THE INTENTION OF THE SETTLOR UNDER THE UNIFORM TRUST CODE: WHOSE PROPERTY IS IT, ANYWAY?

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"Our goods, if we are so fortunate to have any, are not interred with our bones, but are left behind for others to enjoy. But we like to determine who shall enjoy them and how they shall be enjoyed. Shall we not do as we wish with our own?"[1]

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1. Austin W. Scott, *Control of Property by the Dead. I.*, 65 U. PA. L. REV. 527, 527 (1917) (footnote omitted) [hereinafter Scott, *Control of Property I*]. For a discussion of the view that it is human nature to want to control wealth for future generations in a family, *see* Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1218 n.78 (1985).

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I. INTRODUCTION

The question of the extent to which the owner of property may transfer it gratuitously, but continue to exert control over its enjoyment by the donee, has a long history.[2] During much of that history, the law protected donees from efforts by donors to impose restraints on transferred property.[3] The traditional hostility to the enforcement of donor-imposed restraints protected the living from control by the dead,[4] as well as the alienability of property. At odds with those objectives is the policy of allowing the owner of property to dispose of it as he or she

2. *See* RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS (Introductory Note, Historical Background) (1983); Alexander, *supra* note 1, at 1195-1201.

3. *See* Richard R. Powell, *Freedom of Alienation – For Whom? The Clash of Theories*, 2 REAL PROP. PROB. & TR. J. 127 (1967).

4. Professor Scott's articulation of this view is typical:

> [T]his world with its good, or at least its material, things is a world for the living and not for the dead. It would not be the part of wisdom to allow the living, in their enjoyment of property, to be unduly trammeled by the wishes of the dead. . . . The welfare of society demands that the law should set limits to the power of the hand of the dead to control human affairs.

Scott, *Control of Property I*, *supra* note 1, at 527. *See also* LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND 140 (1955).

chooses.[5] How to resolve the tension between these competing interests has received considerable attention.[6]

Three traditional and fundamental questions these competing policies have raised are (i) the Rule Against Perpetuities issue of whether a trust settlor can create contingent interests that will last into the distant future, (ii) the *Claflin*[7] doctrine issue of whether all of the beneficiaries of a trust can terminate it before the date specified for its termination by the settlor, and (iii) the spendthrift trust issue of whether the settlor can prevent the beneficiary from alienating – voluntarily or involuntarily – his or her interest in the trust. From the latter part of the nineteenth century to the present, these issues have been important ones with respect to the control over transferred property a trust settlor will be allowed to exert.[8] The question of the extent to which a settlor's intent

5. *See* Powell, *supra* note 3, at 127. The Ohio Supreme Court articulated this policy in a relatively recent case upholding the validity of spendthrift trusts: "[A]s a matter of policy, it is desirable for property owners to have, within reasonable bounds, the freedom to do as they choose with their own property. . . . In a society that values freedom as greatly as ours, this consideration is far from trivial." Scott v. Bank One Trust Co., 577 N.E.2d 1077, 1083 (Ohio 1991).

6. The Foreword to the first two volumes of the new Restatement (Third) of Trusts notes that its principles

> have two main themes. One is to make it easier to accomplish the settlor's intentions, so long as those intentions can be reliably established and do not offend public policy. The second is to recognize appropriate authority, through doctrines that include cy pres, to enable the living – especially judges – to adapt the settlor's expressed purposes to contemporary circumstances.

RESTATEMENT (THIRD) OF TRUSTS, Foreword (2003). *See also* Alexander, *supra* note 1, at 1189 ("If the donor of a property interest tries to restrict the donee's freedom to dispose of that interest, the legal system, in deciding whether to enforce or void that restriction, must resolve whose freedom it will protect, that of the donor or that of the donee."); Powell, *supra* note 3, at 127 ("[I]t is the purpose of this article to explore how our present law has reached an uneasy compromise of these conflicting claims.. . ."); SIMES, *supra* note 4, at 140 ("our property institutions must be shaped in part by the dead hand. But working compromises must be found, whereby the dead are forever barred from withholding the scepter from the hand of the living"). For an economics-oriented perspective on this tension, *see* Jonathan R. Macey, *Private Trusts for the Provision of Private Goods*, 37 EMORY L.J. 295 (1988). As noted by Professor Macey,

> [t]he legal right to dictate through a trust how wealth is to be used after death may lead to economic inefficiency because conditions inevitably will change in ways unforeseeable to the settlor. On the other hand, regulating how a settlor can dispose of his wealth may lead to inefficiencies because such interference would decrease the incentive to accumulate wealth, since influencing events and individuals after one's death may provide a primary motivation for accumulating wealth during one's life.

Id. at 297. *See also* Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 624-25 (2004) (arguing that the law should minimize the agency costs that are inherent in the trust relationship under which a trustee manages trust property for beneficiaries, but subject to the policy of giving effect to the intent of the settlor).

7. Claflin v. Claflin, 20 N.E. 454 (Mass. 1889).

8. In the United States, trust law has long respected the intention of the settlor to prohibit beneficiaries from alienating their interests, voluntarily or involuntarily, or terminating the trust

with respect to the administration and distribution of trust property will be respected is not, however, limited to circumstances raising those issues, but also arises in a variety of others that are discussed in this Article.

The Uniform Trust Code (the "UTC")[9] was promulgated in 2000.[10] As "the first comprehensive national codification of the law of trusts,"[11] it provides an excellent opportunity to examine current thinking on how the balance should be struck between the property rights of settlors[12] who wish to control the future enjoyment of their property by others, and the interests of beneficiaries when those interests conflict, or are perceived by the beneficiaries to conflict, with the settlor-imposed restrictions.[13] The purpose of this Article is to engage in that

before the date specified for termination by the settlor. *See* Alexander, *supra* note 1, at 1201-08. By contrast, English law generally has treated beneficial interests in trusts as property belonging to, and subject to the control of, the trust's beneficiaries. *Id. See generally* Ronald Chester, *Modification and Termination of Trusts in the 21st Century: The Uniform Trust Code Leads a Quiet Revolution*, 35 REAL PROP. PROB. & TRUST J. 697, 709-14 (2001) [hereinafter Chester, *Modification and Termination*]; Ronald Chester & Sarah Reid Ziomek, *Removal of Corporate Trustees Under the Uniform Trust Code and Other Current Law: Does a Contractual Lense Help Clarify the Rights of Beneficiaries?*, 67 MO. L. REV. 241, 258 (2002). According to Professors Dukeminier and Johanson, "in England and some of the Commonwealth countries. . ., after the settlor's death, the trust is regarded as the beneficiaries' property, not as the settlor's property – and the dead hand continues to rule only by the sufferance of the beneficiaries." JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 651 (6th ed. 2000).

9. UNIF. TRUST CODE §§ 101-1106 (2000).

10. The UTC was amended in 2001, 2003, 2004, and 2005.

11. UNIF. TRUST CODE, Prefatory Note (2004). For a suggestion that even in states without substantial trust law, "a case may be made for letting trust law evolve as case-by-case common law," *see Practical Drafting* (U.S. Trust Co. of NY) 7655 (April 2004). For a discussion questioning the wisdom of attempting to achieve uniformity in state laws generally, *see* David A. Thomas, *Restatements Relating to Property: Why Lawyers Don't Really Care*, 38 REAL PROP. PROB. & TR. J. 655 (2004).

12. With respect to the threshold question of who is to be treated as a "settlor" under the UTC, the term is defined with reference to the creators of, or contributors of property to a trust. UNIF. TRUST CODE § 103(15) (2004). The definition does not address other circumstances in which a person is in substance, if not in form, the transferor of property to the trust, although its comment notes that if one person funds a trust and another executes its instrument as its 'settlor,' the former will be treated as the settlor of the trust. UNIF. TRUST CODE § 103 cmt. (2004). For a discussion of such circumstances, *see* RESTATEMENT (THIRD) OF TRUSTS § 58 cmt. f (2003); Powell, *supra* note 3, at 134. For a recent case on this question in the context of a claim by a provider of public benefits for reimbursement from a trust nominally established by the beneficiary's mother, *see* Hertsberg Trust v. Dep't of Mental Health, 578 N.W.2d 289 (Mich. 1998). Presumably, the substance over form analysis for determining the settlor(s) of a trust will be followed in a jurisdiction adopting the UTC under § 106, which provides that "[t]he common law of trusts and principles of equity supplement this [Code], except to the extent modified by this [Code] or another statute of this State." *See* UNIF. TRUST CODE § 106 (2004).

13. As discussed *infra* at note 31 a trust settlor's imposing restrictions and limitations on trust property may be motivated not by a desire to control the enjoyment of the property by the

examination.

A unique feature of the UTC[14] is that while it generally provides default rules that apply only if and to the extent the settlor does not provide otherwise in the instrument,[15] the settlor's ability to override the UTC's rules is expressly limited by fourteen mandatory rules[16] that will apply regardless of the settlor's intent to the contrary.[17] Although the

beneficiaries, but by the desire to protect the beneficiaries while simultaneously giving them substantial control over the property.

14. As noted by Professor David English, the UTC's Reporter, prior to the UTC, neither the Restatements, treatise writers, nor state legislatures had attempted to describe the trust law principles that the settlor cannot control. David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143, 155 (2002) [hereinafter English, *Significant Provisions*].

15. *See* UNIF. TRUST CODE § 105(a) (2004).

16. UTC § 105(b) provides:

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

UNIF. TRUST CODE § 105(b) (2004).

17. *See generally* John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105 (2004) [hereinafter Langbein, *Mandatory Rules*]. Professor Langbein, a member of the UTC's drafting committee, divides many of the UTC's mandatory rules into intent-defeating and intent-serving rules, and characterizes many others as rules of general application. *Id*. at 1105-07. The rules of general application are said to "rest on self-evident principles of legal process that are broadly shared with the rest of private law." *Id*. at 1107. Included are those (i) empowering the court

UTC's mandatory rules serve as an important focus of this Article, the issue of the extent to which the settlor's intent will be respected under the UTC arises in other contexts that also are analyzed.[18]

II. THE DEMISE OF THE RULE AGAINST PERPETUITIES AND THE EXPANSION OF THE RULES FOR THE MODIFICATION AND TERMINATION OF TRUSTS

A. Introduction

Almost 90 years ago, Professor Scott characterized the common law Rule Against Perpetuities as "perhaps the most sweeping and the most important limitation on the power to control property after death."[19] Under the Rule, "[n]o interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[20] While the Rule does not directly limit the duration of trusts, it indirectly does so because after the expiration of the perpetuities period,

to correct mistakes by reforming the instrument (§ 105(b)(4)), to require or waive bond (§ 105(b)(6)), and to act as necessary in the interests of justice (§ 105(b)(13)), and (ii) setting limitations periods (§ 105(b)(12)), establishing rules of jurisdiction and venue (§ 105(b)(14)), protecting the rights of creditors (§ 105(b)(5)) and third parties who deal with the trustee (§ 105(b)(11)), and prohibiting the establishment of trusts for illegal purposes (§ 105(b)(3)). *Id*. at 1107 n.7-10 and accompanying text. The mandatory rules Professor Langbein characterizes as intent-defeating are those requiring trusts to be for the benefit of their beneficiaries (§ 105(b)(3)) and those requiring that courts have the ability to modify or terminate trusts (§§ 105(b)(4) and (7)). *Id*. at 1107-19. Finally, the mandatory rules with respect to creating trusts (§ 105(b)(1)), requiring the trustee to act in good faith (§ 105(b)(2)), limiting exculpation clauses (§ 105(b)(10)), and requiring the trustee to keep the beneficiaries informed (§§ 105(b)(8) and (9)) are characterized by Professor Langbein as intent-serving. *Id*. at 1119-26.

18. Among the limitations on the ability of settlors to exert dead-hand control over trust property that are not addressed by the UTC are the right of a surviving spouse to elect to receive a statutory share of a deceased spouse's estate; the rights of a surviving spouse and children to a family allowance, exempt tangible personal property, and a homestead allowance; the rule against perpetuities; wealth transfer taxes; and the enforceability of no-contest clauses.

19. Austin W. Scott, *Control of Property by the Dead. II*., 65 U. PA. L. REV. 632, 639 (1917) [hereinafter Scott, *Control of Property II*].

20. JOHN C. GRAY, THE RULE AGAINST PERPETUITIES § 201 (4th ed. 1942). Note that this classic statement of the Rule is inaccurate with respect to contingent interests created by the settlor of a revocable trust. As to such interests, the validity of the interest is measured not from the date the interest is created, but rather from the date the trust becomes irrevocable, which usually occurs at the settlor's death. *See* ROGER W. ANDERSEN, UNDERSTANDING TRUSTS AND ESTATES 289 n.1 (3d ed. 2003). For a brief summary of the historical development of the Rule, *see* THOMAS F. BERGIN & PAUL G. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 179 (2d ed. 1984). For an explanation of how it operates, *see* Carolyn Burgess Featheringill, *Understanding the Rule Against Perpetuities: A Step-By-Step Approach*, 13 CUMB. L. REV. 161 (1982).

the beneficiaries may terminate the trust regardless of its terms.[21] Although the common law Rule Against Perpetuities was the subject of two significant reforms during the latter part of the twentieth century – the development of the wait and see doctrine and the promulgation and adoption of the Uniform Statutory Rule Against Perpetuities by approximately half the states[22] – "[n]either reform embodied any intention to free the dead hand of age-old restrictions; to the contrary, both shared that central policy of the Rule."[23]

Since 1986, however, at least 17 states have, in one form or another, eliminated or reduced restrictions on the duration of trusts.[24] Their motivation to do so was not based on a determination that the underlying policies of the Rule[25] no longer justified it.[26] Rather, the

21. AUSTIN W. SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 62.10 (4th ed. 1987); RESTATEMENT (THIRD) OF TRUSTS § 65 cmt. a (2003).

22. Jesse Dukeminier and James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1305-11 (2003). *See also* W. Barton Leach, *Perpetuities: What Legislatures, Courts and Practitioners Can Do About the Follies of the Rule*, 13 KAN. L. REV. 351 (1965). For a list of many articles that contributed to the debate over perpetuities reform, *see* Adam J. Hirsch and William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L. J. 1 n.4 (1992).

23. Dukeminier and Krier, *supra* note 22, at 1311.

24. *Id.* at 1314. Many such states have conditioned the Rule not applying on the trust instrument giving the trustee the power of sale. *Id*.

25. For a summary of those policies, *see* Jesse Dukeminier, *A Modern Guide to Perpetuities*, 74 CAL. L. REV. 1867, 1868-69 (1986). According to Professor Dukeminier:

> The Rule has three basic purposes: (1) to limit "dead hand" control over the property, which prevents the present generation from using the property as it sees fit; (2) to keep property marketable and available for productive development in accordance with market demands; and (3) to curb trusts, which can protect wealthy beneficiaries from bankruptcies and creditors, decrease the amount of risk capital available for economic development, and after a period of time and change in circumstances, tie up the family in disadvantageous and undesirable arrangements.

Id.

26. For arguments to that effect, to one degree or another, *see* Dukeminier and Krier, *supra* note 22, at 1319-39; Macey, *supra* note 6, at 307-08; and LEWIS M. SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS 253-55 (2d ed. 1966). While Simes concluded that concerns over the marketability of property do not justify the Rule – because the trustee typically has the power to sell trust assets and reinvest the proceeds – he believed the Rule was necessary "to strike a fair balance between the desires of members of the present [and] succeeding generations." *Id*. at 58. Professor Langbein, while agreeing with Simes that the Rule is not needed to promote alienability of land, characterizes Simes' rationale for retaining the Rule as "a slogan, not an explanation." Langbein, *Mandatory Rules*, *supra* note 17, at 1110 n.33. Similarly, Professor Alexander characterizes the argument that it is necessary to balance the interests of the current owner who wants to control property indefinitely with those of the future owner, who wants his or her property to be free from dead hand control, as "either tautological or so vague as to be meaningless." Alexander, *supra* note 1, at 1257. For an argument that perpetuities policy should take into consideration the qualitative nature of dead hand restrictions settlors may attempt to impose, *see* Hirsch and Wang, *supra* note 22. For a recent survey of policy arguments for and against repeal of the Rule, *see* Tye J. Klooster, Recent Development, *Are the Justifications for the Rule against Perpetuities Still Persuasive?*, 30

driving force behind such efforts has been the desire to attract trust business by assisting settlors, beneficiaries, and trustees in avoiding or minimizing wealth transfer taxes.[27] Whatever the motivation, the demise of the Rule leaves settlors free, at least theoretically, to rule from the grave forever.[28]

An obvious drawback to allowing dead hand control is that over time, circumstances will change in ways that settlors did not, and often could not, have foreseen or addressed in the terms of the trusts they create.[29] As many have noted, the problem of dead hand control has been

AM. C. TR. EST. COUNS. J. 95 (2004).

27. *See* Dukeminier and Krier, *supra* note 22, at 1314-15, 1317, 1327-28; Ira Mark Bloom, *The GST Tax Tail is Killing the Rule Against Perpetuities*, 87 TAX NOTES 569, 571-72 (2000); Joel C. Dobris, *The Death of the Rule Against Perpetuities, or the RAP Has No Friends—An Essay*, 35 REAL PROP. PROB. & TR. J. 601 (2000); Stewart E. Sterk, *Jurisdictional Competition To Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.*, 24 CARDOZO L. REV. 2097 (2003). Professor Leach characterized what may have been a similarly motivated judicial decision by an Ohio court, *Smyth v. Cleveland Trust Co*., 179 N.E.2d 60 (Ohio 1961), well before the current wave of anti-Rule legislative actions, as "just a teeny-weeny bit sordid." W. BARTON LEACH, PROPERTY LAW INDICTED 50-51 (1967).

28. With the increase in the amount of property that can pass free of federal estate and generation skipping tax under the Economic Growth and Tax Relief Reconciliation Act of 2001 ("the Act"), Pub. L. No. 107-16, 115 Stat. 38 (2001), and the possibility that the repeal of the federal estate tax that will occur in 2010 under the Act will be made permanent, the amount of wealth a settlor can control in perpetuity in a jurisdiction without the Rule is much greater than was the case prior to the Act. *See* Brian Layman, Comment, *Perpetual Dynasty Trusts: One of the Most Powerful Tools in the Estate Planner's Arsenal*, 32 AKRON L. REV. 747 (1999). *See also* SIMES, *supra* note 4, at 56-7 (arguing that undue concentrations of wealth can best be combated by tax legislation, rather than by perpetuity rules); Dukeminier & Krier, *supra* note 22, at 1327 ("If family dynasties are to be prevented, only the federal government, through income and death taxes, can do it."). *But see* RONALD CHESTER, INHERITANCE, WEALTH AND SOCIETY 127 (1982) (arguing that because wealth transfer tax laws have not prevented huge concentrations of wealth, the Rule is the best weapon for limiting dynastic trusts). Note that while the Act significantly increases the amount of wealth a decedent may leave free of federal estate and generation skipping tax (and indeed provides for the repeal of those taxes during 2010), it limits the amount of otherwise taxable gifts a donor may make free of the federal gift tax to $1 million, thus discouraging the wealthy from making lifetime transfers of more than that amount.

Although facilitating tax planning to attract trust business may be the driving force behind many states' recent legislation permitting dynasty trusts, such trusts apparently are being used by settlors for a variety of other reasons, including protecting trust assets from claims of beneficiaries' creditors and ex-spouses, preventing beneficiaries from leaving their inheritances to persons outside the family or wasting their inheritances through extravagant spending, providing professional asset management, and encouraging beneficiaries to be productive and hardworking members of society. *See* Joshua C. Tate, *Perpetual Trusts and the Settlor's Intent*, 53 U. KAN. L. REV. (forthcoming 2005).

29. *See* Dukeminier & Krier, *supra* note 22, at 1327-35. In the context of the Rule having been fashioned to allow settlors to control property during their lifetimes and the lifetimes of those family members they know, but not beyond, Sir Arthur Hobhouse noted that, with respect to the latter, "the wisest judgment is constantly baffled by the course of events." ARTHUR HOBHOUSE, THE DEAD HAND 188 (1880) (cited in RESTATEMENT (THIRD) OF TRUSTS § 29 gen. notes on clause (c)

exacerbated by the demise of the Rule and the increased use of perpetual trusts.[30] According to Professor English, the UTC Reporter, "[d]ue 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."[31] The UTC, consistent with a modern trend in American trust law,[32] responds to that need in a variety of ways that are designed to enhance flexibility, but to do so "consistent with the principle that preserving the settlor's intent is paramount."[33]

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and cmts. i-i(2)). Further, the inability to foresee the course of future events, of course, is not limited to those affecting beneficiaries born after the creation of the trust. For an account of the case of Lady Mountbatten, which vividly makes that point, *see* LEACH, *supra* note 27, at 32-33. The case is used to support Professor Leach's conclusion that:

> the more one conducts law practice in this field – estates and trusts – the more one realizes the importance of maintaining flexibility in these dispositive instruments, for no one can possibly foresee, even before the atomic age, the consequences which may ensue to disrupt what the poet called 'the best-laid schemes o' mice an' men.'

Id. at 34. For a discussion of the development of charitable trust law to address such problems as the administration of the trust established by Benjamin Franklin for the training of apprentices after apprentices disappeared from American society, *see* Mark Sidel, *Law, Philanthropy and Social Class: Variance Power and the Battle for American Giving*, 36 U.C. DAVIS L. REV. 1145 (2003).

30. *See, e.g.*, SCOTT & FRATCHER, *supra* note 21, at § 333.8 (2003 cumulative supplement); Chester, *Modification and Termination*, *supra* note 8, at 700; English, *Significant Provisions*, *supra* note 14, at 169; Sitkoff, *supra* note 6, at 658; Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 1999 U. ILL. L. REV. 1273, 1280. Because, without the Rule, trusts "can endure indefinitely, or for absurdly long periods of time," it has been argued that "being able to modify or terminate some such venerable trusts seems almost self-evidently desirable." SCOTT & FRATCHER, *supra* note 21, at § 333.8 (2003 cumulative supplement). Professors Dukeminier and Krier characterize the demise of the Rule and the resulting allowance of perpetual trusts as "one of the most significant developments of the late twentieth century," and criticize the UTC for not including different modification and termination rules for such trusts. Dukeminier & Krier, *supra* note 22, at 1331. Their proposed alternatives are far-reaching and include granting the trust beneficiaries — after the deaths of the income beneficiaries who were known to the settlor — (i) non-general powers of appointment to appoint the trust assets during life or at death to anyone except themselves, their estates, or the creditors of either, and (ii) powers to withdraw principal for health, education, support, or maintenance. *Id*. at 1341. For a critical analysis of the Dukeminier and Krier proposals, *see* Tate, *supra* note 28.

31. English, *Significant Provisions*, *supra* note 14, at 169. Note, however, that the motivation of some settlors who create long-term trusts is not to exert dead hand control, but to avoid or minimize wealth transfer taxes and to protect the trust assets from the claims of the beneficiaries' creditors. In such cases, the trust may be designed to give the beneficiaries (or settlor-designated "trust protectors") as much control as possible, without jeopardizing the accomplishment of those objectives. *See* Gideon Rothschild, *More Clients Should Choose Trusts*, TR. & EST. 32-34 (March 2004). For a discussion of how much variety and uncertainty there is in the increasingly common use of trust protectors by settlors, *see* Edward C. Halbach, *Uniform Acts, Restatements, and Trends in American Trust Law at Century's End*, 88 CAL. L. REV. 1877, 1916 (2000).

32. *See* Halbach, *supra* note 31, at 1899; SCOTT AND FRATCHER, *supra* note 21, at § 333.8 (2003 cumulative supplement).

33. UNIF. TRUST CODE, Art. 4 gen. cmt. (2000). *See generally* Chester, *Modification and*

With respect to the early termination of trusts, for more than 100 years American courts have respected the desires of settlors to control the use of property for their beneficiaries by prohibiting beneficiaries from prematurely terminating a trust without either (i) the settlor's consent or (ii) a finding that the termination would not frustrate a material purpose of the settlor.[34] With respect to the modification of trusts, under the equitable deviation doctrine, if circumstances unanticipated by the settlor occur such that administration of the trust in accordance with its terms would defeat or substantially impair the accomplishment of the purposes of the trust, the court may modify the administrative terms of the trust to prevent that result.[35] Several changes to the *Claflin* and equitable deviation doctrines have been made in the UTC. While those and other UTC provisions that provide greater flexibility with respect to the modification and termination of trusts were designed to be consistent with "the principle that the primary objective of trust law is to carry out the settlor's intent,"[36] they lessen the ability of

Termination, *supra* note 8; English, *Significant Provisions*, *supra* note 14, at 169-80. For other alternatives for addressing problems created by the duration of perpetual trusts, *see* Dukeminier & Krier, *supra* note 22, at 1339-43. Note that the enhanced flexibility provided by the UTC's modification and termination provisions is not limited to long-term trusts. Rather, those provisions apply without regard to trust duration. UNIF. TRUST CODE §§ 410-417 (2004). For two cases decided under Kansas' recently enacted version of the UTC that illustrate the need for such flexibility relatively soon after the creation of a trust, *see* In re *Harris Testamentary Trust*, 69 P.3d 1109 (Kan. 2003) and In re *Estate of Somers*, 89 P.3d 898, 905 (Kan. 2004). *See also supra* note 29.

34. *See* RESTATEMENT (SECOND) OF TRUSTS § 337 (1959). The origin of the doctrine was the case of *Claflin v. Claflin*, 20 N.E. 454 (Mass. 1889). For an analysis of the development of the *Claflin* doctrine in its historical context, *see* Alexander, *supra* note 1; Chester, *Modification and Termination*, *supra* note 8, at 716-19. For discussions of a Missouri statute allowing modification or termination of a trust without regard to the settlor's intent with the consent of the trust's adult beneficiaries and a finding that the modification or termination "will benefit the disabled, minor, unborn and unascertained beneficiaries," [MO. REV. STAT. § 456.590.2 (2000)] *see* Julia C. Walker, *Get Your Dead Hands Off Me: Beneficiaries' Right to Terminate or Modify a Trust Under the Uniform Trust Code*, 67 MO. L. REV. 443, 445 (2002) and Peter J. Wiedenbeck, *Missouri's Repeal of the Claflin Doctrine – New View of the Policy Against Perpetuities*, 50 MO. L. REV. 805 (1985). In 1991, Virginia enacted a statute which appeared to allow trusts to be terminated for good cause upon the filing of a petition by a beneficiary, without regard to whether such a termination would contravene a material purpose of the settlor. *See* VA. CODE ANN. § 55-19.4 (1991); *see also* Jessica L. Lacey, *The Dead Hand Loses Its Grip in Virginia: A New Rule for Trust Amendment and Termination?*, 29 U. RICH. L. REV. 1235 (1995). The statute was amended in 1996 to, among other things, prohibit modifications, including terminations, that materially impair the accomplishment of the trust purposes or adversely affect the interests of any beneficiary. *See* VA. CODE ANN. § 55-19.4 (1996). For a discussion of the application of the *Claflin* doctrine in Texas, including a proposal for its relaxation "to reconcile a dead settlor's intent with a living beneficiary's needs," *see* Eun C. Han, *Premature Judicial Termination of Non-Spendthrift Trusts: Reconciling a Dead Settlor's Intent with a Living Beneficiary's Needs*, 3 TEX. WESLEYAN L. REV. 191, 208 (1996).

35. *See* RESTATEMENT (SECOND) OF TRUSTS § 167 (1959).

36. English, *Significant Provisions*, *supra* note 14, at 169; *see also* Sitkoff, *supra* note 6, at

the settlor to control the enjoyment of trust property by its beneficiaries.

B. The Claflin *Material Purpose Doctrine*

Under the *Claflin* doctrine, the beneficiaries[37] of a trust may terminate it before the date specified for its termination by the settlor (i) if the settlor consents,[38] or (ii) if doing so will not frustrate a material purpose of the trust.[39] Thus, if the settlor is dead[40] or does not consent, the beneficiaries may not terminate the trust prematurely if doing so would frustrate a material purpose of the settlor.[41] As a result, identifying the settlor's "material purposes" for the trust[42] can be determinative in an effort by beneficiaries to terminate a trust before the date specified in the instrument for its termination. The UTC, as originally promulgated, did not address the material-purpose subject generally,[43] but provided in section 411(c) that the inclusion of a

660.

37. At common law, all beneficiaries must consent to a permitted early termination and none of them may be under a disability. RESTATEMENT (SECOND) OF TRUSTS § 337 (1959). Two changes to this requirement have been made by the UTC. First, if fewer than all of the beneficiaries consent to a proposed termination (or modification), the court nevertheless may approve the termination (or modification) if it is satisfied that: "(1) if all of the beneficiaries had consented, the trust could have been modified or terminated. . .; and (2) the interests of a beneficiary who does not consent will be adequately protected." UNIF. TRUST CODE § 411(e) (2004). Second, the UTC's representation provisions facilitate obtaining the consent from beneficiaries who are minors, incapacitated, unborn, or unable to be located. *See generally* UNIF. TRUST CODE Art. 3 (2004).

38. Termination (or modification) with the consent of the settlor and all beneficiaries is permitted under UTC § 411(a), without regard to whether it would frustrate a material purpose of the trust, because the settlor and all of the beneficiaries are the only parties with an interest in the trust's continuation. UNIF. TRUST CODE § 411 cmt. (2004). Because of concerns that the ability of the settlor, with the beneficiaries, to modify or terminate the trust under § 411(a) could cause the trust assets to be included in the estate of the settlor for federal estate tax purposes under § 2036 or § 2038 of the Internal Revenue Code, § 411(a) was amended in 2004 to make it applicable on a prospective basis only and to require a court order for such a modification or termination. *See 2004-2005 Amendments to the Uniform Trust Code with Comments* § 411 (Tentative Draft 3/1/2005). For a discussion of the § 411(a) federal estate tax issue that predates the 2004 amendments to § 411(a), *see* Richard B. Covey and Dan T. Hastings, *Recent Developments in Estate, Gift and Income Taxation—2004*, 39 HECKERLING INST. ON EST. PLAN. at 241-47 (2004) [hereinafter HECKERLING INSTITUTE].

39. *See* RESTATEMENT (SECOND) OF TRUSTS § 337 (1959).

40. If the settlor is incapacitated, in specified circumstances the UTC allows an agent, conservator, or guardian to consent on his or her behalf. UNIF. TRUST CODE § 411(a) (2004).

41. If termination would not frustrate a material purpose of the trust, the beneficiaries may terminate it prematurely even if the settlor objects. *See* RESTATEMENT (THIRD) OF TRUSTS § 65 gen. cmt. (2003).

42. For discussions of what constitutes a material purpose of a trust, *see* RESTATEMENT (THIRD) OF TRUSTS § 65 cmts. d, e (2003); RESTATEMENT (SECOND) OF TRUSTS § 337 cmts. f–o (1959); Dukeminier & Krier, *supra* note 22, at 1328.

43. In a comment, the UTC notes that demonstrating that a modification would not frustrate a

spendthrift provision in the instrument "is not presumed to constitute a material purpose of the trust."[44] The 2004 amendments to the UTC, however, bracket section 411(c) because several states that have enacted the Code have not agreed with the provision and have either deleted it or have revised it to state that a spendthrift provision is presumed to constitute a material purpose of the trust.[45] In UTC-adopting

material purpose of the trust does not require showing that the trust has no remaining function. UNIF. TRUST CODE § 411 cmt. (2004). Further, the comment to § 411 quotes from the *Restatement (Third) of Trusts*:

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

RESTATEMENT (THIRD) OF TRUSTS § 65 cmt. d (2003). *See also* Halbach, *supra* note 31, at 1900 (noting that a trend in beneficiary modification is to clarify and provide additional flexibility in the material purpose doctrine). Note that what would constitute a material purpose under the Second Restatement will not necessarily do so under the Third Restatement. For example, because of the material purpose doctrine, spendthrift trusts and trusts for the support of a beneficiary may not be terminated early by the trust's beneficiaries under the Second Restatement, but may under the Third Restatement. *Compare* RESTATEMENT (SECOND) OF TRUSTS § 337 cmts. l, m (1959), *with* RESTATEMENT (THIRD) OF TRUSTS § 65 cmt. e (2003).

44. UNIF. TRUST CODE § 411(c) (2000). The rationale for § 411(c) was that "spendthrift provisions are often added to instruments with little thought." UNIF. TRUST CODE § 411 cmt. (2000). For a discussion of how widespread spendthrift provisions are in trust instruments, along with citations to discussions of potential disadvantages in their use, *see* Alan Newman, *The Rights of Creditors of Beneficiaries Under the Uniform Trust Code: An Examination of the Compromise*, 69 TENN. L. REV. 771, 777 n.36 (2002). In part because spendthrift clauses "may be included as a routine or incidental provision of a trust," under the new Third Restatement, "the fact that a lawyer had explained the effect and advised the inclusion of a spendthrift provision is not alone sufficient to establish that it represents more than an advantage that the beneficiaries are free to relinquish by consenting to termination of the trust." RESTATEMENT (THIRD) OF TRUSTS § 65 cmt. e (2003).

45. *See 2004-2005 Amendments to the Uniform Trust Code with Comments* § 411 (Tentative Draft 3/1/2005) (stating the reason for the bracketing of § 411(c), but also stating the view of the Joint Editorial Board for Uniform Trusts and Estates Acts "that the better approach is to enact subsection (c) in its original form"). Under the Kansas UTC, a spendthrift provision is presumed to constitute a material purpose of the trust, KAN. STAT. ANN. § 58a-411(c) (2003) (*revised in part by* 2004 Kan. Sess. Laws 158 (May 17, 2004)), and, in the absence of the presumption having been rebutted, prevents the premature termination of a trust. *In re* Estate of Somers, 89 P.3d 898, 905 (Kan. 2004). While the trust in *Somers* was a charitable trust, to which UTC § 411 does not apply, the court, relying on the Restatement (Second) of Trusts and Professor Scott's treatise, held that the material purpose limitation on the beneficiaries' ability to terminate the trust was applicable to charitable as well as noncharitable trusts. *Id*. at 903-05. For a pre-UTC argument that any modification to the *Claflin* doctrine should not change the rule that the beneficiaries should not be able to terminate a spendthrift trust, *see* Gail Boreman Bird, *Trust Termination: Unborn, Living, and Dead Hands – Too Many Fingers in the Trust Pie*, 36 HASTINGS L. J. 563, 585-87 (1985).

jurisdictions in which spendthrift provisions are treated as constituting material purposes under pre-UTC law, the deletion of section 411(c) would likely continue that result.[46]

While the UTC "was drafted in close coordination with the writing of the new Restatement (Third) of Trusts,"[47] it does not follow a significant departure from the *Claflin* doctrine made by the Third Restatement. Under the new Restatement, if a termination or modification of the trust desired by all of the beneficiaries

> would be inconsistent with a material purpose of the trust, the beneficiaries cannot compel its termination or modification except with the consent of the settlor or, after the settlor's death, with authorization of the court if it determines that the reason(s) for termination or modification outweigh the material purpose.[48]

As has been noted by others, the Restatement's balancing test after the settlor's death "weakens *Claflin*'s grip" on the administration of trusts in accordance with the settlor's stated intent.[49]

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46. *See* UNIF. TRUST CODE § 106 (2004) (stating that the common law of trusts supplements the UTC except to the extent the UTC or another state statute modifies it).

47. UNIF. TRUST CODE, Prefatory Note (2004).

48. RESTATEMENT (THIRD) OF TRUSTS § 65(2) (2003). This provision allowing the beneficiaries, after the death of the settlor, to modify or terminate a trust even if doing so would be inconsistent with a material purpose of the trust, as long as the court finds that the reason or reasons for the modification or termination outweigh the material purpose, was not based on prior Restatements, but rather on a similar provision of the California Probate Code (CAL. PROB. CODE § 15403(b) (West 1991)) that "ha[d] apparently proved useful and noncontroversial in California since enactment in 1990." *See* RESTATEMENT (THIRD) OF TRUSTS § 65 cmt. d, reporter's note (2003). For an argument, in the context of property law, that the change in the role of Restatements from reporters of existing law to catalysts for reform has significantly weakened their force and effect, *see* Thomas, *supra* note 11, at 664. According to Professor Thomas,

> Often in a general law practice, the lawyers' efforts regarding substantive law center on finding helpful precedent among the case decisions from the courts of the forum state. . . . Lawyers have little interest in universal pronouncements from distant scholars, except as advisory authority in cases of first impression in that jurisdiction.

Id.

49. Chester & Ziomek, *supra* note 8, at 255. The Restatement addresses the wisdom of the *Claflin* doctrine and its limitation of it through the balancing test of § 65(2) in three ways. First, it quotes language from the *Claflin* decision emphasizing the policy of effecting the settlor's intent. RESTATEMENT (THIRD) OF TRUSTS § 65 cmt. d, reporter's note (2003). Second, it discusses the contrary English view, as set forth in *Saunders v. Vautier*, 4 Beav. 115 (1841), under which beneficiaries holding the entire beneficial interest may terminate a trust before the date specified by the settlor, without regard to an intention of the settlor to the contrary. *Id.* Finally, it summarizes an American case, *Ambrose v. First Nat'l Bank*, 482 P.2d 828 (Nev. 1971), in which the court allowed the sole beneficiary of a trust to terminate it early after the settlor's death, in part because of "a strong public policy against restraining one's use and disposition of property in which no other person has an interest. . . ." *Id.* Professor Sitkoff notes both an advantage of the *Claflin* doctrine to beneficiaries as a whole – that "it increases the willingness of grantors to create a trust in the first

C. The Settlor's Ability to Preclude a Premature Termination

One of the mandatory rules of the UTC that the settlor may not override is "the power of the court to modify or terminate a trust under Sections 410 through 416."[50] Prior to its amendment in 2004, section 411(a) allowed the settlor and the beneficiaries to modify or terminate a trust without court involvement.[51] Accordingly, in states that have enacted the pre-2004 version of section 411(a), it appears that at the time of creation of a trust, the settlor can preclude subsequent modifications or terminations by the settlor and all of the beneficiaries.[52] While they are the only parties with an interest in the trust,[53] the trustee has standing to object to a proposed modification or termination,[54] and it is clear under section 105(a) that the terms of the trust control its administration, without regard to provisions of the UTC to the contrary, except as specified in the fourteen mandatory rules of section 105(b).

As amended in 2004, however, an alternative for section 411(a) provides, in part: "If, upon petition, the court finds that the settlor and all beneficiaries consent to the modification or termination of an irrevocable trust, the court shall enter an order approving the modification or termination even if the modification or termination is inconsistent with a material purpose of the trust."[55] The question raised is whether, in a jurisdiction that has enacted this version of section 411(a), the settlor is foreclosed from prohibiting a later section 411(a) modification or termination.[56] Because such a modification or termination could only be made upon approval by the court, it arguably would constitute a modification or termination by the court within the meaning of UTC

place" – and a disadvantage: that it "entrenches the trustee and locks in a certain minimal level of beneficiary-trustee agency costs." Sitkoff, *supra* note 6, at 659-60. From a different perspective, Professor Chester argues for the rejection of the *Claflin* doctrine: "The living, providing they are legally interested parties and can all agree, should be able to bring to an end an individual's estate plan when it no longer suits them, unless there remains some need for 'guardianship-like' protection." CHESTER, *supra* note 28, at 140.

50. UNIF. TRUST CODE § 105(b)(4) (2004).

51. *See* UNIF. TRUST CODE § 411(a) (2000).

52. While doing so obviously would limit flexibility, a settlor with serious concerns about the estate tax risks posed by § 411(a) might nevertheless choose to do so. *See supra* note 38.

53. *See* UNIF. TRUST CODE § 411(a) cmt. (2004).

54. *Id*.

55. UNIF. TRUST CODE § 411(a) (2004).

56. Instances in which a settlor would want to do so presumably would be rare. Examples might include a settlor whose concern over the § 411(a) estate tax risk is not alleviated by the rubber stamp role of the court under amended § 411(a), *see supra* note 38, or a settlor who established a trust for the benefit of children in connection with a divorce from an ex-spouse who successfully insisted on the settlor and the children not having the ability to terminate the trust prematurely.

section 105(b)(4) that the settlor could not override.[57] The argument to the contrary, however, is that the alternative version of section 411(a) still allows the settlor and the beneficiaries to modify or terminate a trust at will, as it directs the court to approve the modification or termination, regardless of whether it violates a material purpose of the trust, if the court finds that the settlor and all of the beneficiaries have consented to the modification or termination. In other words, because the court has no discretion with respect to a section 411(a) modification or termination to which the settlor and the beneficiaries consent, such a modification or termination in substance is being made not by the court, within the meaning of section 105(b)(4), but instead by the settlor and the beneficiaries, in which case the settlor can override their ability to do so.

Under section 411(b), the beneficiaries of a noncharitable trust may terminate or modify it "if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust," or that "modification is not inconsistent with a material purpose of the trust."[58] Presumably, the requirement that the court make such a finding means that a section 411(b) termination or modification is within the mandatory rule of section 105(b)(4). If so, the settlor may not override the ability of the beneficiaries, upon the requisite finding by the court, to modify or terminate the trust under section 411(b). A settlor who desired to do so, however, could explicitly state in the terms of the trust that any modification or premature termination by the beneficiaries would violate a material purpose of the trust,[59] in which case it would be unlikely that the court would make the material purpose finding necessary for a section 411(b) modification or termination.

D. The Equitable Deviation Doctrine

Under the traditional equitable deviation doctrine, if circumstances unanticipated by the settlor occur, the court may modify the administrative terms of the trust, but only to prevent the unanticipated circumstances from defeating or substantially impairing the accomplishment of the purposes of the trust.[60] The UTC counterpart,

57. *See* UNIF. TRUST CODE § 105(b)(4) (2004).

58. UNIF. TRUST CODE § 411(b) (2004).

59. For an example of such a provision, *see* Steven M. Fast, Christiana N. Gianopulos,& Carolyn B. Martino, *Drafting to Excess*, *in* REPRESENTING ESTATE AND TRUST BENEFICIARIES AND FIDUCIARIES, 109, 129-30 (ALI-ABA Course of Study, Jul. 17-18, 2003), *available at* WL, SJ001 ALI-ABA 109.

60. *See* RESTATEMENT (SECOND) OF TRUSTS § 167(1) (1959). For a discussion of two cases in which the unanticipated circumstances doctrine has been applied to modify dispositive trust

section 412(a), does not include that limitation. Rather, it conditions a modification (or termination) for unanticipated circumstances[61] on the modification (or termination) "further[ing] the purposes of the trust."[62] A recent case from Kansas, under its recently adopted version of the UTC[63] illustrates the effect this difference can have. In re *Estate of Somers* involved a trust initially funded with approximately $120,000 in the late 1950s that grew to some $3,500,000 in value by 1991.[64] The settlor's two grandchildren were beneficiaries of the trust; each was to receive distributions of $100 per month for life.[65] Upon the grandchildren's deaths, the trust assets were to be distributed to a charity.[66] Relying on Kansas' version of section 412(a), the court determined that the tremendous increase in the value of the trust was a circumstance the settlor did not anticipate, and that the distribution of some $3,000,000 to the charity before the grandchildren's deaths, with $500,000 retained in the trust to provide for the monthly payments to the grandchildren, furthered the purposes of the trust.[67] Had the unanticipated circumstances doctrine instead required a finding that continuation of the trust on its existing terms would have defeated or substantially impaired the accomplishment of the purposes of the trust, the distribution may not have been approved.[68]

A fundamental change made by the UTC to the traditional unanticipated-circumstances, equitable deviation doctrine is that section 412 expands it to apply to dispositive as well as administrative provisions.[69] In doing so, however, it respects the settlor's intent in

provisions, *see* Macey, *supra* note 6, at 300-01 (discussing Donnelly v. Nat'l Bank of Wash., 179 P.2d 333 (Wash. 1947) and *In re* Estate of Kerber, 336 N.Y.S.2d 400 (N.Y. Sur. 1972)).

61. With respect to what can constitute unanticipated circumstances for § 412 purposes, it is not necessary that the circumstances arise after the trust was created, as long as they were unanticipated by the settlor. UNIF. TRUST CODE § 412 cmt. (2004).

62. UNIF. TRUST CODE § 412(a) (2004).

63. *See* KAN. STAT. ANN. § 58A-412(a) (2003).

64. *Somers*, 89 P.3d at 901.

65. *Id*.

66. *Id*.

67. *Id*. at 906.

68. *Somers* illustrates that the UTC's formulation of the unanticipated circumstances doctrine in § 412(a) – conditioning a modification under it on whether it will further the purposes of the trust – undermines to a significant extent a limitation of the doctrine under the Second Restatement. Under it, the court will not "permit or direct the trustee to deviate from the terms of the trust merely because such deviation would be more advantageous to the beneficiaries than a compliance with such direction." RESTATEMENT (SECOND) OF TRUSTS § 167 cmt. (1959). For criticism of the Second Restatement position, *see* Dukeminier & Krier, *supra* note 22, at 1328-29.

69. *See* UNIF. TRUST CODE § 412(a) (2004). Section 412(a) is not the first trust statute to allow the modification of dispositive terms of a trust in response to unanticipated circumstances. *See*

several ways. First, beneficiaries may not effect a modification or termination based on the occurrence of unanticipated circumstances; rather, court action is required.[70] Second, the court's authorization to do so is limited to situations in which the "modification or termination will further the purposes of the trust."[71] Finally, "[t]o the extent practicable, the modification must be made in accordance with the settlor's probable intention."[72] The UTC comment[73] to this section notes that the expanded equitable deviation doctrine "may be used to modify administrative or dispositive terms due to the failure to anticipate economic change or the incapacity of a beneficiary."[74] The example provided is a modification "to increase support of a beneficiary . . . if the beneficiary has become unable to provide for support due to poor health or serious injury."[75]

The court's power under section 412(a) – to modify or terminate the trust if, because of circumstances the settlor did not anticipate, doing so would further the purposes of the trust – is a mandatory one that the settlor may not override.[76] A settlor concerned about the possibility of an unwanted section 412(a) modification or termination could attempt to

CAL. PROB. CODE § 15409 (West 1991), discussed in Chester, *Modification and Termination*, *supra* note 8, at 701-02. While the change of circumstances doctrine typically is used to authorize modifications, its application under § 412(a) to terminations as well as modifications is consistent with the Second Restatement. *See* RESTATEMENT (SECOND) OF TRUSTS § 336 (1959).

70. *See* UNIF. TRUST CODE § 412(a) (2004).

71. *Id*.

72. *Id*. As noted by Professor Chester, the UTC's trust modification provisions can be viewed as "'settlor friendly.' Flexibility in changed circumstances undoubtedly would appeal to many dead settlors if they could be brought back to life." Chester, *Modification and Termination*, *supra* note 8, at 728. *See also* Appeal of Harrell, 801 P.2d 852 (Or. Ct. App. 1990) (denying a request for modification to convert an incapacitated beneficiary's share of a trust to a supplemental needs trust).

73. With respect to the effect of the UTC's comments, the comment to § 106 provides: "The statutory text of the Uniform Trust Code is . . . supplemented by these Comments, which, like the Comments to any Uniform Act, may be relied on as a guide for interpretation." UNIF. TRUST CODE § 106 cmt. (2004).

74. UNIF. TRUST CODE § 412 cmt. (2004).

75. *Id*. *See generally* LEACH, *supra* note 27, at 36-40 (favoring courts having and exercising a power to modify in such circumstances and noting that while such problems can and should be solved by proper drafting, "let's face it, many members of our profession who draw wills for their clients are mere dabblers in the field. Our courts should assume the power to correct these follies, and our legislatures should give their blessing."). *See also* Paul G. Haskell, *Justifying the Principle of Distributive Deviation in the Law of Trusts*, 18 HASTINGS L. J. 267 (1967). For a contrary view arguing that the presumed intent of the settlor that underlies such modifications "is nothing more than a fiction, justifying judicial intervention," *see* Gareth H. Jones, *The Dead Hand and the Law of Trusts*, *in* DEATH, TAXES, AND FAMILY PROPERTY 124 (Edward C. Halbach, Jr. ed., 1977).

76. *See* UNIF. TRUST CODE § 105(b)(4) (2004). Unlike under the Third Restatement, if the trustee knows of unanticipated circumstances that would warrant a modification under § 412(a), the UTC does not obligate the trustee to petition the court for modification. *Compare* RESTATEMENT (THIRD) OF TRUSTS § 66(2) (2003), *with* UNIF. TRUST CODE § 412 cmt. (2004).

avoid one by including in the terms of the trust a recitation of circumstances the settlor anticipated.[77] If the settlor does so in specific terms, however, it is likely that, over time, circumstances would arise that the settlor had not provided for in the instrument. On the other hand, general statements of the kinds of circumstances the settlor anticipated, and with respect to which he or she would not want the trust modified or terminated, might not be specific enough to overcome an argument that a specific circumstance that had occurred was unanticipated. Thus, particularly for long-term and perpetual trusts, it may prove difficult – arguably, rightfully so – for settlors who do not want the court to modify or amend the trusts they create under the unanticipated circumstances doctrine to accomplish that objective under the UTC.[78]

A second change under the UTC to the traditional equitable deviation doctrine for the modification of trusts is that it makes applicable to non-charitable trusts the UTC's expansion[79] of the *cy pres* doctrine that has traditionally been applicable only to charitable trusts.[80]

77. By contrast, such a recitation would not foreclose a modification of the administrative terms of the trust under § 412(b), because unanticipated circumstances are not required for § 412(b) modifications. UNIF. TRUST CODE § 412(b) (2004).

78. Whether the law should allow perpetual and other long-term trusts is subject to considerable debate. For two recent discussions, *see* Tate, *supra* note 28, and Klooster, *supra* note 26. The unanticipated circumstances doctrine blunts a common criticism of such trusts because it allows the court to address whether a trust should be continued on its existing terms in the face of unforeseen events. As a result, it should play an important role in minimizing the risk that, as circumstances change, a long-term trust will not operate as the settlor had expected and intended. It likely is not possible for a settlor to anticipate the circumstances that may arise in connection with the administration of a trust that lasts not just for decades, but for centuries. If the settlor includes in the instrument broad, general provisions that purport to anticipate a wide variety of possible circumstances that may arise, courts should be circumspect in allowing such provisions to bar them from exercising the power to modify or terminate under § 412(a). But if a settlor did, in fact, anticipate particular circumstances that occurred and intended that the trust be unaffected, that intention should rarely be overridden. *See infra* notes 152-179 and accompanying text (discussing the for-the-benefit-of-the-beneficiaries doctrine).

In determining whether the settlor actually anticipated circumstances that have occurred, courts should consider not just a broad, general provision of the instrument that arguably refers to such circumstances, but also the nature of the circumstances that have occurred relative to those existing when the trust was created and the settlor's knowledge of them. *See* UNIF. TRUST CODE § 412 cmt. (2004). Given that the mandatory rule of § 412(a) permits modification or termination for unanticipated circumstances only if it "will further the purposes of the trust," and requires any such modification or termination to "be made in accordance with the settlor's probable intention," UNIF. TRUST CODE § 412(a) (2004), courts should be hesitant to foreclose application of the unanticipated circumstances doctrine when circumstances have changed significantly since the creation of the trust and the trust instrument includes a broad, general recitation of circumstances the settlor acknowledges might occur.

79. *See infra* notes 104-106 and accompanying text.

80. *See* UNIF. TRUST CODE § 412(b) (2004). The comment to § 412(b) notes that it "does not have a direct precedent in the common law, but various states have insisted on such a measure by

Under section 412(b): "The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration."[81] Noteworthy about section 412(b) is that the court's modification power under that section is not limited to modifications that would not be contrary to a material purpose of the trust, and does not require unanticipated circumstances.[82] While it thus limits the *Claflin* doctrine, its reach is limited to administrative terms.[83]

E. Other Grounds for Modification or Termination of Private Trusts Under the UTC

The additional flexibility the UTC provides with respect to the termination and modification of trusts is not limited to its relaxation of the *Claflin* doctrine, its expansion of the unanticipated circumstances doctrine, and its application of the *cy pres* doctrine to the administrative provisions of non-charitable trusts. For example, the UTC also authorizes the court to modify the terms of a trust to achieve the settlor's tax objectives, so long as the modification is done "in a manner that is not contrary to the settlor's probable intention."[84] Further, under section

statute." *See also* LEACH, *supra* note 27, at 44 (arguing that courts should apply *cy pres* to private, as well as charitable, gifts "to make sensible dispositions out of unwise" ones). Professor Chester argues that the relative ease with which courts traditionally could modify or terminate charitable trusts may be because they are not subject to the Rule Against Perpetuities, and that as private trusts increasingly become free of the constraints of the Rule, the powers that courts have to modify and terminate charitable trusts also should be available for private ones. Chester, *Modification and Termination*, *supra* note 8, at 724.

81. UNIF. TRUST CODE § 412(b) (2004).

82. Because the court's power to modify the administrative terms of a trust under § 412(b), which is mandatory under § 105(b)(4), is not dependent on a finding of unanticipated circumstances, a settlor may not avoid it by reciting in the instrument circumstances that would not be unanticipated. *Cf. supra* note 77 and accompanying text.

83. For a discussion of the lack of precision in distinguishing between administrative and substantive terms in the context of charitable trusts, *see* Alex M. Johnson, *Limiting Dead Hand Control of Charitable Trusts: Expanding the Use of the* Cy Pres *Doctrine*, 21 U. HAW. L. REV. 353, 380 (1999).

84. UNIF. TRUST CODE § 416 (2004). Because any tax savings usually will benefit the beneficiaries, but not the settlor, the UTC's accommodation of tax-motivated modifications is an application of the principle that trusts are for the benefit of their beneficiaries. *See* Halbach, *supra* note 31, at 1887; *infra* notes 152-179 and accompanying text. For two practitioners' views on the increasing need for trust reformations arising from "the complex and ever-changing maze of tax laws and investment vehicles that contemporary trustees must negotiate," *see* David R. Hodgman & David C. Blickenstaff, *Judicial Reformation of Trusts – The Drafting Tool of Last Resort*, 28 EST. PLAN. 287 (June 2001). Whether a reformation under § 416 will be effective for federal tax purposes is dependent on federal, rather than state, law and may be ineffective with respect to a modification made after the taxing event. *See* UNIF. TRUST CODE § 416 cmt. (2004). For that

415:

> The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.[85]

Because the UTC applies to all express trusts,[86] section 415 gives courts the same power to reform testamentary trusts that they traditionally have had with respect to inter vivos instruments.[87]

In addition, the UTC's small trust termination provision, section 414, allows the trustee (with notice to qualified beneficiaries,[88] but

reason, when possible, practitioners frame proceedings to determine the operative effect of irrevocable trusts as construction actions to interpret ambiguous trust terms, rather than reformation proceedings to modify a trust's terms. *See* Hodgman & Blickenstaff, *supra*.

85. UNIF. TRUST CODE § 415 (2004). While this provision and an analogous one in the new Restatement of Property (RESTATEMENT (THIRD) OF PROPERTY: DONATIVE TRANSFERS § 12.1 (2002)) were intended to further the objective of giving effect to the settlor's intent, in cases in which the settlor's plan differs from society's norms there is a danger that it actually will have the opposite effect because of the exercise of "bias by finding evidence of 'mistake' more readily in cases involving testators whose dispositive plans are unusual or unpalatable." Pamela R. Champine, *My Will Be Done: Accommodating the Erring and the Atypical Testator*, 80 NEB. L. REV. 387, 401 (2001). For a recent case applying Kansas' version of the UTC to approve the reformation and modification of a trust instrument, and discussing the distinction between the two, *see In re* Harris Testamentary Trust, 69 P.3d 1109 (Kan. 2003).

86. *See* UNIF. TRUST CODE § 102 (2004).

87. *See* UNIF. TRUST CODE § 415 cmt. (2004). For a current analysis of the law on curing drafting errors in dispositive instruments, *see* Martin L. Fried, *The Disappointed Heir: Going Beyond the Probate Process to Remedy Wrongdoing or Rectify Mistake*, 39 REAL PROP. PROB. & TR. J. 357, 392-402 (2004). *See also* John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521 (1982). Note that with the exception of the mandatory rules of § 105(b), the "terms of the trust" govern its administration. *See* UNIF. TRUST CODE § 105(a) (2004). "Terms of a trust" is defined to mean manifestations of the settlor's intent regarding the trust's provisions, as expressed not only in the trust instrument, but also "as may be established by other evidence that would be admissible in a judicial proceeding." UNIF. TRUST CODE § 103(18) (2004). Examples of evidence that may not be considered in determining a term of the trust include evidence excluded under a jurisdiction's statute of frauds or parol evidence rule. *Id*. cmt.

88. Whether a trust beneficiary is a "qualified beneficiary" is important for a variety of purposes under the UTC. Under the Code, a qualified beneficiary is a beneficiary

> who, on the date the beneficiary's qualification is determined:
> (A) is a distributee or permissible distributee of trust income or principal;
> (B) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subparagraph (A) terminated on that date; or
> (C) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

UNIF. TRUST CODE § 103(12) (2004). Thus, generally, beneficiaries with remote remainder interests are not "qualified beneficiaries."

without court involvement[89]) to terminate a trust with less than $50,000 in assets[90] if it determines that the trust is not large enough to justify the costs of administering it.[91] Further, without regard to the size of the trust, if the court finds that the value of the trust is not sufficient to justify the cost of administering it, the court may terminate the trust,[92] or remove and replace the trustee to reduce administrative costs.[93] The UTC also allows the trustee, again with notice to qualified beneficiaries but without the court's involvement, to combine two or more trusts into one, or divide a trust into two or more separate trusts, if doing so will "not impair rights of any beneficiary or adversely affect achievement of the purposes of the trust."[94]

F. Modification or Termination of Charitable Trusts

The UTC also makes several changes to the common law rules governing the modification or termination of charitable trusts. First, it eliminates the requirement of a finding that a settlor had a general charitable intent in order for the court to exercise its mandatory *cy pres* authority if a particular charitable purpose fails.[95] As a result, unless the settlor explicitly provides for a reversion or another alternative disposition in such a case, the court is to "modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes."[96] This change is viewed as being consistent with the intent of most settlors.[97]

89. Because the mandatory rule of UTC § 105(b)(4) is with respect to the power of the court to modify or terminate a trust, the settlor could negate the ability of the trustee to terminate a small trust under § 414(a). *See* UNIF. TRUST CODE §§ 105(b)(4) and 414(a) (2004).

90. UNIF. TRUST CODE § 414 cmt. (2004). The $50,000 amount in § 414(a) is bracketed "to signal to enacting jurisdictions that they may wish to designate a higher or lower figure." *Id.*

91. *See* UNIF. TRUST CODE § 414(a) (2004).

92. The settlor may not override this power of the court to terminate a trust. *See* UNIF. TRUST CODE § 105(b)(4) (2004).

93. *See* UNIF. TRUST CODE § 414(b) (2004). Having the power to terminate a small trust, of course, does not mean that it should be exercised: "Even if administrative costs may seem excessive in relation to the size of the trust, protection of the assets from beneficiary mismanagement may indicate that the trust be continued." *Id*. cmt.

94. UNIF. TRUST CODE § 417 (2004). Note that trusts may be combined under § 417 even if their terms, including their dispositive provisions, are not identical. *Id*. cmt. Similarly, a single trust may be divided into two or more separate trusts "even if the trusts that result are dissimilar." *Id*.

95. *See* UNIF. TRUST CODE § 413 (2004). *See generally* CHESTER, *supra* note 28, at 116-21.

96. UNIF. TRUST CODE § 413(a)(3) (2004).

97. *See id*. cmt. *See also* English, *Significant Provisions*, *supra* note 14, at 179 n.165. Another intent-affirming change the UTC makes to the traditional rules governing charitable trusts is that it gives the settlor of such a trust standing to enforce it. UNIF. TRUST CODE § 410(b) (2004).

A related change, however, expressly overrides the settlor's intent. If the settlor provides for a gift over to a non-charitable beneficiary if a charitable trust fails, under section 413(b), the UTC will enforce that gift only if the property is to revert to the settlor and he or she is then living, or if the gift over is to occur less than 21 years from the trust's creation.[98] If neither of those circumstances exists, the court is to exercise its *cy pres* authority and the settlor's intent will be overridden.[99] This change from the common law was made because of "concerns about the clogging of title and other administrative problems caused by remote default provisions upon failure of a charitable purpose."[100]

Because section 413(b) is expressly made applicable only to gifts over to noncharitable beneficiaries,[101] presumably a gift over to another charity would be respected without regard to how much time has elapsed since the trust was created. Alternatively, if section 413(b) nevertheless is applied to such a gift, presumably the charity the settlor named to receive the gift over would receive it anyway, because when the court applies *cy pres*, it is to do so "in a manner consistent with the settlor's charitable purposes."[102] If the settlor has named an alternative charity to receive the property in the event of a failure of the initial charitable purpose, a distribution to that named charity should be most consistent with the settlor's charitable purposes.[103]

A third change the UTC makes to traditional charitable trust modification and termination rules is its expansion of the grounds for treating a charitable trust's purposes as having failed, and thus triggering

For an argument that a trust represents a deal between the settlor and the trustee with respect to the management of property for the beneficiaries that is the functional equivalent of a third-party-beneficiary contract, and thus that the default rule should be that the settlor can enforce the trust (as that likely would have been the intent of the parties and included in the terms of the trust had they considered and addressed it), *see* John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L. J. 625, 664 (1995). *See* Sitkoff, *supra* note 6, at 666-69 (discussing a number of issues raised by the prospect of settlor standing to enforce trusts).

98. *See* UNIF. TRUST CODE § 413(b) (2004). Note that § 413(b) does not apply to gifts over to other charitable beneficiaries. *See infra* notes 101-103 and accompanying text.

99. Because the limitation on gifts over to non-charitable beneficiaries under § 413(b) is expressly made a limitation on the court's *cy pres* authority under § 413(a), presumably § 105(b)(4) prohibits it from being waived by the settlor. *See* UNIF. TRUST CODE § 413(b) (2004).

100. UNIF. TRUST CODE § 413 cmt. (2004). *See also* Ronald Chester, Cy Pres *or Gift Over?: The Search for Coherence in Judicial Reform of Failed Charitable Trusts*, 23 SUFFOLK U. L. REV. 41 (1989).

101. *See* UNIF. TRUST CODE § 413(b) (2004) (stating that it applies to trusts that "would result in distribution of the trust property to a noncharitable beneficiary").

102. UNIF. TRUST CODE § 413(a)(3) (2004).

103. For a discussion of § 413 not addressing gifts over to charities, *see* Chester, *Modification and Termination*, *supra* note 8, at 708.

the court's mandatory *cy pres* authority to modify the trust. At common law, the applicability of the *cy pres* doctrine was dependent on the particular charitable purpose having become impossible, impracticable, or illegal.[104] To that list, the UTC adds "wasteful,"[105] apparently to address "situations where the funds allocated to the particular charitable scheme far exceed what is needed."[106] While it may be arguable that settlors would not want their charitable trusts to be administered wastefully,[107] allowing the terms of a charitable trust to be modified upon a judicial determination that its charitable purposes have become wasteful presumably often would be contrary to the settlor's intent.[108]

104. *See* RESTATEMENT (SECOND) OF TRUSTS § 399 (1959); Chester, *Modification and Termination*, *supra* note 8, at 706.

105. UNIF. TRUST CODE § 413(a) (2004).

106. English, *Significant Provisions*, *supra* note 14, at 179 n.164. According to Professor Chester, the ground of wastefulness was added as a basis for applying *cy pres* in part in response to the case of *In re* Estate of Beryl H. Buck, the opinion in which, while not reported, is reproduced in *In re* Estate of Beryl H. Buck, 21 U.S.F. L. REV. 691 (1987). In *Buck*, the principal trust asset was approximately $9 million in value at the trust's creation, but within four years it was sold for $260 million. DUKEMINIER & JOHANSON, *supra* note 8, at 872-77. The trust was established for charitable, religious, and educational purposes in Marin County, California, the second-wealthiest county in the United States. *Id.* The foundation that administered the trust petitioned the court to exercise *cy pres* to expand the counties that could benefit from the trust to include other adjacent, less wealthy counties. *Id.* In rejecting the petition, the court noted that impracticability is a grounds for the application of *cy pres*, but held that:

> The *cy pres* doctrine should not be so distorted by the adoption of subjective, relative, and nebulous standards such as "inefficiency" or "ineffective philanthropy" to the extent that it becomes a facile vehicle for charitable trustees to vary the terms of a trust simply because they believe that they can spend the trust income better or more wisely elsewhere, or as in this case, prefer to do so. There is no basis in law for the application of standards such as "efficiency" or "effectiveness" to modify a trust, nor is there any authority that would elevate these standards to the level of impracticability.

Buck, *supra*, at 752-53. Note that if UTC § 413 had governed in *Buck*, the petition for *cy pres* might still have been unsuccessful and would have required the court to determine if devoting all of the trust's resources to accomplishing charitable, religious, and educational purposes in Marin County was "wasteful." *See* UNIF. TRUST CODE § 413(a) (2004).

107. In *Buck*, the Trustee, relying at least in part on the unexpected, huge increase in the value of the trust estate, made such an argument. Buck, *supra* note 106, at 753-55 (acknowledging the Petitioner's arguments as to wastefulness and stating that wastefulness should be distinguished from impracticability for purposes of applying *cy pres* to a trust).

108. Of course, to say that expanding the *cy pres* doctrine may override the settlor's intent is not necessarily to say that the doctrine should not be expanded. For policy-oriented arguments that settlors should not be able to rule the administration of charitable trusts from the grave indefinitely, *see* Ronald Chester, *Cy Pres: A Promise Unfulfilled*, 54 IND. L. J. 407, 425 (1979); Johnson, *supra* note 83; SIMES, *supra* note 4, at xix-xx; Scott, *Control of Property II*, *supra* note 19, at 654; and LEACH, *supra* note 27, at 47-48. For an argument to the contrary, *see* Chris Abbinante, Comment, *Protecting "Donor Intent" in Charitable Foundations: Wayward Trusteeship and the Barnes Foundation*, 145 U. PA. L. REV. 665 (1997). While allowing charitable trusts to be modified under the *cy pres* doctrine for wastefulness presents the possibility of a settlor's intent being improperly overridden, circumstances may arise when a judicial power to modify a charitable trust whose

III. THE SETTLOR'S ABILITY TO PROHIBIT THE TRANSFER OF THE BENEFICIARY'S INTEREST

Historically, restraints imposed by the donor of property on its alienability by the donee generally were not valid.[109] Beginning in the eighteenth century[110] and continuing through the widespread acceptance of spendthrift trusts today, the settlor's ability to prevent, or at least severely limit, the alienation of the beneficiary's interest has become well established.[111] While that generally is the case under the UTC,[112] in mandatory rules the settlor cannot override,[113] the UTC limits the settlor's ability to prevent the alienation of the beneficiary's interest in several ways.

First, as in most non-UTC jurisdictions, a trust will be a spendthrift trust only if the settlor includes in the instrument language that manifests his or her intent to create a spendthrift trust.[114] Second, as is also the case

purpose has become wasteful is called for. To illustrate, if the charitable trust in *Buck*, *supra* note 106, had been to provide care for stray animals in the Marin County animal shelter, and if the evidence were clear that such care could be perpetually provided for with an endowment of some fraction of the value the trust assets had grown to be, a *cy pres* standard limited to "unlawful, impracticable, or impossible to achieve" arguably would not allow a court to apply the doctrine to redirect the excess trust assets to other charitable needs, rather than using them to, for example, provide Marin County's stray animals with luxurious private quarters, full-time, private caregivers, daily grooming, and weekly veterinarian visits.

109. *See* Powell, *supra* note 3, at 127.

110. Professor Powell's explanation of the origin of the ability of donors to restrict transfers by donees is that:

> Wealthy mature Englishmen (not unlike wealthy and mature persons of other ancestries) had a core of common beliefs. First, they believed that their blooming daughters were pearls above price. Second, they believed that the chaps selected by their daughters as husbands were either scalawags, or, at best, less blessed with wisdom then [sic] they themselves were. Third, they believed it necessary to provide out of their accumulations for the security of their daughters and the progeny of their daughters. Fourth, they desired strongly to perpetuate the provided security against the possible blandishments or improvidence of the disturbed sons-in-law.
>
> When one combined the common core of four beliefs above described with the fact that the class of wealthy and mature Englishmen largely overlapped the class of prominent English lawyers and judges, the judicial evolution of the 'equitable separate property of married women' became easily predictable. Under this doctrine property settled in trust could be made inalienable as to benefit by the married woman and, to make this effective, at a later date, unreachable by the creditors of either the fair beneficiary or her improvident spouse.

Id. at 128 (footnote omitted).

111. *See* Newman, *supra* note 44, at 772 n.10. For a discussion of agency costs associated with honoring or not honoring the settlor's dead hand control with respect to spendthrift restrictions on transfers by beneficiaries, *see* Sitkoff, *supra* note 6, at 675-77.

112. *See* UNIF. TRUST CODE § 502 (2004).

113. *See* UNIF. TRUST CODE § 105(b)(5) (2004).

114. *See* UNIF. TRUST CODE §§ 501, 502(a), and 502(b) (2004). *See also* RESTATEMENT

in most non-UTC jurisdictions, the UTC does not allow the settlor to prevent creditors from reaching the interest, but to permit the beneficiary to voluntarily transfer it.[115] Third, consistent with the Restatements, federal bankruptcy law, and existing law in many states,[116] a spendthrift provision will not protect the beneficiary's interest from the support claims of the beneficiary's child, spouse, or former spouse.[117] Fourth, also excepted from the bar of a spendthrift clause are (i) the claim of a judgment creditor who has provided services for the protection of the beneficiary's interest in the trust, and (ii) a claim of the state or the United States, to the extent a statute of the state or federal law so provides.[118] Fifth, consistent with the common law, but not with recent legislation in several states,[119] regardless of whether the terms of the

(THIRD) OF TRUSTS § 58 cmt. b (2003) ("The settlor must manifest the intention to create a spendthrift trust. No particular form of wording is necessary for this purpose, as long as the requisite intention can be discerned from the terms of the trust." (internal reference omitted)); David M. English, *Is There a Uniform Trust Act in Your Future?,* 14 PROB. & PROP. 25, 30 (Jan.-Feb. 2000) [hereinafter English, *Trust Act in Your Future*] (the title of Professor English's article derives from the fact that earlier drafts of the UTC were titled the "Uniform Trust Act"). By contrast, some states have made trusts spendthrift by statute, even if the instrument does not include a spendthrift provision, unless the transfer of beneficial interests is expressly authorized. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 7-1.5(a)(1) (McKinney 1992).

Further, a few courts have implied a restraint on alienation with little or no express language in the instrument indicating such intent. IIA SCOTT & FRATCHER, *supra* note 21, at 119-20; William S. Huff*, Spendthrift Clauses: Legality and Effect on Post-Transfer Estate Planning*, INSTITUTE ON ESTATE PLANNING ¶ 1202.4 (1984). For example, in *Morrison v. Doyle*, 582 N.W.2d 237 (Minn. 1998), a beneficiary's judgment creditors were prohibited from reaching the beneficiary's trust interest even though the instrument did not include a spendthrift provision. *Id*. at 238. The beneficiary was serving as the trustee, and as such, the beneficiary was to "pay the income and such amounts of the principal as the Trustee in its discretion may determine for the beneficiary's education, support, health, and maintenance." *Id.* at 239. According to the court, that language was sufficient to create a spendthrift trust. *Id*. at 241.

115. *See* UNIF. TRUST CODE § 502(a) (2004). According to Professor English, the UTC Reporter, "[t]he 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 to satisfy their claims." English, *Trust Act in Your Future*, *supra* note 114, at 30.

116. *See* UNIF. TRUST CODE § 503 cmt. (2004).

117. UNIF. TRUST CODE § 503(b) (2004).

118. UNIF. TRUST CODE §§ 503(b) and (c) (2004). The UTC does not include the common exception to spendthrift protection for the claims of those who have provided necessaries to the beneficiary. *Compare* RESTATEMENT (THIRD) OF TRUSTS § 59(b) (2003), *with* UNIF. TRUST CODE § 503(b) (2004). The necessaries exception was omitted from the UTC because most cases in which such claims have been asserted "involve claims by governmental entities, which the drafters concluded are better handled by the enactment of special legislation." UNIF. TRUST CODE § 503 cmt. (2004). *See also* Newman, *supra* note 44, at 789-803.

119. *See, e.g.*, ALASKA STAT. § 34.40.110(a)-(b) (Michie 2000); DEL. CODE ANN. tit. 12, §§ 3570-3576 (2000); NEV. REV. STAT. ANN. § 166.010 (Michie 1993); R.I. GEN. LAWS §§ 18-9.2 (2000); UTAH CODE ANN. § 25-6-14(a)(ii) (2004). Generally, subject to fraudulent transfer and

trust include a spendthrift provision, if the settlor retains a beneficial interest in an irrevocable trust, the settlor's creditors may reach the maximum amount the trustee could distribute to or for the settlor's benefit.[120]

Irrespective of whether the settlor includes a spendthrift provision in the instrument, if the settlor makes the beneficiary's right to receive distributions from the trust subject to the trustee's discretion, the settlor probably intends that creditors of the beneficiary not be able to force distributions from the trust.[121] The UTC respects that intention[122] except with respect to support claims of the beneficiary's child, spouse, or

other limitations, these statutes allow settlors to establish irrevocable trusts in which they may retain a beneficial interest that their creditors may not reach. The effectiveness of such legislation to accomplish that objective, as well as the wisdom of attempting to do so, has been questioned by many. *See, e.g*., Karen E. Boxx, *Gray's Ghost – A Conversation About the Onshore Trust*, 85 IOWA L. REV. 1195 (2000); Randall J. Gingiss, *Putting a Stop to "Asset Protection" Trusts*, 51 BAYLOR L. REV. 987 (1999); Henry J. Lischer, Jr., *Domestic Asset Protection Trusts: Pallbearers to Liability*, 35 REAL PROP. PROB. & TRUST J. 479 (2000); Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom*, 85 CORNELL L. REV. 1035, 1042 (2000). For a contrary view, *see* Adam J. Hirsch, *Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectivces*, 73 WASH. U. L.Q. 1, 83-92 (1995).

120. *See* UNIF. TRUST CODE § 505(a)(2) (2004). If the settlor has reserved the ability to revoke the trust, all of its assets are subject to claims of the settlor's creditors. *See* UNIF. TRUST CODE § 505(a)(1) (2004). For this purpose, a person holding a power of withdrawal over trust assets is treated as the settlor of a revocable trust, but only to the extent of the property subject to the power and only during the period the power may be exercised. *See* UNIF. TRUST CODE § 505(b)(1) (2004). To facilitate planning with Crummey and five or five powers, if the holder of the power allows it to lapse, or releases or waives it, the holder will thereafter be treated as the settlor of the trust only to the extent of the excess of the amount that could have been withdrawn over the greater of the annual exclusion amount of I.R.C. § 2503(b) or the 5 percent or $5,000 amount of I.R.C. § 2041(b)(2) or § 2514(e). *See* UNIF. TRUST CODE § 505(b)(2) (2004). Furthermore, a beneficiary who also is a trustee will not be treated as having a power of withdrawal over the trust, and thus will not be treated as the settlor of the trust for creditors' rights purposes, if the beneficiary/trustee's power to distribute to him or herself is limited by an ascertainable standard relating to his or her health, education, support, or maintenance. *See* UNIF. TRUST CODE §§ 103(2) and (11) (2004). Arguably, if the beneficiary/trustee's power is not so limited, he or she will be treated as the settlor of a revocable trust with respect to the trust assets the beneficiary/trustee could distribute to him or herself. *See* UNIF. TRUST CODE §§ 505(b)(1) and 103(11) (2004). However, the comment to the 2004 amendment to §§ 504(e) and 103(11) states that "[t]he Code does not specifically address the extent to which a creditor of a trustee/beneficiary may reach a beneficial interest of a beneficiary/trustee that is not limited by an ascertainable standard." *See 2004-2005 Amendments to the Uniform Trust Code with Comments* § 504 (Tentative Draft 3/1/2005).

121. *See* RESTATEMENT (SECOND) OF TRUSTS § 155(1) (1959).

122. *See* UNIF. TRUST CODE § 504(b) (2004). Note that § 504(b) applies not only to pure discretionary trusts (e.g., "the trustee, at its discretion, may distribute income and principal to the beneficiary"), but also to trusts with respect to which the settlor has provided standards for the trustee to follow in making distributions to the beneficiary (e.g., "the trustee, at its discretion, may distribute income and principal to provide for the beneficiary's support"). While the common law distinguished between so-called "discretionary" and "support" trusts for creditors' rights purposes, the UTC does not. UNIF. TRUST CODE § 504 cmt. (2004).

former spouse in circumstances in which the trustee's failure to make a distribution constitutes an abuse of its discretion or a failure to comply with a standard of distribution.[123]

IV. THE SETTLOR'S ABILITY TO CONTROL INFORMATION THE BENEFICIARY RECEIVES FROM THE TRUSTEE

The UTC imposes both a general obligation on the trustee to keep the qualified beneficiaries[124] reasonably informed about the administration of the trust[125] and specific obligations to provide specific information to beneficiaries.[126] Of more significance are the Code provisions prohibiting the settlor from waiving certain of the trustee's reporting obligations. As originally promulgated, they provided:

> (b) The terms of a trust prevail over any provision of this [Code] except:. . .
>
> (8) the duty under Section 813(b)(2) and (3) to notify qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, of the identity of the trustee, and of their

123. *See* UNIF. TRUST CODE § 504(c) (2004). While the UTC generally does not allow creditors of beneficiaries of discretionary trusts (including those in which standards for distribution are included) to compel distributions they can reach, in the absence of spendthrift protection the UTC allows the beneficiary's creditors to reach part or all of distributions the trustee, in the exercise of its discretion, decides to make. UNIF. TRUST CODE § 501 (2004). *See also* RESTATEMENT (THIRD) OF TRUSTS § 60 cmts. b, c, reporter's notes (2003).

124. For the definition of "qualified beneficiaries," *see supra* note 88.

125. *See* UNIF. TRUST CODE § 813(a) (2004).

126. *See* UNIF. TRUST CODE § 813(b), (c) (2004). Note that "beneficiaries" is a defined term in the UTC that includes not only those persons who have beneficial interests in the trust, but also holders of powers of appointment (in a capacity other than that of a trustee) over trust property. UNIF. TRUST CODE § 103(2) (2004). Furthermore, "beneficiaries" includes not only those persons

> who received their interests under the terms of the trust but also beneficiaries who received their interests by other means, including by assignment, exercise of a power of appointment, resulting trust upon the failure of an interest, gap in a disposition, operation of an antilapse statute upon the predecease of a named beneficiary, or upon termination of the trust.

Id. cmt. The trustee's reporting obligations do not apply to beneficiaries of revocable trusts (other than the settlor) while the settlor is alive and has capacity. UNIF. TRUST CODE § 603(a) & cmt. (2000). If the settlor of a revocable trust becomes incapacitated, the trustee must thereafter report to the other trust beneficiaries. *Id*. In 2004, an amendment to § 603(a) bracketed its capacity language. *2004-2005 Amendments to the Uniform Trust Code with Comments* § 603(a) (Tentative Draft 3/1/2005). In jurisdictions enacting § 603(a) without that language, the duties of a trustee of a revocable trust, including the duty to report, will be owed exclusively to the settlor during the settlor's lifetime without regard to the settlor's capacity. The UTC does not require the trustee to "account" to the beneficiary, because of uncertainty with respect to the meaning of the term "accounting." *See* Langbein, *Mandatory Rules*, *supra* note 17, at 1125 n.107.

right to request trustee's reports;

(9) the duty under Section 813(a) to respond to the request of a beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust; . . . .[127]

These provisions have been among the UTC's most controversial and heavily criticized.[128] While a trustee's duty to inform is fundamental,[129] the issue of the settlor's ability to waive that duty

127. UNIF. TRUST CODE §§ 105(b)(8), (9) (2000). The comment provides:

> Responding to the desire of some settlors that younger beneficiaries not know of the trust's bounty until they have reached an age of maturity and self-sufficiency, subsection (b)(8) allows a settlor to provide that the trustee need not even inform beneficiaries under age 25 of the existence of the trust. However, pursuant to subsection (b)(9), if the younger beneficiary learns of the trust and requests information, the trustee must respond. More generally, subsection (b)(9) prohibits a settlor from overriding the right provided to a beneficiary in Section 813(a) to request from the trustee of an irrevocable trust copies of trustee reports and other information reasonably related to the trust's administration.

UNIF. TRUST CODE § 105 cmt. (2004). For a thorough, critical analysis of the UTC's provisions addressing the trustee's duty to inform beneficiaries, *see Practical Drafting* (U.S. Trust Co. of NY) 7618-32 (April 2004), which was expanded by its authors to include, among other things, a proposal for revising § 813 in *Heckerling Institute*, *supra* note 38, at 221-23.

128. *See*, *e.g.*, *Heckerling Institute*, *supra* note 38, at 221-23; English, *Significant Provisions*, *supra* note 14, at 202 (stating that, "[t]he most discussed issue during the drafting of the UTC and subsequent to its approval is the extent to which a settlor may waive the [disclosure requirements of §§ 105(b)(8) and (9)]"); Donald D. Kozusko, *In Defense of Quiet Trusts*, TR. & EST. 20, 22 (Mar. 1, 2004) (commenting that, "the UTC has effectively declared the quiet trust violates public policy – an official contempt usually reserved for transfers in fraud of a settlor's creditors, or gifts tied to racial or religious overtones" and that "[i]t is inconsistent with a respect for private property to prohibit quiet trusts by specifying what trustees must disclose, even if it contradicts a settlor's best judgment.").

129. The rationale for the trustee's duty to report to beneficiaries is that:

> The beneficiary is the equitable owner of the trust property, in whole or in part. The trustee is a mere representative whose function is to attend to the safety of the trust property and to obtain its avails for the beneficiary in the manner provided by the trust instrument. That the settlor has created a trust and thus required that the beneficiary enjoy his property interest indirectly does not imply that the beneficiary is to be kept in ignorance of the trust, the nature of the trust property and the details of its administration. If the beneficiary is to be able to hold the trustee to proper standards of care and honesty and to obtain the benefits to which the trust instrument and doctrines of equity entitle him, he must know of what the trust property consists and how it is being managed.
>
> From these considerations it follows that the trustee has the duty to inform the beneficiary of important matters concerning the trust and that the beneficiary is entitled to demand of the trustee all information about the trust and its execution for which he has any reasonable use. It further follows that the trustee is under a duty to notify the beneficiary of the existence of the trust so that he may exercise his rights to secure information about trust matters and to compel an accounting from the trustee.

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received relatively little attention prior to the UTC.[130] Of the first ten jurisdictions to enact the UTC, however, four (Kansas, Tennessee, Utah, and Wyoming) deleted sections 105(b)(8) and (9) entirely.[131] A fifth, the District of Columbia, allows the settlor to waive the trustee's obligations to report to beneficiaries by designating a surrogate to receive information the trustee otherwise would be required to provide to the beneficiaries.[132] Maine's version of the UTC modified the requirements of sections 105(b)(8) and 105(b)(9) to make the trustee's duties under them applicable only to qualified beneficiaries.[133] Missouri limits the trustee's affirmative reporting obligation to current beneficiaries who have attained twenty-one years of age.[134]

In recognition of the diverse approaches the first ten UTC enacting jurisdictions took to this issue, the National Conference of Commissioners on Uniform State Laws amended sections 105(b)(8) and (9) in 2004 by bracketing them, thus highlighting the option of enacting states to modify or delete them.[135] Alternatively, the 2004 amendments

961 (rev. 2d ed. 1992) (footnote omitted). Despite the common law duty to inform, the practice of some trustees, in some circumstances, apparently has been to not do so. *See* Kozusko, *supra* note 128, at 20.

130. *See* RESTATEMENT (SECOND) OF TRUSTS § 173 cmt. c. (1959) (stating that while the settlor may regulate the amount of information the beneficiary receives, and the frequency with which it is provided, "the beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust"); Briggs v. Cowley, 224 N.E.2d 417, 421 (Mass. 1967) (holding that a settlor's attempt to relieve the trustee from the duty to account is against public policy and unenforceable); Wood v. Honeyman, 169 P.2d 131 (Or. 1946) (holding that while a settlor may relieve a trustee from the duty to inform a beneficiary out of court, the settlor may not relieve the trustee from the duty to account in court). The question of the settlor's ability to waive the trustee's duty to inform is, of course, different than the question of what information a beneficiary should be entitled to receive from the trustee in the absence of direction from the settlor to the contrary. With respect to the latter, the trend has been toward greater disclosure. *See* Sitkoff, *supra* note 6, at 680; Ian Marsh & Michael Ben-Jacob, *Go Offshore to Avoid Trust Transparency?*, TR. & EST. 29, 29 (Mar. 1, 2004) (noting the trend towards more transparency with respect to a trustee's administration of a trust even in jurisdictions that have not adopted the UTC and suggesting that settlors for whom confidentiality is important create their trusts in offshore jurisdictions that require less disclosure).

131. *See, e.g.,* KAN. STAT. ANN. § 58a-105(b) (2003); TENN. CODE ANN. § 35-15-105 (2004); UTAH CODE ANN. § 75-7-105(b) (2004); and WYO. STAT. ANN. § 4-10-105(b) (Michie 2004).

132. *See* D.C. CODE ANN. § 19-1301.05(b), (c) (2004). This approach of the District has been characterized as a "unique and highly unusual" one. *2004 Enactments: District of Columbia*, UTC NOTES (Summer 2004) at 3, *available at* http://www.nccusl.org/Update/newsletters/UTCNotes/UTCnotes_ Jul04_print.pdf.

133. *See* ME. REV. STAT. ANN. tit. 18-B, § 105(2)(H), (I) (West 2004).

134. *See* MO. ANN. STAT. § 456.1-105(2)(8) (West 2004).

135. *Compare* UNIF. TRUST CODE §§ 105(b)(8), (9) (2000), *with* UNIF. TRUST CODE §§ 105(b)(8), (9) (2004). The comment to the 2004 amendment bracketing §§ 105(b)(8) and (9) provides:

> The placing of these provisions in brackets does not mean that the Drafting Committee

also insert a bracketed "qualified" in section 105(b)(9), thus noting that an enacting jurisdiction might choose to follow Maine's lead and limit the trustee's mandatory duty to respond to requests for information about the trust to qualified beneficiaries, rather than all beneficiaries.[136]

If the settlor directs the trustee not to provide any information to the beneficiary about the trust, including its existence, the question of whether a trust has in fact been created is raised. If a property owner transfers property to a transferee to manage on behalf of a third party, but the property owner provides that the transferee is not to inform the third party of the transfer, the third party presumably will not know of his or her interest in the transferred property, and thus will not be able to protect it. Such an arrangement arguably constitutes not an enforceable trust, but rather an outright gift to the transferee accompanied by precatory language with respect to the owner's desire that the transferee use it for the benefit of the third party.[137]

For several reasons, however, that should not be the result in jurisdictions that enact the UTC without sections 105(b)(8) and (9). First, such a jurisdiction's version of the UTC presumably will include the UTC's provisions on trust creation, which do not include a requirement that the beneficiaries know of their trust interests.[138] Second, such a jurisdiction's version of the UTC presumably will include default rules with respect to the trustee's duty to inform and report, similar to those in UTC section 813, along with the authorization of the settlor in section 105(a) to override them in the terms of the trust. Those provisions would express legislative intent that the settlor may create a trust and control what, if any, information the beneficiary is to

> recommends that an enacting jurisdiction delete Sections 105(b)(8) and 105(b)(9). The Committee continues to believe that Section [sic] 105(b)(8) and (b)(9), enacted as is, represent the best balance of competing policy considerations. Rather, the provisions were placed in brackets out of a recognition that there is a lack of consensus on the extent to which a settlor ought to be able to waive reporting to beneficiaries, and that there was little chance that the states would enact Sections 105(b)(8) and (b)(9) with any uniformity.

2004-2005 Amendments to the Uniform Trust Code with Comments § 105 (Tentative Draft 3/1/2005).

136. *Compare* UNIF. TRUST CODE § 105(b)(9) (2000), *with* UNIF. TRUST CODE § 105(b)(9) (2004).

137. *See* RESTATEMENT (SECOND) OF TRUSTS § 172 cmt. d (1959); Langbein, *Mandatory Rules*, *supra* note 17, at 1126 ("Like a trust term purporting to abrogate all fiduciary duties, or a term authorizing the trustee to act in bad faith, a term that prevents the beneficiary from obtaining the information needed to enforce the trust entails the risk of making the trust unenforceable and hence illusory."); Marsh & Ben-Jacob, *supra* note 130, at 30.

138. *See* UNIF. TRUST CODE § 402 (2004).

receive about it. Third, for some such trusts, the beneficiary will learn of the trust in one way or the other, at one time or another, and thus presumably be able to protect his or her interest at that time. For example, the settlor may give the trustee discretion with respect to furnishing information to the beneficiary,[139] and upon making a distribution to or for the benefit of the beneficiary, the trustee presumably will be required to furnish the beneficiary information for the beneficiary's use in complying with federal and state tax reporting requirements.[140] Fourth, some such trusts presumably will provide for no information to be given to one or more beneficiaries, but for information to be provided to one or more other beneficiaries who could enforce the trust.

Note also that the UTC itself creates the possibility of a trust being administered for a substantial period of time without any beneficiary receiving any information about it because of the limitation on the affirmative reporting obligation of section 105(b)(8) to beneficiaries who are at least twenty-five years of age.[141] Finally, as is explicitly allowed in the District of Columbia, in jurisdictions that allow the settlor to waive the trustee's duty to provide any information to the beneficiary about the trust, settlors may choose to designate a surrogate to receive information about the trust that otherwise would be provided to the beneficiary.[142]

Although jurisdictions that allow settlors to bar a beneficiary from even knowing about the existence of the trust probably do not jeopardize the validity of such trusts, many questions will arise with respect to their administration.[143] For example, if the settlor directs the trustee not to inform the beneficiary about the trust and the beneficiary directly asks the trustee if it is trustee of a trust for the beneficiary, how should or can

139. *See* Kozusko, *supra* note 128, at 21.

140. *Id*. at 24 n.4.

141. *See* UNIF. TRUST CODE § 105(b)(8) (2004).

142. *See* D.C. CODE ANN. § 19-1301.05(c)(3) (2004).

143. In light of the issues and uncertainties discussed in this paragraph of the text, an important objective of the UTC will not be obtainable in jurisdictions that allow the settlor to waive the trustee's duty to provide the beneficiary with information about the trust: to "provide States with precise, comprehensive, easily accessible guidance on trust law questions." UNIF. TRUST CODE, prefatory note (2004). Practical problems, as well as legal issues, also may arise when beneficiaries are not provided information about trusts of which they are beneficiaries. For example, Professor Whitman reports instances of "trust beneficiaries who, when denied disclosure, contacted the Internal Revenue Service to report suspected tax evasion and sought redress from their state's attorney general, the Securities Exchange Commission, the Federal Bureau of Investigation, the Central Intelligence Agency, the police and newspapers." Robert Whitman, *Full Disclosure is Best*, TR. & EST. 59, 59 (July 2004). Professor Whitman notes that such actions may not be successful, but that "the fallout from non-disclosure is costly, both emotionally and financially." *Id*.

the trustee respond? Section 105(b)(2) makes mandatory the trustee's duty "to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries."[144] If, consistent with the directions of the settlor, the trustee denies the existence of the trust, or the beneficiary's status as a beneficiary of the trust, or misrepresents the terms of the trust or its assets and their management, arguably the trustee would not be acting in good faith with respect to the beneficiary, regardless of whether doing so was consistent with the settlor's intent as set forth in the terms of the trust. If the beneficiary believes he or she is a beneficiary of a trust, and believes that he or she knows who the trustee of the trust is, but the beneficiary is not certain with respect to either matter, presumably the beneficiary could successfully pursue a legal proceeding to find out.[145] If so, could the beneficiary force the trustee to account in court? If the settlor directed that no information about the trust assets be provided to the beneficiary, would any such accounting be accessible by the beneficiary?[146]

The District of Columbia approach of allowing the settlor to waive the trustee's duty to inform the beneficiary by designating a surrogate to receive information that otherwise is to be provided to the beneficiary raises additional questions. To the fundamental question of what are the surrogate's responsibilities to the beneficiary, the District's version of the UTC provides only that the surrogate must "act in good faith to protect the interests of beneficiaries."[147] Presumably the surrogate would owe fiduciary duties to the beneficiaries, and have potential liabilities, rights, and powers with respect to their exercise, but the nature and extent of those duties, potential liabilities, rights, and powers are not addressed. Could the surrogate ever have an obligation to provide information to the beneficiary if the settlor had directed otherwise? For example, if the trustee breached a duty, causing serious loss to the trust estate, would the beneficiary be entitled to know of the loss and the assertion and resolution of any resulting claims by the surrogate against the trustee? If

144. UNIF. TRUST CODE § 105(b)(3) (2004).

145. If the beneficiary knew of the trust, but knew nothing of the extent of the beneficiary's interest in it, or of the assets in the trust, could the beneficiary sue to obtain that information? If the jurisdiction's trust code allows the settlor to prohibit disclosure to the beneficiary, perhaps the court would respect the code and the settlor's intent and not require disclosure. The beneficiary would argue, however, that without that information, the beneficiary would have no way to know if the trustee had breached a duty and no way to hold the trustee accountable.

146. It has been suggested that if a judicial proceeding involving a trust as to which a beneficiary is not to receive information occurs, a guardian ad litem could act for the beneficiary to make necessary decisions, and the court record could be sealed. Kozusko, *supra* note 128, at 24-5.

147. D.C. CODE ANN. § 19-1301.05(c)(3) (2004).

the surrogate provided information to the beneficiary against the directions of the settlor, would the settlor, or the settlor's successors, have a cause of action against the surrogate for unauthorized disclosure? Would the settlor have suffered any damages?

The District's surrogate approach to sections 105(b)(8) and (9) does not address the effect of the trustee providing information to the surrogate on the statute of limitations for actions by the beneficiary against the trustee for breach of duty. The one-year statute under the UTC runs from the "date the beneficiary or a representative of the beneficiary was sent a report. . . ."[148] While "representative" is not a defined term under the Code,[149] it refers to a "person who may represent and bind a beneficiary as provided in [the general representation provisions of the Code],"[150] which may not include a person designated by the settlor to receive information on behalf of a beneficiary.[151] Accordingly, under the District's surrogate approach, the trustee's providing information to a surrogate on behalf of the beneficiary may not start the statute of limitations on actions by the beneficiary against the trustee.

V. THE REQUIREMENT THAT THE TRUST AND ITS TERMS BE FOR THE BENEFIT OF THE BENEFICIARIES

Another of the UTC's mandatory rules is that "[a] trust and its terms be for the benefit of the beneficiaries."[152] The stated purpose of this principle, which was derived from the Restatement (Third) of Trusts,[153] is to preclude the settlor from directing in the nondispositive provisions of the trust that it be administered to achieve a frivolous, capricious, or otherwise invalid trust purpose.[154] Rather, the nondispositive provisions of a trust are required to reasonably relate to

148. *See* UNIF. TRUST CODE § 1005(a) (2004).

149. *See* UNIF. TRUST CODE § 103 (2004).

150. UNIF. TRUST CODE § 1005 cmt. (2004).

151. D.C. CODE ANN. § 19-1303.01 (2004).

152. UNIF. TRUST CODE § 105(b)(3) (2004) (referring to UNIF. TRUST CODE § 404 (2004)).

153. *See* RESTATEMENT (THIRD) OF TRUSTS § 27(2) (2003); UNIF. TRUST CODE § 404 cmt. (2004). *See also* Robert Whitman, *Commentary: A Law Professor's Suggestions for Estate and Trust Reform*, 12 QUINNIPIAC PROB. L.J. 57, 61 (1997) (proposing a Bill of Rights for Trust Beneficiaries, the overriding principle of which is that trusts are for the benefit of beneficiaries); Scott, *Control of Property II*, *supra* note 19, at 650-51 (noting that, "[a] court of equity may sometimes authorize the trustees to depart from the testator's instructions. The trust is created for the beneficiaries, and it is their interests which should be considered.").

154. *See* UNIF. TRUST CODE § 404 cmt. (2004).

the fundamental purpose of benefiting beneficiaries.[155]

For example, a trust term requiring trustees' spouses to be Protestants has been held unenforceable.[156] Other examples of invalid nondispositive provisions from the Restatement are terms directing that "money shall be thrown into the sea, that a field shall be sowed with salt, that a house shall be boarded up and remain unoccupied, or that a wasteful undertaking or activity shall be continued."[157] As noted by the Restatement,[158] several cases that arguably would have been better grounded on the benefit-the-beneficiaries doctrine were instead decided based on a strained application of the equitable deviation doctrine,[159] which normally requires a showing of unanticipated circumstances because of which compliance with the administrative terms of the trust would jeopardize the accomplishment of the purposes of the trust.[160]

Professor Langbein has predicted that the benefit-the-beneficiaries doctrine will be applied most frequently not in cases of capricious purposes that eccentric settlors attempt to impose, but rather on value-impairing investment directions settlors give the trustee.[161] By way of illustration, he hypothesizes "a modest trust fund for the support of [the settlor's] otherwise destitute widow and orphans" that the settlor directs be invested entirely in the stock of a bankrupt corporation because of the settlor's belief that the stock has great appreciation potential.[162] While such an investment policy for the trust would violate the usual rules of diversification and prudent investing,[163] those rules are default rules that the settlor may override.[164] Nevertheless, Professor Langbein concludes that no court would enforce such a trust provision,[165] because doing so "would be so contrary to the risk-and-return profile of the beneficiaries

155. *Id*. The comment to § 404 states that its benefit-the-beneficiaries rule implements the general purpose of trusts "to benefit [the trust's] beneficiaries in accordance with their interests as defined in the trust's terms." *Id.*

156. *See, e.g., In re* Estate of Coleman, 317 A.2d 631 (Pa. 1974).

157. RESTATEMENT (THIRD) OF TRUSTS § 47 cmt. e (2003).

158. *See* RESTATEMENT (THIRD) OF TRUSTS § 27 cmt. b, reporter's note (2003).

159. *See, e.g.*, *In re* Pinkerton, 630 N.Y.S.2d 481 (N.Y. Sur. 1995) (rejecting a requirement that a trustee be president of a company the trust had sold); *In re* Estate of Pulitzer, 249 N.Y.S. 87 (N.Y. Sur. 1931), *aff'd* 260 N.Y. S. 975 (N.Y. App. Div. 1932) (allowing the trustee to sell a closely held business interest the settlor had directed be retained); Colonial Trust Co. v. Brown, 135 A. 555 (Conn. 1926) (refusing to enforce a provision restricting the height of buildings constructed on trust land to three stories and limiting leases of trust property to one year).

160. *See* RESTATEMENT (SECOND) OF TRUSTS § 167(1) (1959).

161. Langbein, *Mandatory Rules*, *supra* note 17, at 1111.

162. *Id*.

163. *See* UNIF. PRUDENT INVESTOR ACT §§ 2, 3 (1994).

164. UNIF. PRUDENT INVESTOR ACT § 1(b) (1994).

165. Langbein, *Mandatory Rules*, *supra* note 17, at 1111.

that the direction could not satisfy an objective standard of benefit under the benefit-the-beneficiaries rule."[166] More generally, "[t]he requirement that there be benefit to the beneficiaries sets outer limits on the settlor's power to abridge the default law [of trusts]. Trust law's deference to the settlor's direction always presupposes that the direction is beneficiary-regarding."[167]

This analysis of the benefit-the-beneficiaries doctrine raises at least three questions. First, given that no similar restrictions apply to the control an owner can exercise over property during life, what is the rationale for limiting that control at death? The answer provided by the Restatement is that self-interest ordinarily restrains a property owner from acting capriciously with respect to his or her own property, and society is reluctant to interfere with an owner's use of his or her own property.[168] By contrast, public policy requires not enforcing directions given by a settlor to another to use property – in which the settlor no longer has a beneficial interest – capriciously.[169]

Second, how are provisions that are capricious or frivolous to be identified? The Restatement notes the obvious: that a clear line between capricious and non-capricious purposes cannot be drawn[170] and that policies affecting that determination will "inevitably vary from time to time and place to place."[171] As a general principle, though,

> [a] purpose is not capricious merely because no living person benefits directly from its performance, if it satisfies a desire that many (even if not most) people have with respect to the disposition of their property . . . and the amount of the property to be devoted to the purpose is not unreasonably large.[172]

166. *Id*. at 1112.

167. *Id*.

168. *See* RESTATEMENT (THIRD) OF TRUSTS § 47 cmt. e (2003). Professor Scott observed:

> It is bad enough when the power conferred by the possession of property is exercised by a living man who is wicked or foolish; it is worse if it is exercised by the wicked or foolish dead; the living are at least open to the influence of the world about them; the dead are beyond our reach.

Scott, *Control of Property II*, *supra* note 19, at 657. *See also* Sherman, *supra* note 30, at 1294.

169. *See* RESTATEMENT (THIRD) OF TRUSTS § 47 cmt. e (2003). *But see* Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781 (2005) (arguing that respecting the right to destroy results in social benefits as well as costs of wasted resources, and that a testator who turns down an offer to buy a remainder interest in property the testator wants destroyed after his or her death should be free to direct its destruction post mortem).

170. RESTATEMENT (THIRD) OF TRUSTS § 47 cmt. e (2003).

171. *Id*.

172. *Id*. The Restatement's illustrations include erecting monuments on graves, caring for gravesites, offering masses for the souls of the decedent and the decedent's predeceased spouse,

Third, what responsibility, and potential liability, does a trustee have when the terms of the trust direct the trustee to administer the trust in what is arguably a capricious manner? Professor Langbein's view is that if the trustee determines that following the settlor's direction to retain an interest in a family business would not be in the interests of the beneficiaries, it has a duty to resist the direction and risks liability to the beneficiaries by not doing so.[173] While the Uniform Prudent Investor Act explicitly provides that the prudent investor rule (which includes duties at the inception of a trusteeship that may include disposing of assets that comprise the initial trust corpus[174]) is a default rule that the settlor may override,[175] its protection of the trustee from liability for acting in reliance on the trust's terms is limited to actions taken in "reasonable reliance" on those terms.[176] No guidance on what constitutes "reasonable reliance" is provided in the Uniform Prudent Investor Act or its comments. Under the Restatement, directions by the settlor that override the otherwise applicable prudent investor rule are binding unless they violate public policy, are impossible or illegal to perform, or a court has directed non-compliance when unanticipated circumstances have arisen such that compliance would defeat or substantially impair the accomplishment of the purposes of the trust.[177] In the event the trustee knows, or should have known, of such unanticipated circumstances, under the Restatement the trustee is under a duty to apply to the court for an order of non-compliance.[178] It appears that under the Restatement, the trustee will not be liable for following value-impairing investment directions of the settlor that not only are inconsistent with the Uniform Prudent Investor Act, but also appear to be not in the best interests of the beneficiaries, absent such unanticipated circumstances (or a violation of public policy, impossibility, or illegality).[179]

developing a phonetic alphabet, and caring for a pet dog. *Id*.

173. *See* Langbein, *Mandatory Rules*, *supra* note 17, at 1116-17. *See also* Hodgman & Blickenstaff, *supra* note 84, at 289-90.

174. *See* UNIF. PRUDENT INVESTOR ACT § 4 (1994).

175. UNIF. PRUDENT INVESTOR ACT § 1(b) (1994).

176. *Id*.

177. *See* RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 228 cmt. e (1992).

178. *Id*. at ill. 6.

179. For a trust provision directing the retention of corporate stock "come what may, subject only to a duty by the Trustee not to act in bad faith," suggested in reliance on the protection afforded by § 1(b) of the Uniform Prudent Investor Act, *see* Fast, Gianopulos & Martino, *supra* note 59.

VI. THE TRUSTEE'S OBLIGATION TO ACT IN GOOD FAITH; EXCULPATION

Regardless of the breadth of discretion the settlor confers on the trustee, the UTC requires the trustee to "act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries."[180] Similarly, a settlor may not exculpate a trustee from liability "for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries,"[181] or if the exculpation clause "was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship."[182]

Some critics of the UTC have argued that its mandatory requirement that the trustee exercise its discretionary powers in good faith, even when the settlor grants the trustee broad discretion through the use of such terms as "sole and absolute," is a material change in the common law that will have adverse effects on the asset protection benefits trusts have traditionally provided.[183] However, imposing a good faith standard on the trustee's conduct, regardless of the breadth of discretion the settlor has granted the trustee, is not new with the UTC.[184]

180. UNIF. TRUST CODE § 105(b)(2) (2004). While the trustee must act in good faith, the settlor may waive the trustee's otherwise applicable duty of loyalty to the beneficiaries. *See* UNIF. TRUST CODE § 105(a) (2004). Allowing the trustee to do so is consistent with common law. *See* RESTATEMENT (SECOND) OF TRUSTS § 170(1) cmt. t (1959). With respect to the trustee's exercise of discretionary powers, the UTC provides that even if the settlor uses such language as "absolute," sole," or "uncontrolled" in describing the trustee's discretion, it must nevertheless be exercised "in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries." UNIF. TRUST CODE § 814(a) (2004). Because § 105(b)(2), as originally promulgated, did not make mandatory the obligation of the trustee to act "in accordance with the terms . . . of the trust" or "the interests of the beneficiaries," arguably the settlor could waive the trustee's otherwise applicable duty to do so under § 814(a). *See* UNIF. TRUST CODE § 105(a) (2004). That was not clear, however, as § 814(a) is expressly made applicable "[n]otwithstanding the breadth of discretion granted to a trustee in the terms of the trust." UNIF. TRUST CODE § 814(a) (2004). To make §§ 105(b)(2) and 814 (a) consistant, § 105(b)(2) was amended in 2005 to track the language of § 814(a). *2004-2005 Amendments to the Uniform Trust Code with Comments* § 105(b)(2) (Tentative Draft 3/1/2005).

181. UNIF. TRUST CODE § 1008(a)(1) (2004).

182. UNIF. TRUST CODE § 1008(a)(2) (2004). If the trustee "drafted or caused to be drafted" the exculpatory clause, it is "invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances. . . to the settlor." UNIF. TRUST CODE § 1008(b) (2004). Professor Langbein characterizes the UTC's exculpatory clause provisions as intent-serving. Langbein, *Mandatory Rules*, *supra* note 17, at 1123–25.

183. *See, e.g.*, Mark Merric and Steven J. Oshins, *How Will Asset Protection of Spendthrift Trusts Be Affected by the UTC?*, 31 EST. PLAN. 478 (Oct. 2004).

184. *See, e.g.*, Friedman v. Friedman, 844 So.2d 789 (Fla. Dist. Ct. App. 2003); *In re* Estate of Mayer, 672 N.Y.S.2d 998 (N.Y. Sur. 1998); Funk v. Comm'r, 185 F.2d 127 (3d Cir. 1951); Alexander v. Alexander, 561 S.W.2d 59 (Ark. 1978).

While some cases have described the duty of a trustee who has such broad discretion in terms of not acting in bad faith, it does not follow that a substantive difference between not acting in bad faith, and acting in good faith, is intended.[185]

Requiring the trustee to act in good faith, regardless of terms of the trust to the contrary, arguably is necessary for there to be an enforceable trust. If the "trustee" need not act in good faith, the "beneficiary" arguably will be unable to hold the "trustee" accountable. In such a case, there may be no trust at all. Rather, the holder of property subject to such an arrangement arguably is its outright owner, with the language describing its use for the "beneficiary" being precatory.[186]

VII. TRUST CREATION

The UTC makes several changes to the traditional rules governing the creation of trusts.[187] Generally, these changes relax common-law

185. For example, a 1991 Colorado Supreme Court case referred to the trustee's duty not to act dishonestly or with an improper motive, or to fail to use his or her judgment. *In re* Marriage of Jones, 812 P.2d 1152, 1156 (Colo. 1991). A year later, however, a lower court in Colorado decided a case in which a trustee with sole and absolute discretion over distributions also was a remainder beneficiary and thus had a conflict of interest with respect to his exercise of discretion. *In re* Estate of McCart, 847 P.2d 184 (Colo. Ct. App. 1992). In upholding the income beneficiary's claim for increased distributions from the trust, the opinion characterized the trustee's conduct as an abuse of discretion, arbitrary and capricious, improperly motivated, and a "breach of his fiduciary responsibilities to act with the utmost good faith and fairness toward the beneficiary." *Id.* at 186. That some courts use the kind of language employed in *Jones* and *McCart* interchangeably is illustrated by a California case in which the court stated that if:

> the "sole discretion" vested in and exercised by the trustees in this case. . .were exercised fraudulently, in bad faith or in an abuse of discretion, it is subject to. . .review. Whether good faith has been exercised, or whether fraud, bad faith or an abuse of discretion has been committed is always subject to consideration by the court upon appropriate allegations and proof.

In re Estate of Ferrall, 258 P.2d 1009, 1013 (Cal. 1953). *See also* SCOTT & FRATCHER, *supra* note 21, at § 187.2 (stating both that a trustee who is granted extended discretion may not act "beyond the bounds of a reasonable judgment, *if he acts in good faith and does not act capriciously*," and that if "by the terms of the trust [the trustee] is not required to act reasonably, the court will interfere *where he acts dishonestly or in bad faith, or where he acts from an improper motive"*) (footnotes omitted; emphasis added); BOGERT & BOGERT, *supra* note 129, § 560 (noting that even a trustee who is granted absolute or uncontrolled discretion must "employ his discretion deliberately and with some thought and not recklessly or capriciously but in a spirit of good faith and honesty").

186. *See* RESTATEMENT (SECOND) OF TRUSTS § 187 cmt. k (1959); Langbein, *Mandatory Rules*, *supra* note 17, at 1120, 1124; McNeil v. McNeil, 798 A.2d 503, 509 (Del. 2002); Keating v. Keating, 165 N.W. 74 (Iowa 1917).

187. Required for the creation of a trust under the UTC are (i) a settlor with capacity to create a trust; (ii) an expression of intent by the settlor to do so; (iii) at least one definite beneficiary (unless the trust is a charitable trust, or one for the care of a pet, or for another valid noncharitable purpose); (iv) duties for the trustee to perform; and (v) a separation of the legal and beneficial interests (i.e.,

restrictions and are intent-serving.[188] Similarly, the UTC's rules under which trusts created in other jurisdictions will be valid[189] furthers the intent of trust settlors.

At common law, a "trust" created for the care of a pet was unenforceable because it did not have an ascertainable beneficiary who could enforce it.[190] In many jurisdictions, such a "trust" was not held void, however, but instead was characterized as an "honorary trust" that the "trustee" could choose, but not be compelled, to respect.[191] To the extent the trustee did not exercise the power to provide for the pet, he or she held the trust assets on a resulting trust for the settlor's successors.[192] Under the UTC, such trusts are valid and enforceable for the lifetimes of the designated pets.[193] While such trusts are without ascertainable beneficiaries to enforce them (and, not being charitable trusts, are not enforceable by the attorney general), the UTC provides for enforcement by a person appointed to do so in the terms of the trust, or if none, by the

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the same person is not the sole trustee and sole beneficiary). UNIF. TRUST CODE § 402(a) (2004). Under the UTC, the requisite capacity to create (or amend, revoke, or add property to) a revocable trust, is the same as the capacity required to make a will. UNIF. TRUST CODE § 601 (2004).

188. *See* Langbein, *Mandatory Rules*, *supra* note 17, at 1121 (noting that the trust creation rules inform the settlor of the requirements for creating a valid trust and thus "protect the purported transferor (and especially his or her estate) against false or mistaken claims that he or she had transferred the property away in trust").

189. An inter vivos trust created in another jurisdiction is valid under the UTC:

> if its creation complies with the law of the jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which, at the time of creation:
>
> (1) the settlor was domiciled, had a place of abode, or was a national;
>
> (2) a trustee was domiciled or had a place of business; or
>
> (3) any trust property was located.

UNIF. TRUST CODE § 403 (2004). *See generally* Eugene F. Scoles, *Choice of Law in Trusts: Uniform Trust Code, Sections 107 and 403*, 67 MO. L. REV. 213, 227 (2002) (noting that § 403 applies even to trusts of real property and is justified, in part, by "the policy of sustaining the intended transfer of the owner by reasonable evidence of intent").

190. RESTATEMENT (SECOND) OF TRUSTS § 124 (1959). This rule has long been criticized. As noted by Professor Scott nearly a century ago, a settlor could accomplish the same or essentially the same objective in an enforceable manner through the use of a power of appointment or a conditional bequest. Scott, *Control of Property I*, *supra* note 1, at 540. Professor Scott argued that:

> There seems to be no reason, therefore, why attempted trusts for these purposes should be regarded as against public policy. One is always inclined to doubt the soundness of an argument that a disposition is against public policy when the same result accomplished in a different way is not against public policy. If they fail it is because of a purely technical rule which defeats the intention of the testator.

Id. For similar arguments made in the context of the UTC's mandatory notice rules and trust choice of law rules, *see* Kozusko, *supra* note 128, at 21-28 and Scoles, *supra* note 189, at 216.

191. *See* RESTATEMENT (THIRD) OF TRUSTS § 47(2) & cmt. d (2003).

192. *Id*.

193. *See* UNIF. TRUST CODE § 408 (2004).

court.[194] More generally, the UTC also validates trusts without ascertainable beneficiaries for other valid noncharitable purposes,[195] but limits the period during which they may be enforced to 21 years.[196] Again, enforcement may be by a person appointed by the settlor in the terms of the trust, or by the court if the settlor does not do so.[197]

If a settlor purports to create a testamentary trust for an indefinite class of beneficiaries (e.g., "friends"), at common law the trust failed for lack of anyone to enforce it, and the assets passed by resulting trust through the settlor's estate to his or her heirs or devisees.[198] By contrast, if the settlor instead created a trust for those same heirs or devisees, subject to a power of appointment in the trustee to direct the disposition of the property among the same indefinite class, the power would be enforceable. Because those two arrangements are in substance, if not in form, identical, the Second Restatement provides that while the first does not create an enforceable trust, the "trustee" may select and distribute among members of the indefinite class.[199]

Consistent with the Third Restatement,[200] and in furtherance of the objective of giving effect to the settlor's intent, the UTC goes a step further. It provides that the trustee's power to select among members of the indefinite class is valid,[201] provided there is at least one person who meets the description of the indefinite class.[202] If the trustee does not exercise the power within a reasonable time, it fails, in which case the property subject to the power will pass to those persons who would have taken it had the power not been conferred.[203] Unlike sections 408 and 409, each of which address the issue of enforcement when a valid

194. *See* UNIF. TRUST CODE § 408(b) (2004). Standing to petition the court to appoint or remove a person to enforce the trust is conferred on anyone "having an interest in the welfare of the animal." *Id*.

195. *See generally* Alexander A. Bove Jr., *The Purpose of Purpose Trusts*, 18 PROB. & PROP. 34, 34 (Jun. 2004). Although the UTC generally provides that a noncharitable trust without ascertainable beneficiaries is enforceable, that is not the case to the extent its purposes are capricious. UNIF. TRUST CODE § 409 cmt. (2004). Among the purposes for which such trusts can be created are the erection of a monument on a grave, the care of a cemetery plot, the saying of masses for the repose of the soul of the settlor, and the study of the advantages of a phonetic alphabet. RESTATEMENT (THIRD) OF TRUSTS § 47 cmt. d (2003).

196. *See* UNIF. TRUST CODE § 409(1) (2004).

197. *Id*.

198. *See, e.g.*, Nichols v. Allen, 130 Mass. 211 (Mass. 1879).

199. *See* RESTATEMENT (SECOND) OF TRUSTS § 122 (1959).

200. *See* RESTATEMENT (THIRD) OF TRUSTS § 46 (2003).

201. *See* UNIF. TRUST CODE § 402(c) (2004).

202. *See* UNIF. TRUST CODE § 402 cmt. (2004).

203. *See* UNIF. TRUST CODE § 402(c) (2004).

noncharitable trust for unascertainable beneficiaries is created,[204] section 402(c) does not do so. Presumably, such a trust could be enforced by the settlor's heirs or devisees who would take if the power is not exercised, although (as is the case with takers in default of exercise of a power of appointment) as a practical matter, their ability to do so would seem to be limited by the trustee's ability to exercise the power to defeat their interests. Less clear is whether a member who meets the description of the indefinite class could enforce the trust.

VIII. PUBLIC POLICY LIMITATIONS ON TRUST PURPOSES

Another of the UTC's mandatory rules is that a trust have a purpose that is "not contrary to public policy. . . ."[205] While the UTC does not attempt to define public policy,[206] citing the Restatements[207] it provides in a comment that "[p]urposes violative of public policy include those that tend to encourage criminal or tortious conduct, that interfere with freedom to marry or encourage divorce, that limit religious freedom, or which are frivolous or capricious."[208]

According to the Restatement, the rationale for public policy

204. *See supra* notes 190-199 and accompanying text.

205. UNIF. TRUST CODE § 105(b)(3) (2004). Under § 404, "[a] trust may be created only to the extent its purposes are . . . not contrary to public policy . . . ." UNIF. TRUST CODE § 404 (2004). Section 410 provides that "a trust terminates to the extent . . . the purposes of the trust have become . . . contrary to public policy . . . ." UNIF. TRUST CODE § 410(a) (2004). The comment to § 103, which includes, among others, the definition of "beneficiary," states that "[e]xcept as limited by public policy, the extent of a beneficiary's interest is determined solely by the settlor's intent." UNIF. TRUST CODE § 103 cmt. (2004).

206. A recent analysis of the role of public policy in the law, quoted in the Third Restatement, discusses its definition:

> A precise definition of public policy is elusive. It is rooted in the definition of law itself. Public policy may be defined broadly to include both utilitarian and moral considerations. Oliver Wendell Holmes, Jr., a jurist who was emblematic of the American pragmatist tradition, described public policy as the essence of jurisprudence . . . . Justice Benjamin Cardozo saw law as an instrument for the conscious pursuit for social welfare, an instrument whose master term was policy rather than principle. Cardozo explained, more concretely than did Holmes, [that] the final cause of law is the welfare of society, defined as public policy, the good of the collective body. . . . In practice, . . . hard cases often raise concerns that compel courts to consider public policy.

RESTATEMENT (THIRD) OF TRUSTS § 29, reporter's notes on clause (c) & cmts. i-i(2) (2003) (quoting Alan B. Handler, *Judging Public Policy*, 31 RUTGERS L.J. 301, 303-07 (2000)).

207. *See* RESTATEMENT (THIRD) OF TRUSTS § 29 cmts. d-h (2003); RESTATEMENT (SECOND) OF TRUSTS § 62 (1959).

208. UNIF. TRUST CODE § 404 cmt. (2004). With respect to conditions affecting conjugal and religious choices, *see* Sherman, *supra* note 30, at 1284 (arguing that such conditions should be unenforceable without regard to whether they might pass a reasonableness test).

limitations on the ability of a settlor to control the enjoyment and use of property in trust is that the significant advantages of private trusts

> are properly to be balanced against other social values and the effects of deadhand control on the subsequent conduct or personal freedom of others, and also against the burdens a former owner's unrestrained dispositions might place on courts to interpret and enforce individualized interests and conditions.[209]

While imposing public policy limitations on trust dispositions is not new,[210] conditions in a trust that violate public policy change from time to time.[211]

209. RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. i (2003). *See* UNIF. TRUST CODE § 103 cmt. (2004) ("Except as limited by public policy, the extent of a beneficiary's interest is determined solely by the settlor's intent.").

210. *See* Scott, *Control of Property II*, *supra* note 19, at 632-53. Having reservations about interfering with a settlor's disposition on public policy grounds also is not new: "It seems to me extremely dangerous to limit the power of disposition on any general notion of impolity, without some definite rule or principle being shown to apply to the case." Egerton v. Brownlow, 10 Eng. Rep. 359, 387-88 (H.L. 1853) (cited in Sherman, *supra* note 30, at 1280 n.36). In a similar vein, public policy as a basis for invalidating provisions in a trust has been referred to as an "unruly horse." Richardson v. Mellish, 130 Eng. Rep. 294, 303 (C.P. 1824). According to Professor Scott, while public policy may be an unruly horse, "it is one the judges have to ride. The fact that it is difficult to draw the line between dispositions which are merely unwise and those which are opposed to public policy does not excuse the courts from attempting to draw the line." *Id*. For a view that the line should be drawn at the point that "the purpose of the trust is so offensive to our mores that society cries out in indignation," *see* Jones, *supra* note 75, at 205.

211. "Unfortunately, it is sometimes difficult to determine what is the public policy at any given moment, for public policy often changes. The invalid condition of another day may become accepted by the time someone challenges it, and vice versa." WALTER L. NOSSAMAN & JOSEPH L. WYATT, JR., TRUST ADMINISTRATION AND TAXATION § 8.01 (Rev. 2d ed. 1990) (cited in RESTATEMENT (THIRD) OF TRUSTS § 29 gen. notes on clause (c) & cmts. (i)-(ii)). By way of example, the Third Restatement departs from the Second Restatement of some forty years earlier in at least three material ways on the question of the enforceability of conditions affecting family and other personal relationships: it protects relationships between unmarried cohabitants as well as spouses, the ability of beneficiaries to divorce, and the ability of beneficiaries to marry outside a faith specified by the settlor. *Compare* RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. j (2003), *with* RESTATEMENT (SECOND) OF TRUSTS § 62 (1959). Even among current Restatements, significant differences exist with respect to the enforceability of conditions involving family relationships, religious freedom, and careers and conduct. *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 29, reporter's note to gen. cmt. f (2003) (noting differences between the Restatement (Third) of Trusts and the Restatement (Second) of Property: Donative Transfers). Generally, the public policy limitation provisions in § 29(b) of the Restatement (Third) of Trusts limit "the extent to which settlors may subject the interests of trust beneficiaries to conditions that tend seriously to intrude upon significant personal decisions, and the private lives of beneficiaries and their families." Halbach, *supra* note 31, at 1891. *See also* Sherman, *supra* note 30, at 1280 n.39 (noting that while the Third Restatement does not expressly state that its treatment of settlor imposed conditions that restrain beneficiaries' conduct is less deferential to the settlor's wishes, that can be inferred from its examples). Note that many limitations on dead hand control do not apply to the living. *See supra* note 168 and accompanying text.

In the absence of direction in the UTC for determining what conditions violate public policy, the common law will control.[212] If a trust or a provision in a trust is found to be contrary to public policy, the trust may be invalid at inception,[213] or, if the violation occurs at a later date, at that time.[214] Further, the invalidity may apply to particular provisions in the trust, rather than to the entire trust.[215] In an innovation from the common law, in the event of a violation of public policy, the Restatement allows a trust to be reformed, if public policy concerns and legitimate settlor objectives can be accommodated.[216] While the UTC relaxes, to some extent, the restrictive rules on modifying trusts,[217] none of its modification provisions expressly accommodate a reformation of the kind allowed by the Third Restatement when a trust is determined to be contrary to public policy. Depending on the circumstances, including the nature of the public policy violation, however, such a determination arguably could constitute an unanticipated circumstance that would allow modification of the trust under section 412(a).[218]

A different public policy limitation on the UTC's honoring of the settlor's intent applies under section 107 with respect to the settlor's choice of governing law for a trust:[219]

> The meaning and effect of the terms of a trust are determined by: (1) the law of the jurisdiction designated in the terms unless the designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue. . . .[220]

While section 107 generally allows the settlor to select the jurisdiction whose law will govern the trust without the trust having any other connection to the jurisdiction,[221] the "strong public policy" limitation introduces uncertainty with respect to when a settlor's choice of law will

212. *See* UNIF. TRUST CODE § 106 (2004).
213. *See* UNIF. TRUST CODE § 404 cmt. (2004).
214. *See* UNIF. TRUST CODE § 410(a) (2004).
215. UNIF. TRUST CODE § 404 cmt. (2004).
216. RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. i(1) & reporter's note (2003).
217. *See supra* notes 19-108 and accompanying text.
218. Reformation might also be allowed under common law. UNIF. TRUST CODE § 106 (2004). While there may be little or no support in the case law for such an approach, the comment to §106 refers to the Restatements as a source of common law that supplements the UTC. *Id*. cmt. *See* RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. i(1), reporter's note (2003).
219. *See generally* Scoles, *supra* note 189, at 217-219.
220. UNIF. TRUST CODE §107(1) (2004).
221. UNIF. TRUST CODE §107 cmt. (2004).

be respected.[222] The UTC "does not attempt to specify the strong public policies sufficient to invalidate a settlor's choice of governing law. These public policies will vary depending upon the locale and may change over time."[223]

IX. TRUSTEE COMPENSATION

The UTC does not allow a settlor to specify, with finality, the trustee's compensation. Rather, if the compensation set by the settlor is unreasonably low or high, or if the trustee's duties are substantially different from those contemplated upon creation of the trust, the court may exercise its inherent equity power to adjust the trustee's compensation,[224] regardless of language in the instrument to the contrary.[225]

While the UTC's trustee compensation provisions have received little attention, they depart from the Restatement's rules on the subject under which it is more difficult for the trustee or the beneficiaries to successfully seek to change the compensation the settlor intended the trustee to receive.[226] Under the Restatement's rule, the trustee's ability to receive more compensation than specified by the settlor is not dependent on a determination that it is unreasonably low or that there has been a material change in the trustee's duties.[227] Rather, it requires a showing that the "amount of compensation provided by the terms of the trust is so inadequate that no qualified person would be willing to act as trustee for the compensation so provided."[228] Similarly, if a beneficiary claims that the compensation set by the settlor is too high, the Restatement does not look to whether the specified compensation is unreasonably high or there has been a material reduction in the trustee's

222. For a discussion of issues raised by § 107, including the questions of what distinguishes a "strong" public policy from other public policies, and whether all of the fourteen mandatory rules of §105(b) reflect strong public policies, *see Heckerling Institute*, *supra* note 38, at 172-74. *See also* Scoles, *supra* note 189, at 234.

223. UNIF. TRUST CODE §107 cmt. (2004). For a discussion of whether a settlor in a state in which self-settled spendthrift trusts are not valid could designate the law of another state in which such trusts are valid and thus preclude the settlor's creditors from reaching the trust assets, *see* Scoles, *supra* note 189, at 235-36.

224. *See* UNIF. TRUST CODE §708(b) (2004).

225. *See* UNIF. TRUST CODE §105(b)(7) (2004).

226. *Compare* RESTATEMENT (SECOND) OF TRUSTS § 242 (1959), *with* UNIF. TRUST CODE § 708(b) (2004).

227. *See* RESTATEMENT (SECOND) OF TRUSTS § 242 (1959).

228. *Id.* cmt. f.

duties.[229] Rather, the compensation set by the settlor will be reduced if the provision setting it was included in the instrument as a result of "an abuse of fiduciary or confidential relationship existing between the trustee and settlor at the time of the creation of the trust."[230]

X. THE COURT'S AUTHORITY TO ACT AS NECESSARY IN THE INTERESTS OF JUSTICE (AND TO REQUIRE, DISPENSE WITH, OR MODIFY OR TERMINATE A BOND)

Also beyond the settlor's control is "the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice."[231] The only mention of this mandatory rule in the comments is a restatement of the rule itself, accompanied by a statement that it includes the ability of the court to require the trustee to furnish a bond.[232] Because the power of the court to require a bond is itself the subject of a separate mandatory rule,[233] the reference to it in the comment is not helpful in determining the circumstances under which the broad power of the court to act as necessary in the interests of justice may be exercised.

Professor English has noted two circumstances in which the court's inherent equity power over trusts could be exercised. First, the court could override a provision in the instrument prohibiting a conservator or guardian from exercising the power of an incapacitated settlor to revoke a revocable trust.[234] Second, the court could remove a trustee without regard to provisions of the instrument that regulate trustee removal.[235] As each of these subjects is addressed by separate provisions of the UTC that the settlor otherwise may override,[236] it appears that the default nature of the UTC's provisions, other than those listed in section 105(b), is subject to the court's ability to override the settlor's intent when it determines that doing so is "necessary in the interests of justice."[237]

Courts have exercised their inherent equity power under non-UTC law in a variety of ways related to the administration of trusts.[238] Further,

229. *See* RESTATEMENT (SECOND) OF TRUSTS § 242 (1959).

230. *Id*. cmt. f.

231. UNIF. TRUST CODE § 105(b)(13) (2004).

232. *See* UNIF. TRUST CODE § 103 cmt. (2004).

233. *See* UNIF. TRUST CODE § 105(b)(6) (2004).

234. English, *Significant Provisions*, *supra* note 14, at 191 n.13.

235. *Id*. at 198 n.225.

236. *See* UNIF. TRUST CODE §§ 602(f), 706(b), 105 (2004).

237. UNIF. TRUST CODE § 105(b)(13) (2004).

238. *See, e.g.*, Shaull v. U.S., 161 F.2d 891 (D.C. Cir. 1947) (requiring the trustee to furnish a bond); Todd v. Citizens' Gas Co., 46 F.2d 855 (7th Cir. 1931) (enforcing charitable trust); State *ex*

at least two courts have, directly or indirectly, exercised their inherent jurisdiction over trusts to modify dispositive provisions of trusts by increasing distributions to a trust's primary beneficiary when the distributions provided for by the settlor proved inadequate for the beneficiary's support.[239] Because section 105(b)(13) does not limit the court's inherent equity power to administrative matters, it appears that it also may be exercisable with respect to the dispositive terms of a trust.

XI. TRUSTEE REMOVAL

The UTC's trustee removal rules set forth in section 706 are not mandatory under section 105(b),[240] and thus generally may be overridden by the settlor. Therefore, at the most basic level, the UTC respects the settlor's intent with respect to whether and under what conditions, if any, the trustee may be changed.[241] But to the extent the settlor does not address trustee removal in the terms of the trust, the UTC's default rules of section 706 will govern. As discussed below, in expanding the common-law rules on trustee removal, the UTC's default rules increase the ability of beneficiaries to change trustees. Whether those rules are consistent with what most trust settlors who do not

rel. Goddard v. Coerver, 412 P.2d 259 (Ariz. 1966) (ordering sale of trust assets); *In re* Estate of Nicholson, 93 P.2d 880 (Colo. 1939) (approving a compromise agreement among beneficiaries and trustees); Dyer v. Paddock, 70 N.E.2d 49 (Ill. 1946) (directing a deviation where unforeseen contingencies arise and there is danger of loss to the beneficiaries); E. Me. Gen. Hosp. v. Harrison, 193 A. 246 (Me. 1937) (appointing a successor trustee); Weston v. Fuller, 9 N.E.2d 538 (Mass. 1937) (correcting errors in previously settled accounts); Williams v. Duncan, 55 S.W.3d 896 (Mo. Ct. App. 2001) (making all orders necessary for the preservation and conservation of trust estates, including removal of the trustee); Morris Cmty. Chest v. Wilentz, 3 A.2d 808 (N.J. Ch. 1939) (authorizing investments outside statutory list); *In re* Estate of Mayne, 345 P.2d 790 (Wyo. 1959) (punishing a trustee for contempt of court); State v. Underwood, 86 P.2d 707 (Wyo. 1939) (permitting trustee to mortgage trust property).

239. *See* Longwith v. Riggs, 14 N.E. 840 (Ill. 1887); *In re* Wolcott, 56 A.2d 641 (N.H. 1948). However, courts in other cases in which such a modification has been requested have refused to grant it. *See, e.g.*, *In re* Estate of Van Deusen, 182 P.2d 565, 571-73 (Cal. 1947); Staley v. Ligon, 210 A.2d 384, 388 (Md. 1965). As discussed *supra*, notes 69-75 and accompanying text, the UTC allows such modifications when, because of unanticipated circumstances, they will further the purposes of the trust. UNIF. TRUST CODE § 412(a) (2004).

240. The UTC's rules allowing the court to modify or terminate a trust are mandatory. UNIF. TRUST CODE § 105(b)(4) (2004). Unlike § 65 of the Third Restatement, however, the UTC does not treat removal of the trustee as a modification of the trust. UNIF. TRUST CODE § 411 cmt. (2004). Rather, under the UTC removal of the trustee is treated exclusively by § 706, the rules of which are not mandatory under § 105(b). *Id*. *See also* UNIF. TRUST CODE § 706 cmt. (2004).

241. As discussed in the preceding section of this Article, however, the UTC's mandatory rule of § 105(b)(13) acknowledges the court's inherent equity power over trusts, which may include the ability to change trustees without regard to the terms of the trust. *See supra* notes 231-239 and accompanying text. If that is the case, it may explain, in part, why no part of § 706 is mandatory.

address the issue in their instruments would intend is difficult to gauge.[242]

Generally, absent a provision in the instrument to the contrary, at common law beneficiaries may not remove the trustee except for cause.[243] The rationale for limiting the ability of the beneficial owners of the trust property to control who manages it for them is deference to the intent of the settlor: "Because of the discretion normally granted to a trustee, the settlor's confidence in the judgment of the particular person whom the settlor selected to act as trustee is entitled to considerable weight."[244] This basis for prohibiting beneficiaries from removing the trustee, except for cause, has been the subject of considerable criticism when the trustee is a professional, corporate trustee.[245] Because today's banking environment is characterized by increasingly large banks, mergers and other consolidations, and transfers of trust business, critics of the common-law rules assert that "it is not material to the purpose of the trust for a particular corporate trustee to serve as trustee when another corporate trustee could perform the same function."[246] The

242. Noting anecdotal evidence of settlors opting out of the traditional trustee removal rules in favor of making it easier for trustees to be removed, including an increased use of trust protectors who are authorized to change trustees, Professor Sitkoff argues that the trustee removal default rules should relax the traditional, restrictive common law rules. *See* Sitkoff, *supra* note 6, at 665. Additionally, Professor Chester and Ms. Ziomek argue that giving beneficiaries a greater ability to change trustees will lead to more effective trust administration, which the settlor likely would have intended. Chester & Ziomek, *supra* note 8, at 264. They also argue that, in any event, the settlor's intent with respect to who serves as trustee should be respected only during the settlor's lifetime. *Id*. at 254, 261. An argument for retaining limitations on the ability of beneficiaries to change trustees is that a trustee who may easily be removed by the beneficiaries may not exercise its discretion with respect to such matters as distributions and investments as independently as the settlor intended. For a tax case rejecting the idea that trustees will not properly fulfill their fiduciary duties if they can be removed by the beneficiaries, *see* Estate of Wall v. Commissioner, 101 T.C. 300 (1993).

243. BOGERT & BOGERT, *supra* note 129, § 527. It is more difficult to remove a trustee appointed by the settlor than one appointed by the court, particularly if the settlor knew of the asserted ground for removal when the settlor designated the trustee. *See* RESTATEMENT (THIRD) OF TRUSTS § 37 cmt. f (2003).

244. UNIF. TRUST CODE § 706 cmt. (2004). *See also In re* Trust Estate of Powell, 411 P.2d 162 (Wash. 1966). Traditionally, the intent of the settlor is primary and the desires of the beneficiaries, whose interests derive solely from the gift of the settlor, are secondary. *See, e.g.*, *In re* Ulansey Estate, 73 Pa. D. & C.2d 453 (Pa. Com. Pl. 1975).

245. *See, e.g.*, Chester & Ziomek, *supra* note 8; Dukeminier & Krier, *supra* note 22, at 1338.

246. Chester & Ziomek, *supra* note 8, at 257-58. For a case agreeing with this argument, *see* Letter Opinion from Glen A. Severson, Circuit Court Judge, Circuit Court of South Dakota, Second Judicial Circuit, to counsel regarding *In re* May C. Hogan Trust, Trust No. 84-17 (Nov. 10, 1999), on file with the Circuit Court of South Dakota, Second Judicial Circuit (cited and discussed by Chester & Ziomek, *supra* note 8, at 256-58). While Professor Chester and Ms. Ziomek also argue that there should be a presumption that the beneficiaries may change institutional trustees, *id*. at 274, they do not go so far as to argue the beneficiaries should be able to remove a trustee at will. *Id*.

traditional, restrictive common law rules on trustee removal have also been under attack by beneficiary organizations whose overriding principle is that trusts are for the benefit of their beneficiaries.[247]

Perhaps in response to such factors,[248] the UTC's default rules have significantly expanded the grounds for changing trustees.[249] First and most important, if the qualified beneficiaries[250] unanimously request that the trustee be removed, section 706(b)(4) authorizes the court to do so if it "finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available."[251] When the settlor selects an individual trustee, presumably the choice of trustee usually will be material to the settlor's purposes for the trust.[252] When a corporate trustee is serving, however, beneficiaries presumably will more often be able to show that removal of the corporate trustee would not be inconsistent with a material purpose of the trust, particularly if it is the successor through court appointment, merger or other consolidation of another corporate trustee designated by the settlor.

Second, section 706(b)(4) also authorizes the court to remove a trustee if there has been a substantial change of circumstances (and the court finds that removal best serves the interests of the beneficiaries, is not inconsistent with a material purpose of the trust, and that a suitable replacement is available).[253] Changed circumstances that might warrant removal of the trustee include "a substantial change in the character of

at 256-58. Rather, in their view a court applied "best interests of the beneficiaries" test should govern to strike a balance "between easy portability of a given corporate trusteeship and the interests of the settlor/promisee and trustee/promisor in establishing the trust deal." *Id*. at 275. Also supporting the argument that beneficiaries should have a greater ability to change the trustee is the fact that they are the "residual claimants" of the trustee's management of the trust assets who bear the marginal costs and receive the benefits of the trustee's administration of the trust. Sitkoff, *supra* note 6, at 663.

247. *See, e.g.,* Whitman, *supra* note 143, at 62.

248. *See* Chester & Ziomek, *supra* note 8, at 253.

249. The basic, traditional ground of removing a trustee when it has committed a serious breach of trust is preserved. UNIF. TRUST CODE § 706(b)(1) (2004). With respect to what constitutes a "serious" breach, the comment notes that it could be a single act or multiple smaller breaches that, when considered together, justify removal. UNIF. TRUST CODE § 706 cmt. (2004).

250. Generally, "qualified beneficiaries" are current and first line remainder beneficiaries. *See supra* note 88.

251. UNIF. TRUST CODE § 706(b)(4) (2004). Note that removal may be allowed under § 706(b)(4) without regard to whether there has been a breach or poor performance by the trustee. *Id.*

252. Settlors presumably name individuals as trustees based on their relationships with the named individuals, their confidence in the named individuals' abilities and judgment, and the named individuals' knowledge of the settlors' intentions and values and the beneficiaries' circumstances.

253. *See* UNIF. TRUST CODE § 706(b)(4) (2004).

the service or location of the trustee."[254]

A third expansion by the UTC of the default rules for changing trustees is its authorization of the court to remove a trustee if "because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries."[255] The comment fleshes out these three grounds for removal: (i) unfitness is not limited to incapacity, but also includes a lack of the basic abilities necessary to administer a trust;[256] (ii) unwillingness is not limited to situations in which the trustee literally refuses to act, but also includes cases in which the trustee demonstrates a pattern of indifference to some or all of the beneficiaries;[257] and (iii) "[a] 'persistent failure to administer the trust effectively' might include a long-term pattern of mediocre performance, such as consistently poor investment results when compared to comparable trusts."[258]

A fourth ground under the UTC for removing a trustee is lack of cooperation among cotrustees that "substantially impairs the administration of the trust."[259] The lack of cooperation need not rise to the level of a breach of trust.[260] Rather, removal may be justified if the trustees' inability to agree results in the need for a judicial proceeding to resolve the impasse.[261] In such a case, the court may remove any or all of the co-trustees.[262]

Finally, in another departure from common-law rules,[263] even if the

254. UNIF. TRUST CODE § 706 cmt. (2004). However, "[a] corporate reorganization of an institutional trustee is not itself a change of circumstances if it does not affect the service provided the individual trust account." *Id*.

255. UNIF. TRUST CODE § 706(b)(3) (2004). "Interests of the beneficiaries" means their interests as defined in the terms of the trust, not as the beneficiaries, or the court, determine them to be. UNIF. TRUST CODE § 103(8) (2004).

256. UNIF. TRUST CODE § 706 cmt. (2004). In determining whether a trustee lacks the requisite competencies to administer a trust, "the court should consider the extent to which the problem might be cured by a delegation of functions the trustee is personally incapable of performing." *Id*.

257. *Id*.

258. *Id*.

259. UNIF. TRUST CODE § 706(b)(2) (2004).

260. *See* UNIF. TRUST CODE § 706 cmt. (2004).

261. *Id*.

262. *Id*. Note that the lack of cooperation ground for trustee removal under § 706(b)(2) applies to co-trustees, not to the relationship between the trustee(s) and the beneficiaries. *Id*. With respect to the latter, "[f]riction between the trustee and the beneficiaries is ordinarily not a basis for removal. However, removal might be justified if a communications breakdown is caused by the trustee or appears to be incurable." *Id*.

263. *See* UNIF. TRUST CODE § 706 cmt. (2004).

settlor has not reserved the power to remove the trustee,[264] the UTC allows the settlor, as well as a beneficiary or co-trustee, to petition the court for removal of the trustee of an irrevocable trust.[265] While the grounds for removal are the same whether the settlor or the beneficiary is the petitioner, this UTC provision clearly is protective of the settlor's intentions with respect to the ongoing administration of the trust.[266]

XII. DELEGATION

Under the Second Restatement, a trustee could not delegate, to either another trustee or to an agent, duties the settlor reasonably expected the trustee to perform.[267] While the UTC essentially retains the traditional rule with respect to delegations among co-trustees,[268] it follows the lead of the Uniform Prudent Investor Act in allowing delegations to agents of "duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances."[269] The two standards are different "because the two situations are different."[270] The broader standard for delegations to an agent is based on the recognition that many trustees do not have the skills of a professional trustee, in which case delegations of the functions they are not competent to perform should be encouraged.[271] By contrast, the

264. Such a power, if accompanied by the ability to appoint the settlor or someone who is related or subordinate to the settlor as successor trustee, could cause adverse estate tax consequences. *See* Rev. Rul. 95-58, 1995-2 C.B. 191 (1995).

265. *See* UNIF. TRUST CODE § 706 (2004). With respect to a revocable trust, while the settlor has capacity, only the settlor, and not the beneficiaries, may remove the trustee. *Id*. cmt.

266. While the UTC allows the settlor to petition for removal of a trustee, it does not provide the settlor with a role in filling a vacancy in a trusteeship. Rather, if a vacancy occurs and the instrument does not designate a successor, the qualified beneficiaries, acting unanimously, may appoint one, and if they do not do so, the court will fill the vacancy. UNIF. TRUST CODE § 704(c) (2004).

267. *See* RESTATEMENT (SECOND) OF TRUSTS § 171 (1959). The traditional distinction between delegable and non-delegable duties sometimes is inaccurately stated as whether the duty is ministerial (delegable) or discretionary (non-delegable). *See* BOGERT & BOGERT, *supra* note 129, § 555.

268. *See* UNIF. TRUST CODE § 703(e) (2004).

269. UNIF. TRUST CODE § 807(a) (2004). *See also* RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 171 (1992). The rule allowing trustees to delegate the investment function is discussed in John H. Langbein, *Reversing the Nondelegation Rule of Trust-Investment Law*, 59 MO. L. REV. 105 (1994).

270. UNIF. TRUST CODE § 703 cmt. (2004).

271. *Id*. With respect to the investment function, the rule of the Second Restatement was that "[a] trustee cannot properly delegate to another power to select investments." RESTATEMENT (SECOND) OF TRUSTS § 171 cmt. h (1959). Under the Third Restatement, trustees not only have the power to delegate with respect to investments, they may have a duty to do so. *See* RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 171 (1992).

stricter rule with respect to delegations among co-trustees – prohibiting delegations of functions the settlor reasonably expected the trustees to perform jointly – "is premised on the assumption that the settlor selected co-trustees for a specific reason."[272] The UTC's rules with respect to both kinds of delegations are default rules that a settlor whose intent is otherwise may override in the terms of the trust.[273]

XIII. REVOCABLE TRUSTS

Article 6 of the UTC addresses a variety of revocable trust issues. Generally, these provisions are not mandatory ones and thus may be overridden by the settlor.[274] With respect to the creation of revocable trusts, in requiring only the capacity necessary to make a will, rather than the greater capacity necessary to make an inter vivos transfer, the UTC furthers the intent of settlors who are increasingly using revocable trusts as will substitutes.[275] Under section 603(a), the rights of the beneficiaries of a revocable trust are subject to the control of the settlor, and the duties of the trustee (including the duty to report to and inform the beneficiaries) are owed exclusively to the settlor.[276] As originally

272. UNIF. TRUST CODE § 703 cmt. (2004).

273. *See* UNIF. TRUST CODE § 105 (2004).

274. *Id.* The exception is § 601, under which the capacity required to create, amend, revoke, or add property to a revocable trust is the same as to make a will. Because one of the mandatory rules prevents the settlor from overriding the UTC's rules for creating a trust, the capacity requirement under § 601 for creating a revocable trust (and perhaps for amending or adding property to one, since those actions are analogous to creating such a trust) cannot be overridden. Apparently the § 105(b)(1) prohibition would not apply to an attempt to change the capacity requirement for revoking a revocable trust.

275. *See* UNIF. TRUST CODE § 601 & cmt. (2004).

276. *See* UNIF. TRUST CODE § 603(a) (2004). Note, however, the inconsistency between the statement in § 603(a) that the duties of the trustee are owed exclusively to the settlor while the settlor has capacity, and the statement in the comment to § 603 prior to its amendment in 2005 that "[t]his section has the effect of *postponing* enforcement of the rights of the beneficiaries of a revocable trust until the death or incapacity of the settlor or other person holding the power to revoke the trust." *Id.* cmt. (emphasis added). If the trustee's duties are owed exclusively to the settlor while he or she has capacity, arguably other beneficiaries would have no claim against a trustee who breached a duty while the settlor had capacity, even if the settlor died or became incapacitated without ever learning of the breach. Rather, a claim for the breach arguably would have to be asserted by the settlor's conservator or guardian (or by the personal representative of the settlor's estate, if the settlor had died) and any recovery apparently would belong to the settlor (or the settlor's estate), perhaps for ultimate distribution to different beneficiaries than the other trust beneficiaries. Consistent with the language from the comment quoted above, the preferable alternative would be to allow the other trust beneficiaries, or a successor trustee acting on their behalf, to pursue such a breach after the settlor's death or incapacity (assuming the settlor had not consented to or ratified the conduct that constituted the breach), and for any resulting recovery to belong to the trust. In 2005, the comment to § 603 was amended to address these issues. Under it,

promulgated, section 603(a) provided that if the settlor becomes incapacitated, the trustee's duties are thereafter owed to the beneficiaries.[277] In response to concerns expressed over the incapacity provision of section 603(a), it was amended in 2004 to bracket the reference to the settlor's incapacity to highlight that enacting states may want to limit the reporting and other obligations of the trustee of a revocable trust to the settlor, during his or her lifetime, even if he or she becomes incapacitated.[278]

Because trust instruments that do not address whether they are revocable or irrevocable often are drafted by non-professionals and intended as will substitutes,[279] the UTC includes an intent-serving provision that rejects the common law presumption that trusts are irrevocable unless expressly made revocable.[280] The UTC goes further than reversing the presumption; under it, a settlor may revoke or amend a trust unless its terms expressly provide otherwise.[281] Another UTC revocable trust provision that usually will be intent serving allows the settlor to revoke a revocable trust by any means that demonstrates clear and convincing evidence of that intent, unless the instrument not only provides a means of revocation, but also expressly makes it exclusive.[282] If a settlor of a revocable trust appoints an agent under a durable power of attorney, the UTC prohibits the agent from exercising the settlor's powers with respect to revocation, amendment, or distribution of trust property unless expressly authorized by the settlor in the durable power

recovery for a breach of trust after the settlor's incapacity or death (assuming lack of consent to the breach) would be for the trust, not for the settlor or the settlor's estate. *2004-2005 Amendments to the Uniform Trust Code with Comments* § 603 cmt. (Tentative Draft 3/1/2005).

UTC § 603(a) may be particularly problematic in the context of a beneficiary who serves as trustee of a third-party created trust and whose power to distribute to himself or herself is not limited by an ascertainable standard relating to health, education, maintenance, or support. Such a beneficiary/trustee arguably is treated as the settlor of a revocable trust with respect to amounts distributable to him or herself. *See* UNIF. TRUST CODE § 603(b). *See also supra* note 120. If so, a beneficiary/trustee with the power to distribute, for example, for his or her "comfort and welfare" (arguably not the requisite ascertainable standard; *see* Treas. Reg. § 20.2041-1(b)(2) (2005)) apparently would not be accountable to other beneficiaries of the trust while he or she served as trustee.

277. *See* UNIF. TRUST CODE § 603(a) (2000).

278. *See* UNIF. TRUST CODE § 603(a) (2004).

279. *See* UNIF. TRUST CODE § 602 cmt. (2004).

280. *See* UNIF. TRUST CODE § 602(a) (2004).

281. *Id*.

282. *See* UNIF. TRUST CODE § 602(c)(2) (2004). Permitted are revocations or amendments made by "a later will or codicil that expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust." UNIF. TRUST CODE § 602(c)(2)(A) (2004). Further, if the terms of the trust specify a means of revocation that is exclusive, substantial compliance with it will be sufficient. UNIF. TRUST CODE § 602(c)(1) (2004).

or the terms of the trust.[283] The rationale for this limitation on the agent's authority with respect to the trust is that "most settlors usually intend . . . the revocable trust, and not the power of attorney, to function as the settlor's principal property management device."[284]

XIV. ABILITY OF THE BENEFICIARIES AND TRUSTEE TO CIRCUMVENT THE SETTLOR'S INTENT

Consistent with the Second Restatement,[285] section 1009 provides that if a beneficiary consents to conduct by the trustee that would or did[286] constitute a breach of trust, ratifies it, or releases the trustee from liability with respect to it, the trustee will not be liable to that beneficiary for the breach.[287] There is no exception in section 1009 for conduct that violates a material purpose of the trust. Rather, the only exceptions to the trustee's avoidance of liability under the section are if the beneficiary's consent, release, or ratification was induced by improper conduct of the trustee, or if at the time of the consent, release, or ratification, the beneficiary did not know of his or her rights or of the material facts relating to the breach.[288]

Although section 1009 cuts off trustee liability only with respect to beneficiaries who provide a consent, release, or ratification to the trustee's conduct, if all beneficiaries do so (and neither of the exceptions described in the preceding paragraph apply), the trustee could administer the trust in accordance with the beneficiaries' desires, rather than the settlor's material purposes, without risk of liability.[289] While many trusts

283. *See* UNIF. TRUST CODE § 602(c) (2004).

284. *See* UNIF. TRUST CODE § 602 cmt. (2004). Similarly, neither a conservator nor a guardian of a settlor may exercise the settlor's powers with respect to a revocable trust without court approval. *See* UNIF. TRUST CODE § 602(f) (2004).

285. *See* RESTATEMENT (SECOND) OF TRUSTS §§ 216-218 (1959).

286. The beneficiary's consent, release, or ratification may occur before or after the trustee's conduct. *See* UNIF. TRUST CODE § 1009 cmt. (2004).

287. *See* UNIF. TRUST CODE § 1009 (2004). Consents under § 1009 may be important for the trustee because of uncertainties about the preclusive effect of a trustee's report under the one year limitations period of § 1005(a). *See Practical Drafting* (U.S. Trust Co. of NY) 7632-36 (April 2004).

288. *See* UNIF. TRUST CODE § 1009 (2004). The Third Restatement includes another limitation on the effectiveness of beneficiaries' consents to shield the trustee from liability for a breach. Under it, the trustee may not be protected from liability, even to a consenting beneficiary, if the trustee's action was contrary to a material purpose of the trust and not taken reasonably and in good faith. RESTATEMENT (THIRD) OF TRUSTS § 65 (2003).

289. The ability of the trustee and beneficiaries to circumvent the settlor's intent in this way is not new with the UTC. *See* CHESTER, *supra* note 28, at 144. While the settlor of a charitable trust has standing to enforce it under § 405(c), the settlor of a noncharitable trust is given no similar right. *See supra* note 97. *See also* Sitkoff, *supra* note 6, at 669 (noting that if the settlor could enforce the

will have minor, unborn, or unascertained beneficiaries, getting the consent, release, or ratification of all beneficiaries may be possible using the representation provisions of UTC Article 3.[290]

In contrast with section 1009, section 111 permits "interested persons," who presumably may include all beneficiaries and the trustee,[291] to enter into a binding nonjudicial settlement agreement with respect to trust matters.[292] For such an agreement to be valid, it must not violate a material purpose of the trust.[293] In many cases, however, the material purpose limitation will be more illusory than real. If trust beneficiaries and the trustee wish to enter into a binding nonjudicial settlement agreement, but would be foreclosed from doing so under section 111 by its material purpose limitation, they could effectively do so by entering into an agreement with respect to which the trustee would be protected under section 1009.[294] Note, however, that section 1009 is not a mandatory rule.[295] Accordingly, a settlor who is concerned about the possibility of the trustee and beneficiaries agreeing to terminate the trust early, or otherwise to administer it in a way that would violate a material purpose of the settlor for the trust, could provide in the terms of the trust that a consent, release, or ratification by a beneficiary will not protect the trustee from liability for a material breach.

trust, the trustee "would be less likely to enter into a side bargain with the beneficiaries to avoid the ex ante constraints imposed by the settlor.").

290. Article 3 of the UTC includes provisions for the representation of beneficiaries not only by such fiduciaries as personal representatives, trustees, guardians, and conservators, but also by a parent of a minor beneficiary, the holder of a general testamentary power of appointment, and by another person having a substantially identical issue with respect to the issue as to which the representation applies. *See* UNIF. TRUST CODE §§ 301-304 (2004). A limitation on the ability of a person to represent a beneficiary under the UTC's representation provisions is that the representative must not have a conflict of interest with respect to the representation. *Id*. Thus, if the trustee's conduct that otherwise would constitute an actionable breach arguably would benefit consenting beneficiaries at the potential expense of beneficiaries for whom representation would be required, the consenting beneficiaries would be unable to also consent on behalf of those other beneficiaries. In such a case, § 305 authorizes the court to appoint a representative of the minor, unborn, or unascertained beneficiaries with respect to whom the conflict exists.

291. The UTC does not define the "interested persons" whose consent is required to have a binding nonjudicial settlement agreement "[b]ecause of the great variety of matters to which a nonjudicial settlement may be applied." *See* UNIF. TRUST CODE § 111 cmt. (2004). If the agreement involves a trustee's administration of the trust, the trustee's consent ordinarily would be required. *Id*.

292. *See* UNIF. TRUST CODE § 111(b) (2004).

293. *See* UNIF. TRUST CODE § 111(c) (2004).

294. *See* UNIF. TRUST CODE § 1009 (2004).

295. *See* UNIF. TRUST CODE § 105(b) (2004).

XV. CONCLUSION

In the context of the wave of recent legislation that effectively abolishes the Rule Against Perpetuities and the increasing use of perpetual and other long-term trusts,[296] the Uniform Trust Code has taken a number of steps towards accommodating the interests of trust beneficiaries when those interests will not be served by strict adherence to the settlor's intent as set forth in the terms of the trust. Mandatory rules that the settlor may not override include, among others, the rules by which a court may modify or terminate a trust.[297] The material purpose limitation on the ability of beneficiaries to terminate a trust has been relaxed.[298] Dispositive as well as administrative terms of a trust may be modified under the unanticipated-circumstances, equitable deviation doctrine, which has been reformulated to provide added flexibility.[299] Administrative terms of a noncharitable trust may be modified under the *cy pres* doctrine.[300] Trusts may be modified to achieve favorable tax results, terminated if they are not large enough to justify their costs of administration, or reformed if their terms do not reflect the settlor's intentions.[301] Further, the trust and its terms must be for the benefit of the beneficiaries,[302] who must be entitled to receive information with respect to the trust.[303] The compensation set by the settlor for the trustee may be adjusted if it proves to be unreasonably low or high,[304] and the court may require a trustee to furnish a bond even if waived by the settlor.[305] Unless the settlor provides otherwise in the terms of the trust, the grounds for changing the trustee have been expanded.[306] With respect to charitable trusts, *cy pres* will be available without the need to first find that the settlor had a general charitable intent and may be applied if the settlor's purposes become wasteful, as well as unlawful, impracticable, or impossible to achieve.[307] In addition, the UTC imposes material limitations on the validity of gifts over from charitable trusts to

296. *See supra* notes 19-33 and accompanying text.
297. *See supra* notes 19-108 and accompanying text.
298. *See supra* notes 37-49 and accompanying text.
299. *See supra* notes 60-75 and accompanying text.
300. *See supra* notes 79-83 and accompanying text.
301. *See supra* notes 84-94 and accompanying text.
302. *See supra* notes 152-179 and accompanying text.
303. *See supra* notes 124-151 and accompanying text.
304. *See supra* notes 224-230 and accompanying text.
305. *See supra* notes 231-233 and accompanying text.
306. *See supra* notes 240-266 and accompanying text.
307. *See supra* notes 95-108 and accompanying text.

noncharitable beneficiaries.[308]

In other respects, the UTC effects no change in the existing common law of trusts that limits the settlor's ability to exert dead hand control. For example, trust purposes and limitations on beneficiaries' interests may not violate public policy,[309] and the beneficiaries and trustee, by agreement, may circumvent the settlor's intent.[310]

Consistent with the common law, the UTC continues to honor the settlor's intent in allowing the settlor to restrict the alienability of the beneficiary's interest,[311] including protecting it from the claims of the beneficiary's creditors,[312] and in prohibiting the beneficiaries from modifying or terminating the trust early if doing so would be inconsistent with a material purpose of the trust (regardless of whether the benefits to the beneficiaries of the modification or termination outweigh the settlor's material purpose).[313] In other respects, the UTC provides greater protection to the settlor's intent than under common law. Even testamentary trusts may be reformed to correct mistakes.[314] Settlors may enforce charitable trusts[315] and petition for the removal of a trustee.[316] Enforceable trusts for indefinite beneficiaries may be created, as may trusts for the care of pets and other noncharitable purposes.[317] Subject only to public policy limitations, the settlor may designate the law that will govern the administration of the trust without regard to whether the selected jurisdiction has contacts with the trustee, beneficiaries, or trust assets.[318] With respect to the increasingly popular revocable trust, the UTC includes a number of intent-serving provisions.[319]

Given the increasingly common use of perpetual and other long-term trusts, the pace of change and complexity in our society now and in the foreseeable future, and our sensibilities with respect to private property rights and dead hand control, the UTC appears to have struck a reasonable balance between respecting the settlor's intent and

308. *See supra* notes 98-103 and accompanying text.
309. *See supra* notes 205-223 and accompanying text.
310. *See supra* notes 285-295 and accompanying text.
311. *See supra* notes 109-123 and accompanying text.
312. *See supra* notes 114-123 and accompanying text.
313. *See supra* notes 50-59 and accompanying text.
314. *See supra* notes 85-87 and accompanying text.
315. *See supra* note 97.
316. *See supra* notes 263-266 and accompanying text.
317. *See supra* notes 187-204 and accompanying text.
318. *See supra* notes 219-223 and accompanying text.
319. *See supra* notes 274-284 and accompanying text.

accommodating the interests of beneficiaries. Undoubtedly, some will find it to have gone too far in favor of trust beneficiaries, while others will find it not to have gone far enough. In any case, this centuries old debate, like the new perpetual trusts that have contributed to its latest round, likely will continue into the indefinite future.