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## Improving the Law Through Codification: Adoption of the Uniform Trust Code in North Dakota

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IMPROVING THE LAW THROUGH CODIFICATION:  
ADOPTION OF THE UNIFORM TRUST CODE  
IN NORTH DAKOTA

KIRSTEN FRANZEN<sup>†</sup> AND BRADLEY MYERS<sup>††</sup>

ABSTRACT

While trusts have existed under the law for centuries, the common use of trusts for estate planning, probate avoidance, and wealth management dates back only a couple of decades. The increase in trust usage has, unfortunately, also served to expose gaps, opaqueness, and inconsistencies that developed under the common law. As the first generation to make liberal use of trusts in estate planning begins to pass away, courts will likely have to regularly wrestle with questions of trust interpretation, implementation, and correction. On August 3, 2000, the Uniform Law Commission (ULC) approved the Uniform Trust Code (UTC). The ULC undertook drafting of the UTC in order to codify the various common law rules that applied to trusts, to clarify an area of law considered “thin” and “fragmentary,” and to provide states with a body of law that was “precise, comprehensive, and easily accessible.” North Dakota adopted the UTC in 2007. This article discusses the development of the UTC, reviews the history of trust law in North Dakota, and examines the adoption of the modified UTC’s treatment of trusts under North Dakota law. Although North Dakota law is not a hotbed of trust conflict, the UTC should bring additional clarity to situations where conflict arises.

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## I. INTRODUCTION

On August 3, 2000, the Uniform Law Commission (ULC)<sup>1</sup> approved the Uniform Trust Code (UTC).<sup>2</sup> Prior to the UTC, trust law differed among the states, and controlling law in many states was unclear.<sup>3</sup> The UTC provided the first uniform scheme for the law of trusts.<sup>4</sup> The ULC amended the UTC in 2001, 2003, 2004, and 2005.<sup>5</sup>

While trusts have existed under the law for centuries, the common use of trusts for estate planning, probate avoidance, and wealth management dates back only a couple of decades.<sup>6</sup> The increase in trust usage has, unfortunately, also served to expose gaps, opaqueness, and inconsistencies that developed under the common law. As the first generation to make liberal use of trusts in estate planning begins to pass away, courts will likely have to regularly wrestle with questions of trust interpretation, implementation, and correction. If the UTC does its job, attorneys, judges, and citizens will find the creation, administration, and enforcement of trusts easier and more predictable. The benefits of the UTC cannot be realized, however, unless states enact the UTC. North Dakota adopted the UTC in

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1. The Uniform Law Commission has been known for most of its existence as the National Conference of Commissioners on Uniform State Laws. The alternate name of the Uniform Law Commission was added to the organization's Constitution in 2007. UNIFORM LAW COMMISSION REFERENCE BOOK 107 (Nat'l Conference of Comm'rs on Unif. State Laws eds., 2010-2011).

2. UNIF. TRUST CODE prefatory note (amended 2005), available at <http://www.nccusl.org/follow/FinalActsandLegislation> hyperlink; then select "Trust Code" in drop-down menu; then follow "Final Act" hyperlink).

3. *Id.* While the UTC represents the first comprehensive attempt to codify trust law, many previous acts have codified particular aspects of trust law, for example the Uniform Principal and Income Act. See John H. Langbein, *Why Did Trust Law Become Statute Law in the United States?*, 58 ALA. L. REV. 1069, 1080 (2007).

4. Langbein, *supra* note 3, at 1069.

5. Unif. Law Comm'rs, *A Few Facts About the Uniform Trust Code*, NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, [http://nccusl.org/Update/uniformact\\_factsheets/uniformacts-fs-utc2000.asp](http://nccusl.org/Update/uniformact_factsheets/uniformacts-fs-utc2000.asp) (last visited Dec. 29, 2010). The UTC has been adopted by Alabama, Arizona, Arkansas, the District of Columbia, Florida, Kansas, Maine, Michigan, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Virginia, and Wyoming. *Id.* In 2010, the UTC was introduced before the legislature of New Jersey. *Id.*

6. See generally JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, *WILLS, TRUSTS & ESTATES* 543-44 (8th ed. 2009). The rise of the revocable trust as a will substitute is tied to the publication of *How to Avoid Probate!*. See generally NORMAN F. DACEY, *HOW TO AVOID PROBATE!* (1st ed. 1965). Trusts now are "big business." For 2006 the banks that are part of the federal reserve system reported holdings of \$760 billion in roughly 1.25 million accounts. In 2007, trusts that must file Form 1041, which excludes revocable trusts, reported \$142.5 billion in gross income on more than 2 million returns.

2007.<sup>7</sup> This article discusses the development of the UTC, reviews the history of trust law in North Dakota, and examines the adoption of the modified UTC's treatment of trusts under North Dakota law.

## II. TRUSTS: DEFINITIONS AND PURPOSES

“A *trust* may be defined as a fiduciary relationship in which one person holds a property interest, subject to an equitable obligation to keep or use that interest for the benefit of another.”<sup>8</sup> Persons within the fiduciary relationship have a duty to act for the benefit of the others and may not profit at the expense of the others in the relationship.<sup>9</sup> Minimally, a trust includes a trustee who holds the property, one or more beneficiaries for whom the trust property is intended to benefit, and the trust property itself.<sup>10</sup> Generally, a trust instrument documents the trust's purpose and terms, identifies the trustees and beneficiaries, and sets forth each party's rights and responsibilities.<sup>11</sup>

The UTC applies to express trusts—trusts that are created from an express intention by the creator of the trust, the settlor.<sup>12</sup> Trusts are used by individuals, primarily for estate planning purposes, and among businesses, for commercial purposes.<sup>13</sup> For example, family members may place property in a trust benefitting other family members in order to ease the transfer

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7. 2007 N.D. Laws 1896-1941. The Uniform Law Commission amended the UTC at its annual meeting in July 2010 to add a new section 113 specifically dealing with the question of when a trust has an insurable interest. The new section was deemed necessary because of the holding in *Chawla v. Transamerica Occidental Life Insurance Co.*, No. 05-1160, 2005 WL 405405 (E.D. Va. 2005), *aff'd in part, vacated in part*, 440 F.3d 639 (4th Cir. 2006). The trial court in the case ruled trusts in Maryland can never have an insurable interest on a person's life. While the appellate court vacated the ruling as “unnecessary,” the Fourth Circuit did not rule that a trust could have an insurable interest. The ULC, recognizing insurance trusts are considered a vital instrument for estate planners, wanted to conclusively settle the issue. The North Dakota Legislature is expected to take up this amendment during the 2011 session.

8. AMY MORRIS HESS ET AL., TRUSTS AND TRUSTEES § 1, at 2 (3d ed. 2007).

9. RESTATEMENT (THIRD) OF TRUSTS § 2 (2003).

10. *Id.*

11. HESS ET AL., *supra* note 8, § 1.

12. UNIF. TRUST CODE § 102; HESS ET AL., *supra* note 8, § 1 at 14. Express trusts are distinguished from resulting trusts and constructive trusts. A resulting trust is a “reversionary, equitable interest implied by law in property that is held by a transferee, in whole or in part, as a trustee for the transferor or the transferor's successors in interest.” RESTATEMENT (THIRD) OF TRUSTS, *supra* note 9, § 7. A constructive trust is used as a legal remedy and is created when “a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain the property.” RESTATEMENT (THIRD) OF TRUSTS § 1 cmt. e (2003).

13. RESTATEMENT (THIRD) OF TRUSTS ch. 1 intro. note (2003). Some states require certain business trusts to register with the state in a manner similar to other incorporated and unincorporated entities. *See, e.g.*, DEL. CODE ANN. tit. 12, §§ 3801-26 (2007). The ULC also adopted the Uniform Statutory Trust Entity Act in 2009, although to date it has not been adopted in any state.

of assets or to derive tax benefits.<sup>14</sup> Similarly, employers commonly keep pension fund assets in trust for the ultimate benefit of employees.<sup>15</sup>

The use of trusts, primarily in the context of estate planning, has recently increased in popularity.<sup>16</sup> This is, in part, due to the trust's utility in avoiding probate, minimizing taxation, maintaining confidentiality, minimizing administrative expenses, and providing protection against will contests.<sup>17</sup> The popularity of trusts in estate planning is also attributable to the financial prosperity of the 1990s and the increase in life spans.<sup>18</sup> Trusts are becoming so common they are increasingly identified as legal entities.<sup>19</sup> However, the UTC is "directed primarily at trusts that arise in an estate planning or other donative context," and not at the regulation of "commercial trusts."<sup>20</sup>

### III. THE PURPOSE OF THE UTC

The ULC drafted the UTC in response to the increasing use of trusts in estate planning and in commercial transactions.<sup>21</sup> Before approval of the UTC, trust law was primarily found in the common law and was represented by the Restatements of the Law of Trusts.<sup>22</sup> Some states codified

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14. See *Duemeland v. Norback*, 2003 ND 1, ¶¶ 3-4, 655 N.W.2d 76, 77-78 (illustrating the use of trusts for tax planning purposes).

15. *Morris v. Job Serv.* N.D., 2003 ND 45, ¶ 19, 658 N.W.2d 345, 351.

16. Cynthia J. Wooden, *The Supreme Court of Nebraska Determines a Court's Power to Authorize a Conservator to Exercise an Incompetent Settlor's Reserved Rights to Amend or Revoke Her Trust* in *In re Guardianship and Conservatorship of Garcia*, 36 CREIGHTON L. REV. 47, 47 (2002).

17. *Id.*

18. *Id.*

19. RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. a (2003); see, e.g., N.D. CENT. CODE. § 13-02.1-01(9) (2009) (defining "person" to include trusts under the Uniform Fraudulent Transfer Act); N.D. CENT. CODE. § 14-02.4-02(13) (2009) (defining "person" to include trust in context of domestic relations); N.D. CENT. CODE. § 23-20.3-02(10) (2002) (defining "person" to include trust in the context of hazardous waste management).

20. UNIF. TRUST CODE § 102 cmt. (2006). Commercial trusts, also identified as "business trusts," "common law trusts," "Massachusetts trusts," and "statutory trusts," operate as business entities. See UNIF. STATUTORY TRUST ENTITY ACT prefatory note (2009). While these entities would still be governed by the UTC, even in jurisdictions that explicitly treat them as business entities, it does so only as necessary to supplement the more specific provisions of state law applicable to commercial trusts. See UNIF. STATUTORY TRUST ENTITY ACT § 105 (2009).

21. UNIF. TRUST CODE prefatory note (amended 2005); see also John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1108 (1984) (noting "[p]robate, our court-operated system for transferring wealth at death, is declining in importance" while the popularity of non-probate will substitutes, including life insurance, pension accounts, joint accounts, and revocable trusts, grows).

22. N.D. LEG. COUNCIL, UNIFORM TRUST CODE—BACKGROUND MEMORANDUM, Judiciary Comm., 59th Sess., at 1 (2005), available at <http://www.legis.nd.gov/assembly/59-2005/docs/pdf/79025.pdf> [hereinafter N.D. BACKGROUND MEMORANDUM].

trust law with varying degrees of treatment.<sup>23</sup> The statutory schemes of New York, California, Georgia, Indiana, and Texas were recognized as the most thorough.<sup>24</sup> North Dakota and several other states codified some components of trust law, but those statutory schemes were incomplete and generally involved only basic elements of trust creation and administration.<sup>25</sup> Furthermore, North Dakota's trust laws were based on the California Civil Code, and the majority of the statutes had not changed since their adoption in 1877.<sup>26</sup> North Dakota's pre-UTC scheme had "fairly minimal requirements for trusts and . . . a limited amount of case law on the topic."<sup>27</sup> The ULC promoted adoption by emphasizing that the UTC would promote uniformity, simplify the law, and update obsolete code provisions.<sup>28</sup>

#### IV. ULC METHODOLOGY AND UTC DEVELOPMENT

The ULC has been in existence since 1892. The stated purpose of the organization is to "promote uniformity in the law among the several States on subjects as to which uniformity is desirable and practicable."<sup>29</sup> The ULC consists of commissioners from all fifty states, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands. The only limitation on ULC commissioners is that they be members of the bars of their respective states<sup>30</sup> and that they be appointed commissioner by some authority in the state.<sup>31</sup>

North Dakota's Commission on Uniform State Laws must consist of: a lawyer from North Dakota; the dean or a faculty member from the University of North Dakota; a law-trained judge; a member of the North Dakota House of Representatives; a member of the North Dakota Senate; a member of the Legislative Council Staff; and any person elected a life member of the ULC.<sup>32</sup> Any residents of the state who have been on the Commission for at least five years may also continue to represent the state.<sup>33</sup> The

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23. Martin D. Begleiter, *In the Code We Trust—Some Trust Law for Iowa at Last*, 49 DRAKE L. REV. 165, 172-73 (2001).

24. HESS ET AL., *supra* note 8, § 7, at 67, 69.

25. *See id.*, § 7, at 70-71 (discussing states having nominal statutory trust treatment prior to the development of the UTC).

26. N.D. BACKGROUND MEMORANDUM, *supra* note 22, at 1.

27. *Id.*

28. *Uniform Trust Code Study: Hearing Before the Judiciary Comm.*, 2005 Leg., 59th Sess. 1 (N.D. 2005), available at <http://www.legis.nd.gov/assembly/59-2005/interim-info/minutes/ju091205minutes.pdf> [hereinafter *Uniform Trust Code Study*].

29. UNIF. LAW COMM'N CONST. art. I, § 2.

30. *Id.* art. II, § 5.

31. *Id.* art. II, § 2.

32. N.D. CENT. CODE § 54-55-01 (2009).

33. *Id.*

members of the Legislative Assembly on the Commission are appointed by the Legislative Management.<sup>34</sup> The member of the Legislative Council Staff is appointed by the Chairman of the Legislative Management.<sup>35</sup> The Governor appoints all other members, other than life members who require no appointment.<sup>36</sup> The North Dakota Century Code empowers the North Dakota Commission to submit bills directly to the legislature when it is in session.<sup>37</sup> When the legislature is not in session, the Commission may submit recommendations for enactment to the Legislative Management for its review and recommendation.<sup>38</sup>

The ULC drafted the UTC over seven years.<sup>39</sup> The ULC began by charging a study committee with the task of determining whether a uniform system of trust laws would be prudent.<sup>40</sup> Maurice Hartnett, who served as a Justice on the Delaware Supreme Court and who had extensive involvement in trust law, chaired the study committee and later chaired the drafting committee.<sup>41</sup> The drafting committee sought the advice of several groups, including the American Bar Association (ABA), the ABA's Section of Real Property Probate and Trust Law, the American College of Trust and Estate Counsel, and the American Bankers Association.<sup>42</sup>

The ULC adopted the UTC in August of 2000, with the official comments completed on April 25, 2001.<sup>43</sup> The ABA House of Delegates added its approval of the final text in February of 2001.<sup>44</sup> On May 17, 2002, Kansas became the first state to adopt the UTC.<sup>45</sup> The Kansas adoption included some non-uniform amendments to the UTC, though efforts were made to maintain the uniformity of the UTC as adopted.<sup>46</sup>

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34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* § 54-55-04.

38. *Id.*

39. David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143, 145 (Spring 2002).

40. *Id.*

41. *Id.*

42. *Id.*

43. Unif. Law Comm'rs, *supra* note 5.

44. Robert T. Danforth, *Article Five of the UTC and the Future of Creditors' Rights in Trusts*, 27 CARDOZO L. REV. 2551, 2554 (2006).

45. *Kansas—First UTC State*, UTC NOTES (Nat'l Conference of Comm'rs on Unif. State Laws, Chicago, Ill.), May 2002, at 1, available at <http://www.nccusl.org/nccusl/UTCNotes2Q02.pdf>.

46. *Id.*



Several states began the process of adopting the UTC shortly after its approval.<sup>47</sup> The path to adoption was not always without controversy. The Arizona Legislature adopted the UTC in 2003.<sup>48</sup> The adoption was delayed and then entirely repealed in 2004 due to criticism from a small group of lawyers.<sup>49</sup> The two primary issues of concern were that the UTC diminishes creditor's rights that existed under the common law and that the UTC requires trustees to disclose trust information to beneficiaries, thus interfering with settlors' ability to keep information about their trusts confidential.<sup>50</sup> Proponents of the UTC claim these criticisms are due to misinterpretation of both the UTC and state creditors' rights laws, the latter of which vary significantly among the states.<sup>51</sup>

## V. ADOPTION OF THE UTC IN NORTH DAKOTA

Prior to the adoption of the UTC, the North Dakota trust laws were contained in North Dakota Century Code (N.D.C.C.) chapters 59-01 through 59-05.<sup>52</sup> N.D.C.C. chapter 59-01 set out general provisions.<sup>53</sup> Chapter 59-02 provided for trusts for the benefit of third persons,<sup>54</sup> and chapter 59-03 provided for trusts with relationship to realty.<sup>55</sup> Chapter 59-04 covered the administration of trusts.<sup>56</sup> The Uniform Principal and Income Act was codified in N.D.C.C. chapter 59-04.2.<sup>57</sup> Finally, N.D.C.C. chapter 59-05 addressed powers in relationship to real property.<sup>58</sup> The North Dakota statutes were not as comprehensive as the UTC.<sup>59</sup>

In a desire to update existing law, a bill was introduced before the North Dakota Legislative Assembly in 2005, providing for the adoption of

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47. *Uniform Trust Code Introduced in 9 States*, UTC NOTES (Nat'l Conference of Comm'rs on Unif. State Laws, Chicago, Ill.), Feb. 2002, at 1, available at <http://www.nccusl.org/nccusl/UTCNotes1Q02.pdf> ("The Uniform Trust Code ("UTC") was introduced by the following legislatures in 2001 or 2002: District of Columbia, Kansas, Minnesota, Nebraska, New Mexico, Oklahoma, Tennessee, Utah, and West Virginia.").

48. Danforth, *supra* note 44, at 2554.

49. *Id.*

50. *Id.* at 2556.

51. Suzanne Brown Walsh et al., *What is the Status of Creditors Under the Uniform Trust Code?*, 32 EST. PLAN. 29, 31 (Feb. 2005).

52. N.D. CENT. CODE ch. 59-01 to 59-05 (repealed 2007).

53. *Id.* ch. 59-01.

54. *Id.* ch. 59-02.

55. *Id.* ch. 59-03.

56. *Id.* ch. 59-04.

57. *Id.* ch. 59-04.2.

58. *Id.* ch. 59-05.

59. N.D. LEGIS. COUNCIL, UNIFORM TRUST CODE, Judiciary Comm., 59th Sess., at 305 (2005), available at <http://www.legis.nd.gov/assembly/59-2005/interim-info/final-reports/jufinal.pdf>.

the UTC.<sup>60</sup> The introduction of the bill was controversial, with representatives of the banking industry opposing the bill.<sup>61</sup> A representative from the North Dakota Bankers Association claimed, “[T]he UTC include[d] provisions that compromise [the] privacy of grantors, endanger[ed] estate plans, and interfere[d] with special needs trusts which are established for disabled persons.”<sup>62</sup> Concern was also expressed about the retroactivity of the provisions, and an implication was made the UTC had not been adequately tested in other jurisdictions.<sup>63</sup> The bill failed to pass the Senate because of opposition by the North Dakota Bankers Association, the North Dakota Credit Union League, and the State Bar Association of North Dakota.<sup>64</sup> A common refrain among the bill’s opponents was that North Dakota’s existing laws were adequate and there was no need for change.<sup>65</sup>

Despite the failure of the bill, a resolution was introduced directing the Legislative Council to study the desirability of later adoption.<sup>66</sup> A task force was formed to review the UTC as well as the modified versions adopted by other states.<sup>67</sup> The task force was formed by the State Bar Association, with members selected based on their involvement with trusts, including attorneys who draft trusts, trust company representatives, bank representatives, and attorneys for government agencies.<sup>68</sup> The interim judiciary committee received testimony from the task force, the ULC, the State Bar Association, and the Bankers Association.<sup>69</sup> By the time the interim judiciary committee’s report and recommendations were issued, eighteen states and the District of Columbia had adopted the UTC.<sup>70</sup> Eight more

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60. S.B. 2122, 59th Sess. (N.D. 2005).

61. *Hearing on S.B. 2122 Before the S. Comm. on the Judiciary*, 59th Sess. (N.D. 2005) (statement of Marilyn Foss, North Dakota Bankers Association, before the committee regarding the organization’s opposition to the bill) [hereinafter *Hearing on S.B. 2122*]; see also *id.* (comments of Sen. Thomas L. Trenbeath, expressing disappointment that the Bankers Association and the State Bar Association failed to support the bill despite the endorsement of the Uniform Law Commission).

62. *Id.* (statement of Marilyn Foss, North Dakota Bankers Association, before the committee regarding the organization’s opposition to the bill).

63. *Id.* (statement of Malcolm H. Brown, attorney at law, expressing his opposition to the bill).

64. N.D. BACKGROUND MEMORANDUM, *supra* note 22, at 1.

65. *Hearing on S.B. 2122*, *supra* note 61 (statement of Greg Tschider, North Dakota Credit Union League, expressing the organization’s opposition to the bill).

66. S. Con. Res. 4031, 59th Sess. (N.D. 2005).

67. *Uniform Trust Code Study*, *supra* note 28.

68. *Id.*; see also *Hearing on H.B. 1034 Before the H. Comm. on the Judiciary*, 60th Sess. (N.D. 2007) (excerpt from the final report of the Legislative Council’s Interim Judiciary Committee and comments of Rep. Lawrence R. Klemin) [hereinafter *Hearing on H.B. 1034*].

69. *Hearing on H.B. 1034*, *supra* note 68 (excerpt from the final report of the Legislative Council’s Interim Judiciary Committee).

70. *Id.*

states were considering adoption.<sup>71</sup> The committee noted several states in the region of North Dakota were considering adoption of the UTC, including South Dakota, Iowa, and Montana.<sup>72</sup> The committee ultimately recommended adoption of the UTC, with the changes recommended by the task force.<sup>73</sup> North Dakota's version of the UTC was passed by both the House and Senate and signed into law on March 13, 2007.<sup>74</sup>

## VI. NORTH DAKOTA'S UTC

While one of the primary goals of the adoption of the UTC was to promote uniformity between jurisdictions, the drafters of the UTC have acknowledged some modification may be necessary.<sup>75</sup> UTC drafters indicated language that may be adopted in brackets.<sup>76</sup> The North Dakota Legislature has tailored the UTC by both modifying the bracketed language and by altering other sections of the UTC.<sup>77</sup> The following discussion examines many of those legislative choices.

### A. GENERAL PROVISIONS AND DEFINITIONS

Article I of the UTC, adopted as N.D.C.C. chapter 59-09, sets the context for the UTC.<sup>78</sup> In addition to providing definitions for terms used by the UTC, this section expresses the fundamental nature of the UTC as a gap filler.<sup>79</sup> Generally, the terms of the specific trust, as drafted by the settler, will prevail over the provisions of the UTC.<sup>80</sup> The cases where the UTC would override specific trust provisions are few and mostly unavoidable. For example, the requirements for trust creation, good-faith requirements for trustees, modification authority of courts, and jurisdiction requirements are all unsurprising.<sup>81</sup> These elements are, mostly, fundamental to the UTC and must be in place for a uniform interpretation among states.<sup>82</sup>

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71. *Id.*

72. *Id.*

73. *Id.*

74. *Measure Actions*, N.D. LEGISLATIVE BRANCH, <http://www.legis.nd.gov/assembly/60-2007/bill-actions/ba1034.html> (last visited Dec. 29, 2010).

75. S. Alan Medlin, *The Impact of Significant Substantive Provisions of the South Carolina Trust Code*, 57 S.C. L. REV. 137, 170 (Autumn 2005).

76. *Id.*

77. *See, e.g.*, N.D. CENT. CODE § 59-09-03(16), (19) (2007) (adding definitions).

78. *See generally* UNIF. TRUST CODE overview (2005) (describing the context of the UTC).

79. N.D. CENT. CODE § 59-09-05.

80. *Id.*; UNIF. TRUST CODE overview (2005).

81. *See* N.D. CENT. CODE § 59-09-05.

82. *See id.*

Interestingly, the North Dakota adoption of the UTC failed to include several provisions in the article that relate to rights of beneficiaries.<sup>83</sup> Section 105(b)(2) of the UTC requires “a trustee to act in good faith and in accordance with the terms and purposes of the trust *and the interests of the beneficiaries.*”<sup>84</sup> The North Dakota adoption of the UTC eliminated the provision regarding a mandatory duty of a trustee to act in accordance with beneficiaries’ interests.<sup>85</sup> Gone, too, are two optional bracketed subsections that address beneficiary notice requirements.<sup>86</sup> These modifications suggest an attempt to place more weight on the purposes of the trust, and therefore the settlor’s intent, than on the beneficiaries’ interests.

Also absent from the North Dakota adoption of Article I are the references to “public policy.”<sup>87</sup> Under the common law, both illegal trusts and trusts deemed “contrary to public policy” were void.<sup>88</sup> Trusts violating public policy are those that “tend to induce the commission of unlawful or immoral acts by beneficiaries or would create an improper motive tending to induce conduct that is not in itself unlawful or immoral.”<sup>89</sup> Trusts including “provisions that tend to undermine proper administration of trusts” are also considered against public policy.<sup>90</sup> The North Dakota Legislature has chosen, perhaps wisely, to abandon such murky concepts in favor of allowing settlors to form a trust for any purpose that is not expressly unlawful.<sup>91</sup>

## B. JUDICIAL PROCEEDINGS

Article II of the UTC addresses a trust’s principal place of administration for trusts that span multiple jurisdictions.<sup>92</sup> This section also provides optional provisions addressing jurisdiction and venue. Section 203, which

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83. *See id.*

84. UNIF. TRUST CODE § 105(b)(2) (emphasis added).

85. N.D. CENT. CODE § 59-09-05(2)(b).

86. UNIF. TRUST CODE § 105(b)(8)-(9) (“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 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;] . . .”).

87. UNIF. TRUST CODE §§ 105(b)(3), 107.

88. RESTATEMENT (THIRD) OF TRUSTS § 29 (2003).

89. *Id.* gen. cmt. on cl. (b) and (c).

90. *Id.*

91. The existence of public policy exceptions to trust provisions make it possible for individuals to challenge the validity of a trust without the settlor of that trust having any notice of the potential defect or having the opportunity to repair it. *See Hecker v. Stark Cnty. Soc. Serv. Bd.*, 527 N.W.2d 226, 234-37 (N.D. 1994).

92. UNIF. TRUST CODE overview (2005).

grants jurisdiction to specific courts, is unnecessary in North Dakota because the state has no courts with specific jurisdiction to deal with trust matters; the section was therefore omitted.<sup>93</sup> The UTC section on venue, however, was preserved.<sup>94</sup>

### C. REPRESENTATION

One of the major gaps in the trust law of most states was guidance as it pertained to representatives.<sup>95</sup> North Dakota is a prime example, having provided no guidance in this area.<sup>96</sup> Article III addresses representation of beneficiaries, including representation by fiduciaries, and introduces a concept known as virtual representation.<sup>97</sup>

A representative may serve on behalf of either the settlor or beneficiaries, and has the authority to receive notice and to give binding consent.<sup>98</sup> This authority is limited, however, to representatives who have no conflict of interest with those being represented.<sup>99</sup> UTC section 303 addresses specific representational relationships, including guardian-ward and agent-principal.<sup>100</sup> Specific to North Dakota's adoption of the UTC is the particular guidance provided to parents acting in a representative capacity for their minor or unborn children.<sup>101</sup> While the UTC recognizes parents may represent their children, the North Dakota adoption provides additional guidance to be applied when parents seeking the same child disagree about representative decisions.<sup>102</sup>

UTC section 304 provides for the practice of "virtual representation," where an individual with a substantially identical interest with respect to a particular issue may represent a minor, an incapacitated or unborn person, or someone who is unascertainable.<sup>103</sup> This representative ability is, of course, limited to issues where there is no conflict of interest.<sup>104</sup> UTC

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93. See N.D. CONST. art. VI, § 1.

94. N.D. CENT. CODE § 59-10-04 (2007).

95. UNIF. TRUST CODE art. III gen. cmt.

96. See, e.g., N.D. CENT. CODE ch. 59-01 to -05, -07 (repealed 2007); *id.* ch. 59-04.1 (repealed 1999).

97. UNIF. TRUST CODE art. III gen. cmt.

98. *Id.* § 301.

99. *Id.* § 302.

100. *Id.* § 303.

101. *Id.* § 303(6).

102. A parent who is a beneficiary of the same trust as the child may represent the child. If both parents, or neither parent, are beneficiaries of the trust, then the one who is the lineal descendant of the settlor may represent the child. If neither parent is a lineal descendant of the settlor nor a beneficiary of the trust, then a guardian ad litem must be appointed. N.D. CENT. CODE § 59-11-03(6) (2007).

103. *Id.* § 59-11-04.

104. *Id.*

section 305 provides for the appointment of a representative to handle non-judicial settlements or to receive notice on behalf of the beneficiary.<sup>105</sup> This provision is intended to remedy concern over adequacy of representation in nonjudicial settings.<sup>106</sup> Ironically, this provision requires a court order to effectuate a representative in nonjudicial circumstances, and thus has been critiqued for being at odds with a fundamental cornerstone of the UTC: keeping trust administration out of court.<sup>107</sup>

#### D. TRUST CREATION, VALIDITY, MODIFICATION, AND TERMINATION

The creation of trusts under the UTC essentially codifies the common law for express trusts.<sup>108</sup> However, the UTC also expressly allows the use of trusts for purposes that were not allowed under the common law. The UTC specifically allows settlors to create trusts for the benefit of animals.<sup>109</sup> Under the common law, these trusts generally failed for lack of an ascertainable beneficiary, although some courts would enforce such trusts as “honorary trusts.”<sup>110</sup> The UTC also specifically codifies honorary trusts.<sup>111</sup> Additionally, the Uniform Probate Code has been amended to allow trusts for animals.<sup>112</sup>

The UTC provides three methods to create a trust: the transfer of property to a trustee during the settlor’s lifetime or at death; declaration by the settlor who is also the trustee that the property is being held in trust; or the exercise of a power of appointment in favor of the trustee.<sup>113</sup> Of these methods, the oral declaration of trust can create the most difficulty because

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105. UNIF. TRUST CODE § 305 cmt. (2006).

106. Martin D. Begleiter, *Serve the Cheerleader—Serve the World: An Analysis of Representation in Estate and Trust Proceedings and Under the Uniform Trust Code and Other Modern Trust Codes*, 43 REAL PROP. TR. & EST. L.J. 311, 347 n.159 (Summer 2008).

107. *Id.* at 349-50 n.174.

108. N.D. CENT. CODE §§ 59-09-05 to -10.

109. *Id.* § 59-12-08.

110. *In re Estate of Searight*, 95 N.E.2d 779, 782 (Ohio Ct. App. 1950). Honorary trusts are non-charitable trusts that fail as trusts because of a lack of an ascertainable beneficiary but are allowed to exist because the trustee agrees to be bound by the trust’s terms. *Id.* At common law, honorary trusts were typically limited to a twenty-one year existence because of the application of the rule against perpetuities. *Id.* at 783.

111. N.D. CENT. CODE § 59-12-09. These trusts overcome the primary concern caused by the lack of an ascertainable beneficiary, the lack of a person with the power to enforce the trust, by allowing either the settlor or a court to name someone who will have that power.

112. The ULC amended the Uniform Probate Code to allow for pet trusts in 1993. UNIF. PROBATE CODE § 2-907(c) (1993). North Dakota did not amend its version of the Uniform Probate Code to include that provision.

113. N.D. CENT. CODE § 59-12-01.

of the lack of a written record.<sup>114</sup> With the adoption of the UTC, North Dakota repealed the existing law that allowed the creation of trusts for real property by any acts or words on the part of the settlor that indicated with certainty the intent to create a trust, the subject, purpose, and the beneficiary.<sup>115</sup> While this statute allows oral declarations of trust generally, a separate provision, one that is not a part of the UTC, imposes the obligation that any trust relating to real property must be created or declared by a written instrument subscribed by the trustee, by an instrument under which the trustee claims the estate affected, or by operation of law.<sup>116</sup>

Perhaps the UTC's most significant change from the common law is in the area of trust modification. Under the common law, absent some reservation of the ability to modify a trust in the trust agreement,<sup>117</sup> trusts could only be amended if very specific circumstances existed.<sup>118</sup> The difficulty in trust modification exists to protect settlor intent. While the UTC still maintains consistency with the settlor's intent as the most important aspect of trust administration, it adds six specific provisions designed to enhance flexibility.<sup>119</sup>

The first section allows modification or termination of a trust with the consent of all the beneficiaries, so long as doing so is not inconsistent with a material purpose of the trust.<sup>120</sup> It is noteworthy that North Dakota did not adopt optional section 411(c) of the UTC.<sup>121</sup> This section would have eliminated the presumption that spendthrift provisions are a material purpose of the trust. It can fairly be concluded the existence of spendthrift

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114. While the official comments to the UTC acknowledge the difficulties that can result from oral declarations of trust, the comments only express a preference for more formal modes of transfer.

115. N.D. CENT. CODE § 59-01-04.

116. *Id.* § 59-12-14. This provision insures real estate trusts will be in compliance with the statute of frauds.

117. Settlers could both reserve the right to amend a trust to themselves and to others. The extent of the right to revise impacted the nature of the trust. An extensive right to amend may, for example, make the trust revocable.

118. *See In re Trust of Stuchell*, 801 P.2d 852, 853-54 (Or. Ct. App. 1990). This should be contrasted with the somewhat easier standard for amending a charitable trust under the doctrine of *cy pres*. A charitable trust could be amended or terminated if its purposes became unlawful, impracticable, or impossible to achieve. The UTC expands *cy pres* to allow the modification or termination of charitable trusts that become wasteful. The lower standard for *cy pres* can be explained by the fact the property in the trust will be applied in a manner consistent with the settlor's original intent, rather than reverting to the settlor.

119. UNIF. TRUST CODE art. IV cmt. (2006).

120. N.D. CENT. CODE § 59-12-11(1). North Dakota did not adopt an optional provision from UTC section 411(a) that would have allowed the modification or termination of a trust with the consent of all the beneficiaries and the settler, even if the modification or termination is inconsistent with a material purpose of the trust.

121. *See* UNIF. TRUST CODE § 411(c). North Dakota adopted sections 411(b), (d), and (e) of the UTC as N.D.C.C. sections 59-12-11(1), (2), and (3).

provisions in a trust will thus render the trust non-modifiable by consent under North Dakota law. If a beneficiary is unable to consent, a court can still allow the modification or termination if the non-consenting beneficiary's interests are adequately protected.<sup>122</sup> This provision represents a codification of the *Clafin* doctrine.<sup>123</sup> It should be contrasted with the law in the United Kingdom that allows the modification of a trust whenever all the beneficiaries agree, regardless of any material purpose of the settlor.<sup>124</sup>

The greatest broadening of the power of modification can be seen in the UTC's allowance of modification or termination because of unanticipated circumstances. "[T]he court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust."<sup>125</sup> Prior North Dakota law only allowed a trust's termination when its object became impossible or unlawful.<sup>126</sup> Modification of a trust was only allowed if the unanticipated circumstance "would defeat or substantially impair the accomplishment of the purposes of the trust[;]" that is, one could not argue what the settlor would have done if confronted with the new conditions.<sup>127</sup>

The UTC allows the modification or termination of trusts solely because the "value of the trust property is insufficient to justify the cost of administration."<sup>128</sup> If the value of the trust property is less than \$100,000, a trustee may terminate the trust after giving notice to the qualified beneficiaries and making an affirmative conclusion the value is insufficient to justify administration.<sup>129</sup> Courts may not only terminate a trust, but can also modify its terms or remove and replace the trustee if the court determines the value of the trust property is insufficient.<sup>130</sup> If either the trustee or the court decides to terminate the trust, the trust property must be distributed in a manner consistent with the purposes of the trust.<sup>131</sup>

Another significant deviation from the common law is the UTC's treatment of reformation to correct mistakes. Under the common law "plain

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122. N.D. CENT. CODE § 59-12-11(3).

123. See generally *Clafin v. Clafin*, 20 N.E. 454 (Mass. 1889) (holding a trust payable to a beneficiary on attaining age thirty cannot be terminated prematurely because the age restriction on termination was a valid limitation on the distribution of the assets).

124. See *DUKEMINIER, SITKOFF & LINDGREN*, *supra* note 6, at 641-42.

125. N.D. CENT. CODE § 59-12-12(1).

126. *Id.* § 59-02-17 (repealed 2007).

127. RESTATEMENT (SECOND) OF TRUSTS § 167 (1959).

128. N.D. CENT. CODE § 59-12-14.

129. *Id.* § 59-12-14(1).

130. *Id.* § 59-12-14(2). Courts may consider the economic viability of a trust regardless of the value of the corpus.

131. *Id.* § 59-12-14(3).



meaning rule,” testamentary trusts could not be amended to fix mistakes.<sup>132</sup> The UTC removes any limitations on a court’s ability to hear evidence concerning mistakes, and the subsequent ability to fix any mistakes uncovered.<sup>133</sup> The evidence as to the existence of the mistake and the true intent of the settlor must be clear and convincing.<sup>134</sup> The mistake of the settlor may be one of either fact or law and may be in either the expression or the inducement.<sup>135</sup>

One interesting provision of the UTC has no analog in prior common or statutory law. Settlor’s often form trusts with the expectation state and federal tax laws will continue to apply to the trust in roughly the same manner as they do when the trust is established. While changes in tax law are often enacted with grandfather provisions that allow a trust to be amended to comply with the new law,<sup>136</sup> these provisions assume a process for amending the trusts exists under state law. The UTC allows a court to amend a trust to achieve the settlor’s tax objectives as long as the modifications are consistent with “the settlor’s probable intention[;]” in other words, the court must determine what the settlor would have done if the settlor were aware of the new tax laws.<sup>137</sup> The court is even authorized to give these changes retroactive effect.<sup>138</sup>

Finally, the UTC clarifies rules regarding the combination or division of trusts.<sup>139</sup> After notifying the beneficiaries, the trustee may combine trusts or divide trusts unless doing so will “impair the rights of any beneficiary or adversely affect achievement of the purposes of the trust.”<sup>140</sup> The trustee can determine the terms of the resulting trusts with some flexibility to alter the terms as long as the rights of the beneficiaries are substantially the same.<sup>141</sup> The UTC does not address the question of whether a trust with

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132. LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW 12-8 (4th ed. 2006). Under the plain meaning rule, if the words of a trust agreement have a plain meaning, a court cannot consider evidence that the settlor intended something other than the plain meaning.

133. N.D. CENT. CODE § 59-12-15.

134. *Id.*

135. *Id.*

136. *See, e.g.*, Treas. Reg. 26.1601-1(b). The generation-skipping tax does “not apply to any generation[-]skipping transfer under a trust . . . that was irrevocable on September 25, 1985.” The Treasury enacted additional regulations outlining the extent to which irrevocable trusts could be modified without being considered a new trust that would be subject to the generation-skipping tax. Treas. Reg. 26.2601-1(b)(4).

137. N.D. CENT. CODE § 59-12-16.

138. *Id.*

139. *Id.* § 59-12-17.

140. *Id.*

141. This means divided trusts do not have to have the same terms as one another or the original trust if the beneficiaries have different rights under that trust. The trustee must also determine a single set of terms to govern a combined trust that will fairly represent the interests of the beneficiaries under the trusts being combined.

a value in excess of \$100,000 could be divided into two trusts with lesser values, thus allowing the trustee to terminate those trusts if it determines the value of the trust property does not justify the cost of administration.<sup>142</sup> Some have speculated such an action would be impermissible if part of a plan for the early termination of a trust.<sup>143</sup>

#### E. CHARITABLE TRUSTS

While charitable trusts are generally required to meet the same requirements as any other trust, the UTC does contain some provisions that apply specifically to charitable trusts. As under the common law, a charitable trust need not have an ascertainable beneficiary under the UTC.<sup>144</sup> The UTC allows enforcement of a charitable trust by the settlor and the attorney general, “among others.”<sup>145</sup> The granting of this right to the settlor is a change from the common law.<sup>146</sup> The extent the “among others” language allows others to enforce the terms of a charitable trust is not as clear; the official comment only refers to people with “special interests.”<sup>147</sup> Under the common law, the number of people with a special interest was quite limited.<sup>148</sup> The courts in some states, however, have been broadening the definition of special interest to allow individuals, other than the attorney general or those with directly affected interests, to enforce charitable trusts.<sup>149</sup>

The UTC codifies and broadens the application of *cy pres* to charitable trusts.<sup>150</sup> While the common law ability is retained to reform charitable

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142. N.D. CENT. CODE § 59-12-14. See *supra* text accompanying note 130.

143. Alan Newman, *The Uniform Trust Code: An Analysis of Ohio's Version*, 34 N.U.L. REV. 135, 159-60 n.154 (2008) (citing UNIF. TRUST CODE § 414 cmt. (2006)).

144. N.D. CENT. CODE § 59-12-02(1). If a charitable trust designates a charitable organization as eligible to receive distributions, that organization has the rights of a qualified beneficiary under the UTC, including the right to enforce the terms of the trust. *Id.* § 59-09-10.

145. *Id.* § 59-12-05(3).

146. See RESTATEMENT (SECOND) OF TRUSTS § 391 (1959).

147. UNIF. TRUST CODE § 405 cmt. (2006).

148. See MARK L. ASCHER ET AL., SCOTT AND ASCHER ON TRUSTS § 37.3.10, at 2441 (5th ed. 2008) (identifying persons “entitled to benefits under the trust that are greater than or different from those to which members of the public are entitled generally;” for example, the current minister of a church that is the designated beneficiary of a charitable trust has standing to enforce that trust). Further, the Second Restatement of Trusts states:

A suit can be maintained for the enforcement of a charitable trust by the Attorney General or other public officer, or by a co-trustee, or by a person who has a special interest in the enforcement of the charitable trust, but not by persons who have no special interest or by the settlor or his heirs, personal representatives or next of kin.

RESTATEMENT (SECOND) OF TRUSTS § 391 (1959).

149. *Smithers v. St. Luke's-Roosevelt Hosp. Ctr.*, 723 N.Y.S.2d 426, 426 (App. Div. 2001).

150. N.D. CENT. CODE § 59-12-13.

trusts that become unlawful, impracticable, or impossible,<sup>151</sup> the UTC also allows *cy pres* when a charitable trust is merely wasteful.<sup>152</sup> Perhaps more importantly, the UTC also modifies the common law with regard to intent. *Cy pres*, as applied in most jurisdictions, only allowed a court to modify the terms of a charitable trust if the court found the beneficiary had a general charitable intent.<sup>153</sup> The UTC now presumes the settlor had a general charitable intent, thus allowing the court to reform the terms of the charitable trust. While a charitable trust that is unlawful, impracticable, impossible, or wasteful might still fail if the settlor had only a specific charitable intent, the burden falls on the party opposing reformation to establish that fact.<sup>154</sup> A provision in the charitable trust that provides for the distribution of property to a non-charitable trust beneficiary denies a court the power to apply *cy pres* to the trust.<sup>155</sup>

#### F. THE RIGHTS OF CREDITORS OF TRUST BENEFICIARIES

The provisions dealing with the right of trust beneficiary creditors to pursue trust assets caused the most debate for the ULC.<sup>156</sup> The drafting committee made several choices regarding the rights of creditors that conflict with the policy choices made by some states.<sup>157</sup>

##### 1. Spendthrift Trusts

The common law has long recognized the validity of spendthrift trusts, and the UTC does not change their general validity.<sup>158</sup> Creation of a spendthrift trust requires an affirmative act on the part of the settlor, but the settlor need only say the interest of the beneficiary is “held subject to a ‘spendthrift’ trust, or word of similar import” to be effective.<sup>159</sup> The UTC specifically provides creditors or assignees may not reach the interest of a beneficiary of a spendthrift trust.<sup>160</sup> Creditors or assignees may, however,

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151. RESTATEMENT (THIRD) OF TRUSTS § 67 (2003).

152. N.D. CENT. CODE § 59-12-13(1).

153. See RESTATEMENT (SECOND) OF TRUSTS § 399 (1959).

154. UNIF. TRUST CODE § 413 cmt. (2005).

155. N.D. CENT. CODE § 59-12-13(2).

156. English, *supra* note 39, at 180.

157. See English, *supra* note 39, at 181-82. For example, the UTC specifically prohibits a settlor from retaining an interest in a spendthrift trust, while Alaska, Delaware, Rhode Island, and Nevada all allow for that possibility. *Id.* at 182 n.175.

158. N.D. CENT. CODE § 59-13-02; RESTATEMENT (THIRD) OF TRUSTS § 58 (2003).

159. N.D. CENT. CODE § 59-13-02(2). While the UTC retains the common law requirement that spendthrift trusts had to restrain both voluntary and involuntary transfers, the trust need only identify itself as a spendthrift trust to both attain spendthrift status and to impose voluntary and involuntary restrictions.

160. *Id.* § 59-13-02(3).

reach the interests of beneficiaries of trusts that do not contain a spendthrift provision.<sup>161</sup> After distribution of trust assets to the beneficiary, the trust assets become subject to attachment like any other property held by the beneficiary.<sup>162</sup>

The UTC limits a trustee's ability to restrict mandatory distributions to frustrate the creditor's ability to reach assets in the hands of the beneficiary.<sup>163</sup> If a trustee must make distributions to a beneficiary, but fails to do so, a creditor may reach those distributions while still in the hands of the trustee.<sup>164</sup> It should be noted a mandatory distribution subject to a discretionary standard would not be considered mandatory for these purposes.<sup>165</sup> The only limitation is the creditor must wait until a reasonable time has passed since the designated distribution date.<sup>166</sup>

The UTC contains exceptions to the enforcement of spendthrift provisions. The largest of these exceptions may be claims due on a judgment or court order for support or maintenance by a child, spouse, or former spouse.<sup>167</sup> This limitation, however, only puts the claimants in the same position they would be in as creditors of a non-spendthrift trust—that is, while they can attach to present or future distributions, they must wait until such distributions are made.<sup>168</sup> However, unlike general creditors, spouses and children have standing to force trustees to make a distribution if they have “not complied with a standard of distribution or have abused their discretion.”<sup>169</sup>

While theoretically applying to others, the most likely persons to benefit from the inability to enforce a spendthrift trust are those “who provided services for the protection of a beneficiary's interest in the trust[,]” or the beneficiary's attorney.<sup>170</sup> The drafting committee justifies this exception as being necessary to allow “a beneficiary of modest means to overcome an obstacle preventing the beneficiary's obtaining services essential to the

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161. *Id.* § 59-13-01.

162. *Id.* § 59-13-02 (prohibiting attachment of assets “before its receipt by the beneficiary”).

163. *Id.* § 59-13-06.

164. A mandatory distribution is one the trustee is required to make and excludes any distribution that is subject to an exercise of the trustee's discretion. *Id.* § 59-13-06.

165. For example, a trustee may be obligated to make distributions when he or she determines such a distribution is necessary for a beneficiary's health, education, support, and maintenance. Despite the fact the beneficiary would have the right to force such a distribution, it would not be treated as mandatory for purposes of a creditor's rights. Newman, *supra* note 143, at 164.

166. N.D. CENT. CODE § 59-13-07. The UTC does not provide any standard for reasonable time.

167. *Id.* § 59-13-03(2)(a).

168. *Id.* § 59-13-03(4); *see* discussion *supra* Part VI.F.2.

169. N.D. CENT. CODE § 59-13-04.

170. *Id.* § 59-13-2(b).

protection or enforcement of the beneficiary's rights under the trust."<sup>171</sup> Unlike family creditors, however, the person who provides services does not have the ability to compel a distribution that is subject to a trustee's discretion.<sup>172</sup>

The UTC excludes governmental claims from spendthrift provisions as well.<sup>173</sup> Exceptions for claims by state or federal governments are not surprising. Moreover, claims by the federal government cannot be barred under state law.<sup>174</sup> Under the preemption doctrine, federal law, not state law, determines the extent to which a spendthrift clause can limit claims of the United States.<sup>175</sup> The exception for claims by the states merely ensures if a state statute allows for claims against spendthrift trusts, the general provisions of the UTC enforcement spendthrift provisions will not render those statutes unenforceable. Absent some specific allowance in a state statute, however, claims by a state are barred.<sup>176</sup>

## 2. *Non-Spendthrift Trusts*

Trusts that do not contain spendthrift provisions may be wholly mandatory, wholly discretionary, or some combination of the two. The ability of creditors to reach the interest of a beneficiary depends on the existence and nature of trustee discretion. If a trust is wholly mandatory, a court may "authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions . . . ."<sup>177</sup> The court may limit the award as is appropriate under the circumstances.<sup>178</sup> As discussed below, the UTC authorizes the creditor to pursue the trustee directly if a mandatory distribution has not been made within a reasonable time after the designated time for distribution has passed.<sup>179</sup> Mandatory distributions are narrowly defined. Only distributions a trustee is required to make, including distributions on termination of the trust, are included.<sup>180</sup> Distributions that are subject to a standard of

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171. UNIF. TRUST CODE § 503 cmt. (2005) (citing RESTATEMENT (THIRD) OF TRUSTS § 59 cmt. d (2003)).

172. N.D. CENT. CODE § 59-13-04(2).

173. *Id.* § 59-13-03(2)(c).

174. ASCHER ET AL., *supra* note 148, § 15.5.4.

175. While the federal government is not subject to state law regarding the application of spendthrift provisions, state property law may actually defeat a claim of the United States if the beneficiary of a spendthrift trust is not deemed to have any "property rights" to which a federal claim can attach. *See* United States v. O'Shaughnessy, 517 N.W.2d 574, 577 (Minn. 1994).

176. Newman, *supra* note 143, at 165.

177. N.D. CENT. CODE § 59-13-01.

178. *Id.*

179. *Id.* § 59-13-06(2).

180. *Id.* § 59-13-06(1).

distribution, even if the beneficiary could require the trustee to make the distribution, are not covered.<sup>181</sup>

While the general language allowing the attachment of a present or future interest equally applies to a wholly discretionary trust, the creditor is unable to actually enforce the attachment unless the trustee decides to make a distribution.<sup>182</sup> The creditor is generally prohibited from stepping into the shoes of the beneficiary to force a distribution.<sup>183</sup> This limitation can even apply to claims against a trust where the trustee is also a beneficiary.<sup>184</sup> The drafters of the UTC were mindful that many estate planning trusts provide for distributions from principal for the benefit of a surviving spouse. Under federal estate tax law, such distributions must be subject to an ascertainable standard to avoid inclusion of the entire trust principal in the surviving spouse's estate.<sup>185</sup> Surviving spouses also typically serve as trustees of these trusts. In order to avoid inadvertently exposing all of the principal of such a trust to the claims of creditors, the drafters decided the fact that the surviving spouse was the trustee should not be a factor in determining whether the assets should be exposed to creditors.<sup>186</sup> Thus, if a distribution by a trustee to herself is subject to an ascertainable standard, creditors will only be able to reach the distribution if they could reach it were the trustee not a beneficiary.<sup>187</sup> The UTC does not take a position on whether distributions not subject to an ascertainable standard from trustees to themselves should receive the same protection.<sup>188</sup> Some trusts can have both mandatory and discretionary provisions, like mandatory distributions of income with discretionary distributions of principal subject to an ascertainable standard. Courts should apply the rules appropriate to the type of distribution the creditor wishes to attach.

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181. *Id.*

182. *See id.* § 59-13-01.

183. “[A] creditor of a beneficiary may not compel a distribution that is subject to the trustee’s discretion, even if the discretion is expressed in the form of a standard of distribution, or the trustee has abused the discretion.” *Id.* § 59-13-04(2). *See also id.* § 59-13-04(3) (discussing the exception that applies to claims made by children, spouses, and former spouses of the beneficiary).

184. *Id.* § 59-13-04(5).

185. The power to invade the corpus for the benefit of the spouse that is “limited by an ascertainable standard relating to the health, education, support or maintenance” of the spouse is not considered a power of appointment that must be included in the spouse’s estate. I.R.C. § 2041(b)(1)(A) (West 2010).

186. UNIF. TRUST CODE § 504 cmt. (2005).

187. N.D. CENT. CODE § 59-13-04(5).

188. RESTATEMENT (THIRD) OF TRUSTS § 60 cmt. g (2003) (explaining the beneficial interest of a beneficiary/trustee may be reached by the beneficiary/trustee’s creditors).

### 3. *Claims Against the Settlor*

Creditors of a settlor also have a limited ability to pursue a trust's assets while the settlor is alive.<sup>189</sup> If the trust is a revocable trust, the property in the trust can be subject to the claims of the settlor's creditors to the extent the property will be subject to those claims had it not been in trust.<sup>190</sup> If the trust is irrevocable, a creditor can only reach the amount of the trust that could be distributed for the settlor's benefit.<sup>191</sup> Thus, creditors can only reach an irrevocable trust if the settlor is also a beneficiary. When the settlor is also a beneficiary, the creditor can reach the full amount that *could* be distributed. This means the settlor/beneficiary does not receive any of the benefits a non-settlor/beneficiary receives when distributions are subject to trustee discretion.<sup>192</sup>

The rights of creditors to pursue trust assets continue after the settlor dies if the settlor could revoke the trust.<sup>193</sup> The exposure is not only to creditors of the settlor, but to the costs of estate administration, the expenses of the settlor's funeral and remains disposal, and the statutory allowances for the spouse and the children to the extent the probate estate is insufficient.<sup>194</sup> The UTC treats individuals with the power to withdraw property from a trust as if they were settlors of revocable trusts, at least to the extent of the power.<sup>195</sup> If the holder of the power allows it to lapse, releases, or waives it, the person will only be treated as a settlor to the extent the power exceeds the greater of five percent of the trust's value or \$10,000.<sup>196</sup>

#### G. REVOCABLE TRUSTS

The common law of trust developed when revocable trusts served, at best, as supplemental to passing estates by will. As revocable trusts have taken an ever greater role in supplanting wills as the mechanism for

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189. N.D. CENT. CODE § 59-13-05.

190. *Id.* § 59-13-05(1).

191. *Id.*

192. *Id.* If the trust should have more than one settlor, the amount that can be reached cannot exceed the portion of the trust attributable to the particular settlor whose claims are being satisfied. *Id.*

193. *Id.*

194. *Id.* The statute providing for spouses and children can be found in N.D.C.C. title 30.1, North Dakota's adoption of the Uniform Probate Code, and in chapter 47-18, the homestead exception.

195. *Id.* § 59-13-05(2).

196. *Id.* The limitations come from the Internal Revenue Code sections 2041(b)(2) and 2514(e), which define the five and five power—the release of a power of appointment is only treated as a gift to the extent it exceeds five percent of the value of the trust or \$5,000—and section 2503(b), which identifies the annual exclusion gifts.

transferring property at death, the common law of trusts often failed to help trusts fill the will substitute role. The UTC, in recognition of this fact, adopts numerous rules dealing specifically with revocable trusts.<sup>197</sup> The UTC incorporated the mental capacity requirements for wills for the creation of revocable trusts.<sup>198</sup> This should be contrasted with the requirement to make a non-revocable trust, where the settlor need only have the “capacity to create a trust.”<sup>199</sup> The UTC also incorporates the will concepts of fraud, duress, and undue influence, although these concepts apply to all trusts.<sup>200</sup> Those who wish to contest the validity of a revocable trust must do so by the earlier of three years after the death of the settlor or 120 days after the trustee notified the person of the trust’s existence.<sup>201</sup> Although not perfectly clear from the statutory language, notice may not be given until the death of the settlor because the revocability of the trust at the death of the settlor cannot be known until then. Those who will use revocable trusts as a will substitute and wish to protect against the possibility of challenges being mounted after the settlor dies would be well advised to bring an action for ante-mortem probate of a pour-over will under North Dakota law.<sup>202</sup>

Prior North Dakota law presumed irrevocability of trusts.<sup>203</sup> All trusts created after August 1, 2007, are presumed to be revocable absent an express statement in the trust that it be irrevocable.<sup>204</sup> A settlor who has

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197. N.D.C.C. chapter 59-14 contains rules that apply exclusively to revocable trusts, while other sections of the UTC have provisions that apply different rules to revocable trusts. *E.g., id.* § 59-13-05(1) (allowing creditors of the estate of the settlor of a revocable trust to reach all of the trust assets, while no similar right is granted to the creditors of the estate of a settlor of an irrevocable trust).

198. “The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will.” *Id.* § 59-14-01.

199. *Id.* § 59-12-02(1). The capacity to make an irrevocable trust is the same as the capacity one must have to make a gift of property. UNIF. TRUST CODE § 402 cmt (2005).

200. N.D. CENT. CODE § 59-12-06.

201. *Id.* § 59-14-04(1). The notice must also include a copy of the trust instrument, the trustee’s name and address, and notice of the time allowed for commencing a proceeding.

202. *Id.* ch. 30.1-08.1. The probate process allows a testator to institute an action for a declaratory judgment regarding the validity of the will as to the testamentary capacity and freedom from undue influence of the testator. *Id.* The declaratory judgment can also speak to the validity of the signature on the will and the required number of witnesses and their signatures. While the provision does not apply to trusts, a court ruling on the validity of a pour-over will signed at the same time as a trust agreement should provide more than ample evidence of a settlor’s capacity to make a trust.

203. *Id.* § 59-02-18 (repealed 2007).

204. *Id.* § 59-14-02(1). The effective date protects settlors who created trusts prior to the adoption of the UTC, with the intention the trusts be irrevocable, and who relied on the prior law, that such irrevocability need not be expressly stated. The drafting committee expects the provision to have limited impact because “professional drafters habitually spell out whether or not a



retained the power to revoke is also presumed to have retained the power to amend that trust.<sup>205</sup> Because that settlor could have revoked the trust and then created a new trust with amended terms, this is not much of an extension of the settlor's power. Amendment or revocation of a revocable trust requires the settlor to substantially comply with any method provided by the trust for that action.<sup>206</sup> If the trust does not provide for a method, or provides for a nonexclusive method, the settlor may use any method "manifesting clear and convincing evidence of the settlor's intent."<sup>207</sup> This includes the ability to amend the trust by a later executed will or codicil that expressly refers to the trust.<sup>208</sup>

The power to amend or revoke a revocable trust is personal to the settlor, but the UTC clarifies when that power may be exercised by someone else on behalf of the settlor. An agent may act on behalf of the settlor, but only if the power to amend, revoke, or distribute trust property has been expressly granted to the agent under the trust or the power.<sup>209</sup> If the settlor's capacity has become the subject of legal action, the powers to amend, revoke, or distribute trust property can be exercised by the appointed conservator, or if no conservator has been appointed, by the settlor's guardian, but "only with the approval of the court supervising the conservatorship or guardianship."<sup>210</sup>

The UTC makes considerable changes to the general rules of trusts dealing with the relationship between the trustee and the beneficiaries. While trustees generally owe a duty of impartiality that requires trustees to give "due regard" to the respective interests of multiple beneficiaries,<sup>211</sup> during the time a trust is revocable, "rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor."<sup>212</sup> This is true even if the settlor is incapacitated. While others

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trust is revocable." UNIF. TRUST CODE § 602 cmt. The provision may have more impact with trusts established by people without the help of professionals.

205. UNIF. TRUST CODE § 601 cmt.

206. N.D. CENT. CODE § 59-14-02(3).

207. *Id.*

208. *Id.* This is a change from the common law, where changes to a revocable trust could not be effectuated by a will unless the settlor specifically reserved the power to do so. *See Connecticut Gen. Life Ins. Co. v. First Nat'l Bank*, 262 N.W.2d 403, 405 (Minn. 1977); RESTATEMENT (SECOND) OF TRUSTS § 330 cmt. j (1959).

209. N.D. CENT. CODE § 59-14-02(5).

210. *Id.* § 59-14-02(6).

211. *Id.* § 59-16-03. The most difficult aspect of this duty is the ability to balance the interests of the income and remainder beneficiaries.

212. *Id.* § 59-14-03(1). The drafters of the UTC provided states with the included option to limit the exclusivity to the time when the settlor has the capacity to revoke the trust. The expressed justification was this would allow beneficiaries to "request information concerning the trust" and receive other reports and information from the trustee. UNIF. TRUST CODE § 603 cmt.

have suggested this is a problem that should be rectified by granting other beneficiaries the right to receive and enforce the duties,<sup>213</sup> this concern seems overstated. Any beneficiary who suspects a trustee has failed to fulfill its duties to an incapacitated settlor can petition a court to appoint a conservator for that settlor, providing a person who can enforce the trust. Even if a court feels a conservator is unnecessary, it can appoint a person to represent the settlor's interests.<sup>214</sup>

## H. THE TRUSTEE

The provisions of the UTC concerning trustees can be roughly divided into three groups: those concerning the office generally; those concerning the duties and powers of the trustee; and those dealing with trustee liability.<sup>215</sup>

### 1. *The Office of Trustee*

N.D.C.C. chapter 59-15 contains the general rules concerning the office of the trustee. However, these default rules can generally be changed by the terms of the trust.<sup>216</sup> A person does not become a trustee until he or she accepts the position. The terms of the trust may provide for an exclusive method of acceptance, and the position is accepted by substantially complying with that method.<sup>217</sup> If the trust does not provide an exclusive method for acceptance, a person may accept the trusteeship by "accepting delivery of the trust property, exercising power or performing duties as trustee, or otherwise indicating acceptance of the trusteeship."<sup>218</sup> A person may decline the trusteeship anytime before acceptance.<sup>219</sup> However, if a designated person does not accept the proffered trusteeship within a reason-

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The North Dakota Legislature decided to exclude the bracketed language and maintain the trustee's duties as being owed solely to the settlor while the trust is revocable.

213. Newman, *supra* note 143, at 177-78.

214. See N.D. CENT. CODE § 59-11-05. While this section is designed to deal with the problems associated with minor and unascertained beneficiaries, the language allows its application anytime a "court determines that an interest is not represented under this chapter, or that the otherwise available representation might be inadequate[.]" *Id.* § 59-11-05(1).

215. The trustee is, of course, heavily impacted by other provisions of the N.D.C.C. For example, the Uniform Principal and Income Act and the Uniform Probate Code both contain numerous provisions that impact the duties that apply to trustees.

216. *Id.* The settlor may not alter the power of a court to require, dispense with, modify, or terminate a bond, or the ability of a court to adjust a trustee's compensation. *Id.* § 59-09-05(2)(f)-(g).

217. *Id.* § 59-15-01(1). Although not explicitly stated, any method of acceptance that does not demonstrate the necessary intent on the part of the nominated person to accept the trusteeship would not cause the person to be trustee. See UNIF. TRUST CODE § 701 cmt.

218. UNIF. TRUST CODE § 701.

219. N.D. CENT. CODE § 59-15-01(2). Once a person has accepted the trusteeship, the person may only leave the trusteeship by resigning under N.D.C.C. section 59-15-05.

able time after knowing of the designation, the trusteeship is deemed declined.<sup>220</sup> A designated person in possession of trust property may act to preserve that property without being deemed to have accepted the position as trustee.<sup>221</sup> However, the designated person must provide notice to the settlor that the designated person has declined the trusteeship.<sup>222</sup>

Should a trust have more than one trustee, the UTC allows trustees to make decisions by majority vote.<sup>223</sup> This is a change from the common law presumption that multiple trustees must act by unanimous vote.<sup>224</sup> The UTC also provides clear rules regarding co-trustees who cannot, or choose not to, perform certain trustee functions. The general rule is that all trustees must participate in the performance of a trustee function.<sup>225</sup> A trustee who is unable to perform the function because of absence, illness, disqualification under another law, or some other temporary incapacity need not perform the trustee's function.<sup>226</sup> A trustee also need not participate in the performance of a function if the function has been properly delegated.<sup>227</sup> The drafters prohibited a trustee from delegating any "function the settlor reasonably expected the trustees to perform jointly."<sup>228</sup> The North Dakota Legislature allowed a trustee to delegate any function "other than a function that the terms of the trust expressly require to be performed by the trustees jointly."<sup>229</sup> This is a change from the common law, which provided certain core functions could never be delegated.<sup>230</sup>

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220. *Id.* § 59-15-01(2). The drafters intended this provision to protect the trust from the inaction that can result if a designated trustee neither accepts nor declines within a reasonable time. UNIF. TRUST CODE § 701 cmt.

221. N.D. CENT. CODE § 59-15-01(3). In addition to preserving the trust property, the designated person has the specifically provided power to inspect or investigate the trust property to determine potential liability under "environmental or other law or for any other purpose." *Id.*

222. *Id.* If the settlor is no longer living or otherwise lacks capacity, the designated person must provide the notice of declination to a qualified beneficiary of the trust.

223. *Id.* § 59-15-03(1).

224. See DUKEMINIER, SITKOFF & LINDGREN, *supra* note 6, at 687.

225. N.D. CENT. CODE § 59-15-03(3).

226. *Id.* The UTC also allows the other co-trustees to act whenever one of their number is unable to perform because of absence, illness, disqualification under other law, or other temporary capacity if "prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property." *Id.* § 59-15-03(4).

227. *Id.* § 59-15-03(3). This section deals solely with delegation to another trustee. Trustees who wish to delegate duties and powers to a non-trustee must do so in compliance with N.D.C.C. section 59-16-07.

228. UNIF. TRUST CODE § 703(e) (2005).

229. N.D. CENT. CODE § 59-15-03(5).

230. "A traditional rule of trust fiduciary law is that trustees may not delegate to others those responsibilities that they can reasonably be required to perform themselves." WAGGONER ET AL., *supra* note 132, at 20-42.

Trustees who do not participate in an action of the trustees are not liable for that action.<sup>231</sup> However, a trustee that delegates or is otherwise unable to participate in trustee action still must “exercise reasonable care to prevent a co-trustee from committing a serious breach of trust.”<sup>232</sup> When the actions of the trustees require the participation of a trustee who dissented from that action, the trustee may participate in that action without liability so long as the action is not a serious breach of trust.<sup>233</sup>

The provisions of the UTC governing the appointment of successor trustees are fairly straightforward. A vacancy can occur because the existing trustee declines, cannot be located, cannot be identified, does not exist, resigns, is disqualified or removed, dies, or has a guardian appointed.<sup>234</sup> If co-trustees remain, replacement of a trustee is not required.<sup>235</sup> The UTC gives courts the ability to appoint an additional trustee or special fiduciary whenever it considers such an appointment necessary, regardless of whether the trust has a vacancy.<sup>236</sup> If a vacancy must be filled, the successor will be named from a priority list. First, the person designated by the terms of the trust to act as successor trustee will be named.<sup>237</sup> Second, for a noncharitable trust, a person may be appointed by unanimous agreement of qualified beneficiaries.<sup>238</sup> For a charitable trust, the position must be filled by someone expressly designated by the charity to receive distributions, with the concurrence of the Attorney General.<sup>239</sup> For both charitable and noncharitable trusts, the failure to name a trustee under the first two methods leaves the appointment of a successor trustee to the court.<sup>240</sup>

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231. N.D. CENT. CODE § 59-15-03(6).

232. *Id.* § 59-15-03(7). This includes an obligation to compel the co-trustees to redress a serious breach of trust that has already been committed.

233. *Id.* § 59-15-03(8).

234. *Id.* § 59-15-04(1). Consistent with common law, the fact an initially designated trustee declines the office does mean that the trust fails. UNIF. TRUST CODE § 701 cmt. (2005) (citing RESTATEMENT (THIRD) OF TRUSTS § 35 cmt. c (Tentative Draft No. 2, 1999)).

235. N.D. CENT. CODE § 59-15-04(2).

236. *Id.* § 59-15-04(5). Note, however, this provision is not specifically identified under N.D.C.C. section 59-09-05 as one that cannot be overridden by the terms of the trust. Any court finding such an appointment would be necessary for the administration of the trust, however, would likely find the authority to do so under N.D.C.C. section 59-09-05(2)(k), which prevents a trust agreement from inhibiting a court’s ability “to take such action and exercise such jurisdiction as may be necessary in the interests of justice[.]” *Id.* § 59-09-05(2)(k).

237. *Id.* § 59-15-04(3)-(4).

238. *Id.* § 59-15-04(3).

239. *Id.* § 59-15-04(4). The section does not require the appointment by the charitable organization to be unanimous. While the Attorney General has the rights of a qualified beneficiary with respect to a charitable trust under N.D.C.C. section 59-09-10(3), the Attorney General would not be covered by the language of “charitable organizations expressly designated to receive distributions.” *Id.* § 59-09-10(1).

240. *Id.* § 59-15-05(4).

Trustees, as fiduciaries, face limitations on their ability to resign. Under the UTC, the trustee must give at least thirty days notice to: the settlor, if living; all co-trustees; and all qualified beneficiaries.<sup>241</sup> The trustee may also seek to resign with court approval.<sup>242</sup> The resignation of the trustee has no impact on the potential liability of a trustee for any acts or omissions, other than to start the running of the statute of limitations for such an action.<sup>243</sup>

While the settlor can retain or grant the power to remove a trustee,<sup>244</sup> the UTC provides specific guidance for removal of a trustee by the courts.<sup>245</sup> Three findings that justify a trustee removal are:

[I]f the trustee has committed a serious breach of trust; if lack of cooperation among co-trustees substantially impairs the administration of the trust; if because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, . . . removal of the trustee best serves the interest of the beneficiaries . . . .<sup>246</sup>

These findings are consistent with the common law limitation that trustees could only be removed for cause.<sup>247</sup> A significant change from the common law under the UTC is to allow the removal of a trustee upon a substantial change of circumstances or upon the request of all the qualified beneficiaries.<sup>248</sup> The court need only find that removal serves the interests of all the beneficiaries, is not inconsistent with a material purpose of the trust, and a suitable successor is available.<sup>249</sup> Regardless of why a trustee

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241. *Id.* § 59-15-05(1)(a). In keeping with the general rule, the trustees of revocable trusts only owe duties to the settlor under N.D.C.C. section 59-16-13(1); the resigning trustee need not provide notice to any qualified beneficiaries of a revocable trust.

242. *Id.* § 59-15-05(1)(b). The court, in approving the resignation, may impose any conditions it determines reasonably necessary for the protection of the trust property. *Id.* § 59-15-05(2).

243. *Id.* § 59-15-05(3). Under N.D.C.C. section 59-18-05(3), a judicial proceeding for breach of trust must be commenced within five years of a trustee's resignation. The period can be shortened if the beneficiary is provided with a report that adequately discloses the potential claim for breach of trust. *Id.* § 59-18-05(1)-(2). See discussion *supra* note 295 and accompanying text.

244. A person other than the settlor who has the power to remove a trustee, commonly referred to as a trust protector, while not possessing the same duties and obligations as a trustee, is still presumed to be "a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries." N.D. CENT. CODE § 59-16-08(4).

245. N.D.C.C. section 59-15-06 allows a court to remove a trustee on a request by the settlor, a co-trustee, a beneficiary, or on its own initiative.

246. *Id.* § 59-15-06(2).

247. ASCHER ET AL., *supra* note 148, § 11.10, at 654.

248. N.D. CENT. CODE § 59-15-06(2). See RESTATEMENT (THIRD) OF TRUSTS § 37, 37 cmt. (2003).

249. N.D. CENT. CODE § 59-15-06(2).

removal is contemplated, the court may order relief in addition to or in lieu of removing the trustee.<sup>250</sup>

## 2. *Trustee's Duties and Powers*

The UTC generally carries forward the common law duties of trustees. The trustee must “administer the trust in good faith,”<sup>251</sup> must exercise the “reasonable care, skill, and caution” of a “prudent person,”<sup>252</sup> and must generally care for the trust property.<sup>253</sup> Perhaps the most significant change in the area of trustee duties is the formal codification of the duties of loyalty and impartiality.<sup>254</sup> The duty of loyalty requires the trustee to “administer the trust solely in the interests of the beneficiaries.”<sup>255</sup> The UTC now places numerous presumptions on transactions by the trustee with the trust or beneficiaries. Any “sale, encumbrance, or other transaction involving the investment or management of trust property” on the trustee’s own account or that is “otherwise affected by a conflict between the trustee’s fiduciary and personal interests is voidable by a beneficiary.”<sup>256</sup> This is a codification of the no further inquiry rule: any transaction between the trust and the trustee is voidable without the need for any further proof.<sup>257</sup> The only transactions that avoid this treatment are those authorized by the trust, approved by a court, consented to by the beneficiary, or involving a contract entered into before the trustee became or contemplated becoming trustee.<sup>258</sup> Transactions are presumed to be in conflict with the fiduciary interests of the trustee if the transaction is between the trust and: the trustee’s spouse, descendants, siblings, parents, or their spouses; an agent or

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250. *Id.* § 59-15-06(3). The relief may be awarded even while the removal is still being considered by the court. The nature of the possible relief is defined under N.D.C.C. section 59-18-01(2) and includes a broad range of financial and other remedies. *See infra* note 292.

251. N.D. CENT. CODE § 59-16-01.

252. *Id.* § 59-16-04.

253. This includes: taking “reasonable steps to take control of and protect the trust property,” *id.* § 59-16-09; keeping “adequate records” to avoid intermingling of trustee property with trust property, *id.* § 59-16-10; taking “reasonable steps to enforce claims of the trust and to defend claims against the trust,” *id.* § 59-16-11; and collecting the trust property from former trustees or other persons, *id.* § 59-16-12.

254. Both of these duties have long been recognized under the common law. *See* RESTATEMENT (THIRD) OF TRUSTS §§ 78-79 (2003).

255. N.D. CENT. CODE § 59-16-02.

256. *Id.* § 59-16-02(2).

257. UNIF. TRUST CODE § 802 cmt. (2005).

258. *Id.* A beneficiary may only consent to, ratify, or release a trustee from liability for an action if the beneficiary knew the material facts relating to the transaction. N.D. CENT. CODE § 59-18-09.

attorney of the trustee; or an entity or enterprise in which the trustee has an interest that might affect the trustee's best judgment.<sup>259</sup>

Even if a transaction does not involve trust property, a transaction between the trustee and a beneficiary is voidable by the beneficiary if the transaction was entered into "during the existence of the trust or while the trustee retain[ed] significant influence over the beneficiary."<sup>260</sup> Unlike the transactions involving trust property, however, the trustee is able to prove the transaction was fair to the beneficiary and render the deal enforceable.<sup>261</sup> The UTC also codifies the opportunity doctrine, which defines a transaction as representing a conflict between the trustee's personal and fiduciary interests if the transaction involved an opportunity that properly belonged to the trust.<sup>262</sup>

The duty of loyalty provides provisions that deal directly with the ownership and management of trust property. Trustees are specifically authorized to invest in companies or trusts to which the trustee provides services in a capacity other than as trustee.<sup>263</sup> The trustee is even authorized to receive compensation from the company or trust out of the fees charged to the trust for the investment, although the trustee must notify the qualified beneficiaries of the rate and method for determining that compensation.<sup>264</sup> In exercising voting or other control rights over any investment or other business interests, the trustee must act in the best interests of the beneficiaries.<sup>265</sup>

The UTC approves, at least if they are fair to the beneficiaries, several transactions that could run afoul of the no further inquiry rule of the duty of loyalty.<sup>266</sup> Such transactions concern agreements between the trustee and the beneficiary related to compensation, transactions between the trust and other entities to which the trustee owes a fiduciary duty, and some advances of money to trust by the trustee.<sup>267</sup> Neither the UTC nor its comments,

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259. N.D. CENT. CODE § 59-16-02(3). For institutional trustees, transactions between the trust and someone who has a significant interest in the trustee also raises the presumption.

260. *Id.* § 59-16-02(4).

261. *Id.*

262. *Id.* § 59-16-02(5). The comment to UTC section 802 notes this section allows the beneficiary to void a transaction involving a trust opportunity. The language of the section does not create that voidability directly, but does so because such a transaction involves the "investment" of trust property, bringing the transaction under N.D.C.C. section 59-16-02(2).

263. *Id.* § 59-16-02(6). More precisely, such an investment is not presumed to present a conflict between the personal and fiduciary interests of the trustee as long as the investment complies with the prudent investor rule of N.D.C.C. chapter 59-17.

264. *Id.* §§ 59-16-02(6),-13.

265. *Id.* § 59-16-02(7).

266. *Id.* § 59-16-02(8).

267. *Id.* This section does not preclude the following transactions, if fair to the beneficiaries:

however, provide any indication as to whether the burden is on the trustee to prove the transactions are fair to the beneficiary.<sup>268</sup>

The duty of impartiality requires the trustee “to act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries’ respective interests.”<sup>269</sup> The common law duty of impartiality developed as an aspect of the duty of loyalty.<sup>270</sup> Impartiality “does not mean that the trustee must treat the beneficiaries equally.”<sup>271</sup> Rather, the trustee must treat the beneficiaries equitably given the purposes and terms of the trust. A settlor may, in fact, advise the trustee to generally favor the interest of one beneficiary over those of another.<sup>272</sup>

The UTC authorizes the trustee to make certain delegations to non-trustees, and even encourages such delegation in some situations.<sup>273</sup> Allowance of delegation removes some of the uncertainty regarding delegation that existed under the common law and is consistent with the Uniform Prudent Investor Act.<sup>274</sup> The standard for any delegation of power is whether a prudent trustee of comparable skill could properly delegate under the same circumstances.<sup>275</sup> The trustee must “exercise reasonable care, skill, and caution” in selecting the agent, setting the terms of the delegation, and monitoring the agent.<sup>276</sup> Compliance with delegation rules means the trustee will have no liability for the actions of the agent.<sup>277</sup> Agents who accept a delegation from a North Dakota trust owe a duty to the trust to exercise reasonable care,<sup>278</sup> and subject themselves to the jurisdiction of the North Dakota courts.<sup>279</sup>

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[A]n agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee; payment of reasonable compensation to the trustee; a transaction between a trust and another trust, decedent’s estate, or conservatorship of which the trustee is a fiduciary or in which a beneficiary has an interest; a deposit of trust money in a regulated financial-service institution operated by the trustee; or an advance by the trustee of money for the protection of the trust . . . .

*Id.*

268. *See* OHIO REV. CODE ANN. § 5808.02(G)(2) (West 2006) (placing the burden on the beneficiary).

269. N.D. CENT. CODE § 59-16-03.

270. *See* UNIF. TRUST CODE § 803 cmt. (“The duty of impartiality is an important aspect of the duty of loyalty.”).

271. *Id.*

272. *Id.* For example, a person who wants a trustee to favor a surviving spouse over other beneficiaries may so advise the trustee.

273. UNIF. TRUST CODE § 807 cmt.; *see also* N.D. CENT. CODE § 59-16-07.

274. UNIF. TRUST CODE § 807 cmt.

275. N.D. CENT. CODE § 59-16-07(1).

276. *Id.*

277. *Id.* § 59-16-07(3).

278. *Id.* § 59-16-07(2).

279. *Id.* § 59-16-07(4).



Perhaps the most important change in the trustee's duties under the UTC concerns the obligation to provide information to the beneficiaries. Under prior North Dakota law, trustees did not have to regularly provide such information.<sup>280</sup> Trustees were, however, always advised to make regular accountings to the beneficiaries in order to limit their liability.<sup>281</sup> The UTC requires the trustee to "keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests."<sup>282</sup> If a beneficiary requests information, the trustee must "promptly respond to [the] request" as long as it is not "unreasonable under the circumstances."<sup>283</sup> Any qualified beneficiary of a revocable trust or any beneficiary of a non-revocable trust may request a copy of the trust instrument.<sup>284</sup>

The UTC also includes several instances where trustees have a mandatory obligation to provide information.<sup>285</sup> Within sixty days of accepting a trusteeship, the trustee must notify all qualified beneficiaries of the acceptance and provide contact information for the trustee.<sup>286</sup> Also within sixty days after a trustee obtains knowledge of either the creation of an irrevocable trust or a revocable trust becomes irrevocable, the trustee must notify the qualified beneficiaries of the trust's existence, the identity of the settlor, and the right to request a copy of the trust.<sup>287</sup>

Distributees and permissible distributees of trust income must receive an annual report on the trust property, liabilities, receipts, and disbursements.<sup>288</sup> The UTC used the term "report" rather than the traditional term "accounting" "in order to negate any inference that the report must be prepared in any particular format or with a high degree of formality."<sup>289</sup> The qualified beneficiaries must be notified in advance of any change in the method or rate of the trustee's compensation.<sup>290</sup>

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280. The trustee of a trust subject to court supervision, which could be requested by any beneficiary or trustee, had to provide annual reports to the court. *Id.* § 59-04-17 (repealed 2007).

281. RESTATEMENT (THIRD) OF TRUSTS § 83, cmt. c (2003).

282. N.D. CENT. CODE § 59-16-13(1).

283. *Id.*

284. Although N.D.C.C. section 59-14-03 limits the duties of a trustee of a revocable trust to the settlor, N.D.C.C. section 59-16-08 exempts the reporting duties from that exclusion.

285. The obligation to make mandatory reports does not apply: to a trustee that accepts the trusteeship before August 1, 2007; to irrevocable trusts created before August 1, 2007; or to trusts that became irrevocable before August 1, 2007.

286. *Id.* § 59-16-13(2)(c).

287. *Id.* § 59-16-13(2)(d).

288. *Id.* § 59-16-13(2)(f). Other qualified and nonqualified beneficiaries may also request copies of the report. *Id.*

289. UNIF. TRUST CODE § 813 cmt.

290. N.D. CENT. CODE § 59-16-13(2)(e).

### 3. *Trustee Liability*

The remedies available when a trustee has breached a duty<sup>291</sup> include most of the commonly available court powers.<sup>292</sup> The amount of damages a trustee would pay is limited to “the greater of the amount required to restore the value of the trust property and trust distributions to what they would have been.”<sup>293</sup> If the trustee made a profit because of the breach of trust, the profit must be paid to the trust.<sup>294</sup>

The statute of limitations for a breach of trust action is one year from the date the beneficiary receives a report that “adequately disclosed the existence of a potential claim for breach.”<sup>295</sup> If no report is given, a five-year statute of limitation applies starting from the removal, resignation, or death of the trustee; the termination of the beneficiary’s interest; or the termination of the trust.<sup>296</sup>

Many settlors include provisions, called exculpatory clauses, “that purport to relieve the trustee of liability for certain kinds of breaches of trust.”<sup>297</sup> At common law, exculpatory clauses in a trust were generally enforceable, at least to the extent they only relieved the trustee of liability for negligence.<sup>298</sup> The common law had many situations, however, where an exculpatory clause was considered unenforceable as a violation of public policy.<sup>299</sup> The UTC codifies these exceptions and renders exculpatory clauses unenforceable to the extent they protect the trustee from a breach “committed in bad faith or with reckless indifference to the purposes of the trust or was inserted as the result of an abuse by the trustee of a fiduciary or

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291. If the trustee has not breached a duty under the trust, the trustee is not liable for any loss or depreciation in the value of the trust property or for the failure of the trust to make a profit. *Id.* § 59-18-03.

292. *Id.* § 59-18-01(2). The court may: compel the trustee to perform the trustee’s duties; enjoin the trustee from committing a breach of trust; compel the trustee to redress a breach of trust by paying money, restoring property, or other means; order a trustee to account; appoint a special fiduciary to take possession of the trust property and administer the trust; suspend the trustee; remove the trustee as provided in N.D.C.C. section 59-15-06; reduce or deny compensation to the trustee; subject to N.D.C.C. section 59-18-12, void an act of the trustee, impose a lien, or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or order any other appropriate relief.

293. *Id.* § 59-18-02(1).

294. *Id.*

295. *Id.* § 59-18-05(1). A report adequately discloses the potential claim “if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence.” *Id.* § 59-18-05(2).

296. *Id.* § 59-18-05(3).

297. ASCHER ET AL., *supra* note 148, § 24.27.

298. *Id.*

299. *Id.* § 24.27.3 (“No matter how broad the provision, the trustee is liable for committing a breach of trust in bad faith or with reckless indifference to the interests of the beneficiaries.”).

confidential relationship to the settlor.”<sup>300</sup> More importantly, if the trustee caused the exculpatory clause to be in the trust, the clause is invalid unless the trustee proves the clause was “fair under the circumstances and that its existence and contents were adequately communicated to the settlor.”<sup>301</sup>

## VII. CONCLUSION

The ULC undertook drafting of the UTC in order to codify the various common law rules that applied to trusts, to clarify an area of law considered “thin” and “fragmentary,” and to provide states with a body of law that was “precise, comprehensive, and easily accessible.”<sup>302</sup> It also aimed to bring consistency among the states and offer “innovative” changes to existing trust rules that did not work well.<sup>303</sup> While North Dakota law was not a hotbed of trust conflict, the UTC should bring additional clarity to situations where conflict arises. The coming generation of change in property ownership, with a significant portion of property either in revocable trusts or likely to be placed in trust in order to take advantage of the estate tax credits, will surely increase the number of questions regarding trust formation, operation, and termination. By adopting the UTC, North Dakota has placed itself ahead of the curve.

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300. N.D. CENT. CODE § 59-18-08(1).

301. *Id.* § 59-18-08(2). The clause will be enforceable if the settlor had independent legal counsel. *Id.*

302. UNIF. TRUST CODE prefatory note (2005).

303. *See id.*