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

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

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

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

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

The UTC was also enacted in Arizona in 2003, but was repealed by Arizona in 2004.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

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

D. Who Drafted the Uniform Trust Code? The UTC was drafted by a committee chaired by Maurice Hartnett, a Judge of the Delaware Supreme Court and former Justice of the Delaware Chancery Court with long experience with trust cases. This writer served as Reporter with responsibility for carrying out the drafting committee’s decisions on a day-to-day basis and for preparing the various drafts. The drafting committee was assisted by numerous advisors, most of whom attended a majority of the twice annual drafting committee meetings. Groups represented included the American Bar Association and its Section on Real Property Probate and Trust Law (3 advisors), the American College of Trust and Estate Counsel, the American Bankers Association, and the California and Colorado State Bars. Key advice was also provided by the Joint Editorial Board for Uniform Trusts and Estates Acts and the ACTEC Committee on State Laws.

E. What Process Was Followed? The drafting of the UTC was a seven-year process. A Study Committee Chaired by Judge Hartnett was initially appointed in 1993. The function of the Study Committee was to decide whether the Commissioners should undertake the drafting of a comprehensive uniform law on trusts. The Study Committee recommended the appointment of a drafting committee, which was appointed in 1994. To gather as much input as possible, the drafting of the UTC was deliberately not placed on the fast track, but extended over a period of six years.

F. What Models Did the Drafting Committee Use? While the UTC is the first comprehensive uniform act on the subject of trusts, comprehensive trust statutes are already in effect in several states. Notable examples include California, Georgia, Indiana, and Texas. However, during the drafting process, the trust statutes in all states were reviewed.
G. Why a Uniform Trust Code? There are several reasons why the drafting of a Uniform Trust Code was timely. The primary stimulus for the drafting of the UTC is the much greater use of the trust in recent years, both in family estate planning and in commercial transactions, in the United States and internationally. This greater use of the trust, and consequent rise in the number of day-to-day questions involving trusts, led to a recognition that the trust law in many states is thin. It also led to a recognition that the existing uniform acts relating to trusts, while numerous, are fragmentary. The primary source of trust law in most States is thus the Restatement (Second) of Trusts and the multivolume treatises by Scott and Bogert, sources that fail to address numerous practical issues and that on others sometimes provide insufficient guidance. The UTC will enable states which enact it to specify their rules on trust law with precision and in a readily available source. Finally, while much of the UTC codifies the common law, the UTC does make some significant changes.

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

1. Prepare State Law Study. The first step is to determine how enactment of the UTC would change existing law, both statutes and case law. With respect to case law, most courts rely heavily on the Restatement of Trusts, on which the UTC also places major reliance.

2. Decide on Drafting Model. One approach is to start with the UTC as a base and then make modifications. The other approach is to begin with existing law and to add selected provisions of the uniform law. Relying on the UTC as the starting point will result in greater consistency with other states. It will also reduce the risk of gaps and inconsistencies.

3. Decide What to Do About Optional Provisions. Certain sections of the UTC are placed in brackets to signal that modifications may be appropriate. The reasons why modification of a section may be appropriate are then discussed in the comments to the bracketed sections. Sections of the UTC containing bracketed language include Sections 112 (rules of construction), 203 (subject-matter jurisdiction), 204 (venue), and 604 (contest of revocable trusts). The 2004 amendments provide additional bracketed provisions in Sections 105 (mandatory notice), 110 (charitable trust notice to attorneys general), and 411 (modification and termination of noncharitable irrevocable trust by consent).

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

5. Accommodate Variations in Local Court Systems. In many states, testamentary trusts are within the jurisdiction of the probate court, with one set of rules and procedures, while inter vivos trusts are within the jurisdiction of a court of equity, with yet another set of rules and procedures. The UTC, being a *uniform* act, cannot accommodate all local variations.

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

7. Decide What to do about the Uniform Prudent Investor Act. Article 9 of the UTC provides a place for an enacting jurisdiction to insert its version of the Uniform Prudent Investor Act. The comment to that article provides instructions on how to eliminate overlap between the Uniform Prudent Investor Act and the provisions of UTC Article 8 describing the fiduciary duties of a trustee. An enacting jurisdiction will need to determine whether to leave its version of the Prudent Investor Act where is or codify it as part of the UTC.

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

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

II. OTHER UNIFORM ACTS ON TRUSTS

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

B. Uniform Acts Requiring Replacement or Other Action. The following Uniform Acts are
incorporated into or otherwise superseded by the UTC:

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

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

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

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

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

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

2. Uniform Custodial Trust Act (1987) – This Act has been enacted in 18 jurisdictions. This Act allows standard trust provisions to be automatically incorporated into the terms of a trust simply by referring to the Act. This Act is not displaced by the UTC but complements it.

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

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

5. Uniform Probate Code – Originally approved in 1969, and enacted in close to complete form in about 20 states but influential in virtually all, the UPC overlaps with trust topics in several areas. One area of overlap, already mentioned, is UPC Article VII. Another area of overlap concerns representation of beneficiaries. UPC Section 1-403 provides principles of representation for achieving binding judicial settlements of matters involving both estates and trusts. The UTC refines these representation principles, and extends them to nonjudicial settlement agreements and to optional notices and consents. See UTC Section 111 and Article 3. A final area of overlap between the UPC and trust law concerns rules of construction. The UPC, in Article II, Part 7, extends certain of the rules on the construction of wills to trusts and other nonprobate instruments. The UTC similarly extends to trusts the rules on the construction of wills. Unlike the UPC, however, the UTC does not prescribe the exact rules. Instead, Section 112 of the UTC is an optional provision applying to trusts whatever rules the enacting jurisdiction already has in place on the construction of wills.
6. Uniform Statutory Rule Against Perpetuities -- Originally approved in 1986, this Act has been enacted in about half of the states. The Act reforms the durational limit on when property interests, including interests created under trusts, must vest or fail. The UTC does not limit the duration of trusts or alter the time when interests must otherwise vest, but leaves this issue to other state law. The UTC may be enacted without change regardless of the status of the perpetuities law in the enacting jurisdiction.

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

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

III. RELATIONSHIP OF UTC TO RESTATEMENTS OF LAW

A. What are Restatements? Restatements, which are written and approved by a national body of lawyers comprising the members of the American Law Institute, serve a proactive role close to that of uniform acts. A Restatement is more than a document that collects and summarizes in one place the common law on a particular subject. Rather, where the decisions of the courts conflict, a Restatement strives to delineate the better rule. It also tries to fill in gaps in the law, to promote the rule the courts should apply when it encounters an issue for the first time. The hope is that the courts of the different states, by relying on the Restatement as a primary guide for decision, will over time adopt uniform rules of decision.

B. Restatement (Third) of Trusts. The Restatement (Second) of Trusts was approved by the American Law Institute in 1957. Beginning in the late 1980s, work on the Restatement Third began. The portion of Restatement Third relating to the prudent investor rule and other investment topics was completed and approved in 1990. A tentative draft of the portion of Restatement Third relating to the rules on the creation and validity of trusts was approved in 1996, the portion relating to the office of trustee, trust purposes, spendthrift provisions and the rights of creditors was approved in 1999, and the portion relating to trust modification and termination was approved in 2001.
C. What is Relationship of UTC to Restatement of Trusts? The Uniform Trust Code was drafted in close coordination with the revision of the Restatement. This coordination has hopefully made both into better products. The UTC offers the benefit of certain rules. The Restatement provides a wealth of background materials for interpreting the language of the UTC.

D. Relationship to Restatement of Property. Much of the law on voluntary transfer of property, both during life and at death, is collected in the portion of the Restatement of Property entitled Wills and Other Donative Transfers. The portions of this Restatement dealing with interpretation of documents are relevant whether the document in question is a will, inter vivos trust, or other form of nonprobate transfer. While less influential on the UTC than the Restatement of Trusts, several sections of the UTC are patterned on the Restatement of Property. These include Section 414 (reformation to correct mistakes) and Section 415 (modification to achieve settlor’s tax objectives).

E. Why Not Rely on Restatements Alone? Restatements are not statutes. Until accepted by the courts of a particular state, the courts are free to, and often will, adopt a different rule. By contrast, Uniform Acts, when enacted, become mandatory rules of law that can be relied on and are easily accessible to all of a state’s citizens, whether or not they are in front of the courts. The UTC will thus serve an important educational function. Legal practitioners in many states for the first time will be able actually to determine their state’s law on trusts. Furthermore, there are numerous practical issues that are best addressed by specific legislation, such as the UTC, instead of by a more discretionary guideline such as a Restatement.

IV. SCOPE AND ORGANIZATION

9. Scope (Section 102).

1. Express Trusts. The Uniform Trust Code states the law relating to express trusts. These are trusts created by settlors who transfer property to a trustee or declare themselves as trustee of their own property. Following its creation, the trustee will then hold the property for the benefit of beneficiaries. This is to be distinguished from what are known as resulting or constructive trusts, which are remedial devices imposed by the courts and which are excluded from the Code.

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

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

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

2. Article 2. This article addresses selected topics involving judicial proceedings concerning trusts. This minimal coverage was deliberate; the drafting committee concluded that most issues relating to jurisdiction and procedure before the courts are best left to other bodies of law, such as the rules of civil procedure.

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

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

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

6. Article 6. This article collects the special rules relating to revocable trusts, including the standard of capacity, the procedure for revocation or modification, and the statute of limitations on contests.
7. Article 7. This article deals with the office of trustee, specifying numerous procedural rules that apply absent special provision in the trust. Included are the rules on trustee acceptance, the rights and obligations of cotrustees, the procedure for resignation, the grounds for removal, the methods for appointing successors, and trustee compensation.

8. Article 8. This article details the duties and powers of the trustee. The powers listed are an updated version of the Uniform Trustee Powers Act, including coverage of such current topics as the power to deal with environmental hazards. The specified duties of the trustee, like the duty of loyalty, were drafted where relevant to conform to the Uniform Prudent Investor Act. The Uniform Prudent Investor Act prescribes a trustee’s responsibilities with regard to the management and investment of trust property. The UTC expands on this by also specifying the trustee’s duties regarding distributions to beneficiaries.

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

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

1. lists the remedies for breach of trust;

2. specifies how money damages are to be determined;

3. provides that the court, in judicial proceedings relating to the administration of the trust, may award attorney’s fees against the trustee, the trust, or even a beneficiary, as justice and equity may require;

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

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

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

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

V. THE NEED FOR AMENDMENT

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

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

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

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

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

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

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

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

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

VI. SIGNIFICANT POLICY ISSUES

A. Changing the Judge-Made Law. The Uniform Trust Code does not make sweeping changes in the common law of trusts, but neither does it woodenly copy the previous judge-made law. The UTC makes significant strides. What follows is a description of the more important changes made by the UTC in the rules prevailing in most states. These are also the issues likely to receive the most discussion when the UTC is considered by the states, which is why they are highlighted here.

B. Default Rules (Section 105).

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

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

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

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

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

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

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

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

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

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

C. Procedural Rules. While most of the procedural issues involved in administering a trust can be addressed in the trust instrument, it is difficult to anticipate all questions. Even if the drafter does anticipate every issue, the drafter will frequently rely on the local trust statute for guidance on the language to employ. Oftentimes, the drafter will choose to let the statute control. The UTC specifies numerous procedural rules for administering a trust. All of these procedures are subject to override in the terms of the trust, but the drafters of the UTC expect that many scriveners of trust instruments may prefer to rely on the Code.

1. The Rules. Among the procedural issues addressed in the UTC are:

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

b. the method for revoking or amending a revocable trust (Section 602);

c. the requirements for rejecting or accepting appointment as trustee
d. the division of responsibilities among cotrustees (Section 703);

e. the procedure for appointing a successor trustee (Section 704); and

f. the requirements for an effective trustee resignation (Section 705).

2. Policy Issues. All of the above items were the subject of extensive discussion during the drafting of the UTC. The rules try to further several not always consistent objectives.

a. Honoring Intent: The UTC generally prefers honoring of intent over required formalities. Consequently, absent specific provision in the terms of the trust, a trustee may accept the trusteeship (Section 701) or a settlor may revoke or amend a revocable trust (Section 602) by any method indicating the necessary intent.

b. The Better-Drafted Document: Many trust documents allow a trustee to resign following notice to a specified class of beneficiaries. Under the UTC, the specified class of beneficiaries are known as the “qualified beneficiaries” [defined in Section 103], and a trustee may resign by giving notice to that group (Section 705).

c. Keeping Issues Out of Court. The UTC strongly encourages the resolution of disputes outside of court (see Section 111). This philosophy also applies to matters of procedure. While the court is always available, a trustee may transfer the principal place of administration upon notice to the qualified beneficiaries (Section 108); absent a successor appointment in the terms of the trust, a successor trustee may be appointed upon unanimous agreement of the qualified beneficiaries (Section 704).

d. The Cotrustee Dilemma. While appointment of cotrustees is common, the situations under which cotrustees are appointed are so varied that designing appropriate default rules is difficult. Given this difficulty, specifying the powers, duties, and divisions of responsibilities among cotrustees is among the more important issues to address in drafting. Yet, this issue is often neglected. Among the matters the trust instrument should address:
(a) Would the settlor have preferred that the cotrustees act by majority or unanimity? The UTC opts for efficiency by allowing the cotrustees to act by majority (Section 703(a)).

(b) To what extent did the settlor intend to allow cotrustees to delegate responsibilities to each other? The UTC allows a cotrustee to delegate to the other trustee responsibilities the settlor did not expect the cotrustee to perform personally (Section 703(c)). The standard is appropriate but may be difficult to apply in practice.

(c) To what extent should a nonparticipating cotrustee be liable for another trustee’s breach. The UTC generally immunizes a nonparticipating trustee from liability (Section 703(f)). However, the Code also assumes that the settlor did not intend for the trustee to totally neglect duties. Each trustee must exercise reasonable care to (1) prevent a cotrustee from committing a serious breach of trust; and (2) compel a cotrustee to redress a serious breach of trust (Section 703(g)).

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

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

D. Principal Place of Administration (Section 108).

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

2. Determining the Principal Place. As trust administration has become more complex, determining a trust’s principal place of administration has become more difficult. Cotrustees may be located in different states, or a corporate trustee’s personal trust officers may be located in one state, its investment division in another, and its operations facilities yet somewhere else. Also, a variety of nontrustees, such as advisors and trust protectors, may play a role in
the trust’s administration.

3. The Code’s Approach. The UTC does not and probably cannot resolve the difficult cases. Attempts to define principal place of administration in the terms of the trust were not successful. For cases in which determining a trust’s principal place of administration is important, settlors are encouraged to address the issue in the terms of the trust. Under Section 108(a) of the UTC, a provision in the trust terms designating the principal place of administration is valid and controlling as long as a trustee’s principal place of business is located in or a trustee is a resident of the designated jurisdiction, or all or part of the trust’s administration occurs in the designated place.

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

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

Modifications in Enacting Jurisdictions. Wyoming provides that the settlor may designate the settlor’s domicile as the principal place of administration even though the domicile does not otherwise have any connection to the trust. New Hampshire and Tennessee allow a trustee to transfer the trust’s principal place of administration unless a “majority of qualified beneficiaries” object.
E. Representation and Settlements (Article 3).

1. Overview. The UTC strives to keep administration of trusts outside of the courts. Numerous actions are allowed solely upon notice to the beneficiaries. Other actions can be accomplished upon consent of the beneficiaries. But achieving notice to or the consent of all of the beneficiaries is frequently difficult. Trusts commonly last for decades. In an increasing number of American jurisdictions trusts can in theory last in perpetuity. The current beneficiaries of the trust are frequently minors or adults who lack capacity. Future beneficiaries may not yet be born. To achieve notice to or the consent of beneficiaries incapable of representing themselves, others must be empowered to act on their behalf. This is the function of rules on representation. Concepts of representation are not new, but the UTC addresses the subject in more detail than previous efforts. The UTC also encourages resolution of disputes by nonjudicial means.

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

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

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

   c. resignation of a trustee (Section 705);

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

   e. trustee’s notice of proposed plans of distribution (Section 817).

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

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

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

4. Representation Principles. The UTC provides comprehensively for the representation of beneficiaries and others unable to represent themselves, both with respect to notices and consents. Among the representation concepts:
a. While the settlor is competent, the rights of the beneficiaries of a revocable trust are within the settlor’s exclusive control (Section 603(a)).

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

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

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

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

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

(c) an agent having authority to act with respect to the particular matter or dispute may represent and bind the principal (Section 303(3));

(d) a trustee may represent and bind the beneficiaries of the trust (Section 303(4));

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

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

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

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

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

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

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

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

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

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

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

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

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

a. The Court Could Have Approved Requirement. Section 111 requires a nonjudicial settlement to contain only such terms and conditions as a court could have approved. This standard is less stringent than one requiring that the nonjudicial settlement contain terms and conditions that the court would have approved, but it still opens the possibility that the parties may achieve more nonjudicially than had they gone to court. On the other hand, in Washington State there is no limitation on the matters to which the parties to a nonjudicial settlement can agree.

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

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

8. Modifications in Enacting Jurisdictions. Kansas reduces the list of matters that can be resolved by nonjudicial settlement, deleting agreements relating to interpretation or construction of trusts terms, and directions to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power. Missouri provides that a nonjudicial settlement cannot be used to implement an agreement by the beneficiaries to terminate a modify a trust. Tennessee, on the other hand, adds additional items to the list of matters that can be resolved by nonjudicial settlement, including determination of bond, determining the governing law of a trust, and determining the propriety of a
discretionary distribution.

The District of Columbia, Missouri and Wyoming provide that the holder of a testamentary general power of appointment may bind those whose interests are subject to the power regardless of possible conflict of interest. The District of Columbia and Missouri also expand the definition of general testamentary power to include a power exercisable in favor of anyone other than the powerholder, the powerholder’s estate, the powerholder’s creditors, or the creditors of the powerholder’s estate.

The District of Columbia and Wyoming modify the provision on representation by parents. In Wyoming, only a custodial parent may represent and bind a child, but that parent may represent not only a minor or unborn child but also an incapacitated child and any descendants of such children. The District of Columbia provides that a person may represent a grandchild or more remote descendant.

Wyoming adds a new category of representative, providing that a qualified beneficiary may represent and bind a nonqualified beneficiary who might succeed to the qualified beneficiary’s interest. The District of Columbia provides that a qualified beneficiary may represent any beneficiary who may succeed to the interest under the terms of the trust or pursuant to the exercise of a power of appointment. The new provisions are not as significant as they might first appear. The authority of the qualified beneficiary in each case is inoperative in the event of conflict of interest. Furthermore, situations where the qualified beneficiary might represent other beneficiaries are also situations where virtually representation would likely already apply.

Tennessee clarifies that a beneficiary may be represented by a person designated in the terms of the trust, a provision that would be valid in any event without statutory authorization. Tennessee also authorizes a beneficiary to be represented by a person designated by the beneficiaries. However, such an agreement would presumably by valid in any case under general principles of agency law.

F. Trust Modification and Termination (Sections 410-417).

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

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

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

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

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

2. Modification or Termination by Beneficiaries. Section 411 follows traditional doctrine in allowing for termination or modification of an irrevocable trust by unanimous agreement of the settlor and beneficiaries. The UTC also follows traditional doctrine in allowing for termination of an irrevocable trust by unanimous agreement of the beneficiaries. However, the trust may be terminated by the beneficiaries alone only if it no longer serves a material purpose, or may be modified by the beneficiaries alone only if such modification is not inconsistent with a material purpose. Provision is made for partial termination or modification if obtaining the consent of all beneficiaries is impracticable. Similar to other sections of the UTC but not consistent with traditional doctrine, the representation principles of Article 3 may be employed to obtain the necessary consents to termination.

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

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

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

4. Modification or Termination Because of Unanticipated Circumstances. Section 412 of the UTC confirms but at the same time expands the traditional doctrine of equitable deviation. The court may apply the doctrine to modify not only administrative terms but also dispositive provisions. Without regard to unanticipated circumstances, the court may modify an administrative term if continuation of the trust on its existing terms would be impracticable, wasteful, or impair the trust’s administration.

5. Uneconomic Trust. Section 414 of the UTC authorizes the court to terminate an uneconomical trust of any size, and allows a trustee, without approval of court, to terminate a trust with a value of $50,000 or less. Before terminating the trust, the court or trustee must conclude that the value of the trust property is insufficient to justify the cost of administration. The figure $50,000 is placed in brackets in recognition that many states may wish to change the amount. Initial indications are that many states will increase the amount to $100,000.

6. Reformation. Consistent with Restatement (Third) of Property: Wills and Other Donative Transfers § 12.1, Section 415 of the UTC clarifies that the doctrine of reformation may be applied to testamentary as well as inter vivos trusts. Also, the doctrine may be applied to correct a mistake of fact or law whether or not the terms of the trust are ambiguous.

7. Modification to Achieve Settlor’s Tax Objectives. Consistent with Restatement (Third) of Property: Wills and Other Donative Transfers § 12.2, Section 416 expands the court’s ability to modify a trust to achieve the settlor’s tax objectives. The court may modify the trust in any manner not contrary to the
settlor’s probable intention. Such broad authority is appropriate because the settlor’s objective - to achieve tax savings of a particular type - is usually abundantly clear. The other sections of Article 4, where applicable, can also be used to secure modifications for tax reasons.

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

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

10. Modifications in Enacting Jurisdictions. The majority of states increase the $50,000 small trust termination limit. Only the District of Columbia and New Mexico retain the $50,000 limit. Wyoming increases the limit to $150,000, the remaining states to $100,000. Wyoming also adds a detailed procedure for implementing a small trust termination.

Kansas makes several changes. Kansas allows a trust that no longer serves a material purpose to be terminated by the “qualified” beneficiaries; it combines the UTC provision on trust consolidation and division with its procedure under former law; it reverses the presumption on spendthrift provisions by providing that a spendthrift provision is presumed to constitute a material purpose; and it provides that the small trust termination provision cannot be applied to a trust whose assets are distributable to the trustee or to a person whom the trustee is obligated to support.

Missouri carries forward its prior law allowing the beneficiaries to terminate a trust regardless of whether there is a material purpose, a provision which was derived from British and not American law. Missouri also adds detail to the provision on combination and division of trusts.

New Hampshire, anticipating the estate tax issue, deletes Section 411(a). Tennessee adds a definition of “noncharitable irrevocable trust” and also allows
a settlor to block a beneficiary termination or modification.

G. Charitable Trusts (Section 413).

1. Scope. Charitable gifts may be made in numerous ways. The donor may create and transfer property to a non-profit corporation. The donor may make an outright gift to charity in the donor’s will. The donor may transfer property directly to a charity but subject its use to various restrictions. Finally, the donor may create a charitable trust. The UTC, being a trust code, only addresses the law with respect to charitable trusts. However, the topics addressed in the UTC, such as permitted charitable purpose and cy pres, are also relevant to other forms of charitable giving.

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

3. Cy Pres. Upon failure of a charitable purpose, the court may apply cy pres to reform the disposition to better carry out the settlor’s charitable purposes. If the settlor’s charitable purpose is deemed specific rather than general, however, under traditional principles the charitable disposition fails and the property is returned to the settlor or settlor’s successors in interest. Section 413(a) of the UTC liberalizes the doctrine of cy pres in a way believed more likely to carry out the average settlor’s intent. First, the UTC expands the ability of the court to apply cy pres. The court may apply cy pres not only if the original scheme becomes impossible or unlawful, but also if it becomes impracticable or wasteful. Second, the UTC creates a presumption in favor of general charitable intent. In applying cy pres, the court cannot divert the trust property to a noncharity unless the terms of the trust expressly so provide.

4. Remote Gifts Over. Section 413(b) of the UTC eliminates a severe administrative inefficiency. The UTC recognizes that provisions diverting property to a noncharity that take effect far in the future often cause more mischief than help, necessitating detailed searches for heirs and the running of property through numerous estates. To limit this difficulty, under the UTC a gift
over to a noncharity upon failure or impracticality of the original charitable purpose is effective only for the settlor’s lifetime, if the trust property is to revert to the settlor, or if fewer than 21 years have elapsed since the date of the trust’s creation.

5. **Enforcement.** Traditionally, standing to enforce a charitable trust is conferred on the Attorney General and persons with a special interest. Concluding that the settlor often has the greatest if not the only practical interest in seeing that the trust is enforced, the drafters added language authorizing a settlor to maintain an action to enforce a charitable trust (Section 405(c)), or to bring an action requesting modification of the trust under the doctrine of cy pres (Section 410(b)).

6. **Policy Issues.**

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

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

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

7. Modifications in Enacting Jurisdictions. Kansas and New Hampshire carry over their prior cy pres standard in lieu of enacting the standard under the UTC. The District of Columbia and Wyoming delete Section 413(b), dealing with remote gifts over. New Mexico modifies Section 405 to clarify the authority of the Attorney General.

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

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

2. Summary of Provisions. Article 5, which contains the Code’s provisions relating to spendthrift protection and the rights of a beneficiary’s creditors, was the most widely debated article of the UTC. The result, however, largely tracks the law in effect in many states but not in others. In some states, enactment of Article 5 will significantly change the law. The more significant of the rules:

a. a trust is not spendthrift unless the instrument specifically so states, the drafters rejecting the approach that all trusts are spendthrift unless the instrument says otherwise (Section 502);

b. a restraint against claims by the creditors of a beneficiary is effective only if the beneficiary is also restrained from assigning the beneficiary’s interest (Section 502);

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

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

4. Self-Settled Trusts. The drafting committee concluded that it was undesirable as a matter of policy to allow a settlor to create a trust, retain a beneficial interest, but yet deny the settlor’s creditors the right to reach the trust. Consequently, the UTC rejects the approach taken in the legislation enacted in Alaska and Delaware, Rhode Island, Nevada, and, most recently, Utah. A creditor of the settlor can fully reach the settlor’s beneficial interest (Section 505(a)(2)). Although not encouraged, it is possible for states to combine the UTC with a provision insulating self-settled spendthrift trusts from creditor claims, as has been done in Utah. Self-settled spendthrift trust provisions alone are not a substitute for the many advantageous to a codified comprehensive trust law such as the UTC. In addition, substantial doubt currently exists as to the validity of self-settled creditor avoidance trusts due to Full Faith and Credit, federal bankruptcy law, and other issues.

5. Public Policy Exceptions. A key policy issue in drafting the UTC was determining which classes of creditors should be exempt from the spendthrift bar. In determining the exceptions, the drafting committee did not start from scratch but paid particular attention to the exceptions listed in Restatement (Second) of Trusts § 157, and Restatement (Third) of Trusts § 59. The following are the principal exceptions:

a. Child Support/Alimony. The Restatement of Trusts, the trust statutes in many states, as well as other relevant statutes such as Federal Bankruptcy Code § 523(a)(5) and ERISA § 206(d)(3) grant special deference to collection of court orders for support of a beneficiary’s child, spouse, or former spouse. Given this background and the important public policy concerns in making certain that those to whom legal obligations of support are owed actually receive such payment, the UTC allows a child, spouse, or former spouse to attach the trust to collect on a court order for support (Section 503(b)). However, if the beneficiary’s interest is discretionary, the child, spouse, or former
spouse can collect only to the extent the trustee has abused the discretion (Section 504). Other creditors are not allowed to collect from a discretionary trust, no matter how stingy the trustee has been in exercising the discretion.

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

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

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

8. Policy Issues. Among the issues debated during the drafting process:

a. Should Spendthrift be Automatic? This is the law currently in Illinois and New York. Given that spendthrift provisions are routinely inserted in trust instruments, the argument is made that applying a spendthrift presumption to instruments that have neglected to include a provision would better carry out settlor intent. But the routine insertion argument also supports the opposite conclusion - that the drafter’s omission of a spendthrift provision was not inadvertent but deliberate.

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

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

allow a spendthrift provision to bar a claim by a current or former spouse.
Tennessee eliminate protections for both spouses and children. Kansas
eliminates all public policy exceptions to a spendthrift bar. Kansas and Missouri
also provide that a spendthrift provision is valid if it restrains either voluntary or
involuntary transfer. New Hampshire limits the amounts available to a spouse
and former spouses to “the most basic food, shelter and medical needs.”

I. Revocable Trusts (Article 6).

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

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

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

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

5. Contest of Revocable Trust. Contest of a will is typically barred under one of two alternative statutes. Normally, a contest is barred following some period of time, such as four or six months, following notice of probate. In addition, many states bar a contest after a specified period of time following the settlor’s death, whether or not the will was probated or notice of probate given. The most commonly enacted time limit is three years following the testator’s death. Most states currently have no limitation period on contest of a revocable trust. Section 604 of the UTC corrects this omission by providing that a potential contestant must file a contest within the earlier of 120 days following receipt of a notice or three years following the settlor’s death. These time limits have been placed in brackets, however. States are encouraged to substitute the periods under their comparable will contest statutes. In addition, to encourage expeditious distribution of trust assets, Section 604 absolves a trustee from liability for making distributions even before the contest period has expired as long as the trustee has not received notice of the contest. Liability in such cases is solely on the distributees.
6. Rules of Construction. The drafters agreed that the rules of construction for trusts should track those applicable to wills, but were fully aware that disagreements will arise when one gets down to specifics. Disagreements may arise as to which rules of will construction ought to be extended to trusts as well as with the specific content of those rules. Section 112 of the UTC provides that the rules of will construction apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property. However, the section is placed in brackets with the suggestion made in the comments that the enacting jurisdiction would be better served by enacting specific and detailed rules.

7. Creditor Claims. Section 505(a)(3) of the UTC clarifies that the assets of a revocable trust are liable for the claims of a settlor’s creditors to the extent the probate estate is insufficient. The UTC does not try to resolve the many other issues that can arise, such as liability among different categories of nonprobate assets, whether claims against nonprobate assets should be subject to a special statute of limitations, and whether this period can be shortened by the giving of notice. The appropriate answers to these questions will depend on the particulars of the state’s probate code. Section 6-102 of the Uniform Probate Code, added to that Code in 1998, may be looked to as a model both by states that have enacted the UPC as well as by those having different probate systems.

8. Policy Issues. Among the policy issues:

   a. Presumption of Revocability. The presumption of revocability is a major change for most states. The question may be raised whether the benefits of the switch are sufficient to justify reversal of a long-ingrained rule. One alternative being discussed is to apply the presumption of revocability only to trusts in which the settlor has retained a beneficial interest. A trust in which the settlor has not retained a beneficial interest would be presumed to be irrevocable.

   b. Settlor’s Rights While Incompetent. Reading Sections 105 and 603 together, upon a settlor’s incompetency, the settlor’s right to control the beneficiary’s rights ends and the beneficiaries have the right to know about the trust and exercise other beneficiary rights. The debate over this provision was spirited. One view was that a revocable trust should in all instances be treated the same as a will. Because the devisees under a will have no right to know of the devise no matter how incapacitated the settlor, then neither should the beneficiaries of a revocable trust. Another position was that upon the settlor’s incapacity
the trust beneficiaries should only learn of the trust if no agent or conservator for the settlor has been appointed. But then the question was raised whether the rule should be different if the agent or conservator also was the trustee. A final approach emphasized the use of a trust as a lifetime management device. Those holding this view argued that disclosure of the trust upon the settlor’s incapacity should be required even despite a statement of contrary intent in the terms of the trust. The provision as finally drafted was a compromise. Settlors for whom confidentiality is important can so provide in the terms of the trust.

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

9. Modifications in Enacting Jurisdictions. Not surprisingly, several of the states changed the limitations period on contest of a revocable trust in Section 604. New Mexico totally deleted the provision. Several of the states also modify the creditor claims provision to incorporate procedures adapted from their probate codes.

The District of Columbia and Nebraska provide that the beneficiaries’ rights are subject to the settlor’s exclusive control even if the settlor is incapacitated. Missouri instead adds a procedure for determining the settlor’s capacity.

Finally, Nebraska, Wyoming and D.C. delete Section 112, the optional provision on rules of construction. Missouri omits Section 112 but substitutes a provision terminating a spouse’s interest in either a revocable or irrevocable trust upon the settlor’s divorce. Utah, instead of extending all rules of will construction to trusts, extends to trusts only its statutory rules of will construction.

J. Trustee Removal (Section 706).

1. Traditional Grounds. Removal of a trustee traditionally has been based on a good cause standard, focusing primarily on misconduct or unfitness of the trustee. Section 706 of the UTC retains a standard based in part on
misconduct of the trustee, allowing a trustee to be removed for such grounds as serious breach of trust, unfitness, and unwillingness or persistent failure to effectively perform the function. A trustee may also be removed due to lack of cooperation among cotrustees. Removal for serious breach of trust or lack of cooperation among the cotrustees requires no additional findings. Removal for unfitness, unwillingness or persistent failure to effectively administer the trust additionally requires a finding by the court that removal would best serve the interests of the beneficiaries. “Interests of the beneficiaries,” defined in Section 103, means the beneficial interests provided in the terms of the trust.

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

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

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

c. a suitable cotrustee or successor trustee is available.

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

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

4. Modifications in Enacting Jurisdictions. Kansas deletes a request of the qualified beneficiaries as a factor for the court to consider in removing a trustee. Missouri and Wyoming allow only a “qualified” beneficiary to petition for a trustee’s removal. Missouri also makes extensive changes in the provision allowing a trustee to be removed due to a substantial change of circumstances.

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

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

2. The Code’s Approach. Despite these concerns, nearly all states have passed statutes authorizing financial institution trustees to invest in mutual funds, even if the investment will generate additional fees for the trustee. Recognizing this political reality, Section 802(f) of the UTC does not prohibit investment in mutual funds from which the trustee derives additional fee income but provides instead that such investments, while not automatically self-dealing, are subject to all other fiduciary responsibilities. When investing in a fund from which the trustee, or its affiliate, receives fees for providing services other than as trustee, the trustee must not place its interests over those of the beneficiaries and the investment must otherwise comply with the enacting jurisdiction’s prudent
investor rule. Furthermore, the trustee must disclose at least annually to the persons entitled to receive the trustee’s annual report the rate of extra compensation received for providing services to the fund and the method by which this compensation was determined. The 2004 amendments

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

4. Modifications in Enacting Jurisdictions. Kansas provides that the trustee’s disclosure obligation is met if the trustee notifies the qualified beneficiaries of the “rate, formula or method” by which the trustee’s compensation from the fund was determined. Wyoming provides that the trustee’s obligation to disclose compensation paid by the mutual fund can be met by furnishing the beneficiaries with the relevant prospectus. Missouri creates an additional exception for securities transactions handled by a broker employed by the trustee or the trustee’s affiliate.

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

1. Philosophy. Section 813 of the UTC fills out and adds detail to the trustee’s duty to keep the beneficiaries informed of administration. When in doubt, the UTC favors disclosure to beneficiaries as being the better policy. The UTC imposes both a general obligation on the trustee to keep the qualified beneficiaries reasonably informed of administration as well as several specific notice requirements.

2. Specific Notice Requirements. A trustee is required to notify the qualified beneficiaries of the trustee’s acceptance of office and of any change in the method or rate of the trustee’s compensation (Section 813(b)). Regular reporting by the trustee is required. The trustee must furnish the qualified beneficiaries at least annually with a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee’s compensation (Section 813(c)). The trustee must also promptly respond to any beneficiary’s request for information, unless unreasonable under the circumstances (Section 813(a)). This includes a requirement that the trustee provide a beneficiary upon request with a copy of the trust instrument (Section 813(b)(1)). The drafting committee rejected the more limited approach of letting the trustee decide which provisions are material to the beneficiary’s
interest; the trustee’s version of what is material may differ markedly from what the beneficiary might find relevant.

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

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

The waiver issue brings into direct conflict the goal of carrying out settlor intent with the goal of making certain the beneficiaries have sufficient information to enforce their interests. The result is a compromise of which some on both sides of the issue will not be satisfied. The extent to which a settlor may waive notices and other information requirements is not a new issue. Limitations on the ability to waive is found in case law and in the Restatement (Second) of Trust Law. Considering the issue in the form of a statute brings the issue into much sharper focus, however.

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

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

6. Modifications in Enacting Jurisdictions. Kansas, Tennessee, Utah, and Wyoming delete both Section 105(b)(8) and (b)(9) in their entirety, allowing a settlor to waive all reporting to the beneficiaries, even if a beneficiary makes a request. Maine deleted Section 105(b)(8) but did retain Section 105(b)(9), with the result that the trustee need not notify the beneficiaries of the trust but must respond to a beneficiary request if they otherwise learn of it. Missouri allows a settlor to waive notice to remaindermen but requires that the trustee notify the current beneficiaries who are at least 21 years of age. The District of Columbia provides a procedure by which a settlor can provide that a third party be notified in lieu of the beneficiaries.

Wyoming both expands and contracts the annual reporting requirements. Unlike the UTC, the trustee must furnish a report to all of the qualified beneficiaries. However, Wyoming limits the definition of “qualified beneficiary” to mandatory income and vested remainder interests, allowing the trustee to keep discretionary beneficiaries in the dark. Kansas made a similar change to the definition of qualified beneficiary. The result is to limit the class of beneficiaries entitled to notices, not only under Section 813, but also under numerous other sections of the Code. Both Kansas and Wyoming provide that only a qualified beneficiary can demand a copy of the trust instrument. Kansas, Missouri, New Hampshire, and Wyoming also provide that a trustee need respond only to the request of a “qualified” beneficiary for information. Finally, Kansas severely limits the scope of Section 813 while a surviving spouse is alive. Although the language is jumbled, the intent appears to be to require that the trustee need keep only the spouse informed in cases where the trust will pass at the spouse’s death to the spouse’s descendants.
M. Retroactivity (Section 1106).

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

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

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

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

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

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

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