

**To: Commissioners, Advisors, Observers,  
Drafting Committee on Uniform Trust Act**

**From: David English, Reporter**

**Re: November Meeting**

**Date: 10/21/99**

Since the annual meeting draft was completed in May, I have presented several CLEs, attended numerous meetings with advisory groups, and solicited written comments, principally by e-mail, with the purpose of coming up with a final list of issues for our meeting in November. The result was a 12-page list of issues which I have then whittled down, addressing some in the statutory text, leaving others for the comments, and leaving still others for our meeting in November.

Described below are these remaining issues, as well as a summary of changes made since the annual meeting draft.

A principal objective of our meeting in November is to make certain that it is in fact our last meeting. Consequently, this is our probable last opportunity prior to the final reading in which to make major policy decisions. Following our November meeting, suggestions will of course continue to come in, most of which will be quite technical in nature. We can decide in Cary how we will handle these. But one thought is for me to collect the suggestions, to sometime in the Spring send you a memo summarizing them, and to resolve the more important of them via a conference call.

Since the annual meeting, my focus has been almost exclusively on the statutory text. I have spent little time on the comments, other than to update cross-references and to try to make certain the comments do not directly contradict the statute. Comments have not yet been written for any of the new provisions.

The section numbers below are based on the October 13, 1999 draft. If a section is not cited, it is because it is the same as in prior draft.

### **General.**

John Langbein suggests that title be changed from "Uniform Trust Act" to "Uniform Trust Code." Note that Iowa, which enacted the Trust Act this year (not at our suggestion), titled its statute the "Iowa Trust Code."

### **Section 102. Definitions.**

Per a JEB recommendation, the definition of "beneficiary" is revised to clarify that it does not include a person holding a power in a fiduciary capacity.

The definition of “know” has been revised per Style Committee suggestion.

Per a recommendation of the ABA Task Force on the UTA, a definition of “power of withdrawal” is added, clarifying that a power of withdrawal does not include a power exercisable only with the consent of the trustee or person holding an adverse interest. “Power of withdrawal” is used in Sections 402, 505, and 604.

Based on a discussion at JEB, the language “except to the extent someone else has the power to revoke that portion” is added to the definition of “settlor.” We need to discuss whether this addition is appropriate and whether this is the appropriate place for it. We also need to discuss how this revised definition interrelates with Section 604, which grants the holder of a power of withdrawal the rights of the settlor of a revocable trust. Here are four fact patterns with which to test the revised definition: (1) parent transfers property to revocable trust created by child; (2) decedent creates testamentary trust granting spouse an unlimited power of withdrawal; (3) parent created trust for minor child; child has right at age 21, but only for 60 days, to withdraw the trust in its entirety; and (4) grandparent creates irrevocable trust granting grandchild a Crummey withdrawal power.

Bob Freedman suggests amending the definition of “settlor” as follows: “Settlor” means a person who creates and transfers property to an inter vivos or testamentary trust. If more than one person transfers property to a trust . . .

Commissioner King Burnett asks how Act applies to donations of conservation easements, in particular the relationship between conservation easements and the law of charitable trusts. For example, he expressed a concern on how the provision on termination of uneconomic charitable trusts might apply (see Section 408). At a minimum, the comment should describe how the definition of “trust” is broad enough to encompass conservation easements and other nontraditional trust devices. Comment should also discuss how conservation easements are handled under the Uniform Management of Institutional Funds Act.

The definition of “trust” is revised to conform to a Style Committee rewrite of the definition of “trust” in the Disclaimers Act.

### **Section 103. Mandatory Rules.**

Nat Sterling asks whether we need to say that Act applies if terms don’t control.

John Langbein suggests that we rewrite (b) to separate out important limitations on power to vary Act in terms of trust from those which are less important. Any suggestions on how this can best be accomplished?

### **Section 106. Choice of Law.**

JEB discussed but never resolved question of whether public policy exception to validity of governing law clause should be as established by law of “this” State or by law of state most significantly connected with issue, as provided in Restatement (Second) of Conflicts. Currently, subsection (b) refers to law of “this” state.

In conformity with Restatement (Second) of Conflicts, in (b) “significant” public policy is changed to “strong” public policy.

Per JEB, in (a), place of trustee’s residence and business and places where trust property located have been added as bases for validating trust.

### **Section 107. Principal Place of Administration.**

Section overhauled per discussion at JEB. Efforts to define “principal place of administration” are abandoned. In (b), same standard now applies with respect to place where trustee has duty to administer trust as applies with respect to trustee’s ability to transfer the place of administration (“place appropriate to its purposes, its administration, and the interests of the beneficiaries”). Also in (b), language added clarifying that court may order, approve, or disapprove a transfer by the trustee.

Standish Smith suggests that the beneficiaries be given right to change trust’s principal place of administration with or without approval of court.

### **Section 108. Trust Registration.**

This section, which is new, but which codifies concept previously discussed by Drafting Committee, allows for *optional* trust registration. The language, with many revisions, is taken from Article VII of UPC. Registration is referred to in Sections 109, 202, and 205.

### **Section 109. Nonjudicial Settlements.**

This is former Section 108, which is unchanged except for addition of reference to trust registration.

### **Section 110. Rules of Construction.**

This is former Section 605, which previously addressed only revocable trusts. It has been moved here due to recommendation of ABA Task Force that section be expanded to also cover rules of construction applicable to irrevocable trusts.

This section, as revised, engendered a long debate by the ACTEC Committee on State Laws. Arguments favoring the extension of the provision to irrevocable trusts include: (1) nearly all rules of construction applicable to revocable trusts also apply to irrevocable trusts; (2)

referring only to revocable trusts might imply that similar rules do not apply to irrevocable trusts.

Arguments favoring not extending the provision to irrevocable trusts include: (1) objective of Act is not to cover every aspect of trust law, but only those most amenable and most important to codify; (2) key problem to address is application to rules to revocable trusts - need for extension of rules to irrevocable trusts less critical; (3) extending section to irrevocable trusts increases pressure on what we mean by a rule of construction - do we intend to refer only to interpretation of particular words, such as “heirs” or “descendants”? What about rules, like anti-lapse, that in effect add language to the document and do not involve interpretation of particular words? Finally, what about provisions like ademption by extinction, omitted spouses/children, and effect of a divorce? Are these even rules of construction at all (they deal with events occurring after date document signed).

Whichever view is adopted, both the ABA Task Force and the ACTEC Committee were in agreement that qualifying language, such as “to extent pertinent” or “to extent appropriate” should be added to signal to court that applying rules of will construction to trusts is not always automatic.

## **Section 202. Jurisdiction Over Trustee and Beneficiary.**

Note addition of reference to trust registration.

## **Section 203. Notice of Judicially-Approved Agreement.**

Per discussion at JEB, subsection (b) is revised to require, as prerequisite for applying virtual representation, that actual notice be given to persons to be represented whose identities and locations are known or reasonably ascertainable. Similar changes also made in Article 3. New to the Act is subsection (a), which clarifies that notice of judicial settlement must be given to all interested persons or to one who can bind an interested person, is new.

## **Section 205. Venue.**

This section has been revised to (1) clarify when proceedings can be brought in court which probated will creating testamentary trust; (2) provide that absent trust registration, that venue is always in place of principal administration; and (3) provide that venue in place of trust registration is exclusive. The comments of Style Committee are invited on how to make revised language less cumbersome.

## **Article 3. Representation by Others.**

Per suggestion of Maurice Hartnett and JEB, title is changed from “Representation” to “Representation by Others.”

### **Section 301. Representation: Basic Principles.**

Minor style changes plus former Section 302, which dealt with effect of consent, is now found in subsection (b) of this section.

### **Section 304. Representation by Person Having Substantially Identical Interest**

Per JEB suggestion, section revised to eliminate virtual representation for beneficiaries, such as presumptive heirs, who might be technically “unascertained,” but whose identities and locations are known or reasonably ascertainable. Also, language that virtual representative must adequately represent interest of person represented will be moved to comment.

### **Section 305. Appointment of Representative.**

Consistent with Sections 203 and 304, reference to “unascertained” persons is deleted.

### **Section 401. Methods of Creating Trust.**

In (b), reference to “identified” property now applies not only to property identified in a self declaration but also to conveyances of property to a trustee.

### **Section 402. Requirements for Creation.**

Correcting an error in expression, not in intent, in (a)(4), “presently exercisable power of appointment” is changed to “power of withdrawal.” Per Section 102, powers of withdrawal are limited to presently exercisable general powers of appointment.

### **Section 403. Trust Purposes.**

Per discussion by Drafting Committee this summer, following language was added from Restatement Third: “A noncharitable trust, its terms, and its administration must be for the benefit of its beneficiaries.”

### **Section 406. Trust for Care of Animal.**

To clarify that section can apply to trust created for more than one animal, in first line of (a), “animal” is changed to “animal or animals.”

In this and in the next section, we provide for disposition of excess funds that are not needed for intended purpose. Is this a general principle of law that should be extended to all trusts, not merely honorary ones? Sections 408 and 411 contemplate this result with respect to other types of trusts but neither section is as explicit.

### **Section 407. Trust for Noncharitable Purpose.**

Same issue on excess funds as in previous section.

Adam Hirsch questions the 21-year limit. Why not 90 years as under Uniform Statutory Rule Against Perpetuities?

### **Section 408. Charitable Trusts.**

Ron Chester suggests that standard for modification of charitable trusts authorized by this section be made identical to standard for noncharitable trusts as provided in Section 411. He also asks whether the four enumerated grounds in this section for applying cy pres ( unlawful, impracticable, impossible to achieve, wasteful) aren't just various ways of saying "unanticipated circumstances." In addition, he asks whether (b)(3), which requires that court "shall" apply cy pres if circumstances suggest, be made permissive. He also notes that under (c), cy pres can be trumped by a gift over, but under Section 411 "unanticipated circumstances" is not a default rule. Finally, he notes that equitable deviation is expressly addressed in Section 411 but not in this section.

### **Section 411. Modification or Termination Because of Unanticipated Circumstances or Inability to Effectively Administer Trust.**

Marty Begleiter suggests adding a clear and convincing evidence requirement.

Language of (a)(2), clarifying that court may modify trust if purposes of trust have been fulfilled or have become illegal or impossible to fulfill, is new. Style Committee will change "fulfilled" to "achieved."

### **Section 412. Termination of Uneconomic Noncharitable Trust.**

Standish Smith suggests that the beneficiaries, instead of trustee, be given the power to terminate a trust with a value of less than \$50,000.

### **Article 5. Creditor's Claims; Spendthrift Provisions; Discretionary Trusts.**

Please take a look at the organization. Is there a better way to organize the sections of this article.

### **Section 501. Rights of Beneficiary's Creditor or Assignee.**

The second sentence, allowing court to consider actual needs of beneficiary and of legal dependents in making awards to creditors, carries out decision of Drafting Committee. Effect is to make all trusts at least modestly spendthrift. Given change, section has been renamed and

order switched with next section.

### **Section 502. Spendthrift Provision: General.**

Per suggestion of Bill McGovern, language formerly in comment (“A voluntary assignment by a beneficiary as to periodic payments otherwise due the beneficiary may be honored by a trustee but is revocable by the beneficiary at any time”) has been made into a new subsection (d).

### **Section 503. Exceptions to Spendthrift Provision.**

This section does not mention necessities exception. But if necessities exception is part of common law, and Section 105 provides that the common law supplements the Act, does the necessities exception creep in by the back door? Do we need to say in this section that the exceptions listed in the statute are exclusive?

Per floor comment, in (b) “a” State is now “this” State.

With respect to this and next section, Commissioner Behr asks whether beneficiary and spouse can agree in divorce settlement to waive spouse’s right to make claim against trust? Also, may a testator or settlor make a gift to an ex-spouse that will be forfeited upon the making of a claim under this or the next section? Finally, she suggests adding an exception for claims by local governmental agencies.

### **Section 505. Creditor’s Claims Against Settlor.**

Exception in (b)(2) for Crummey and 5 and 5 powers has been rewritten for clarity.

### **Section 602. Revocation or Amendment of Revocable Trust.**

Should a trustee who distributes property without notice that the trust has been revoked be protected from liability? Should we say this somewhere?

### **Section 603. Direction of Settlor.**

This was formerly subsection (a)(2) of next section, moved here because, unlike next section, it does not deal with rights of beneficiaries. Also, “written direction” is changed to “direction.”

### **Section 604. Settlor’s Exercise of Rights of Beneficiaries; Presently Exercisable Powers of Withdrawal.**

This was Section 603 in prior draft.

JEB, the ABA Task Force, and the ACTEC Committee on State Laws are divided over extent to which beneficiaries of revocable trust should have rights of beneficiaries upon incapacity of settlor. Three views have been expressed: (1) as long as trust is revocable, rights of beneficiaries should be held exclusively by the settlor, whether or not the settlor is incapacitated. Result is to treat revocable trust identically to a will, under which devisees have no rights until testator's death; (2) upon incapacity of settlor, beneficiaries have rights of beneficiaries whether or not an agent or conservator has been appointed; and (3) upon incapacity of settlor, rights of beneficiaries continue to be held by the settlor only if there is an agent or conservator in office who is someone other than the trustee (this is approach of present and prior draft).

The ACTEC Committee on State Laws suggests that it be made clear that this section is subject to contrary provision in the terms of the trust. Also, Stan Kent, looking at Section 813(f), suggests that one solution to the problem of the incapacitated settlor is to clarify that settlor, in terms of the trust, can appoint someone to act on settlor's behalf.

Per recommendation of JEB, the rights of the beneficiaries are now "subject to the control of " as opposed to "held by" the settlor.

Ray Young points out that it is not totally clear whether language "someone other than the trustee" modifies reference to both agents and conservators or only reference to agents.

### **Section 605. Limitation on Action Contesting Validity of Revocable Trust.**

This is Section 604 of prior draft.

There is a split of views on this section. One view is that this section should track the comparable probate sections, in this case, the UPC. UPC Sections 3-108 and 3-705 automatically bar contests three years after death. Notice to heirs is mandatory but the right to contest is barred after three years whether or not notice is given. A failure of a personal representative to give a required notice is a breach of duty to the persons effected.

A second view is that the draft takes the right approach. The section automatically cuts off contest claims two years following death whether or not notice is given. Notice is optional and is given only in cases where the trustee wishes to shorten the period.

The third approach is to make notice the exclusive means for barring claims. If the trustee decides not to give notice there would be no statutory bar to bringing a contest.

Other, less controversial changes are the deletion of the language barring a contest 120 days after notice of probate of a pourover will (this was simply too confusing), and the addition of language in (a)(1) requiring that a notice, in order to bar a claim, must notify the potential contestant of the time limit. Also, in (b) language has been added clarifying that until a trustee gets notice of an actual or threatened contest, distribution to beneficiaries may be made "without



liability.”

### **Section 703. Cotrustees.**

Subsection (d)(2), relating to delegation to cotrustee, is revised but further comment welcomed. Objective is to clarify that trustee may always delegate what used to be known as “ministerial” functions, but may not delegate other functions which the trustee expected trustees to perform jointly unless delegation is necessary to avoid adverse tax consequences.

### **Section 704. Vacancy in Trusteeship.**

Do we want to follow Texas statute which allows the filling of a vacancy in a charitable trusteeship by a majority vote of the remaining trustees.

Standish Smith suggests adding a provision providing that agreements made between a corporate trustee and the trust beneficiaries would be binding on a successor corporate trustee by merger, purchase, consolidation, etc. The ACTEC Committee on State Laws failed to understand why a special statute is needed.

### **Section 705. Resignation of Trustee.**

To resign, trustee under (a) must give qualified beneficiaries at least 30 days advance notice. Under (b), trustee must inform cotrustees of resignation. Should we also require that notice to the cotrustees be given at least 30 days in advance?

Maurice Hartnett suggests that in (d) we specify the duties of the special fiduciary.

### **Section 706. Removal of Trustee.**

Carlyn McCaffrey suggests that the Act provide that absent a contrary provision in the terms of the trust that a court may remove and replace a corporate trustee upon petition of all of the qualified beneficiaries. Standish Smith makes a similar although more elaborately drafted proposal.

Standish Smith concludes that subsection (b)(3), which allows a court to remove a trustee for investment performance persistently and substantially below that of comparable trusts, is too vague. He prefers a standard of \_\_\_% below that of comparable index funds for a period of \_\_\_ years.

### **Section 708. Compensation of Trustee.**

Standish Smith suggests, subject to prior agreement between the trustee and settlor/beneficiaries, that a trustee be required to provide the beneficiaries with a schedule of

fees/costs for ordinary and usual services which would be fixed for the 15 year period following trust funding. Under his proposal, the beneficiaries would be required to approve a modification of the fee schedule whenever services are expanded beyond those originally contemplated. Following the expiration of the 15 year period, the trustee may demand a change of compensation but must agree to resign if the beneficiaries do not approve.

### **Section 709. Repayment of Expenditures.**

Standish Smith suggests that the costs of a judicial accounting be paid by the trustee if the accounting was requested by the court or trustee, be paid from the trust if requested by the beneficiaries, or be paid by the trustee even if requested by the beneficiaries if the court determines that the trustee has seriously breached a duty.

### **Article 8. Fiduciary Administration.**

Standish Smith suggests adding language encouraging prompt delivery of property by terminated trustee? The ABA Task Force suggests that this issue be discussed in comment. The ACTEC Committee on State Laws concluded that this should be made part of statute.

### **Section 802. Duty of Loyalty.**

In subsection (b), the reference to BFPs (Section 1012) and the limitations period (Section 1006) is new but does not change the substance.

Subsection (f), which addresses proprietary funds, is rewritten to clarify that objective of subsection is only to waive absolute prohibition against self dealing and not to waive other trustee duties.

Standish Smith recommends that conversion of common trust funds to proprietary mutual funds be allowed only if (a) approved by unanimous vote of the qualified beneficiaries; (b) the trustee rebates any additional costs/fees over that incurred by the predecessor common trust fund; and (c) the bank provides a written explanation of how and why investment in the proprietary fund better meets the objectives of the trust than alternative investments.

### **Section 808. Powers to Direct.**

In (b), is there a better term than “presumptively”?

### **Section 813. Duty to Inform and Report.**

With respect to (a), Standish Smith suggests that statute require that a trustee respond within 14 days following beneficiary’s written request. If trustee concludes that request requires extraordinary amount of research, Smith would require the trustee to (1) characterize and

summarize what is required to provide a relevant response; (2) furnish a reasonable estimate of the time required to meet the request; and (3) quote a cost per hour. Also, Standish Smith would require that trustee furnish copy of trust instrument to beneficiaries, whether or not there has been a request.

Commissioner Behr suggests with respect to (b)(2) that trustee inform beneficiaries not only of the trustee's address but also of the telephone number and electronic mail address.

Subsection (c), which is based on a discussion by JEB, is an attempt to more precisely describe transactions for which advance notice to the beneficiaries is required.

Standish Smith, with respect to subsection (c), would require trustee to give beneficiaries advance notice of all sales and purchases except for sales and purchases of publicly traded securities comprising less than \_\_\_% of the trust.

Subsection (e) is revised to clarify that beneficiary may revoke a waiver of right to information.

Consider Tennessee statute on blind trusts.

Standish Smith would require, with respect to mutual fund investments by trustees, that the trustee disclose for each reporting period: (a) all administrative costs/fees, including those allocated directly against principal/income, on an unbundled basis; (b) the method of calculation and the component values used in the calculation of all fees/costs assessed; and (c) the identity of the individual securities held within a fund and the size of the holding. The ACTEC Committee on State Laws, without trying to specify the exact parameters, agreed that more detailed disclosure should be required.

Standish Smith, to reduce confusion by beneficiaries, would prohibit a trustee from distributing more than one fee schedule per reporting period, on which the trustee must report all of its fees.

Standish Smith would require that the trustee, on a quarterly basis, provide the beneficiaries with a comparison of its investment fund against that of a comparable index fund.

Standish Smith suggests that the trustee, in sending its report to the beneficiaries, include a statement that (a) the beneficiary need not respond but that the beneficiary does have the right to make further inquiries; (b) if the beneficiary does inquire that the trustee agrees to provide a responsive written answer within 20 days; and (c) that the beneficiaries' questions cannot be used as evidence that the trustee knew of the trustee's decision/action or could/should have inquired into its existence.

#### **Section 814. Duty With Regard to Discretionary Power.**

Standish Smith recommends that a trustee be prohibited from inquiring into a beneficiary's financial resources when making distribution decisions, which he concludes is an invasion of privacy.

### **Section 816. Specific Powers of Trustee.**

Maurice Hartnett suggests revising (14)(C) to provide that trustee may decline to accept or disclaim powers with respect to property only if the potential environmental liability is "significant."

Per suggestion of ABA Task Force, provision on facility of payments (paragraph (22)) is expanded to allow direct deposit to bank account and to incorporate language from Restatement Third Section 49 re ability of trustee to withhold distribution and expend directly on the beneficiary's behalf.

### **Section 817. Proposal for Distribution.**

This new section is copied from a comparable provision of the UPC.

### **Section 1002. Breach of Trust; Equitable Remedies.**

Standish Smith would require that if the settlor is deceased, upon petition of a majority of the trust beneficiaries, the court must appoint an individual to review the acts of the trustee and to recommend appropriate action, with the cost to be borne by the trust.

Standish Smith suggests the addition of language that if a beneficiary lacks resources to press a claim, that the court may act on its own motion to resolve the issue.

### **Section 1005. Attorney's Fees and Costs.**

Do we need a more precise standard? For example, if judicial accounting requested, under what circumstances should costs be charged to trustee, to trust, or to petitioning beneficiary. Maurice Hartnett suggests that attorney fees be charged to a party only in event of bad faith or fraud.

Standish Smith suggests the following standard for payment of legal fees:

- (1) the fees of a petitioning beneficiary shall be paid from the trust and those of the trustee by the trustee personally;
- (2) if the trustee of an irrevocable trust has refused to transfer administration upon request of a majority of the beneficiaries, and the court later orders the trustee's removal, that the court shall order that petitioner's fees be paid by the trustee;
- (3) the trustee may not recover its fees from the trust prior to a court adjudication without

written authorization of the income beneficiaries.

#### **Section 1006. Limitation of Action Against Trustee Following Trustee's Report.**

Per JEB recommendation, section has been rewritten to emphasize what beneficiary can do instead of when beneficiary is prohibited from maintaining action.

Boone Schwartzel asks whether minor beneficiary barred if report sent to person designated in terms of trust as authorized by Section 813(f).

Standish Smith would clarify that upon termination of the trust, a beneficiary is not obligated to sign a release of the trustee. JEB would address this in comment, stating that trustee cannot condition distribution on signing of release and why such releases are invalid.

#### **Section 1008. Events Affecting Administration or Distribution.**

This new section, which is derived from Wash. Stat. Sec. 11.98.100, addresses what is sometimes a very serious problem.

#### **Section 1009. Exculpation of Trustee.**

The ACTEC Committee on State Laws finds the language “on behalf of” in (b) to be ambiguous. If trustee insists on exculpation, and settlor’s lawyer includes provision in document, is presumption applicable? Or what if settlor signs standard form following consultation with her attorney?

#### **Section 1011. Limitation on Personal Liability of Trustee.**

Reconsider (b). Should a negligent trustee always be personally liable. Look at Uniform Trusts Act (1937).

#### **Section 1011. Limitation on Personal Liability of Trustee.**

Subsection (b), which is new, carries out a decision made at the last drafting committee meeting.

#### **Section 1013. Certification of Trust.**

Subsection (g) was formerly last sentence of (f). Also, the reference in (g) to “good faith” is new.

#### **Section 1105. Application to Existing Relationship**

The ABA Task Force concludes that the effective date provisions need clarification. The key issue is the retroactive application of rules of construction. Currently, under this section the sole limitation on retroactive application of rules of construction is the statement that “any accrued right” is not affected by this Act. The comment then explains that this means that rules of construction apply to all trusts except for trusts which were irrevocable on effective date and where particular provision of Act would reduce or threaten a beneficial interest. Should this statement in the comment be made more precise and then moved into the statute? Also, to what extent should rules of construction apply to settlors of revocable trusts and wills who were incapacitated on the effective date of the Act and at all times thereafter?