8 *Jennings*, 211 Kan. 515, Syl. 12, 507 P.2d 241 (1973) (trustee who repudiates trust agreement
9 commits act which necessarily encompasses fraud).

10 **UTC Comment**

11 The one-year and five-year limitations periods under this section are not the only means for
12 barring an action by a beneficiary. A beneficiary may be foreclosed by consent, release, or
13 ratification as provided in Section 1009. Claims may also be barred by principles such as estoppel
14 and laches arising in equity under the common law of trusts. *See* Section 106.

15 The representative referred to in subsection (a) is the person who may represent and bind a
16 beneficiary as provided in Article 3. During the time that a trust is revocable and the settlor has
17 capacity, the person holding the power to revoke is the one who must receive the report. *See* Section
18 603(a) (rights of settlor of revocable trust).

19 This section addresses only the issue of when the clock will start to run for purposes of the
20 statute of limitations. If the trustee wishes to foreclose possible claims immediately, a consent to
21 the report or other information may be obtained pursuant to Section 1009. For the provisions
22 relating to the duty to report to beneficiaries, see Section 813.

23 Subsection (a) applies only if the trustee has furnished a report. The one-year statute of
24 limitations does not begin to run against a beneficiary who has waived the furnishing of a report as
25 provided in Section 813(d).

26 Subsection (c) is intended to provide some ultimate repose for actions against a trustee. It
27 applies to cases in which the trustee has failed to report to the beneficiaries or the report did not meet
28 the disclosure requirements of subsection (b). It also applies to beneficiaries who did not receive
29 notice of the report, whether personally or through representation. While the five-year limitations
30 period will normally begin to run on termination of the trust, it can also begin earlier. If a trustee
31 leaves office prior to the termination of the trust, the limitations period for actions against that
32 particular trustee begins to run on the date the trustee leaves office. If a beneficiary receives a final
33 distribution prior to the date the trust terminates, the limitations period for actions by that particular
34 beneficiary begins to run on the date of final distribution.

35 If a trusteeship terminates by reason of death, a claim against the trustee’s estate for breach

1 of fiduciary duty would, like other claims against the trustee’s estate, be barred by a probate
2 creditor’s claim statute even though the statutory period prescribed by this section has not yet
3 expired.

4 This section does not specifically provide that the statutes of limitations under this section
5 are tolled for fraud or other misdeeds, the drafters preferring to leave the resolution of this question
6 to other law of the State.

7 **SECTION 1006. RELIANCE ON TRUST INSTRUMENT.** A trustee who acts in
8 reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a
9 beneficiary for a breach of trust to the extent the breach resulted from the reliance.

10 **Kansas Comment**

11 This section conforms to Kansas law. A trustee is not liable to a beneficiary for the trustee’s
12 reasonable and good faith reliance on the express provisions of a trust instrument. K.S.A. 17-
13 5004(a)(2).

14 **UTC Comment**

15 It sometimes happens that the intended terms of the trust differ from the apparent meaning
16 of the trust instrument. This can occur because the court, in determining the terms of the trust, is
17 allowed to consider evidence extrinsic to the trust instrument. *See* Section 103(17) (definition of
18 “terms of a trust”). Furthermore, if a trust is reformed on account of mistake of fact or law, as
19 authorized by Section 415, provisions of a trust instrument can be deleted or contradicted and
20 provisions not in the trust instrument may be added. The concept of the “terms of a trust,” both as
21 defined in this Code and as used in the doctrine of reformation, is intended to effectuate the principle
22 that a trust should be administered and distributed in accordance with the settlor’s intent. However,
23 a trustee should also be able to administer a trust with some dispatch and without concern that a
24 reasonable reliance on the terms of the trust instrument is misplaced. This section protects a trustee
25 who so relies on a trust instrument but only to the extent the breach of trust resulted from such
26 reliance. This section is similar to Section 1(b) of the Uniform Prudent Investor Act, which protects
27 a trustee from liability to the extent that the trustee acted in reasonable reliance on the provisions
28 of the trust.

29 This section protects a trustee only if the trustee’s reliance is reasonable. For example, a
30 trustee’s reliance on the trust instrument would not be justified if the trustee is aware of a prior court
31 decree or binding nonjudicial settlement agreement clarifying or changing the terms of the trust.

1 confidential relationship to the settlor.

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

6 **Kansas Comment**

7 This section is new.

8 **UTC Comment**

9 Even if the terms of the trust attempt to completely exculpate a trustee for the trustee's acts,
10 the trustee must always comply with a certain minimum standard. As provided in subsection (a),
11 a trustee must always act in good faith with regard to the purposes of the trust and the interests of
12 the beneficiaries. Subsection (a) is consistent with the standards expressed in Sections 105 and
13 814(a), which, similar to this section, place limits on the power of a settlor to negate trustee duties.
14 This section is also similar to Section 222 of the Restatement (Second) of Trusts (1959), except that
15 this Code, unlike the Restatement, allows a settlor to exculpate a trustee for a profit that the trustee
16 made from the trust.

17 Subsection (b) disapproves of cases such as *Marsman v. Nasca*, 573 N.E.2d 1025 (Mass.
18 App. Ct. 1991), which held that an exculpatory clause in a trust instrument drafted by the trustee was
19 valid because the beneficiary could not prove that the clause was inserted as a result of an abuse of
20 a fiduciary relationship. For a later case where sufficient proof of abuse was present, see *Rutanan*
21 *v. Ballard*, 678 N.E.2d 133 (Mass. 1997). Subsection (b) responds to the danger that the insertion
22 of such a clause by the fiduciary or its agent may have been undisclosed or inadequately understood
23 by the settlor. To overcome the presumption of abuse in subsection (b), the trustee must establish
24 that the clause was fair and that its existence and contents were adequately communicated to the
25 settlor. In determining whether the clause was fair, the court may wish to examine: (1) the extent
26 of the prior relationship between the settlor and trustee; (2) whether the settlor received independent
27 advice; (3) the sophistication of the settlor with respect to business and fiduciary matters; (4) the
28 trustee's reasons for inserting the clause; and (5) the scope of the particular provision inserted. *See*
29 *Restatement (Second) of Trusts § 222 cmt. d (1959).*

30 The requirements of subsection (b) are satisfied if the settlor was represented by independent
31 counsel. If the settlor was represented by independent counsel, the settlor's attorney is considered
32 the drafter of the instrument even if the attorney used the trustee's form. Because the settlor's
33 attorney is an agent of the settlor, disclosure of an exculpatory term to the settlor's attorney is
34 disclosure to the settlor.

1
2 **SECTION 1009. BENEFICIARY’S CONSENT, RELEASE, OR RATIFICATION.**

3 A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct
4 constituting the breach, released the trustee from liability for the breach, or ratified the transaction
5 constituting the breach, unless:

6 (1) the consent, release, or ratification of the beneficiary was induced by improper
7 conduct of the trustee; or

8 (2) at the time of the consent, release, or ratification, the beneficiary did not know
9 of the beneficiary’s rights or of the material facts relating to the breach.

10 **Kansas Comment**

11 Although the general rule has apparently never been applied in Kansas, the Kansas Supreme
12 Court has stated it has no quarrel with the doctrine. See *Gillespie v. Seymour*, 250 Kan. 123, 130,
13 823 P.2d 782 (1991) (doctrine cited at length but inapplicable to facts of case).

14 **UTC Comment**

15 This section is based on Sections 216 through 218 of the Restatement (Second) of Trusts
16 (1959). A consent, release, or affirmance under this section may occur either before or after the
17 approved conduct. This section requires an affirmative act by the beneficiary. A failure to object
18 is not sufficient. See Restatement (Second) of Trusts § 216 cmt. a (1959). A consent is binding on
19 a consenting beneficiary although other beneficiaries have not consented. See Restatement (Second)
20 of Trusts § 216 cmt. g (1959). To constitute a valid consent, the beneficiary must know of the
21 beneficiary’s rights and of the material facts relating to the breach. See Restatement (Second) of
22 Trusts § 216 cmt. k (1959). If the beneficiary’s approval involves a self-dealing transaction, the
23 approval is binding only if the transaction was fair and reasonable. See Restatement (Second) of
24 Trusts §§ 170(2), 216(3) and cmt. n (1959).

25 An approval by the settlor of a revocable trust or by the holder of a presently exercisable
26 power of withdrawal binds all the beneficiaries. See Section 603. A beneficiary is also bound to
27 the extent an approval is given by a person authorized to represent the beneficiary as provided in
28 Article 3.

29 **2001 UTC Comment**

1 This section includes the 2001 amendments to the 2000 Uniform Trust Code. The change
2 is as follows:

3 "Section 1009. Beneficiary's Consent, Release, or Ratification. A
4 trustee is not liable to a beneficiary for breach of trust if the
5 beneficiary, ~~while having capacity,~~ consented to the conduct
6 constituting the breach, released the trustee from liability for the
7 breach, or ratified the transaction constituting the breach, unless:"

8 The lead-in language is revised to avoid implication that Article 3 representation rules cannot
9 be applied to represent an incapacitated beneficiary with respect to a beneficiary consent.

10 SECTION 1010. LIMITATION ON PERSONAL LIABILITY OF TRUSTEE.

11 (a) Except as otherwise provided in the contract, a trustee is not personally liable on
12 a contract properly entered into in the trustee's fiduciary capacity in the course of administering the
13 trust if the trustee in the contract disclosed the fiduciary capacity.

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

17 (c) A claim based on a contract entered into by a trustee in the trustee's fiduciary
18 capacity, on an obligation arising from ownership or control of trust property, or on a tort committed
19 in the course of administering a trust, may be asserted in a judicial proceeding against the trustee in
20 the trustee's fiduciary capacity, whether or not the trustee is personally liable for the claim.

21 Kansas Comment

22 Subsection (a) is apparently new as applied to trustees. The Kansas Supreme Court has
23 applied a similar rule for agents acting in a representative capacity. See *Lentz Plumbing Co. v. Fee*,
24 235 Kan. 266 Syl. 2, 679 P.2d 736 (1984). The Kansas Uniform Transfers to Minors Act contains
25 a substantially identical provision. See K.S.A. 38-1718(b)(1). The Kansas Supreme Court has
26 recognized that the failure to register stocks "as trustee" rather than individually may subject the
27 trustee personally to liability for any resulting losses. *Taliaferro v. Taliaferro*, 260 Kan. 573, 921
28 P.2d 803 (1996). Additionally, the Kansas Supreme Court has held that in order to absolve a trustee

1 from personal liability upon his contract, an express agreement to that effect is necessary. *Austin*
2 *v. Prudential Trust Co.*, 112 Kan. 545, 212 P. 77 (1923).

3 Subsection (b) generally conforms to Kansas law, although provisions regarding
4 environmental law and imposing personal liability on trustee only if he is personally at fault is new.
5 See *Gillespie v. Seymour*, 250 Kan. 123, 145, 823 P.2d 782 (1991) (co-trustee personally liable for
6 failure to perform duties); *Kline v. Orebaugh*, 214 Kan. 207, 210-11, 519 P.2d 691 (1974) (trustee
7 who violates any duty owed to beneficiary is liable to beneficiary to redress breach of trust); *Moore*
8 *v. Adkins*, 2 Kan. App. 2d 139, 151, 576 P.2d 245 (1978) (trustee who pays or conveys trust property
9 to one who is not a beneficiary in violation of the trust is liable to beneficiary even though trustee
10 acts in good faith and under reasonable mistake of law or fact); *Wilcox v. Gentry*, 254 Kan. 411,
11 413-14, 867 P.2d 281 (1994) (unless trust contains valid restraint on alienation, trustee who pays
12 or applies for the beneficiary any part of trust property with knowledge of a transfer or after he has
13 been served with process is liable to the transferee or creditor); *Carson v. Davidson*, 248 Kan. 543,
14 547-48, 808 P.2d 1377 (1991) (court recognized trustee is personally liable for trust property used
15 for trustee's own purposes or disposed of by trustee); *Holderman v. Hood*, 70 Kan. 267, 78 P. 838
16 (1904) (action in tort for damages may be maintained against a trustee who fraudulently conspires
17 to make sale of trust property at less than its value to the injury of beneficiaries). The Kansas
18 Uniform Transfers to Minors Act contains a substantially similar provision. See K.S.A. 38-
19 1718(b)(2).

20 Subsection (c) is new, although consistent with Kansas law. See K.S.A. 60-217(a) (action
21 may be prosecuted in trustee's name). The Kansas Uniform Transfers to Minors Act contains an
22 identical provision. See K.S.A. 38-1718(a).

23
24 The U.T.A. does not address the liability of a third person who joins with the trustee in a
25 breach of trust. See *Gillespie v. Seymour*, 14 Kan. App. 2d 563, 796 P.2d 1060 (1990).

26 UTC Comment

27 This section is based on Section 7-306 of the Uniform Probate Code. However, unlike the
28 Uniform Probate Code, which requires that the contract both disclose the representative capacity and
29 identify the trust, subsection (a) protects a trustee who reveals the fiduciary relationship either by
30 indicating a signature as trustee or by simply referring to the trust. The protection afforded the
31 trustee by this section applies only to contracts that are properly entered into in the trustee's
32 fiduciary capacity, meaning that the trustee is exercising an available power and is not violating a
33 duty. This section does not excuse any liability the trustee may have for breach of trust.

34 Subsection (b) addresses trustee liability arising from ownership or control of trust property
35 and for torts occurring incident to the administration of the trust. Liability in such situations is
36 imposed on the trustee personally only if the trustee was personally at fault, either intentionally or
37 negligently. This is contrary to Restatement (Second) of Trusts § 264 (1959), which imposes
38 liability on a trustee regardless of fault, including liability for acts of agents under respondeat
39 superior. Responding to a particular concern of trustees, subsection (b) specifically protects a trustee

1 from personal liability for violations of environmental law such as CERCLA (42 U.S.C. § 9607)
2 or its state law counterparts, unless the trustee was personally at fault. *See also* Sections 701(c)(2)
3 (nominated trustee may investigate trust property to determine potential violation of environmental
4 law without having accepted trusteeship) and 816(13) (trustee powers with respect to possible
5 liability for violation of environmental law).

6 Subsection (c) alters the common law rule that a trustee could not be sued in a representative
7 capacity if the trust estate was not liable.

8 **§SECTION 1011. INTEREST AS GENERAL PARTNER.**

9 (a) Except as otherwise provided in subsection (c) or unless personal liability is
10 imposed in the contract, a trustee who holds an interest as a general partner in a general or limited
11 partnership is not personally liable on a contract entered into by the partnership after the trust's
12 acquisition of the interest if the fiduciary capacity was disclosed in the contract or in a statement
13 previously filed pursuant to the §Kansas Uniform Partnership Act, K.S.A. 56a-101 et seq. or the
14 Revised Uniform Limited Partnership Act, K.S.A. 56-1a101 et seq.

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

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

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

24 **Kansas Comment**

1 This section is new.

2 The Kansas drafting committee inserted the proper Kansas titles and cites for the Kansas
3 Uniform Partnership Act and the Revised Uniform Limited Partnership Act.

4 **UTC Comment**

5 Section 1010 protects a trustee from personal liability on contracts that the trustee enters into
6 on behalf of the trust. Section 1010 also absolves a trustee from liability for torts committed in
7 administering the trust unless the trustee was personally at fault. It does not protect a trustee from
8 personal liability for contracts entered into or torts committed by a general or limited partnership
9 of which the trustee was a general partner. That is the purpose of this section, which is modeled
10 after Ohio Revised Code § 1339.65. Subsection (a) protects the trustee from personal liability for
11 such partnership obligations whether the trustee signed the contract or it was signed by another
12 general partner. Subsection (b) protects a trustee from personal liability for torts committed by the
13 partnership unless the trustee was personally at fault. Protection from the partnership’s contractual
14 obligations is available under subsection (a) only if the other party is on notice of the fiduciary
15 relationship, either in the contract itself or in the partnership certificate on file.

16 Special protection is not needed for other business interests that the trustee may own, such
17 as an interest as a limited partner, a membership interest in an LLC, or an interest as a corporate
18 shareholder. In these cases the nature of the entity or the interest owned by the trustee carries with
19 it its own limitation on liability.

20 Certain exceptions apply. The section is not intended to be used as a device for individuals
21 or their families to shield assets from creditor claims. Consequently, subsection (c) excludes from
22 the protections provided by this section trustees who own an interest in the partnership in another
23 capacity or if an interest is owned by the trustee’s spouse or the trustee’s descendants, siblings,
24 parents, or the spouse of any of them.

25 Nor can a revocable trust be used as a device for avoiding claims against the partnership.
26 Subsection (d) imposes personal liability on the settlor for partnership contracts and other
27 obligations of the partnership the same as if the settlor were a general partner.

28 This section has been placed in brackets to alert enacting jurisdictions to consider modifying
29 the section to conform it to the State’s specific laws on partnerships and other forms of
30 unincorporated businesses.

31 **SECTION 1012. PROTECTION OF PERSON DEALING WITH TRUSTEE.**

32 (a) A person other than a beneficiary who in good faith assists a trustee, or who in
33 good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or

1 improperly exercising the trustee's powers is protected from liability as if the trustee properly
2 exercised the power.

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

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

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

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

13 **Kansas Comment**

14
15 Subsection (a) is codified in K.S.A. 58-1207 (third persons, without actual knowledge that
16 trustee is exceeding powers or improperly exercising them, are fully protected in dealing with trustee
17 as if trustee possessed and properly exercised such powers) and K.S.A. 58-2409 (any right or title
18 derived by third person dealing with trustee in good faith shall not be called in question). The
19 Kansas Supreme Court has held that, if a trustee in breach of trust transfers trust property to a person
20 who takes for value and without notice of the breach and who is not knowingly taking part in an
21 illegal transaction, the latter holds the property free of trust and is under no liability to the
22 beneficiary. *Kline v. Orebaugh*, 214 Kan. 207, Syl. 4, 519 P.2d 691 (1974). The court in *Kline* did
23 not address K.S.A. 58-2405, which voids every sale, conveyance or act of a trustee in contravention
24 of a trust.

25 Subsection (b) is codified in K.S.A. 58-1207 except uniform code adds good faith
26 requirement.

27 Subsection (c) is codified in K.S.A. 58-1207 except uniform code adds good faith
28 requirement. Also, K.S.A. 58-2409 contains a similar provision to the good faith requirement.

1 The Uniform Transfers to Minors Act contains a provision similar to subsections (a), (b) and
2 (c). See K.S.A. 38-1717.

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

4 **UTC Comment**

5 This section is derived from Section 7 of the Uniform Trustee Powers Act.

6 Subsection (a) protects two different classes; persons other than beneficiaries who assist a
7 trustee with a transaction, and persons other than beneficiaries who deal with the trustee for value.
8 As long as the assistance was provided or the transaction was entered into in good faith and without
9 knowledge, third persons in either category are protected in the transaction even if the trustee was
10 exceeding or improperly exercising the power. For the definition of “know,” see Section 104. This
11 Code does not define “good faith” for purposes of this and the next section. Defining good faith with
12 reference to the definition used in the State’s commercial statutes would be consistent with the
13 purpose of this section, which is to treat commercial transactions with trustees similar to other
14 commercial transactions.

15 Subsection (b) confirms that a third party who is acting in good faith is not charged with a
16 duty to inquire into the extent of a trustee’s powers or the propriety of their exercise. The third party
17 may assume that the trustee has the necessary power. Consequently, there is no need to request or
18 examine a copy of the trust instrument. A third party who wishes assurance that the trustee has the
19 necessary authority instead should request a certification of trust as provided in Section 1013.
20 Subsection (b), and the comparable provisions enacted in numerous States, are intended to negate
21 the rule, followed by some courts, that a third party is charged with constructive notice of the trust
22 instrument and its contents. The cases are collected in George G. Bogert & George T. Bogert, *The*
23 *Law of Trusts and Trustees* § 897 (Rev. 2d ed. 1995); and 4 Austin W. Scott & William F. Fratcher,
24 *The Law of Trusts* § 297 (4th ed. 1989).

25 Subsection (c) protects any person, including a beneficiary, who in good faith delivers
26 property to a trustee. The standard of protection in the Restatement is phrased differently although
27 the result is similar. Under Restatement (Second) of Trusts § 321 (1959), the person delivering
28 property to a trustee is liable if at the time of the delivery the person had notice that the trustee was
29 misapplying or intending to misapply the property.

30 Subsection (d) extends the protections afforded by the section to assistance provided to or
31 dealings for value with a former trustee. The third party is protected the same as if the former
32 trustee still held the office.

33 Subsection (e) clarifies that a statute relating to commercial transactions controls whenever
34 both it and this section could apply to a transaction. Consequently, the protections provided by this
35 section are superseded by comparable protective provisions of these other laws. The principal
36 statutes in question are the various articles of the Uniform Commercial Code, including Article 8

1 on the transfer of securities, as well as the Uniform Simplification of Fiduciary Securities Transfer
2 Act.

3 **SECTION 1013. CERTIFICATION OF TRUST.**

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

7 (1) that the trust exists and the date the trust instrument was executed;

8 (2) the identity of the settlor;

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

10 (4) the powers of the trustee;

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

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

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

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

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

18 (c) A certification of trust must state that the trust has not been revoked, modified,
19 or amended in any manner that would cause the representations contained in the certification of trust
20 to be incorrect.

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

22 (e) A recipient of a certification of trust may require the trustee to furnish copies of

1 those excerpts from the original trust instrument and later amendments which designate the trustee
2 and confer upon the trustee the power to act in the pending transaction.

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

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

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

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

16 **Kansas Comment**

17 This section is new.

18 **UTC Comment**

19 This section, derived from California Probate Code § 18100.5, is designed to protect the
20 privacy of a trust instrument by discouraging requests from persons other than beneficiaries for
21 complete copies of the instrument in order to verify a trustee's authority. Even absent this section,
22 such requests are usually unnecessary. Pursuant to Section 1012(b), a third person proceeding in
23 good faith is not required to inquire into the extent of the trustee's powers or the propriety of their
24 exercise. This section adds another layer of protection.

25 Third persons frequently insist on receiving a copy of the complete trust instrument solely

1 to verify a specific and narrow authority of the trustee to engage in a particular transaction. While
2 a testamentary trust, because it is created under a will, is a matter of public record, an inter vivos
3 trust instrument is private. Such privacy is compromised, however, if the trust instrument must be
4 distributed to third persons. A certification of trust is a document signed by a currently acting
5 trustee that may include excerpts from the trust instrument necessary to facilitate the particular
6 transaction. A certification provides the third party with an assurance of authority without having
7 to disclose the trust's dispositive provisions. Nor is there a need for third persons who may already
8 have a copy of the instrument to pry into its provisions. Persons acting in reliance on a certification
9 may assume the truth of the certification even if they have a complete copy of the trust instrument
10 in their possession.

11 Subsections (a) through (c) specify the required contents of a certification. Subsection (d)
12 clarifies that the certification need not include the trust's dispositive terms. A certification, however,
13 normally will contain the administrative terms of the trust relevant to the transaction. Subsection
14 (e) provides that the third party may make this a condition of acceptance. Subsections (f) and (g)
15 protect a third party who relies on the certification. The third party may assume that the certification
16 is true, and is not charged with constructive knowledge of the terms of the trust instrument even if
17 the third party has a copy.

18 To encourage compliance with this section, a person demanding a trust instrument after
19 already being offered a certification may be liable under subsection (h) for damages if the refusal
20 to accept the certification is determined not to have been in good faith. A person acting in good faith
21 would include a person required to examine a complete copy of the trust instrument pursuant to due
22 diligence standards or as required by other law. Examples of such due diligence and legal
23 requirements include (1) in connection with transactions to be executed in the capital markets where
24 documentary standards have been established in connection with underwriting concerns; (2) to
25 satisfy documentary requirements established by state or local government or regulatory agency; (3)
26 to satisfy documentary requirements established by a state or local government or regulatory agency;
27 and (4) where the insurance rates or premiums or other expenses of the party would be higher absent
28 the availability of the documentation.

29 The Uniform Trust Code leaves to other law the issue of how damages for a bad faith refusal
30 are to be computed and whether attorney's fees might be recoverable. For a discussion of the
31 meaning of "good faith," see Section 1012 Comment.

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
21 to 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).

26 **SECTION 1103. SEVERABILITY CLAUSE.** If any provision of this [Code] or its

1 application to any person or circumstances is held invalid, the invalidity does not affect other
2 provisions or applications of this [Code] which can be given effect without the invalid provision or
3 application, and to this end the provisions of this [Code] are severable.

4 **Kansas Comment**

5 This section is new.

6 **SECTION 1104. EFFECTIVE DATE.** This [Code] takes effect on January 1, 2003.

7 **Kansas Comment**

8 This section is new.

9 **SECTION 1105. REPEALS.** The following ~~Acts Sections~~ are repealed:

10 ~~(1) Uniform Trustee Powers Act;~~

11 ~~—————(2) Uniform Probate Code, Article VII;~~

12 ~~—————(3) Uniform Trusts Act (1937); and~~

13 ~~—————(4) Uniform Prudent Investor Act.~~

14 K.S.A. 58-1201, 58-1202, 58-1203, 58-1204, 58-1205, 58-1206, 58-1207, 58-1208, 58-1209, 58-
15 1210, 58-1211, 58-2404, 58-2405, 58-2409, 58-2410, 58-2411, 58-2412, 58-2413, 58-2415, 58-
16 2417, 58-2420, 59-2295 and 59-2296.

17 **Kansas Comment**

18 This section is new.

19 **UTC Comment**

1 For the reasons why the above Uniform Acts should be repealed upon enactment of the
2 Uniform Trust Code, see the Prefatory Note. Enacting jurisdictions that have not enacted one or
3 more of the specified Uniform Acts should repeal their comparable legislation. Because of the
4 comprehensive scope of the Uniform Trust Code, many States will have trust provisions not based
5 on any Uniform Act that will need to be repealed upon enactment of this Code. This section does
6 not attempt to list the types of conforming amendments, whether in the enacting State's probate code
7 or elsewhere, that need to be made upon enactment of this Code.

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

9 (a) Except as otherwise provided in this Act, on the effective date of this Act:

10 (1) this Act applies to all trusts created before, on, or after its effective date;

11 (2) this Act applies to all judicial proceedings concerning trusts commenced
12 on or after its effective date;

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

18 (4) any rule of construction or presumption provided in this Act applies to
19 trust instruments executed before the effective date of the Act unless there is a clear indication of
20 a contrary intent in the terms of the trust; and

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

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

25 **Kansas Comment**

