

D R A F T

FOR APPROVAL

**AMENDMENTS TO THE UNIFORM TRUST CODE
(2000)**

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDRED-AND-THIRTEENTH YEAR
PORTLAND, OREGON
JULY 30-AUGUST 6, 2004

**AMENDMENTS TO THE UNIFORM TRUST CODE
(2000)**

AS APPROVED BY THE EXECUTIVE COMMITTEE OF THE NATIONAL CONFERENCE
OF COMMISSIONERS ON UNIFORM STATE LAWS PURSUANT TO SECTION 4.3(3) OF
ITS CONSTITUTION

WITH PRELIMINARY COMMENTS

Copyright ©2004

By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporters. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

DRAFTING COMMITTEE TO AMEND UNIFORM TRUST CODE (2000)

MAURICE A. HARTNETT, III, Delaware Supreme Court, 144 Cooper Road, Dover, DE 19901,
Chair

FRANK W. DAYKIN, 4745 Giles Way, Carson City, NV 89704, *Committee Member and
Committee on Style Liaison*

E. EDWIN ECK, II, University of Montana, School of Law, Missoula, MT 59812

JOHN H. LANGBEIN, Yale Law School, P.O. Box 208215, New Haven, CT 06520

GLEE S. SMITH, P.O. Box 360, 111 E. 8th, Larned, KS 67550

NATHANIEL STERLING, Law Revision Commission, Suite D-1, 4000 Middlefield Road, Palo
Alto, CA 94303

RICHARD V. WELLMAN, University of Georgia, School of Law, Athens, GA 30602

DAVID M. ENGLISH, University of Missouri School of Law, Missouri and Conley Avenues,
Columbia, MO 65211, *Reporter*

EX OFFICIO

FRED H. MILLER, University of Oklahoma, College of Law, 300 Timberdell Rd., Room 3056,
Norman, OK 73019, *President*

REX BLACKBURN, 1673 West Shoreline Dr., Suite 200, P.O. Box 7808, Boise, ID 83702,
Division Chair

AMERICAN BAR ASSOCIATION ADVISOR

JOSEPH KARTIGANER, 812 Fifth Ave., New York, NY 10021, *American Bar Association
Advisor*

EXECUTIVE DIRECTOR

WILLIAM H. HENNING, University of Alabama School of Law, Box 870382, Tuscaloosa, AL
35487-0382, *Executive Director*

WILLIAM J. PIERCE, 1505 Roxbury Rd., Ann Arbor, MI 48104, *Executive Director Emeritus*

Copies of this Code may be obtained from:
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611
312/915-0195
www.nccusl.org

AMENDMENTS TO THE UNIFORM TRUST CODE (2000)

TABLE OF CONTENTS

SECTION 103. DEFINITIONS 1

SECTION 105. DEFAULT AND MANDATORY RULES 3

SECTION 110. OTHERS TREATED AS QUALIFIED BENEFICIARIES 5

SECTION 411. MODIFICATION OR TERMINATION OF NONCHARITABLE
IRREVOCABLE TRUST BY CONSENT 7

SECTION 504. DISCRETIONARY TRUSTS; EFFECT OF STANDARD 8

SECTION 603. SETTLOR’S POWERS; POWERS OF WITHDRAWAL 10

SECTION 704. VACANCY IN TRUSTEESHIP; APPOINTMENT OF SUCCESSOR 11

SECTION 813. DUTY TO INFORM AND REPORT 12

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

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

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

9 (12) “Qualified beneficiary” means a beneficiary who, on the date the
10 beneficiary’s qualification is determined:

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

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

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

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

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

1 (15) “Spendthrift provision” means a term of a trust which restrains both
2 voluntary and involuntary transfer of a beneficiary’s interest.

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

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

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

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

14 **Preliminary Comments**

15
16 Section 103(10), the definition of “power of withdrawal” is amended to exclude a
17 possible inference that the term includes a power exercisable by a trustee. For an explanation of
18 the reason for this amendment, see the amendment to Section 504, which addresses a related
19 issue.
20

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

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

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

- 1 (1) the requirements for creating a trust;
- 2 (2) the duty of a trustee to act in good faith and in accordance with the
3 purposes of the trust;
- 4 (3) the requirement that a trust and its terms be for the benefit of its
5 beneficiaries, and that the trust have a purpose that is lawful, not contrary to public policy, and
6 possible to achieve;
- 7 (4) the power of the court to modify or terminate a trust under Sections
8 410 through 416;
- 9 (5) the effect of a spendthrift provision and the rights of certain creditors
10 and assignees to reach a trust as provided in [Article] 5;
- 11 (6) the power of the court under Section 702 to require, dispense with, or
12 modify or terminate a bond;
- 13 (7) the power of the court under Section 708(b) to adjust a trustee's
14 compensation specified in the terms of the trust which is unreasonably low or high;
- 15 [(8) the duty under Section 813(b)(2) and (3) to notify qualified
16 beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the
17 trust, of the identity of the trustee, and of their right to request trustee's reports;]
- 18 [(9) the duty under Section 813(a) to respond to the request of a [qualified]
19 beneficiary of an irrevocable trust for trustee's reports and other information reasonably related
20 to the administration of a trust;]
- 21 (10) the effect of an exculpatory term under Section 1008;
- 22 (11) the rights under Sections 1010 through 1013 of a person other than a

1 trustee or beneficiary;
2 (12) periods of limitation for commencing a judicial proceeding; [and]
3 (13) the power of the court to take such action and exercise such
4 jurisdiction as may be necessary in the interests of justice [; and
5 (14) the subject-matter jurisdiction of the court and venue for commencing
6 a proceeding as provided in Sections 203 and 204].

7 **Preliminary Comments**

8 Sections 105(b)(8) and 105(b)(9) address the extent to which a settlor may waive trustee
9 notices and other disclosures to beneficiaries otherwise required under the Code. These
10 subsections have generated more discussion in jurisdictions considering enactment than have any
11 other provisions in the Code. A majority of the enacting jurisdictions have modified these
12 provisions but not in a consistent way. This lack of agreement and resulting variety of
13 approaches is expected to continue as additional states enact the Code.

14
15 Placing these sections in brackets signals that uniformity is not expected. States may
16 elect to enact these provisions without change, delete these provisions, or enact them with
17 modifications. In Section 105(b)(9), an internal bracket has been added to make clear that an
18 enacting jurisdiction may elect to limit to the qualified beneficiaries the obligation to respond to a
19 beneficiary’s request for information.

20
21 The placing of these provisions in brackets does not mean that the Standby Committee
22 recommends that an enacting jurisdiction delete Sections 105(b)(8) and 105(b)(9). The comment
23 to Section 105 will be expanded to add additional discussion of the policy factors that an
24 enacting jurisdiction may wish to consider in formulating its provision on this issue.

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

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

30 (b) A charitable organization expressly designated to receive distributions under

1 the terms of a charitable trust has the rights of a qualified beneficiary under this [Code] if the
2 charitable organization, on the date the charitable organization's qualification is being
3 determined:

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

5 _____ (B) would be a distributee or permissible distributee of trust income or
6 principal upon the termination of the interests of other distributees or permissible distributees
7 then receiving or eligible to receive distributions; or

8 _____ (C) would be a distributee or permissible distributee of trust income or
9 principal if the trust terminated on that date. ~~or a~~

10 (c) A person appointed to enforce a trust created for the care of an animal or
11 another noncharitable purpose as provided in Section 408 or 409 has the rights of a qualified
12 beneficiary under this [Code].

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

15 Preliminary Comments

16 The amendments to this Section respond to various concerns being expressed in the states
17 considering enactment of the Code.

18
19 Subsection (b) is amended to better conform this provision to the drafter's original intent.
20 Charitable trusts do not have beneficiaries in the usual sense. Yet, such trusts are often created to
21 benefit named charitable organizations. The effect of the amendment, which is based on the
22 definition of qualified beneficiary in Section 103, is to provide that such designated charitable
23 organizations are entitled to the rights of a qualified beneficiary only if they hold an interest
24 similar to that of a qualified beneficiary in a noncharitable trust. The effect of the amendment is
25 to exclude charitable organizations, which even though named in the terms of the trust, hold only
26 remote remainder interests.

27
28 The amendment to subsection (d) recognizes that the role of the attorney general in the

1 enforcement of charitable trusts varies greatly in the states. In some states, the legislature may
2 prefer that the attorney general be granted the rights of a qualified beneficiary. In other states, the
3 attorney general may play a lesser role in enforcement. By placing subsection (d) in brackets the
4 drafters hope that the state considering enactment will conform this provision to match the
5 particular role that the attorney general plays in the enforcement of charitable trusts in that state.
6 Some states may prefer to delete this provision. Other states might provide that the attorney
7 general has the rights of a qualified beneficiary only for trusts in which no charitable organization
8 has been designated to receive distributions. Yet other states may prefer to enact the provision
9 without change.
10

11 **SECTION 411. MODIFICATION OR TERMINATION OF NONCHARITABLE**
12 **IRREVOCABLE TRUST BY CONSENT.**

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

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

26 (c) ~~A spendthrift provision in the terms of the trust is not presumed to constitute a~~

1 ~~material purpose of the trust.~~

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

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

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

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

11 **Preliminary Comments**

12 Subsection (c), which is being deleted, provided that a spendthrift provision is not
13 presumed to constitute a material purpose of the trust. Several states that have enacted the Code
14 have not agreed with this conclusion, however, and have either deleted this provision or, in at
15 least one case, have reversed the presumption to provide that a spendthrift provision *is presumed*
16 to constitute a material purpose of the trust. Given these developments, the Standby Committee
17 has concluded that it is better to leave the issue of whether a spendthrift provision constitutes a
18 material purpose in a particular case to the courts instead of trying to provide a rule by
19 legislation.
20

21 **SECTION 504. DISCRETIONARY TRUSTS; EFFECT OF STANDARD.**

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

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

1 (1) the discretion is expressed in the form of a standard of distribution; or

2 (2) the trustee has abused the discretion.

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

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

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

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

15 (e) The provisions of this section shall apply even if the beneficiary is the trustee
16 or co-trustee of the trust.

17 **Preliminary Comments**

18 Trusts are frequently drafted in which a trustee is also a beneficiary. A common example
19 is what is often referred to as a Bypass Trust, under which the settlor's spouse will frequently be
20 named as both trustee and beneficiary. An amount equal to the exemption from federal estate tax
21 will be placed in the Bypass Trust, and the trustee, who will often be the settlor's spouse, will be
22 given discretion to make distributions to the beneficiaries, a class which will usually include the
23 spouse/trustee.

24
25 The UTC, as currently drafted, does not specifically address the issue of whether a
26 creditor of a beneficiary may reach the interest of a beneficiary who is also a trustee. However,

1 Restatement (Third) of Trusts §60, comment g, which was approved by the American law
2 Institute in 1999, does mandate this result. Because the UTC is supplemented by the common
3 law (see UTC Section 106), this Restatement rule may might also apply in states enacting the
4 UTC. The Standby Committee has concluded that adoption of the Restatement rule would
5 unduly disrupt estate planning and should be rejected. Consequently, Section 504 is amended to
6 provide that the provisions of this section, which generally prohibit a creditor of a beneficiary
7 from reaching a beneficiary’s discretionary interest, apply even if the beneficiary is also a trustee
8 or cotrustee.
9

10 In addition, the definition of “power of withdrawal” in Section 103 is amended to clarify
11 that a power of withdrawal does not include a power exercisable solely by the trustee, thereby
12 precluding a claim that the right of a trustee/beneficiary to make discretionary distributions for
13 the trustee/beneficiary’s own benefit results in a an enforceable claim of the trustee/beneficiary’s
14 creditors to reach the trustee/beneficiary’s interest as provided in Section 505(b).
15

16 **SECTION 603. SETTLOR’S POWERS; POWERS OF WITHDRAWAL.**

17 (a) While a trust is revocable [and the settlor has capacity to revoke the trust],
18 rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed
19 exclusively to, the settlor.

20 (b) During the period the power may be exercised, the holder of a power of
21 withdrawal has the rights of a settlor of a revocable trust under this section to the extent of the
22 property subject to the power.

23 **Preliminary Comments**

24 Section 603 generally provides that while a trust is revocable, all rights that the trusts’s
25 beneficiaries would otherwise possess are subject to the control of the settlor. Section 603,
26 however, negates the settlor’s control if the settlor is incapacitated. In such case, the
27 beneficiaries are entitled to assert all rights provide to them under the Code.
28

29 Two issues have arisen concerning this incapacity limitation. First, because determining
30 when a settlor is incapacitated is not always clear, concern has been expressed that it will often
31 be difficult in a particular case to determine whether the settlor has become incapacitated and the
32 settlor’s control of the beneficiary’s rights have ceased. Second, concern has been expressed that
33 the rule in this section should be the same as the rule in the case of the will. In the case of a will,
34 the devisees have no right to know of the dispositions made in their favor until the testator’s

1 death, whether or not the testator is incapacitated. Concluding that uniformity among the states
2 on this issue is not essential, the Standby Committee has decided to place the reference to the
3 settlor's incapacity in Section 603(a) in brackets. Enacting jurisdictions are free to strike the
4 incapacity limitation or, similar to the Missouri enactment, provide a more precise definition of
5 when a settlor is incapacitated.
6

7 **SECTION 704. VACANCY IN TRUSTEESHIP; APPOINTMENT OF**
8 **SUCCESSOR.**

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

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

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

12 (3) a trustee resigns;

13 (4) a trustee is disqualified or removed;

14 (5) a trustee dies; or

15 (6) a [guardian] or [conservator] is appointed for an individual serving as
16 trustee.

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

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

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

23 (2) by a person appointed by unanimous agreement of the qualified
24 beneficiaries; or

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

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

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

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

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

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

13 **Preliminary Comments**

14 The amendment to subsection (d)(2) of this Section is a conforming amendment to the
15 amendment in Section 110(d). If an enacting jurisdiction elects to delete Section 110(d), which
16 provides that the attorney general has the rights of a qualified beneficiary with respect to
17 charitable trusts having a principal place of administration in the state, then the enacting
18 jurisdiction should also modify subsection (d)(2) of this Section, which requires that the attorney
19 general concur in the selection of a successor trustee nominated by a designated charitable
20 organization.
21

22 **SECTION 813. DUTY TO INFORM AND REPORT.**

23 (a) A trustee shall keep the qualified beneficiaries of the trust reasonably
24 informed about the administration of the trust and of the material facts necessary for them to
25 protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly

1 respond to a beneficiary's request for information related to the administration of the trust.

2 (b) A trustee:

3 (1) upon request of a beneficiary, shall promptly furnish to the beneficiary
4 a copy of the trust instrument;

5 (2) within 60 days after accepting a trusteeship, shall notify the qualified
6 beneficiaries of the acceptance and of the trustee's name, address, and telephone number;

7 (3) within 60 days after the date the trustee acquires knowledge of the
8 creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly
9 revocable trust has become irrevocable, whether by the death of the settlor or otherwise, shall
10 notify the qualified beneficiaries of the trust's existence, of the identity of the settlor or settlors,
11 of the right to request a copy of the trust instrument, and of the right to a trustee's report as
12 provided in subsection (c); and

13 (4) shall notify the qualified beneficiaries in advance of any change in the
14 method or rate of the trustee's compensation.

15 (c) A trustee shall send to the distributees or permissible distributees of trust
16 income or principal, and to other qualified or nonqualified beneficiaries who request it, at least
17 annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and
18 disbursements, including the source and amount of the trustee's compensation, a listing of the
19 trust assets and, if feasible, their respective market values. Upon a vacancy in a trusteeship,
20 unless a cotrustee remains in office, a report must be sent to the qualified beneficiaries by the
21 former trustee. A personal representative, [conservator], or [guardian] may send the qualified
22 beneficiaries a report on behalf of a deceased or incapacitated trustee.

1 (d) A beneficiary may waive the right to a trustee’s report or other information
2 otherwise required to be furnished under this section. A beneficiary, with respect to future
3 reports and other information, may withdraw a waiver previously given.

4 (e) Subsections (b)(2) and (b)(3) of this section shall apply only to trustees who
5 accept a trusteeship on or after [the effective date of this [Code]], to irrevocable trusts created on
6 or after [the effective date of this [Code]], and to revocable trusts which become irrevocable on
7 or after [the effective date of this [Code]].

8 **Preliminary Comments**

9 Subsection (b)(2) and (b)(3) require that certain notices be sent by the trustee to the
10 qualified beneficiaries within 60 days of the trustee’s acceptance of office, or within 60 days after
11 the creation of an irrevocable trust or the date a revocable trust becomes irrevocable. Subsection
12 (e) is added to make clear the drafting committee’s intent that these requirements are not to be
13 retroactively applied to trustee acceptances and to trusts which have become irrevocable prior to
14 the effective date of the Code.