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THE NEW MEXICO UNIFORM TRUST CODE

DAVID M. ENGLISH*

INTRODUCTION

House Bill 48,¹ which was enacted by the New Mexico Legislature in 2003, and which became effective on July 1, 2003,² is a largely faithful adoption of the Uniform Trust Code (UTC). The New Mexico UTC is codified in a new chapter, New Mexico Statutes Annotated chapter 46A.³ The UTC is the Uniform Law Commissioners' first effort to provide the states with a comprehensive model for codifying their law on trusts.⁴ New Mexico is one of the first five states to enact the UTC,⁵ although the UTC is currently under study for possible enactment by bar committees and other groups in over thirty other states. New Mexico might have been the first state to enact the UTC, but House Bill 111, passed by the New Mexico Legislature in 2001, was vetoed by then-Governor Gary Johnson.⁶ The 2003 bill, which was backed by the Real Property, Probate and Trust Section of the State Bar of New Mexico, was enacted with relatively few amendments and signed, without hesitation, by Governor Bill Richardson.⁷

This article provides an overview of the New Mexico UTC, focusing on how its enactment either changes or clarifies existing New Mexico law.⁸ Part I describes the reasons behind the drafting of the UTC and the relationship of the UTC with the *Restatement (Second) of Trusts* and concludes with a description of New Mexico's former and limited statutory law on trusts. Part II provides an overview of the UTC's provisions and its scope of coverage. Part III lists the modifications that New Mexico made to the official text of the uniform act. Part IV, which constitutes the bulk of this article, analyzes the provisions of the UTC that have received the most debate among the numerous states considering enactment of the UTC,⁹ the

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1. H.B. 48, 46th Leg. (2003).

2. NMSA 1978, § 46A-11-1106 (2003).

3. Section 101 of the Uniform Trust Code (U.T.C.) will become New Mexico Statutes Annotated § 46A-1-101, section 201 will become § 46A-2-201, and so forth.

4. A copy of the U.T.C. with complete comments can be accessed through the Commissioners' website, at <http://www.nccusl.org> (last visited Apr. 1, 2004).

5. Kansas enacted the Code in 2002. 2002 Kan. Sess. Laws ch. 133 (codified at KAN. STAT. ANN. ch. 58a (Supp. 2002)) (effective Jan. 1, 2003). In addition to New Mexico, the Code was enacted in 2003 in Arizona, 2003 Ariz. Sess. Laws ch. 212 (to be codified at ARIZ. REV. STAT. §§ 14-10101-11203 (2003)) (effective Jan. 1, 2004); Nebraska, 2003 Neb. Laws 130 (effective Jan. 1, 2005); and Wyoming, 2003 Wyo. Sess. Laws ch. 124 (codified at WYO. STAT. ANN. §§ 4-10-101-1103 (Michie 2003)) (effective July 1, 2003). For a discussion of the Kansas enactment, see David M. English, *The Kansas Uniform Trust Code*, 51 U. KAN. L. REV. 311 (2003).

6. Governor Johnson expressed concern that New Mexico would become "one of the only states" to enact the U.T.C. He also expressed concern that the law would "apply retroactively to trusts already in existence." See 2001 House Executive Message No. 62, available at <http://legis.state.nm.us/Sessions/01%20Regular/ExecMessages/house/hb0111.html>.

7. For background on the 2003 bill, see Fletcher Catron, *New Mexico*, UTC NOTES, Summer 2003, at 5, available at <http://www.nccusl.org/nccusl/UTCNotes2Q03.pdf>.

8. For a more detailed analysis of the topics discussed in this article but without comparison to a particular state's law, see David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143 (2002). For a detailed analysis of the U.T.C. on a section-by-section basis, see DAVID M. ENGLISH & ROBERT WHITMAN, *FIDUCIARY ACCOUNTING AND TRUST ADMINISTRATION GUIDE* pt. 2 (2002).

9. See *infra* notes 118-130, 345-351, and accompanying text (section 105, Default Rules); *infra* notes

provisions that make the most significant changes to or clarification of the common law,¹⁰ and the provisions for which New Mexico made the most changes,¹¹ which can only be understood by reference to other New Mexico law¹² or which require additional attention by the New Mexico Legislature.¹³

Prior to the enactment of the UTC, New Mexico had relatively few trust statutes and even sparser reported case law on trust matters. On numerous topics addressed by the UTC, there was literally no New Mexico law. By enacting the UTC, New Mexico's trust law is more complete, more accessible, and, as additional states enact the UTC, more uniform with the trust law of other states.

I. BACKGROUND

The UTC was officially drafted by a committee consisting of Uniform Law Commissioners and assisted by a Reporter whose duties included drafting the committee's decisions on a day-to-day level and preparing the various drafts. The committee was also assisted by numerous advisors and observers, representing an array of organizations, who attended and participated fully at drafting sessions. The drafting of the UTC was prompted by the much increased use of trusts in recent years.¹⁴ This greater use of the trust, and consequent rise in the number of day-to-day questions involving trusts, led to the Commissioners' recognition that the trust law in most states is thin, with many gaps between the often few statutes and reported cases.¹⁵ It also led to recognition that previous uniform acts relating to trusts, while numerous, are fragmentary.¹⁶ The primary source of trust law in New Mexico, and in most other states, is the *Restatement of Trusts*¹⁷ and the multivolume treatises by Scott¹⁸ and Bogert,¹⁹ sources that fail to address numerous practical issues and provide insufficient guidance.

The Uniform Trust Code was drafted in close coordination with the revision of the *Restatement of Trusts*. This coordination has hopefully made both into better products. The *Restatement* provides a wealth of background materials for interpreting the language of the UTC. The *Restatement (Second) of Trusts* was approved

277-297 and accompanying text (Article 5, Spendthrift Provisions and Rights of Beneficiary's Creditors); *infra* notes 323-332 and accompanying text (section 706, Removal of Trustee); *infra* notes 333-351 and accompanying text (section 813, Duty to Keep the Beneficiaries Informed).

10. See *infra* notes 138-149 and accompanying text (section 108, Principal Place of Administration); *infra* notes 175-207 and accompanying text (section 111 and Article 3, Representation and Settlements); *infra* notes 232-276 and accompanying text (sections 410-417, Trust Modification and Termination); *infra* notes 298-322 and accompanying text (Article 6, Revocable Trusts).

11. See *infra* notes 352-377 and accompanying text (sections 204 and 1001-1009, Remedies for Breach of Trust).

12. See *infra* notes 150-174 and accompanying text (section 112, Rules of Construction).

13. See *infra* notes 208-231 and accompanying text (sections 401-409, Creation of Trusts). The provisions requiring additional attention are sections 408 and 409 (NMSA 1978, §§ 46A-4-408 to -409 (2003)), relating to trusts for animals or other noncharitable purpose, which conflict with NMSA 1978, § 45-2-907 (1995). See *infra* notes 218-219, 229-231, and accompanying text.

14. U.T.C. prefatory note (2000).

15. *Id.*

16. *Id.*

17. For citations to the *Restatement (Second)* and *Restatement (Third) of Trusts*, see *infra* notes 20-24.

18. AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* (4th ed. 1987).

19. GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* (rev. 2d ed. 1977).

by the American Law Institute in 1957.²⁰ Approval of the *Restatement (Third)*, which is not yet complete, began in 1990 with the approval of the portion relating to the prudent investor rule and other investment topics.²¹ The portion of the *Restatement (Third)* relating to the rules on the creation and validity of trusts was approved in 1996,²² the portion relating to the office of trustee, trust purposes, spendthrift provisions, and the rights of creditors was approved in 1999;²³ and the portion on termination and modification of trusts was approved in 2001.²⁴

The New Mexico courts have frequently cited to the *Restatement (Second) of Trusts*,²⁵ but there are numerous New Mexico trust cases that do not cite to the *Restatement* and there are numerous trust-law topics on which there are yet no New Mexico cases.²⁶ Enactment of the UTC by New Mexico closes many of these gaps and, in their place, substitutes readily accessible law.

While the UTC is the first comprehensive uniform act on the subject of trusts in New Mexico, comprehensive trust statutes are already in effect in several states, with the statutes in California²⁷ and Texas²⁸ being the most widely known. The UTC is not directed principally at these states, but rather at states like New Mexico, which formerly had relatively few trust statutes.²⁹ Such trust statutes as did exist in New Mexico consisted largely of prior uniform acts focusing on discrete trust topics.³⁰ Several of these prior uniform acts, which are rendered obsolete or redundant by the UTC,³¹ were repealed by House Bill 48,³² which enacted the New Mexico UTC. Repealed were New Mexico's version of the Uniform Probate Code (UPC) Article VII,³³ which addressed a limited number of trust topics,³⁴ the portion of the Uniform

20. RESTATEMENT (SECOND) OF TRUSTS (1959).

21. RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE (1992). For a discussion, see Edward C. Halbach, Jr., *Trust Investment Law in the Third Restatement*, 77 IOWA L. REV. 1151 (1992).

22. RESTATEMENT (THIRD) OF TRUSTS (Tentative Draft No. 1, 1996).

23. *Id.* (Tentative Draft No. 2, 1999).

24. *Id.* (Tentative Draft No. 3, 2001). The first three tentative drafts of the *Restatement (Third)* were published in book form in 2003. See RESTATEMENT (THIRD) OF TRUSTS (2003). For an analysis of the *Restatement (Third)*, see Edward C. Halbach, Jr., *Uniform Acts, Restatements, and Trends in American Trust Law at Century's End*, 88 CAL. L. REV. 1877 (2000).

25. A Westlaw search conducted by the author on July 25, 2003, found that the *Restatement of Trusts* has been cited in twenty-one reported cases of the New Mexico Supreme Court and Court of Appeals.

26. Examples include most aspects of the law on trust termination and modification, discussed *infra* notes 232–276 and accompanying text; most aspects of the law on spendthrift provisions, discussed *infra* notes 277–297; and the law on trustee removal, discussed *infra* notes 323–332 and accompanying text.

27. CAL. PROB. CODE §§ 15000–18201 (West 1991 & Supp. 2003).

28. TEX. PROP. CODE ANN. chs. 111.001–115.017 (Vernon 1995 & Supp. 2003).

29. Such trust statutes as exist in New Mexico are codified in chapters 45 and 46 of the New Mexico Statutes Annotated. In addition to the uniform acts on trust law topics discussed *infra* notes 33–40, New Mexico has also enacted provisions on trusts of which a state or political subdivision is a beneficiary. See NMSA 1978, §§ 46-4-1 to -9 (2001), discussed *infra* note 227 and accompanying text.

30. For a discussion of this issue, see *infra* notes 33–40 and accompanying text.

31. For a list of uniform acts that a state should repeal upon enactment of the U.T.C., see U.T.C. prefatory note.

32. H.R. 48, 46th Leg. (2003).

33. NMSA 1978, §§ 45-7-101 to -307 (1995) (repealed 2003). New Mexico had also placed in its version of Article VII other uniform acts that were not part of the official text of Article VII. These are the Uniform Custodial Trust Act (NMSA 1978, §§ 5-7-501 to -522 (1995)) and the Uniform Prudent Investor Act (NMSA 1978, §§ 45-7-601 to -612 (1995)). Neither of these acts were repealed upon enactment of the U.T.C.

34. Article VII of the Uniform Probate Code (U.P.C.) addresses the jurisdiction of the courts to hear trust matters, the concept of a trust's place of administration, the rights of bona fide purchasers, limitations on actions

Trustees' Powers Act listing the powers of a trustee,³⁵ and the Uniform Trusts Act,³⁶ a 1937 uniform law that, despite the breadth suggested by its title, also addressed relatively few trust law topics³⁷ and received relatively few enactments.³⁸ Trust acts not superseded by the UTC and, consequently, not repealed in New Mexico are the Uniform Prudent Investor Act, enacted in New Mexico in 1995,³⁹ and the Uniform Custodial Trust Act, enacted in New Mexico in 1992.⁴⁰ Other uniform acts relevant to trusts, but also applicable to other forms of property transfer, remain fully in effect. These are the Uniform Management of Institutional Funds Act,⁴¹ the 1997 version of the Uniform Principal and Income Act,⁴² the Uniform Statutory Rule Against Perpetuities,⁴³ and the Uniform Disclaimer of Property Interests Act.⁴⁴

II. UTC OVERVIEW

The UTC codifies the law relating to express trusts, both charitable and noncharitable.⁴⁵ Excluded from the UTC's coverage are what are known as resulting or constructive trusts, which are remedial devices imposed by the courts.⁴⁶ Express

against a trustee following the furnishing of a final account or other statement, and the duty of the trustee to act with prudence and to keep the beneficiaries informed of administration. *See* NMSA 1978, § 45-7-101 to -307 (1995) (repealed 2003). For an overview of Article VII as adopted in New Mexico, see Pamela B. Minzner, *Article VII of the New Probate Code: In Pursuit of Uniform Trust Administration*, 6 N.M. L. REV. 213 (1976).

35. New Mexico did not enact the entire Uniform Trustees' Powers Act but only the listing of trustee powers found in Section 3(c) of that Act, which it codified at NMSA 1978, § 45-7-401 (1995) (repealed 2003). An updated list of trustee powers is found at U.T.C. § 816; NMSA 1978, § 46A-8-816 (2003).

36. The New Mexico version of the Uniform Trusts Act was codified at NMSA 1978, §§ 46-2-1 to -19 (2001) (repealed 2003). New Mexico did not enact sections 12-14 of the Uniform Trusts Act, which protected a trustee from personal liability on contracts and from liability for torts committed during the course of administration.

37. Topics addressed in the Uniform Trusts Act included the duty of loyalty, the registration and voting of securities, and trustee liability to persons other than beneficiaries. *See* U.T.C. prefatory note. The U.T.C. addresses the duty of loyalty in section 802, NMSA 1978, § 46A-8-802 (2003). The authority to vote stock and register it in nominee form is covered in section 816, NMSA 1978, § 46A-8-816 (2003). The provisions on trustee liability to persons other than beneficiaries are located in sections 1010 through 1013, NMSA 1978, §§ 46A-10-1010 to -1012 (2003).

38. In addition to New Mexico, the Uniform Trusts Act was enacted in Louisiana, Nevada, North Carolina, Oklahoma, South Dakota, and the Virgin Islands. The Uniform Trusts Act was withdrawn by the Commissioners from its list of recommended acts in 1984 on the grounds that it was obsolete. *See* U.T.C. historical notes.

39. The Uniform Prudent Investor Act is codified at NMSA 1978, §§ 45-7-601 to -612 (1995).

40. The Uniform Custodial Trust Act is codified at NMSA 1978, §§ 45-7-501 to -522 (1995).

41. The Uniform Management of Institutional Funds Act, which was enacted in 1997, is codified at NMSA 1978, §§ 46-9-1 to -12 (2001). The Act governs management of funds held by governmental agencies and non-profit organizations, including funds given to the institution to be held in trust. The Act does not apply to trust funds managed by an independent trustee from which the institution receives distributions. *See* NMSA 1978, § 46-9-1(B)(1) (2001).

42. The Uniform Principal and Income Act, which was enacted in 2001, is codified at NMSA 1978, §§ 46-3A-101 to -603 (2001). The Act governs accounting for financial transactions of both estates and trusts.

43. The Uniform Statutory Rule Against Perpetuities, which was enacted in 1992, is codified in New Mexico as part of the New Mexico U.P.C. *See* NMSA 1978, §§ 45-2-901 to -906 (1995). When applicable, the Act invalidates remote contingent interests no matter how created, whether in trust or otherwise.

44. The Uniform Disclaimers of Property Interests Act, which was enacted in 2001, is codified at NMSA 1978, §§ 46-10-1 to -17 (2001). The Act governs disclaimer of any type of property interest, including interests created in trust.

45. U.T.C. § 102.

46. U.T.C. § 102 cmt. For the law on resulting trusts, see RESTATEMENT (THIRD) OF TRUSTS §§ 7-9 (2003). For the law on constructive trusts, see V AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* §§ 461-529 (4th ed. 1989), and VA AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS*, §§ 530-552 (4th ed. 1987).

trusts are trusts created by settlors who, during life or at death, transfer property to a trustee, or who, during their lifetime, declare themselves trustee of their own property.⁴⁷ The UTC also applies to trusts to be administered in the manner of an express trust but that are created pursuant to a statute, judgment, or decree.⁴⁸

The organizational structure of the UTC reveals its breadth. The UTC is organized into eleven articles.⁴⁹ Article 1, in addition to providing definitions,⁵⁰ addresses topics such as the ability of a trust instrument to override the UTC's provisions,⁵¹ the validity of choice-of-law provisions and the law to govern in the absence of such a provision,⁵² and the procedure for transferring the principal place of administration to another jurisdiction.⁵³ Article 2 addresses selected topics involving judicial proceedings concerning trusts,⁵⁴ including conferring jurisdiction on the court to intervene in a trust's administration,⁵⁵ specification of the court's jurisdiction over trustees and beneficiaries,⁵⁶ and provisions on subject-matter jurisdiction of the courts⁵⁷ and venue.⁵⁸ This minimal coverage was deliberate; the drafting committee concluded that most issues relating to jurisdiction and procedure before the courts were best left to other bodies of law, such as the rules of civil procedure.⁵⁹ The provision on subject matter jurisdiction allows the enacting jurisdiction to insert the name of the court that is to be granted exclusive jurisdiction over proceedings concerning administration of a trust, whether inter vivos or testamentary.⁶⁰

Most of the topics addressed in Articles 3 through 7 are discussed in detail below.⁶¹ Article 3 deals with the important topic of representation of beneficiaries, including virtual representation and representation by fiduciaries and specifying when a representative may receive notice or give consent on behalf of the beneficiary or other persons represented.⁶² Article 4, which begins the heart of the UTC, prescribes the requirements for creating, modifying, and terminating trusts.

47. U.T.C. § 401.

48. U.T.C. § 102. A trust created pursuant to a judgment or decree would include a trust ordered by the court on behalf of a protected person. *See, e.g.*, NMSA 1978, § 45-5-402.1(B)(3)(e) (1995).

49. *See* U.T.C. Table of Contents.

50. U.T.C. § 103.

51. U.T.C. § 105.

52. U.T.C. § 107. For an article on the U.T.C.'s choice of law provisions, see Eugene F. Scoles, *Choice of Law in Trusts: Uniform Trust Code, Sections 107 and 403*, 67 MO. L. REV. 213 (2002).

53. U.T.C. § 108.

54. U.T.C. art. 2 general cmt.

55. U.T.C. § 201(a).

56. U.T.C. § 202.

57. U.T.C. § 203.

58. U.T.C. § 204.

59. *See* U.T.C. art. 2 general cmt.

60. *See id.* § 203 cmt. In New Mexico, this jurisdiction is in the district court, which under the New Mexico U.T.C. is granted exclusive jurisdiction concerning the internal affairs of trusts. *See* NMSA 1978, § 46A-2-203 (2003).

61. For a discussion of Article 3, see *infra* notes 175–207 and accompanying text. For a discussion of Article 4, see *infra* notes 208–276 and accompanying text. For a discussion of Article 5, see *infra* notes 277–297 and accompanying text. For a discussion of Article 6, see *infra* notes 298–322 and accompanying text. For a discussion of Section 706 on removal of trustees, see *infra* notes 323–332 and accompanying text.

62. U.T.C. art. 3. For a discussion of Article 3, see *infra* notes 175–207 and accompanying text.

The provisions on the creation of trusts largely track traditional doctrine,⁶³ those relating to modification and termination liberalize the prevailing law.⁶⁴ Article 5 covers spendthrift provisions and rights of creditors, both of the settlor and beneficiaries.⁶⁵ Article 6 collects the special rules relating to revocable trusts, including the standard of capacity and the procedure for revocation or modification.⁶⁶ Article 7 turns to the office of trustee, specifying numerous procedural rules that apply absent a special provision in the trust.⁶⁷ Included are the rules on trustee acceptance,⁶⁸ the rights and obligations of cotrustees,⁶⁹ the procedure for resignation,⁷⁰ the grounds for removal,⁷¹ the methods for appointing successors,⁷² and trustee compensation.⁷³

Article 8 details the duties and powers of the trustee.⁷⁴ The powers listed in section 816 are an updated version of the Uniform Trustee Powers Act, including coverage of such current topics as the power to deal with environmental hazards.⁷⁵ The trustee duties contained in Article 8, such as the duty of loyalty,⁷⁶ were drafted where relevant to conform to the Uniform Prudent Investor Act.⁷⁷ The Uniform Prudent Investor Act prescribes a trustee's responsibilities with regard to the management and investment of trust property. The UTC expands on this by also specifying the trustee's duties regarding distributions to beneficiaries.⁷⁸ By enacting Article 8, New Mexico now has a consistent set of duties whether the issue is investment, management, or distribution.

Article 9 provides a place for the jurisdiction enacting the larger UTC to codify its version of the Uniform Prudent Investor Act, if it is so inclined.⁷⁹ Article 10 addresses the liability of trustees for breach of trust and transactions by trustees with persons other than beneficiaries.⁸⁰ With respect to the liability of trustees for breach of trust, the Article lists the remedies for breach of trust,⁸¹ specifies how money damages are to be determined,⁸² and specifies certain trustee defenses, including the

63. U.T.C. §§ 401–409. For a discussion, see *infra* notes 208–231 and accompanying text.

64. U.T.C. §§ 410–417. For a discussion of the rules applicable to both charitable and noncharitable trusts, see *infra* notes 232–276 and accompanying text.

65. U.T.C. §§ 501–507. For a discussion of Article 5, see *infra* notes 277–297 and accompanying text.

66. U.T.C. §§ 601–604. For a discussion of Article 6, see *infra* notes 298–322 and accompanying text.

67. U.T.C. §§ 701–709.

68. U.T.C. § 701.

69. U.T.C. § 703.

70. U.T.C. § 705.

71. U.T.C. § 706. For a discussion of this provision, see *infra* notes 323–332 and accompanying text.

72. U.T.C. § 704.

73. U.T.C. § 708.

74. U.T.C. §§ 801–817.

75. U.T.C. § 816. New Mexico's former trustee powers list, which was copied from section 3(c) of the Uniform Trustee Powers Act, was codified at NMSA 1978, § 45-7-401 (1995) (repealed 2003).

76. U.T.C. § 802. For an article on this provision, see Karen E. Boxx, *Of Punctilios and Paybacks: The Duty of Loyalty Under the Uniform Trust Code*, 67 MO. L. REV. 279 (2002).

77. U.T.C. art. 8 general cmt.

78. *Id.*

79. U.T.C. art. 9 general cmt.

80. U.T.C. §§ 1001–1013. Liability for breach of trust is addressed in sections 1001–1009. Transactions with persons other than beneficiaries is addressed in sections 1010–1013.

81. U.T.C. § 1001(b).

82. U.T.C. § 1002(a).

addition of a statute of limitations for claims alleging breach of trust⁸³ and a provision for enforcing exculpatory clauses.⁸⁴ With respect to transactions by trustees with persons other than beneficiaries, Article 10 treats trustees as if they were managers of entities and encourages trustees and third persons to engage in commercial transactions to the same extent as if no trust were involved. A trustee is not personally liable for contracts entered into in the trustee's fiduciary capacity, as long as the trustee disclosed the fiduciary capacity.⁸⁵ A trustee is personally liable for torts committed in administering the trust only if the trustee is personally at fault.⁸⁶ This protection from contract and tort liability also extends to protection from personal liability for contract and tort liability of partnerships in which the trustee is a general partner.⁸⁷ Persons dealing with a trustee in good faith and for value need not inquire into the extent of the trustee's powers and are protected as if the trustee was acting properly.⁸⁸ To protect the privacy of the trust, a trustee may provide, and a third person may rely on, a written certification by the trustee as to the trustee's authority.⁸⁹ The trustee need not provide the third person with a complete copy of the trust instrument.⁹⁰

Article 11 deals with the application of the UTC to existing trusts;⁹¹ the intent is to give the UTC the widest possible application, consistent with limitations placed on it by the U.S. Constitution.⁹² Consequently, the UTC generally applies not only to trusts created on or after the effective date of the UTC's implementation, but also to trusts already in existence.⁹³

III. NEW MEXICO MODIFICATIONS

Typical of most uniform acts, the Uniform Trust Code was not enacted in New Mexico without modification. All of the states that have enacted the UTC to date have modified the uniform language to varying degrees.⁹⁴ The New Mexico modifications are relatively minor, but they are not without significance.⁹⁵ At the insistence of the New Mexico Trial Lawyer's Association, the sponsors of House Bill 48 agreed to delete several sections relating to judicial actions against trustees.⁹⁶

83. U.T.C. § 1005.

84. U.T.C. § 1008.

85. U.T.C. § 1010(a).

86. U.T.C. § 1010(b).

87. U.T.C. § 1011.

88. U.T.C. § 1012(a).

89. U.T.C. § 1013.

90. U.T.C. § 1013(d).

91. U.T.C. § 1106. The other sections of Article 11 are boilerplate common to all uniform acts. This includes provisions on uniformity of application and construction (U.T.C. § 1101); the application of the Code to electronic records and signatures (U.T.C. § 1102); severability of the Code's provisions in the event of invalidity (U.T.C. § 1103); places for an enacting jurisdiction to enter an effective date (U.T.C. § 1104); and a list of statutory provisions being repealed (U.T.C. § 1105).

92. U.T.C. § 1106 cmt.

93. U.T.C. § 1106.

94. For the modifications made in Arizona, Nebraska, and Wyoming, see 2003 Uniform Trust Code *Enactments*, UTC NOTES, Summer 2003, 2-6, available at <http://www.nccusl.org/nccusl/utcnote/2003.pdf>.

95. The changes in Kansas and Wyoming were much more extensive. For a list of the Kansas revisions, see English, *supra* note 5, at 318-21. For the changes in Wyoming, see UTC NOTES, *supra* note 94, at 6.

96. E-mail dated Nov. 3, 2003, from Fletcher Catron to author (on file with author).

The result is that it is easier to sue a trustee in New Mexico than under the unaltered UTC. The New Mexico enactment eliminates the statutes of limitations on actions against a trustee for breach of trust,⁹⁷ thereby lengthening the time in which a beneficiary may sue a trustee.⁹⁸ New Mexico also eliminated the UTC's measure of damages for breach of trust,⁹⁹ leaving the measure of damages more uncertain.¹⁰⁰ The UTC's provision limiting venue to particular counties was deleted,¹⁰¹ allowing a trustee to sue a trustee in more counties than under the UTC.¹⁰² Should an aggrieved party, such as an heir, decide to contest the settlor's revocable trust but not bring that action promptly after the settlor's death, New Mexico facilitated that process by eliminating the UTC's statute of limitation on contest of revocable trusts.¹⁰³ Should a third party decide to sue a trustee with respect to a contract or tort of a general partnership of which the trustee is a general partner, the New Mexico UTC also assists in that effort. The UTC limits trustee liability in such a case to the value of the trust assets, but New Mexico deleted that provision.¹⁰⁴ More surprisingly, New Mexico also eliminated the UTC's nonexclusive list of remedies for breach of trust, a provision that was intended to be educational rather than substantive.¹⁰⁵

Other New Mexico changes include the addition of language affirming the traditional role of the attorney general as *parens patriae* with respect to charitable trusts within its jurisdiction,¹⁰⁶ a change made at the request of the New Mexico Attorney General,¹⁰⁷ the deletion of the UTC's provision for bonding of financial

97. U.T.C. § 1005. Due to the deletion of section 1005, sections 1006–1010 of the U.T.C. become sections 1005–1009 of the New Mexico U.T.C.

98. For a discussion of actions against a trustee, see *infra* notes 363–368 and accompanying text.

99. U.T.C. § 1002(a).

100. For a discussion of remedies for breach of trust, see *infra* notes 354–357 and accompanying text.

101. U.T.C. § 204.

102. For a discussion of venue, see *infra* notes 358–362 and accompanying text.

103. U.T.C. § 604. For a discussion of this provision, see *infra* notes 317–322 and accompanying text.

104. U.T.C. § 1011. Due to the deletion of section 1011, sections 1012–1013 of the U.T.C. become sections 1010–1011 of the New Mexico U.T.C. Section 1010, discussed *supra* notes 85–86, does not offer a trustee sufficient protection, protecting a trustee from personal liability only for the trustee's own contracts or torts, not for contracts or torts of an entity in which the trust has an ownership interest. Section 1011 extends similar protection from personal liability with respect to a trustee's interest as a general partner. With respect to other business interests that the trustee may own, such as an interest as a limited partner, corporate shareholder, or membership interest in a limited liability company, the nature of the entity or interest owned by the trustee will insulate the trustee from personal liability on contracts made or torts committed by the entity. See U.T.C. § 1011 cmt.

105. U.T.C. § 1001(b). To remedy a breach of trust or threatened breach of trust, a court may compel a trustee to perform the trustee's duties; enjoin the trustee from committing a breach of trust; compel a 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; reduce or deny the trustee compensation; void an act of the trustee, impose a lien or constructive trust on trust property, or trace property and recover its proceeds; or order any other appropriate relief. *Id.* Because this list of remedies is derived from the common law as compiled in RESTATEMENT (SECOND) OF TRUSTS § 199 (1959), its exclusion from the U.T.C. does not likely remove them as available options under New Mexico law. For further discussion, see *infra* note 357 and accompanying text.

106. NMSA 1978, § 46A-4-405 (2003). New Mexico also adds that distributions from a charitable trust may be made only in furtherance of the trust's charitable mission and that the enactment of the U.T.C. is not intended to limit the attorney general's authority under the Charitable Solicitations Act. *Id.*

107. See *Catron*, *supra* note 7.

institution trustees,¹⁰⁸ a subject already addressed by other law;¹⁰⁹ minor changes in the certification of trust procedure;¹¹⁰ and the exclusion from the UTC's scope of the trust for the common schools created by the New Mexico Enabling Act.¹¹¹ Finally, New Mexico chose not to recodify its version of the Uniform Prudent Investor Act as Article 9 of the UTC but to leave that Act in its present location.¹¹²

IV. SIGNIFICANT ISSUES

This article does not describe and contrast all provisions of the UTC to prior New Mexico law, only those of most significance. Included are the provisions that have received the most debate among the numerous states considering enactment of the UTC,¹¹³ provisions that make the most significant changes to, or clarification of, the common law,¹¹⁴ provisions for which New Mexico made the most changes,¹¹⁵ which can only be understood by reference to other New Mexico law,¹¹⁶ and those that require additional attention by the New Mexico Legislature.¹¹⁷ In connection with each issue, prior New Mexico statutes and case law are also discussed.

A. Default Rules (Section 105)

Most American trust law consists of rules subject to override by the terms of the trust.¹¹⁸ But, prior to the UTC, neither the *Restatements*, treatise writers, nor state legislatures had attempted to comprehensively list the principles of law that are not subject to override by the trust terms. The UTC collects these principles in Section

108. U.T.C. § 702(c).

109. Before becoming qualified to do trust business in New Mexico, a financial institution must establish financial responsibility. See NMSA 1978, § 58-9-7 (1997).

110. New Mexico adds that a trustee may certify that an action taken through an agent is not prohibited by the trust instrument. In cases where title to real property may be affected, New Mexico also provides that the person receiving the certification may require it to be acknowledged so as to allow recordation. See NMSA 1978, § 46A-10-1012(A)(9), (B) (2003).

111. NMSA 1978, § 46A-11-1104(C) (2003). For the New Mexico Enabling Act, see ch. 310, 36 Stat. 557 (1910). For a recent case involving a trust created by the Enabling Act, see *Forest Guardians v. Powell*, 130 N.M. 368, 24 P.3d 803 (N.M. Ct. App. 2001).

112. The Uniform Prudent Investor Act is codified at NMSA 1978, §§ 45-7-601 to -612 (1995).

113. Section 105 (Default Rules), discussed *infra* notes 118–130, 345–351, and accompanying text; article 5 (Spendthrift Provisions and Rights of Beneficiary's Creditors), discussed *infra* notes 277–297 and accompanying text; section 706 (Removal of Trustee), discussed *infra* notes 323–332 and accompanying text; section 813 (Duty to Keep the Beneficiaries Informed), discussed *infra* notes 333–351 and accompanying text.

114. Section 108 (Principal Place of Administration), discussed *infra* notes 138–149 and accompanying text; section 111 and Article 3 (Representation and Settlements), discussed *infra* notes 175–207 and accompanying text; sections 410–417 (Trust Modification and Termination), discussed *infra* notes 232–276 and accompanying text; Article 6 (Revocable Trusts), discussed *infra* notes 298–322 and accompanying text.

115. Sections 204 and 1001–1009 (Remedies for Breach of Trust), discussed *infra* notes 352–377 and accompanying text.

116. Section 112 (Rules of Construction), discussed *infra* notes 150–174 and accompanying text.

117. Sections 401–409 (Creation of Trusts), discussed *infra* notes 208–231 and accompanying text. The provisions requiring additional attention are NMSA 1978, §§ 46A-4-408 to -409 (2003), relating to trusts for animals or other noncharitable purpose, which conflict with NMSA 1978, § 45-2-907 (1995). See *infra* notes 218–219, 229–231, and accompanying text.

118. See generally John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. (forthcoming 2004).

105(b),¹¹⁹ which New Mexico enacted without change.¹²⁰ Included are the requirements for creating a trust;¹²¹ the effect of a spendthrift provision;¹²² the rights of third parties in their dealings with the trustee;¹²³ the power of the court to take actions necessary in the interests of justice, such as to remove a trustee;¹²⁴ the power of the court to modify or terminate a trust as provided elsewhere in the UTC;¹²⁵ and a trustee's obligation to act in good faith and in accordance with the purposes of the trust.¹²⁶ The limits in the UTC on the settlor's ability to waive the duty to keep the beneficiaries informed,¹²⁷ which is described in detail below,¹²⁸ is the most discussed provision of the UTC.

The UTC also provides that the settlor may not override either the periods of limitations for commencing a judicial proceeding¹²⁹ or the UTC's provisions on subject-matter jurisdiction of the court and venue for commencing a proceeding.¹³⁰ New Mexico, however, eliminated the UTC's provision on venue,¹³¹ making this reference meaningless, although it did retain the UTC's provision on subject-matter jurisdiction.¹³² New Mexico also deleted the UTC's statutes of limitation.¹³³ However, because the prohibition in Section 105 on the settlor's ability to override statutes of limitation is not restricted to statutes of limitation provided in the UTC, a New Mexico trust would remain subject to any statutes of limitation provided by other New Mexico law, no matter what the settlor's contrary intent.¹³⁴

119. U.T.C. § 105(b). For a comprehensive discussion of Section 105(b), see Langbein, *supra* note 118.

120. NMSA 1978, § 46A-1-105(b) (2003).

121. U.T.C. § 105(b)(1); NMSA 1978, § 46A-1-105(B)(1) (2003). Incident to the requirements for trust creation, the settlor may also not override the requirement that a trust have a purpose that is lawful, not contrary to public policy, and possible to achieve, and that a trust and its terms be for the benefit of its beneficiaries. U.T.C. § 105(b)(3); NMSA 1978, § 46A-1-105(B)(3) (2003). For a discussion of the requirements for creating a trust, see *infra* notes 208–231 and accompanying text.

122. U.T.C. § 105(b)(5); NMSA 1978, § 46A-1-105(B)(5) (2003). For a discussion of the spendthrift provision and the rights of creditors of a beneficiary or settlor, see *infra* notes 277–297 and accompanying text.

123. U.T.C. § 105(b)(11); NMSA 1978, § 46A-1-105(B)(11) (2003). For a discussion of these provisions, see *supra* notes 85–90 and accompanying text.

124. U.T.C. § 105(b)(13); NMSA 1978, § 46A-1-105(B)(13) (2003). For a discussion of trustee removal, see *infra* text accompanying notes 323–332. A settlor may also not override the power of the court under U.T.C. § 702 to require, dispense with, modify, or terminate a bond, and the power of the court under U.T.C. § 708(b) to adjust a trustee's compensation, specified in the terms of the trust, that is unreasonably low or high. U.T.C. § 105(b)(6)–(b)(7); NMSA 1978, § 46A-1-105(B)(6)–(B)(7) (2003).

125. U.T.C. § 105(b)(4); NMSA 1978, § 46A-1-105(B)(4) (2003). For a discussion of the provisions on trust termination and modification, see *infra* notes 232–276 and accompanying text.

126. U.T.C. § 105(b)(2); NMSA 1978, § 46A-1-105(B)(2) (2003). To implement this requirement, the U.T.C. also provides that a settlor may not override the Code's limits on the effect of an exculpatory term. U.T.C. § 105(b)(10); NMSA 1978, § 46A-1-105(B)(10) (2003). For a discussion of exculpatory terms, see *infra* notes 371–374 and accompanying text.

127. See U.T.C. § 105 (b)(8)–(b)(9); NMSA 1978, § 46A-1-105(B)(8)–(B)(9) (2003).

128. See *infra* notes 345–351 and accompanying text.

129. U.T.C. § 105(b)(12); NMSA 1978, § 46A-1-105(B)(12) (2003).

130. U.T.C. § 105(b)(14); NMSA 1978, § 46A-1-105(B)(14) (2003).

131. U.T.C. § 204. For a discussion of venue, see *infra* notes 358–362 and accompanying text.

132. U.T.C. § 203; NMSA 1978, § 46A-2-203 (2003).

133. The U.T.C., but not the New Mexico U.T.C., contains a statute of limitations on contest of a revocable trust (U.T.C. § 604) and a statute of limitations on actions against a trustee for breach of trust (U.T.C. § 1005).

134. For a discussion of New Mexico law on limitations on actions against a trustee for breach of trust, see *infra* notes 359–368 and accompanying text. For a discussion of contests of revocable trusts, see *infra* notes 317–322 and accompanying text.

Mandatory rules for trusts were also addressed under prior New Mexico law but in a more limited way. The Uniform Trusts Act, approved in 1937 and adopted in New Mexico but repealed upon enactment of the UTC,¹³⁵ made certain provisions related to the trustee's duty of loyalty nonwaivable,¹³⁶ providing a settlor less latitude than under the UTC.¹³⁷

B. Principal Place of Administration (Section 108)

Determining a trust's principal place of administration is important for a variety of reasons: it may determine which state's income tax applies to the trust and will establish which court has primary jurisdiction concerning trust administrative matters. Locating a principal place of administration in a particular jurisdiction also makes it more likely that the particular jurisdiction's law will govern the trust.¹³⁸

As trust administration has become more complex, determining a trust's principal place of administration has become more difficult. Cotrustees may be located in different states, or a corporate trustee's personal trust officers may be located in one state, its investment division in another, and its operations facilities yet somewhere else. Also, a variety of nontrustees, such as advisors and trust protectors, may play a role in the trust's administration. Concluding that it was impossible to devise a rule that would address all of these situations, the drafters of the UTC did not attempt to define principal place of administration,¹³⁹ although a definition had been included in section 7-101 of the UPC, which was repealed upon New Mexico's enactment of the UTC.¹⁴⁰

Nevertheless, section 108 of the UTC, which New Mexico enacted without change,¹⁴¹ otherwise facilitates the locating of a trust in New Mexico. A provision in the trust terms designating the principal place of administration is valid and controlling if a trustee's principal place of business is located in, or a trustee is a

135. The New Mexico version of the Uniform Trusts Act was codified at NMSA 1978, §§ 46-2-1 to -19 (2001) (repealed 2003). For a discussion, see *supra* notes 36-38 and accompanying text.

136. Section 17 of the Uniform Trusts Act (NMSA 1978, § 46-2-14 (2001) (repealed 2003)) provides that a settlor may not dispense with the restriction in section 3 (NMSA 1978, § 46-2-3 (2001) (repealed 2003)) against a trustee loaning trust funds to itself or to a related party. A settlor may also not override the provisions of section 4 (NMSA 1978, § 46-2-4 (2001) (repealed 2003)) dealing with deposit of trust funds. Finally, a settlor may not override the restrictions of section 5 (NMSA 1978, § 46-2-5 (2001) (repealed 2003)) relating to the purchase and sale of trust assets to the trustee or related party. Such restrictions may be overridden only upon approval of the court. UNIF. TRUSTS ACT § 19; NMSA 1978, § 46-2-16 (2001) (repealed 2003).

137. Section 802 of the U.T.C., which codifies the duty of loyalty, is not one of the mandatory provisions listed in section 105(b) (NMSA 1978, § 46A-1-105(B) (2003)). Furthermore, section 802(b)(1) (NMSA 1978, § 46A-8-802(B)(1) (2003)) provides that a beneficiary may not void a transaction otherwise violative of the duty of loyalty if the transaction was authorized in the terms of the trust.

138. U.T.C. § 108 cmt.

139. *Id.*

140. Section 7-101 of the U.P.C. (NMSA 1978, § 45-7-101 (1995) (repealed 2003)) provides that the trust's principal place of administration is the trustee's usual place of business or at the trustee's residence if the trustee has no such place of business. In the case of cotrustees, the principal place of administration is the usual place of business of the corporate cotrustee if there is but one corporate cotrustee, or the usual place of business or residence of the individual trustee who is a professional fiduciary if there is but one such person and no corporate trustee. If neither of the preceding categories applies, the principal place of administration in the case of cotrustees is the usual place of business or residence of any of the cotrustees as agreed upon by them. U.P.C. § 7-101; NMSA 1978, § 45-7-101 (1995) (repealed 2003).

141. NMSA 1978, § 46A-1-108 (2003).

resident of, the designated jurisdiction,¹⁴² or all or part of the trust's administration occurs in the designated place.¹⁴³ If the trust instrument fails to address the subject, the UTC specifies a procedure for transferring the principal place of administration.¹⁴⁴ The transfer must facilitate the trust's administration,¹⁴⁵ and the trustee must inform the qualified beneficiaries of the transfer at least sixty days in advance.¹⁴⁶ The transfer may proceed as long as no qualified beneficiary objects by the date specified in the notice.¹⁴⁷ If the transfer involves the appointment of a new trustee, the requirements for the appointment of a successor trustee, either under the trust instrument or otherwise, must first be satisfied before the transfer can occur.¹⁴⁸ "Qualified beneficiary," a term used with some frequency in the UTC, excludes those holding remote remainder interests. The term includes only beneficiaries currently entitled to or eligible to receive a distribution and beneficiaries who would take the trust if a beneficiary's interest or trust were to immediately terminate.¹⁴⁹

C. Rules of Construction (Section 112)

Rules of construction attribute intent to individual donors in situations where the governing instrument is either silent or insufficiently clear. Rules of construction, which are based on "assumptions of common intention[,]...can involve the meaning to be given to" particular words, can "address situations the donor" did not plan for, such as "failure to anticipate the predecease of a beneficiary," and can also make assumptions about "how a donor would have revised donative documents in light of events occurring after execution," such as a testator's divorce.¹⁵⁰

The UTC contains several provisions specifically addressed to revocable trusts.¹⁵¹ Not included in the UTC, however, are specific rules of construction. While the UTC's drafters concluded that the rules of construction for revocable trusts and, to a lesser extent, irrevocable trusts, ought to be the same as the rules for wills, the drafters realized that any effort on their part to draft detailed rules for trusts would not succeed.¹⁵² Because the rules of construction for wills vary radically among the states, any detailed rules on trusts that the drafters might have developed would have matched the rules for wills in only a limited number of states.¹⁵³

Instead of including detailed rules of construction for revocable trusts, section 112 of the UTC, which New Mexico enacted without change,¹⁵⁴ is a general provision providing that the enacting jurisdiction's rules of construction for wills apply, as appropriate, to the construction of trusts.¹⁵⁵ But the comment to this section of the

142. U.T.C. § 108(a)(1); NMSA 1978, § 46A-1-108(A)(1) (2003).

143. U.T.C. § 108(a)(2); NMSA 1978, § 46A-1-108(A)(2) (2003).

144. U.T.C. § 108(c)-(f); NMSA 1978, § 46A-1-108(C)-(F) (2003).

145. U.T.C. § 108(c); NMSA 1978, § 46A-1-108(C) (2003).

146. U.T.C. § 108(d); NMSA 1978, § 46A-1-108(D) (2003).

147. U.T.C. § 108(e); NMSA 1978, § 46A-1-108(E) (2003).

148. U.T.C. § 108(f); NMSA 1978, § 46A-1-108(F) (2003).

149. For the definition of "qualified beneficiary," see U.T.C. § 103(12); NMSA 1978, § 46A-1-103(L) (2003).

150. U.T.C. § 112 cmt.

151. For a detailed discussion of revocable trusts, see *infra* notes 298-322 and accompanying text.

152. See U.T.C. § 112 cmt.

153. *Id.*

154. NMSA 1978, § 46A-1-112 (2003).

155. U.T.C. § 112; NMSA 1978, § 46A-1-112 (2003).

UTC states that an enacting jurisdiction might be better served by enacting specific rules of construction for trusts.¹⁵⁶ The key is the language in section 112 stating that the rules on wills apply to trusts “as appropriate.”¹⁵⁷ This phrase masks some difficult questions. Not all will-construction rules should necessarily be applied to trusts.¹⁵⁸ Even those that should apply may require modification due to the legal distinctions between wills and trusts.¹⁵⁹

The Uniform Probate Code was amended in 1990 to add numerous specific rules on the construction of trusts.¹⁶⁰ Fortunately, New Mexico is one of eleven states to have enacted the UPC rules,¹⁶¹ which it did without change in 1993.¹⁶² Section 112 of the UTC will therefore have limited applicability in New Mexico, covering only topics not already addressed by more specific rules in the UPC. The UPC includes rules requiring beneficiaries to survive the event determining their interest by 120 hours¹⁶³ and addressing whether the interest of a predeceased beneficiary fails or instead passes to a statutory substitute.¹⁶⁴ Also included are several rules interpreting particular provisions or words in an instrument, including a provision designating a governing law,¹⁶⁵ a specific reference requirement in a power of appointment,¹⁶⁶

156. U.T.C. § 112 cmt.

157. See U.T.C. § 112; NMSA 1978, § 46A-1-112 (2003).

158. An example might be the rule of construction that a surviving spouse is entitled to elect an intestate share if the decedent's will made prior to the marriage did not mention or provide for the future spouse. While the extension to trusts of the rules on construction of wills has been a topic of discussion among estate planning groups for many years and numerous states have enacted statutes extending specific rules to trusts (see *infra* note 161 for a partial list), only California has enacted legislation allowing a surviving spouse to claim the equivalent of an intestate share from a revocable trust created prior to the marriage. See CAL. PROB. CODE §§ 21601, 21610–1612 (West Supp. 2003).

159. Examples of rules requiring modification include the rules for abatement and antilapse. Abatement applies when the assets of an estate are insufficient to pay all devises. Under a typical abatement statute, the residue abates first, followed by the general devises, and lastly the specific devises. See, e.g., U.P.C. § 3-902 (1998). While abatement should logically apply to a revocable trust used as a will substitute, a trust does not contain “devises” or “residue.” Special definitions are needed.

An antilapse statute determines who takes the share of a devisee who predeceases a testator. Extending an antilapse statute for wills to revocable trusts also encounters definitional problems. A devise payable at the death of a testator is a *present* interest, while a disposition at the death of the settlor of a revocable trust is a *future* interest.

160. U.P.C. art. II, pt. 7 (1998). For an overview of the 1990 revisions, see Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891 (1992).

161. The others are Alaska, Arizona, Colorado, Hawaii, Michigan, Minnesota, Montana, North Dakota, South Dakota, and Utah. See ALASKA STAT. §§ 13.12.701 to -711 (Michie 2002); ARIZ. REV. STAT. ANN. §§ 14-2701 to -2711 (West 1995 & Supp. 2003); COLO. REV. STAT. ANN. §§ 15-11-701 to -711 (West 1997); HAW. REV. STAT. ANN. §§ 560:2-701 to -711 (Michie 1999 & Supp. 2002); MICH. COMP. LAWS ANN. §§ 700.2701 to -2720 (West 2002); MINN. STAT. ANN. §§ 524.2-701 to -711 (West 2002); MONT. CODE ANN. §§ 72-2-711 to -721 (2003); N.D. CENT. CODE §§ 30.1-09.1-01 to -11 (1996); S.D. CODIFIED LAWS §§ 29A-2-701 to -711 (Michie 1997); UTAH CODE ANN. §§ 75-2-701 to -711 (Supp. 2003).

162. NMSA 1978, §§ 45-2-701 to -711 (1995).

163. U.P.C. § 2-702; NMSA 1978, § 45-2-702 (1995).

164. U.P.C. §§ 2-706–707; NMSA 1978, §§ 45-2-706 to -707 (1995). For an analysis of these provisions and the 120-hour survivorship requirement of U.P.C. section 2-702, see Edward C. Halbach, Jr. & Lawrence W. Waggoner, *The UPC's New Survivorship and Antilapse Provisions*, 55 ALB. L. REV. 1091 (1992).

165. U.P.C. § 2-703; NMSA 1978, § 45-2-703 (1995). For an analysis, see Jeffrey A. Schoenblum, *Multijurisdictional Estates and Article II of the Uniform Probate Code*, 55 ALB. L. REV. 1291, 1317–22 (1992).

166. U.P.C. § 2-704; NMSA 1978, § 45-2-704 (1993). For an analysis, see Sheldon F. Kurtz, *Powers of Appointment Under the 1990 Uniform Probate Code: What Was Done—What Remains to Be Done*, 55 ALB. L. REV. 1151, 1168–72 (1992).

and the meaning of class gifts¹⁶⁷ and specific words such as “descendants,”¹⁶⁸ “by representation,”¹⁶⁹ and “heirs.”¹⁷⁰ Finally, for states in which it may still be an issue, a provision is included abolishing the doctrine of worthier title.¹⁷¹

Despite the numerous specific statutory rules that the UPC has made expressly applicable to trusts, there are several statutory rules of will construction that the UPC does not specifically extend to trusts that may now apply to trusts in New Mexico by reason of the general language of section 112 of the UTC. Potential candidates include the provisions addressing devises of securities,¹⁷² whether a specific devise fails if the property is no longer present at death,¹⁷³ and whether an advance payment should be charged against a beneficiary’s share.¹⁷⁴

D. Representation and Settlements (Section 111 and Article 3)

The UTC contains comprehensive provisions on representation of beneficiaries¹⁷⁵ and nonjudicial settlements,¹⁷⁶ provisions that New Mexico enacted without change.¹⁷⁷ The UTC strives to keep administration of trusts outside of the courts; therefore, numerous actions are allowed upon notice to variously defined groups of beneficiaries without requirement of court approval. These actions include transfer of a trust’s principal place of administration to or from another country or American state;¹⁷⁸ combination of separate trusts into one or the division of a single trust into two or more separate trusts;¹⁷⁹ resignation of a trustee;¹⁸⁰ submission of a trustee’s report;¹⁸¹ and a trustee’s notice of proposed plans of distribution.¹⁸² Other actions can be accomplished upon consent of the beneficiaries. These include selection of a successor trustee¹⁸³ and release of a trustee from potential liability.¹⁸⁴ The UTC also contains a comprehensive provision generally authorizing the use of nonjudicial settlement agreements to resolve disputes.¹⁸⁵

However, providing notice to, or obtaining the consent of, all the beneficiaries is frequently difficult. Trusts commonly last for decades. In an increasing number of

167. U.P.C. § 2-705; NMSA 1978, § 45-2-705 (1993).

168. U.P.C. § 2-708; NMSA 1978, § 45-2-708 (1993).

169. U.P.C. § 2-709; NMSA 1978, § 45-2-709 (1995).

170. U.P.C. § 2-711; NMSA 1978, § 45-2-711 (1995). For an analysis of this provision and of the rules cited in notes 169–170, see William F. Fratcher, *Class Gifts to “Heirs,” “Issue,” and Like Groups*, 55 ALB. L. REV. 1205 (1992).

171. U.P.C. § 2-710; NMSA 1978, § 45-2-710 (1993).

172. U.P.C. § 2-605; NMSA 1978, § 45-2-605 (1993). For an overview of the 1990 revisions, see Averill, *supra* note 160.

173. U.P.C. § 2-606; NMSA 1978, § 45-2-606 (1993). For an analysis of this provision, see Gregory S. Alexander, *Ademption and the Domain of Formality in Wills Law*, 55 ALB. L. REV. 1067 (1992).

174. U.P.C. § 2-609; NMSA 1978, § 45-2-609 (1993).

175. U.T.C. art. 3.

176. U.T.C. § 111.

177. NMSA 1978, §§ 46A-1-111, 46A-3-301 to -305 (2003).

178. U.T.C. § 108; NMSA 1978, § 46A-1-108 (2003) (qualified beneficiaries).

179. U.T.C. § 417; NMSA 1978, § 46A-4-417 (2003) (qualified beneficiaries).

180. U.T.C. § 705; NMSA 1978, § 46A-7-705 (2003) (qualified beneficiaries).

181. U.T.C. § 813; NMSA 1978, § 46A-8-813 (2003) (distributees and permissible distributees).

182. U.T.C. § 817; NMSA 1978, § 46A-8-817 (2003) (beneficiaries).

183. U.T.C. § 704; NMSA 1978, § 46A-7-704 (2003) (qualified beneficiaries).

184. U.T.C. § 1009; NMSA 1978, § 46A-10-1009 (2003) (any beneficiary).

185. U.T.C. § 111; NMSA 1978, § 46A-1-111 (2003).

American jurisdictions, trusts can, in theory, last in perpetuity.¹⁸⁶ The current beneficiaries of the trust are often minors or adults who lack capacity, and future beneficiaries may not yet be born. To satisfy notice and consent requirements for beneficiaries incapable of representing themselves, others must be empowered to act on their behalf. This is the function of rules on representation. Concepts of representation are not new, but the UTC addresses the subject in more detail than previous efforts.¹⁸⁷ The UTC provides not only for representation by fiduciaries (guardians, conservators, personal representatives),¹⁸⁸ but also for what is known as virtual representation, under which an unrepresented person, such as a child who may not yet be born, may be represented by another beneficiary with a similar beneficial interest.¹⁸⁹ In addition, the UTC authorizes the holder of a general testamentary power of appointment to represent and bind those whose interests are subject to the power¹⁹⁰ and a parent to represent and bind a minor or unborn child.¹⁹¹ The representation provisions of the UTC can be utilized not only for the beneficiary notices and consents described above,¹⁹² but also to settle any dispute whether in or out of court.¹⁹³ The nonjudicial settlement provision is broad, and the parties may enter into a nonjudicial settlement agreement with respect to any matter involving a trust.¹⁹⁴ The settlement agreement may contain any term or condition that a court could properly approve.¹⁹⁵ Among the issues that can be resolved by a nonjudicial settlement agreement are “approval of a trustee’s report or accounting; . . . resignation or appointment of a trustee and determination of a trustee’s compensation; . . . transfer of a trust’s principal place of administration; . . . and liability of a trustee for an action relating to the trust.”¹⁹⁶

Although the representation provisions provide legal practitioners with an added tool that will solve many practical problems, they should not be used without thought. Even with proper notice, the consent of a representative is not binding if there is a conflict of interest between the representative and those ostensibly represented.¹⁹⁷ If conflict of interest is a possibility, the practitioner should consider requesting the court to appoint a guardian ad litem (termed a “representative” under the UTC) to represent the otherwise unrepresented beneficiary.¹⁹⁸ Under the UTC,

186. For a discussion of the movement to abolish the Rule Against Perpetuities and citations to the statutes of seventeen states that have abolished the Rule, most within the last decade, see T.P. Gallanis, *The Future of Future Interests*, 60 WASH. & LEE L. REV. 513, 554–56 (2003).

187. The previous efforts to compile the rules on representation are section 1-403 of the U.P.C., discussed *infra* notes 205–207 and accompanying text, the RESTATEMENT (SECOND) OF JUDGMENTS §§ 41–42 (1982), and the RESTATEMENT (FIRST) OF PROPERTY §§ 180–186 (1936).

188. U.T.C. § 303; NMSA 1978, § 46A-3-303 (2003).

189. U.T.C. § 304; NMSA 1978, § 46A-3-304 (2003).

190. U.T.C. § 302; NMSA 1978, § 46A-3-302 (2003).

191. U.T.C. § 303(6); NMSA 1978, § 46A-3-303(F) (2003).

192. U.T.C. § 301(a)–(b) (NMSA 1978, § 46A-3-301(A)–(B) (2003)) provides that the representation provisions of Article 3 apply to any notice or consent under the Code. For the notices to and consents that can be given by beneficiaries under the U.T.C., see *supra* notes 178–184 and accompanying text.

193. U.T.C. art. 3 general cmt.

194. U.T.C. § 111(b); NMSA 1978, § 46A-1-111(B) (2003).

195. U.T.C. § 111(c); NMSA 1978, § 46A-1-111(C) (2003).

196. U.T.C. § 111(d); NMSA 1978, § 46A-1-111(D) (2003).

197. See U.T.C. §§ 302–304; NMSA 1978, §§ 46A-3-302 to -304 (2003).

198. U.T.C. § 305(a); NMSA 1978, § 46A-3-305(A) (2003).

the appointment of a representative is available whether the matter to be resolved is in or out of court.¹⁹⁹

The UTC provisions on representation and settlement have numerous similarities to the representation and settlement provisions of the UPC, provisions that New Mexico has also adopted.²⁰⁰ But there are also some differences between the two codes. The UPC authorizes interested persons to enter into a nonjudicial compromise as to the construction, validity, or effect of any governing instrument,²⁰¹ a term that includes a trust.²⁰² The UTC authorizes interested persons to enter a nonjudicial settlement agreement with respect to *any* matter involving a trust.²⁰³ The UTC also authorizes the use of virtual representation to resolve any dispute, whether in or out of court,²⁰⁴ not merely judicial settlements as under the UPC.²⁰⁵ The UTC and UPC also differ in minor details as to who may represent whom.²⁰⁶ New Mexico may wish to follow the lead of Arizona, which, upon enactment of the UTC, amended its version of the UPC to make certain that the representation and settlement provisions of the Arizona UTC and UPC were in conformity.²⁰⁷

E. Creation of Trusts (Sections 401–409)

UTC Sections 401–409, which New Mexico enacted without change,²⁰⁸ describe the basic requirements for the creation of express trusts and largely codify traditional doctrine.²⁰⁹ Trusts may be created by transfer of property, self-declaration, or exercise of a power of appointment.²¹⁰ Whatever method may have been employed, other requirements, including intention, capacity, and, for certain types of trusts, an ascertainable beneficiary, must also be satisfied before a trust is created.²¹¹ “A trust not created by will is validly created if its creation” complied with the law of specified jurisdictions in which the settlor or trustee had significant contact, or “any

199. U.T.C. § 305(b); NMSA 1978, § 46A-3-305(B) (2003).

200. See U.P.C. § 3-1101; NMSA 1978, § 45-3-1101 (1995); *infra* notes 201–202 and accompanying text. See also U.P.C. § 1-403 (1998); NMSA 1978, § 45-1-403 (1975); *infra* notes 205–207 and accompanying text.

201. U.P.C. § 3-1101; NMSA 1978, § 45-3-1101 (1995).

202. For the definition of “governing instrument,” see NMSA 1978, § 45-1-201(A)(17) (1995).

203. U.T.C. § 111(b); NMSA 1978, § 46A-1-111(B) (2003).

204. U.T.C. art. 3 general cmt.

205. The representation section of the U.P.C. applies only to judicially approved settlements and to formal probate proceedings, which also require court action. See U.P.C. § 1-403; NMSA 1978, § 45-1-403 (1975). The concept of virtual representation is codified at U.P.C. § 1-403(2)(iii) (1998); NMSA 1978, § 45-1-403(B)(3) (1975).

206. The U.P.C. provides that a parent may represent a minor child. The U.T.C. provides that a parent may represent a child even if unborn. The U.T.C. authorizes an agent to represent a principal. The U.P.C. omits this provision. The U.P.C. authorizes the court to appoint a “guardian ad litem.” The U.T.C. changes this to “representative.” The U.T.C. authorizes the court-appointed representative to consider general family benefit when making decisions. The U.P.C. omits this language. Compare U.P.C. § 1-403 (1998) and NMSA 1978, § 45-1-403 (1975) with U.T.C. §§ 303, 305 and NMSA 1978, §§ 46A-3-303, 305 (2003).

207. Arizona conformed the representation provisions of the two codes by enacting the representation provisions of the U.T.C. as part of its version of the U.P.C. and then by amending the U.T.C. to make the representation provisions of the U.P.C. applicable to the U.T.C. See Act of May 12, 2003, 2003 Ariz. Legis. Serv. ch. 212, §§ 4–5 (West) (repealing ARIZ. REV. STAT. ANN. § 14-1403(2)–(4) (West 1995) and enacting U.T.C. Article 3 as ARIZ. REV. STAT. §§ 14-1404 to -1408); Ariz. Sess. Laws ch. 212, § 13 (enacting ARIZ. REV. STAT. ANN. § 14-10301 (West Supp. 2003), making ARIZ. REV. STAT. ANN. §§ 14-1404 to -1408 applicable to trusts).

208. NMSA 1978, §§ 46A-4-401 to -409 (2003).

209. U.T.C. art. 4 general cmt.

210. U.T.C. § 401; NMSA 1978, § 46A-4-401 (2003).

211. U.T.C. § 402; NMSA 1978, § 46A-4-402 (2003).

trust property was located.”²¹² A trust must have a purpose that is of benefit to its beneficiaries and that is not illegal or impossible to achieve,²¹³ and a charitable trust must have a proper charitable purpose.²¹⁴ The creation of a trust may be contested on grounds of lack of capacity, undue influence, or duress.²¹⁵ An oral trust is valid if its creation is evidenced by “clear and convincing evidence” and if its creation is not forbidden by some other statute,²¹⁶ such as a Statute of Frauds.²¹⁷ A trust for the care of an animal is valid for the life of the animal.²¹⁸ A trust for another non-charitable purpose and without an ascertainable beneficiary may be created but is enforceable for only twenty-one years.²¹⁹

New Mexico case law on creation of trusts is sparse but is largely consistent with the UTC.²²⁰ Even with enactment of the UTC, most of this case law will continue to be relevant. Enactment of the UTC does not eliminate the common law of trusts, except, to the extent inconsistent otherwise, the provisions of the UTC are supplemented by the common law of trusts and principles of equity.²²¹ Among the topics on trust creation that have been addressed by New Mexico courts are intent to create a trust,²²² the ascertainable beneficiary requirement,²²³ the requirements for creating

212. U.T.C. § 403; NMSA 1978, § 46A-4-403 (2003). A trust is valid if created in compliance with the law of the place where the trust instrument was executed. Otherwise, a trust is valid if its creation complied with the law of any of the following jurisdictions: place where any trust property was located; place where settlor was domiciled, had a place of abode, or was a national; or place where trustee was domiciled or had a place of business. U.T.C. § 403; NMSA 1978, § 46A-4-403 (2003). For a case applying prior New Mexico law, see *infra* note 226.

213. U.T.C. § 404; NMSA 1978, § 46A-4-404 (2003).

214. U.T.C. § 405(a); NMSA 1978, § 46A-4-405(A) (2003). “A charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes, or other purposes the achievement of which is beneficial to the community.” U.T.C. § 405(a); NMSA 1978, § 46A-4-405(A) (2003). This standard, which is copied from the *Restatement of Trusts*, is ultimately derived from the English Statute of Charitable Uses, which is part of New Mexico’s received law. See U.T.C. § 405 cmt; Santa Fe Lodge No. 460 v. Employment Sec. Comm’n, 49 N.M. 149, 154–55, 159 P.2d 312, 315 (1945).

215. Section 406 of the U.T.C. (NMSA 1978, § 46A-4-406 (2003)) voids a trust whose creation was induced by fraud, duress, or undue influence. For a discussion of the law on contest of a trust on the ground of lack of capacity, see U.T.C. § 406 cmt.

216. U.T.C. § 407; NMSA 1978, § 46A-4-407 (2003).

217. For the application of the Statute of Frauds to trusts of real property, see *Aragon v. Rio Costilla Coop. Livestock Ass’n*, 112 N.M. 152, 155, 812 P.2d 1300, 1303 (1991).

218. U.T.C. § 408; NMSA 1978, § 46A-4-408 (2003).

219. U.T.C. § 409; NMSA 1978, § 46A-4-409 (2003). Because Section 409 provides that it can be overridden by another statute, the twenty-one-year limit would not apply to a perpetual cemetery fund authorized by the New Mexico Endowed Care Cemetery Act, NMSA 1978, §§ 58-17-1 to -21 (2001).

220. For the caselaw, see *infra* notes 222–226 and accompanying text.

221. U.T.C. § 106; NMSA 1978, § 46A-1-106 (2003).

222. See *Aragon*, 112 N.M. at 157, 812 P.2d at 1305 (negotiations leading up to loan for purchase of property and manner in which title acquired did not demonstrate intent to create trust); *Torres v. Abeyta*, 42 N.M. 665, 668–69, 84 P.2d 592, 596–97 (1938) (will created equitable charge and not a trust).

223. See *Boyer v. Morrison* (*In re Estate of Boyer*), 117 N.M. 74, 868 P.2d 1299 (N.M. Ct. App. 1994). The court invalidated a purported trust that directed the trustee to distribute proceeds to persons intended to be “the object of [the decedent’s] generosity.” The court held that the described class was too vague to meet requirement that trust must have an ascertainable beneficiary. The *Boyer* trust would have been valid under the U.T.C. While the U.T.C. retains the ascertainable beneficiary requirement, it creates an exception for powers in a trustee to select from an indefinite class. The trustee is allowed a reasonable time in which to carry out the direction. See U.T.C. § 402(c); NMSA 1978, § 46A-4-402(C) (2003).

a charitable trust,²²⁴ the requirements for creating an oral trust,²²⁵ and the law governing the validity of a trust.²²⁶

The New Mexico Legislature has also previously addressed the requirements for creating a trust, although only in a limited way. The statutes authorizing the creation of trusts to benefit the state or political subdivisions of the state were not repealed upon enactment of the UTC and will continue to supplement the UTC.²²⁷ Also consistent with the UTC is the Uniform Custodial Trust Act, which similarly continues in effect.²²⁸ Inconsistent with the UTC, however, is section 2-907 of the UPC, a provision authorizing the creation of a trust for a pet or other specific lawful non-charitable purpose,²²⁹ a subject that the UTC also addresses in sections 408 and 409. The cited UPC provision conflicts with the comparable provisions of the UTC on a number of important details and should be repealed;²³⁰ although, because New Mexico enacted the UTC later in time than section 2-907 of the UPC,²³¹ the provisions of the UTC presumably supersede this earlier enactment.

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

Due to the increasing use in recent years of long-term trusts, there is a need for greater flexibility in the restrictive rules that apply concerning when a trust may be terminated or modified other than as provided in the instrument. Sections 410 through 417 of the UTC, which New Mexico enacted without change,²³² provide for

224. See *Forest Guardians v. Powell*, 2001-NMCA-028, ¶ 8, 24 P.3d 803, 808 (trust created under the New Mexico Enabling Act met requirements for a charitable trust); *Toney v. Coe (In re Will of Coe)*, 113 N.M. 355, 359–60, 826 P.2d 576, 580–81 (N.M. Ct. App. 1992) (provision providing for distributions to aid the work of a charitable corporation was sufficiently certain to constitute a proper charitable purpose); *Baasch v. Webb (In re Mills' Will)*, 57 N.M. 577, 260 P.2d 1111 (1953) (provision for "deformed and crippled children in such manner as my executors may arrange for" was sufficiently certain to constitute proper charitable purpose); *Rhodes v. Yater*, 27 N.M. 489, 202 P. 698 (1921) (trust for purpose of "evangelization" and "preaching of the gospel" was not void for uncertainty).

225. See *Thomas v. Reid*, 94 N.M. 241, 608 P.2d 1123 (1980) (record failed to show substantial evidence to support lower court's finding of oral trust); *Portales Nat'l Bank v. Beeman*, 52 N.M. 243, 250, 196 P.2d 876, 880 (1948) (beneficiaries of alleged oral trust failed to present necessary "strong, cogent and convincing" evidence of trust's creation).

226. See *Farmers & Merchs. Bank v. Woolf*, 86 N.M. 320, 321–22, 523 P.2d 1346, 1347–48 (1974) (holding that the validity of a charitable trust created by an Arizona decedent, to be funded by New Mexico assets and administered by a Texas trustee, was governed by Texas law). Under the U.T.C., the trust could have been validated under the law of any of the three states: Arizona because it was the settlor's residence, New Mexico because of the location of the assets, and Texas because it was the location of the trustee. See U.T.C. § 403; NMSA 1978, § 46A-4-403 (2003).

227. For the provisions on state beneficiary trusts, see NMSA 1978, §§ 46-4-1 to -9 (1957).

228. The Uniform Custodial Trust Act is codified at NMSA 1978, §§ 45-7-501 to -522 (1992).

229. U.P.C. § 2-907; NMSA 1978, § 45-2-907 (1995).

230. For a comparison of the provisions of the U.P.C. and U.T.C. on the creation of trusts for animals, see *Christine Cave, Trusts: Monkeying Around with Our Pets' Futures: Why Oklahoma Should Adopt a Pet-Trust Statute*, 55 OKLA. L. REV. 627, 644–47, 653–55 (2002). The most significant difference is that trusts created pursuant to sections 408 and 409 of the U.T.C. are part of a comprehensive trust code and, as such, are subject to the other provisions of the U.T.C. Section 2-907 of the U.P.C., by contrast, is the sole trust provision in an article of the U.P.C. that is devoted to the law of wills and intestate succession. The U.T.C. provisions on trusts for animals and other noncharitable purposes, while shorter in length, are, in fact, more comprehensive. The other provisions of the U.T.C. fill in many details on the administration of such trusts that the U.P.C. fails to address.

231. Section 2-907 of the U.P.C. was enacted by New Mexico in 1995, Act of Apr. 6, 1995, ch. 210, § 30, 1995 N.M. Laws 1968, 2042–45.

232. NMSA 1978, §§ 46A-4-410 to -417 (2003).

this increased flexibility but without disturbing the principle that the primary objective of trust law is to carry out the settlor's intent.²³³ The result is a liberalizing nudge, but one founded on traditional doctrine. For New Mexico, increased flexibility is not the only benefit from the enactment of these provisions. New Mexico, which has little case law on trust modification and termination,²³⁴ will also benefit from finally having a set of rules on the subject, regardless of the specifics. Under the UTC, a trust may be modified or terminated by the beneficiaries if the trust no longer furthers a material purpose or if the modification is not inconsistent with a material purpose;²³⁵ it may also be modified or terminated by the court due to unanticipated circumstances,²³⁶ failure or impracticality of charitable purpose,²³⁷ mistake of fact or law,²³⁸ if uneconomic to administer,²³⁹ or to achieve the settlor's tax objectives.²⁴⁰ In addition, a trustee, without approval of court, may terminate a trust with a value of \$50,000 or less²⁴¹ and may divide a trust or consolidate trusts.²⁴²

1. Modification or Termination by Beneficiaries

Section 411 of the UTC follows traditional doctrine in allowing for termination or modification of an irrevocable trust by unanimous agreement of the settlor and beneficiaries.²⁴³ Section 411 also follows traditional doctrine in allowing for termination of an irrevocable trust by unanimous agreement of the beneficiaries if the trust no longer serves a material purpose.²⁴⁴ In addition, provision is made for partial termination or modification if the consent of all beneficiaries cannot be obtained, such as can occur if one or more beneficiaries are minors, incapacitated, or unborn.²⁴⁵ In addition, provision is made for partial termination or modification

233. For further background on the American law on trust modification and termination, together with a discussion of the relevant provisions of the U.T.C., see Ronald Chester, *Modification and Termination of Trusts in the 21st Century: The Uniform Trust Code Leads a Quiet Revolution*, 35 REAL PROP. PROB. & TR. J. 697 (2001).

234. Other than for a single case applying *cy pres*, which is discussed *infra* note 257 and accompanying text, the sole cases found are *Loco Credit Union v. Reed*, 85 N.M. 729, 733, 516 P.2d 1112, 1116 (1973), which held that a trust did not fail because of the omission of a provision on termination but would terminate when its purposes were accomplished, and *Delaney v. First National Bank in Albuquerque*, 73 N.M. 192, 200, 386 P.2d 711, 717 (1963), which held that a trust terminated upon the death of the beneficiary for whom the trust was primarily created. Both cases are consistent with U.T.C. § 410(a); NMSA 1978, § 46A-4-410(A) (2003), which provides that a trust terminates when no purpose of the trust remains to be fulfilled.

235. U.T.C. § 411; NMSA 1978, § 46A-4-411 (2003); see *infra* notes 243–249 and accompanying text.

236. U.T.C. § 412(a); NMSA 1978, § 46A-4-412(A) (2003); see *infra* notes 250–254 and accompanying text.

237. U.T.C. § 413(a); NMSA 1978, § 46A-4-413(A) (2003); see *infra* notes 255–259 and accompanying text.

238. U.T.C. § 415; NMSA 1978, § 46A-4-415 (2003); see *infra* notes 268–269 and accompanying text.

239. U.T.C. § 414(b); NMSA 1978, § 46A-4-414(B) (2003); see *infra* notes 260–263 and accompanying text.

240. U.T.C. § 416; NMSA 1978, § 46A-4-416 (2003), see *infra* notes 270–273 and accompanying text.

241. U.T.C. § 414(a); NMSA 1978, § 46A-4-414(A) (2003), see *infra* notes 260–267 and accompanying text.

242. U.T.C. § 417; NMSA 1978, § 46A-4-417 (2003); see *infra* notes 275–277 and accompanying text.

243. U.T.C. § 411(a); NMSA 1978, § 46A-4-411(A) (2003). Section 411(a) is similar to RESTATEMENT (THIRD) OF TRUSTS § 65(2) (2003) and RESTATEMENT (SECOND) OF TRUSTS § 338(2) (1959), both of which permit termination or modification upon unanimous agreement of the beneficiaries and settlor.

244. U.T.C. § 411(b); NMSA 1978, § 46A-4-411(B) (2003). This doctrine, which is known as the *Clafin* rule, was first stated in *Clafin v. Clafin*, 20 N.E. 454 (Mass. 1889).

245. U.T.C. § 411(b); NMSA 1978, § 46A-4-411(B) (2003). Section 411(b) is more restrictive than RESTATEMENT (THIRD) OF TRUSTS § 65(1) (2003) (court can terminate or modify trust upon request of beneficiaries if court concludes reasons for modification or termination outweigh material purpose), but more liberal than RESTATEMENT (SECOND) OF TRUSTS § 337 (1959), which addressed only termination, not modification, upon failure of a material purpose.

if obtaining the consent of all beneficiaries is impracticable.²⁴⁶ Similar to other sections of the UTC, but not consistent with traditional doctrine, the representation principles of Article 3 may be employed to obtain the necessary consents to termination.²⁴⁷ Furthermore, section 411 provides that it is not presumed that a spendthrift provision is a material purpose barring the beneficiaries from compelling termination of a trust.²⁴⁸ Upon termination of a trust by the beneficiaries, whether with or without the settlor's consent, the trust property is to be distributed as the beneficiaries agree.²⁴⁹

2. Modification or Termination Because of Unanticipated Circumstances

Section 412 of the UTC confirms, but at the same time extends, the traditional doctrine of equitable deviation to permit modification not only of the trust's administrative terms but also of its dispositive provisions.²⁵⁰ Before ordering a modification or termination, the court must find that there are "circumstances not anticipated by the settlor" and that "modification or termination will further the purposes of the trust."²⁵¹ "To the extent practicable, the modification must be made in accordance with the settlor's probable intention."²⁵² Without regard to unanticipated circumstances, the court may also modify an administrative term "if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration."²⁵³ "Upon termination of a trust," the trustee must "distribute the trust property in a manner consistent with" the trust purposes.²⁵⁴

3. Charitable Cy Pres

Charitable trusts must have a charitable purpose, a concept that has evolved over the centuries as society has changed.²⁵⁵ Should the specific charitable means specified in the trust become impossible to achieve, however, the court may apply what is known as cy pres to reform the gift to better carry out the settlor's charitable purposes. But, under traditional doctrine, if the settlor's charitable purpose is

246. U.T.C. § 411(e); NMSA 1978, § 46A-4-411(E) (2003). To qualify, the court first must find that the trust could have been terminated or modified under section 411(a) or (b) had all beneficiaries consented. Second, the court must be assured that the interests of a nonconsenting beneficiary will be adequately protected. U.T.C. § 411(e); NMSA 1978, § 46A-4-411(E) (2003).

247. U.T.C. § 411 cmt. For a discussion of the provisions of Article 3 on representation, see *supra* notes 175-207 and accompanying text.

248. U.T.C. § 411(c); NMSA 1978, § 46A-4-411(C) (2003). Spendthrift terms sometimes have been construed to constitute a material purpose without inquiry into the intention of the particular settlor. For citations to cases, see RESTATEMENT (SECOND) OF TRUSTS § 337 (1959); GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 1008 (2d ed. rev. 1983); IV AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* § 337 (4th ed. 1989).

249. U.T.C. § 411(d); NMSA 1978, § 46A-4-411(D) (2003).

250. For a discussion of the traditional doctrine of equitable deviation, which was limited to administrative provisions, see RESTATEMENT (THIRD) OF TRUSTS § 66 reporter's notes to cmt. a (2003).

251. U.T.C. § 412(a); NMSA 1978, § 46A-4-412(A) (2003).

252. U.T.C. § 412(a); NMSA 1978, § 46A-4-412(A) (2003). Subsection (a) is similar to RESTATEMENT (THIRD) OF TRUSTS § 66(1) (2003).

253. U.T.C. § 412(b); NMSA 1978, § 46A-4-412(B) (2003).

254. U.T.C. § 412(c); NMSA 1978, § 46A-4-412(A) (2003).

255. For a comprehensive discussion of the evolution and current status of the charitable purposes doctrine, see Mary Kay Lundwall, *Inconsistency and Uncertainty in the Charitable Purposes Doctrine*, 41 WAYNE L. REV. 1341 (1995).

deemed specific rather than general, the charitable gift fails and the property is returned to the settlor or settlor's successors in interest.²⁵⁶ New Mexico has not previously addressed cy pres in its trust statutes and its sole reported case on the topic is not particularly illuminating.²⁵⁷

The UTC liberalizes the traditional doctrine of cy pres in a way believed more likely to carry out the average settlor's intent. First, the UTC expands the ability of the court to apply cy pres. The court may apply cy pres not only if the original scheme becomes impossible or unlawful, but also if it becomes impracticable or wasteful.²⁵⁸ More significant is the creation of a presumption in favor of general charitable intent. In applying cy pres, the court cannot decree a reversion to the settlor, unless the terms of the trust expressly so provide.²⁵⁹

4. Uneconomical Trust

Section 414 of the UTC authorizes the court to terminate an uneconomical trust of any size²⁶⁰ and allows a trustee, without approval of court, to terminate a trust with a value of \$50,000 or less.²⁶¹ Before terminating the trust, the court or trustee must conclude that the value of the trust property is insufficient to justify the cost of administration.²⁶² Upon termination of the trust, the trustee is to distribute the trust property in a manner consistent with the purposes of the trust.²⁶³ The figure \$50,000 was placed in brackets to signal that states are free to change the amount.²⁶⁴ New Mexico retained the \$50,000 figure,²⁶⁵ but the other states enacting the UTC have raised the amount.²⁶⁶ Raising the amount responds to the concerns of institutional trustees who find it difficult to make a profit on such small trusts. On the other hand, many small trusts are handled by family member trustees without charge. Also, should the beneficiary be disabled, it may be better to maintain a trust, even if unprofitable, instead of distributing the property to the beneficiary's conservator, an arrangement that may be even more expensive to administer.²⁶⁷

256. For the traditional cy pres doctrine, see generally RESTATEMENT (SECOND) OF TRUSTS § 399 (1959); IVA AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 399 (4th ed. 1989).

257. See *Gunderson v. Sage*, 54 N.M. 347, 225 P.2d 136 (1950) (following end of World War II, cy pres applied to reform fund intended to benefit prisoners of war).

258. U.T.C. § 413(a); NMSA 1978, § 46A-4-413(A) (2003).

259. U.T.C. § 413(a); NMSA 1978, § 46A-4-413(A) (2003).

260. U.T.C. § 414(b); NMSA 1978, § 46A-4-414(B) (2003).

261. U.T.C. § 414(a); NMSA 1978, § 46A-4-414(A) (2003).

262. U.T.C. § 414(a)-(b); NMSA 1978, § 46A-4-414(A)-(B) (2003).

263. "In addition to outright distribution to the beneficiaries, section 816(21) authorizes payment to be made by a variety of alternate payees. Distribution upon termination under...section [414] will typically be made to the qualified beneficiaries in proportion to the actuarial value of their interests." U.T.C. § 414 cmt.

264. *Id.*

265. NMSA 1978, § 46A-4-414(A) (2003).

266. Act of May 12, 2003, ch. 122, 2003 Ariz. Laws § 13 (enacting ARIZ. REV. STAT. ANN. § 14-10414(A) (West Supp. 2003) (\$100,000)); KAN. STAT. ANN. § 58a-414(a) (Supp. 2002) (\$100,000); Act of Mar. 20, 2003, L.B. 130, 2003 Neb. Laws § 40 (\$100,000); Act of Mar. 4, 2003, 2003 Wyo. Laws ch. 124, § 1 (enacting WYO. STAT. ANN. § 4-10-415(a) (Michie 2003) (\$150,000)).

267. U.T.C. § 414 cmt. states,

When considering whether to terminate a trust under either subsection (a) or (b) [of section 414], the trustee or court should consider the purposes of the trust. Termination [of a trust] under this section is not always wise. Even if administrative costs may seem excessive in relation to the size of the trust, protection of the assets from beneficiary mismanagement may indicate that the trust be continued.

5. Reformation

Consistent with the *Restatement (Third) of Property*,²⁶⁸ section 415 of the UTC clarifies that the doctrine of reformation may be applied to testamentary as well as, *inter vivos*, trusts. Also, the doctrine may be applied to correct a mistake of fact or law, even if the original terms of the trust, as originally but mistakenly created, are unambiguous. The mistake may be one either of expression or inducement, but, in any event, it must be established by clear and convincing evidence.²⁶⁹

6. Modification to Achieve Settlor's Tax Objectives

In another provision derived from the *Restatement (Third) of Property*,²⁷⁰ section 416 expands the court's ability to modify a trust to achieve the settlor's tax objectives. The court may modify the trust in any manner not contrary to the settlor's probable intention.²⁷¹ The court may also give the modification retroactive effect.²⁷² Such broad authority is appropriate because the settlor's objective to achieve tax savings of a particular type is usually abundantly clear.²⁷³ The other sections of Article 4, where applicable, also can be used to secure modifications for tax reasons.

7. Combination and Division of Trusts

Consistent with many state statutes,²⁷⁴ section 417 authorizes a trustee to divide a trust or combine trusts without approval of the court. While the trust or trusts that result need not have identical provisions, the consolidation or division cannot impair the rights of any beneficiary or adversely affect achievement of the trust purposes.²⁷⁵ Before combining trusts or dividing a trust, the trustee must send notice of the proposed action to the qualified beneficiaries.²⁷⁶

268. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 (2003).

269. U.T.C. § 415; NMSA 1978, § 46A-4-415 (2003). A mistake of expression occurs when the terms of the trust misstate the settlor's intention, fail to include a term that was intended to be included, or include a term that was not intended to be included. A mistake in the inducement occurs when the terms of the trust accurately reflect what the settlor intended to be included or excluded but this intention was based on a mistake of fact or law. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 cmt. i (2003). Mistakes of expression are frequently caused by scrivener's errors, while mistakes of inducement often trace to errors of the settlor.

270. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 12.2 (2003).

271. U.T.C. § 416; NMSA 1978, § 46A-4-416 (2003).

272. U.T.C. § 416; NMSA 1978, § 46A-4-416 (2003). Whether a modification made by the court will be recognized under federal tax law is a matter of federal law. Absent specific statutory or regulatory authority, binding recognition is normally given only to modifications made prior to the taxing event, for example, the death of the testator or settlor in the case of the federal estate tax. *See* Rev. Rul. 73-142, 1973-1 C.B. 405.

273. The donor's tax objectives can be established not only from language in the instrument but also by showing that the document was "tax-conscious," *i.e.*, that the settlor intended to take advantage of various tax exemptions, deductions, or credits. *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 12.2 reporter's notes to cmt. c (2003).

274. For a list of the state statutes, *see id.* § 12.2 reporter's notes to cmt. d, item 7.

275. U.T.C. § 417; NMSA 1978, § 46A-4-417 (2003).

276. U.T.C. § 417; NMSA 1978, § 46A-4-417 (2003).

G. Spendthrift Provisions and Rights of Beneficiary's Creditors (Article 5)

Spendthrift provisions, when effective, prohibit a creditor or assignee of a beneficiary from attaching a beneficiary's interest.²⁷⁷ Spendthrift provisions are not recognized in England,²⁷⁸ where trust law originated, and they are of limited utility in the United States. A spendthrift provision prohibits a creditor or assignee from attaching a beneficiary's interest in the trust but does not protect a beneficiary against attachment of the beneficiary's personal assets. As soon as the trustee makes a distribution to a beneficiary and the funds are converted from funds of the trustee into funds of the beneficiary, the beneficiary's creditor may collect.²⁷⁹ But, even funds retained in trust are not always protected. Numerous public policy exceptions allow specified creditors to attach a debtor beneficiary's interest.²⁸⁰

Article 5, which contains the provisions on spendthrift protection provisions and the rights of a beneficiary's creditors, was the most widely debated Article during the drafting of the UTC.²⁸¹ New Mexico, however, enacted Article 5 without change,²⁸² perhaps because the final result under the UTC largely tracks majority American doctrine. A trust is not spendthrift unless the instrument specifically so states; the drafters rejected the approach that all trusts are spendthrift unless the instrument says otherwise.²⁸³ In addition, a restraint against claims by the creditors of a beneficiary is effective only if the beneficiary is also restrained from assigning the beneficiary's interest.²⁸⁴ The Commissioners concluded that it was undesirable, as a matter of policy, for a beneficiary to be able to transfer the beneficiary's interest while at the same time denying the beneficiary's creditors the right to reach the trust in payment of their claims.²⁸⁵

Consistent with the *Restatement of Trusts*,²⁸⁶ the UTC recognizes several public-policy exceptions to the enforceability of a spendthrift provision, including judgments for child support and alimony, claims of the state, and claims of judgment on creditors who have provided services to a beneficiary.²⁸⁷ Although not all states have historically recognized all of these public policy exceptions, a majority of the states that have enacted the UTC to date have enacted the UTC's public policy exceptions without change.²⁸⁸

277. On spendthrift provisions generally, see IIA AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* §§ 151–158.1 (4th ed. 1987).

278. *See id.* § 152.

279. *See id.* § 152.5.

280. *See generally id.* § 157; *infra* notes 286–288 and accompanying text.

281. For a comprehensive discussion of U.T.C. Article 5, see Alan Newman, *The Rights of Creditors of Beneficiaries Under the Uniform Trust Code: An Examination of the Compromise*, 69 TENN. L. REV. 771 (2002).

282. NMSA 1978, §§ 46A-5-501 to -507 (2003).

283. For a listing of the small number of states that protect a beneficiary's interest against creditor claims even without the insertion of a spendthrift provision in the terms of the trust, see IIA AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* § 152.1 (4th ed. 1987).

284. U.T.C. § 502(a); NMSA 1978, § 46A-5-502(A) (2003).

285. For background on the requirement that a spendthrift provision, to be valid, must restrain both voluntary and involuntary transfer, see RESTATEMENT (THIRD) OF TRUSTS § 58 cmt. b(2) & reporter's note (2003).

286. RESTATEMENT (SECOND) OF TRUSTS § 157 (1959); RESTATEMENT (THIRD) OF TRUSTS § 59 (2003).

287. U.T.C. § 503; NMSA 1978, § 46A-5-503 (2003).

288. In addition to New Mexico, the exceptions were enacted without change in Arizona and Nebraska. Wyoming eliminated claims for alimony. Kansas eliminated all public-policy exceptions. *See* Act of May 12, 2003, 2003 Ariz. Sess. Laws ch. 12, § 13 (enacting ARIZ. REV. STAT. ANN. § 14-10503 (West Supp. 2003)); Act of Mar.

The omission of a spendthrift provision from a trust does not necessarily mean that a beneficiary's creditor can reach the beneficiary's interest. If the trust is discretionary or for support, the creditor generally cannot attach the beneficiary's interest.²⁸⁹ The UTC abolishes the often evasive and arbitrary distinction between discretionary and support trusts.²⁹⁰ It instead substitutes a single rule prohibiting a creditor from collecting against the beneficiary's interest, regardless of whether the discretion is expressed in the form of a standard of distribution or not, or even if the discretion was abused.²⁹¹

While Article 5 of the UTC grants broad recognition to the enforceability of a spendthrift provision, creditors of a settlor-beneficiary do retain significant rights. The drafting committee concluded that it was undesirable, as a matter of policy, to allow a settlor to create a trust and retain a beneficial interest but yet deny the settlor's creditors the right to reach the trust.²⁹² Consequently, the UTC rejects the approach taken in the legislation enacted in Alaska and Delaware and, more recently, Rhode Island, Nevada, and Utah, each of which allows a settlor to retain a beneficial interest immune from creditor claims.²⁹³ Consistent with prior New Mexico law, the UTC allows a creditor of the settlor to fully reach the settlor's beneficial interest.²⁹⁴ With respect to a revocable trust, the UTC clarifies that a revocable trust is fully subject to the settlor's creditors while the settlor is living.²⁹⁵ In addition, following the settlor's death, a revocable trust is liable for the settlor's debts but only to the extent the settlor's probate estate is insufficient.²⁹⁶

The recognition of spendthrift trusts in New Mexico is not in doubt, but the cases to date have addressed only claims by a settlor's creditors.²⁹⁷ Article 5, like most of the rest of the UTC, therefore fills in many important details on which former New Mexico law was either unknown or uncertain.

20, 2003, L.B. 130, 2003 Neb. Laws § 48; Act of Mar. 4, 2003, 2003 Wyo. Sess. Laws ch. 12, § 1 (enacting WYO. STAT. ANN. § 4-10-503 (Michie 2003)). For a discussion of the Kansas enactment, see English, *supra* note 5, at 333-35. On the extent to which other states have recognized the various public policy exceptions to a spendthrift provision, see IIA AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 157 (4th ed. 1989).

289. See generally IIA AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS §§ 154-155 (4th ed. 1987).

290. For a discussion of the distinction and the difficulties that it caused, see RESTATEMENT (THIRD) OF TRUSTS § 60 reporter's notes to cmt. a (2003).

291. U.T.C. § 504(b); NMSA 1978, § 46A-5-504(B) (2003). An exception is created for alimony and child support claimants. They may reach the trust to the extent the trustee has abused a discretion or standard in making distributions to the beneficiary. See U.T.C. § 504(c); NMSA 1978, § 46A-5-504(C) (2003).

292. U.T.C. § 505 cmt.

293. For a discussion of the Alaska, Delaware, Nevada, and Rhode Island statutes, see Karen E. Boxx, *Gray's Ghost—A Conversation About the Onshore Trust*, 85 IOWA L. REV. 1195. For the Utah enactment, see Act of Mar. 22, 2003, 2003 Utah Laws ch. 301.

294. U.T.C. § 505(a)(2); NMSA 1978, § 46A-5-504(A)(2) (2003). Prior New Mexico law similarly prohibited a settlor from creating a trust and at the same time retaining a beneficial interest immune from creditor claims. See *Reardon v. Brackett (In re Brackett)*, 54 B.R. 57 (Bankr. D.N.M. 1985) (authorizing creditors in bankruptcy to reach settlors' interest in trust). In *Armendaris Water Development Co. v. Rainwater*, 109 N.M. 71, 76, 781 P.2d 799, 804 (N.M. Ct. App. 1989), the court expressed doubt as to whether a settlor could create a spendthrift trust for settlor's own benefit but noted that the trust at issue did not include a spendthrift provision.

295. U.T.C. § 505(a)(1); NMSA 1978, § 46A-5-505(A)(1) (2003).

296. U.T.C. § 505(a)(3); NMSA 1978, § 46A-5-505(A)(3) (2003).

297. See *supra* note 294 and cases cited therein.

H. Revocable Trusts (Article 6)

Spurred on by the desire to avoid probate, the revocable trust is the most common trust created today in the United States.²⁹⁸ This heavy use of the revocable trust is a recent phenomenon, beginning decades, if not centuries, after most traditional trust law was formulated.²⁹⁹ The provisions of the UTC on revocable trusts, which are concentrated in Article 6, are among its most important and most innovative, dealing largely with issues unaddressed at common law.³⁰⁰ New Mexico enacted sections 601 through 603 without change³⁰¹ but deleted section 604, which provides a statute of limitations on contests of revocable trusts.³⁰²

The biggest change that the UTC makes with respect to a revocable trust is to reverse the common-law presumption that trusts are irrevocable. Reflecting the increasing, if not predominant, use of the revocable trust in the United States, the UTC provides that a trust is revocable absent clarifying language in the terms of the trust.³⁰³ Providing a presumption in the statute is most relevant for homegrown trusts; professional drafters routinely state whether the trust is revocable or irrevocable. Because the UTC's presumption will reverse the rule in most jurisdictions, including New Mexico,³⁰⁴ the presumption of revocability applies only to trust instruments executed on or after the UTC's effective date.³⁰⁵

The revocable trust is used today largely as a substitute for a will. The UTC in general reflects this usage, treating the revocable trust, in most respects, as the functional equivalent of a will, at least while the settlor is alive. The capacity requirement for creating a trust is the same as that for a will.³⁰⁶ Also, while the settlor has capacity, the settlor exclusively controls all of the rights of the beneficiaries.³⁰⁷ Notices that would otherwise be given to the beneficiaries must instead be given to the settlor, and the settlor is authorized to give binding consent

298. On the use of the revocable trusts in estate planning, see JOHN J. REGAN, ET AL., *TAX, ESTATE & FINANCIAL PLANNING FOR THE ELDERLY* § 13.04 (2002).

299. The revocable trust got its big push as an estate planning technique with the 1965 publication of the book *How to Avoid Probate*, by Norman Dacey. See ROGER W. ANDERSEN, *UNDERSTANDING TRUSTS AND ESTATES* § 11 (3rd ed. 2003). The law of trusts more generally can be traced to the Middle Ages. On the history of the trust, see I AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* §§ 1-1.8 (4th ed. 1987).

300. Issues largely unaddressed at common law include the capacity to create a revocable trust, discussed *infra* note 306 and accompanying text; the rights of the beneficiaries while the settlor holds a power to revoke, discussed *infra* notes 307-310 and accompanying text; and the statute of limitations on contest of revocable trusts, discussed *infra* notes 317-322 and accompanying text.

301. NMSA 1978, §§ 46A-6-601 to -603 (2003).

302. For a discussion of this issue, see *infra* notes 317-322 and accompanying text.

303. U.T.C. § 602(a); NMSA 1978, §§ 46A-6-602(A) (2003). For the common law rule that a trust that fails to state otherwise is presumed to be irrevocable, see IV AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* § 330 (4th ed. 1989).

304. See *Loco Credit Union v. Reed*, 85 N.M. 729, 733, 516 P.2d 1112, 1116 (1973) (trust is irrevocable unless power to revoke reserved in trust instrument); *Crutcher v. Joyce*, 134 F.2d 809, 816 (10th Cir. 1943) ("A completed trust without reservation of power of revocation or modification cannot be revoked in toto or modified by reducing the estate of the cestuis que trust, without their consent.").

305. U.T.C. § 602(a); NMSA 1978, § 46A-6-602(A) (2003).

306. U.T.C. § 601; NMSA 1978, § 46A-6-601 (2003). Under prior New Mexico law, the test was whether the settlor was capable of understanding in a reasonable manner the nature and effect of the act in which the person was engaged. See *In re Head's Estate*, 94 N.M. 656, 659, 615 P.2d 271, 274 (N.M. Ct. App. 1980).

307. U.T.C. § 603(a); NMSA 1978, § 46A-6-603(A) (2003).

on a beneficiary's behalf.³⁰⁸ A beneficiary's right to access the trust document is also within the settlor's control.³⁰⁹ Upon a settlor's loss of capacity, however, the beneficiaries may exercise their rights as beneficiaries absent contrary intent in the terms of the trust.³¹⁰

Unless the terms of the trust make a specified method of revocation exclusive, the UTC provides that a trust may be revoked or amended by substantially complying with the method specified in the trusts terms or by any other method manifesting clear and convincing evidence of the settlor's intent.³¹¹ The UTC also authorizes revocation or amendment by will if the trust does not provide an exclusive method of revocation and the will expressly refers to the trust or specifically devises property that would otherwise pass under the trust.³¹²

The UTC also addresses the authority of an agent, conservator, or guardian to revoke or amend a trust on the settlor's behalf.³¹³ An agent may participate in a decision to modify or terminate a trust but only to the extent expressly authorized in the power of attorney or terms of the trust.³¹⁴ A conservator may consent to a proposed modification or termination only upon approval of the court supervising the conservatorship.³¹⁵ If no conservator has been appointed, the UTC authorizes a guardian to revoke or amend the trust with the approval of the court supervising the guardianship.³¹⁶

The UTC contains a statute of limitations on contest of revocable trusts,³¹⁷ an innovative concept for most states. A potential contestant must file a contest within the earlier of 120 days following receipt of a notice or three years following the settlor's death.³¹⁸ These time limits have been placed in brackets, however; states are encouraged to substitute their own limitation periods under their comparable will-contest statutes.³¹⁹ The New Mexico Legislature, however, consistent with the philosophy of making lawsuits easier to maintain,³²⁰ eliminated this statute of limitations. It also eliminated the provision allowing a trustee, without knowledge that a contest has or will be filed, to distribute assets without liability should the

308. For a list of the notices to which the beneficiaries or qualified beneficiaries are entitled, see *supra* notes 178–182 and accompanying text. For a list of actions that can be taken upon the consent of the beneficiaries, see *supra* notes 183–184 and accompanying text.

309. On the right of a beneficiary to obtain a copy of the trust instrument, see *infra* notes 341–344 and accompanying text.

310. U.T.C. §§ 105(a), 603; NMSA 1978, §§ 46A-1-105(A), 603 (2003).

311. U.T.C. § 602(c)(1), (c)(2)(B); NMSA 1978, § 46A-6-602(C)(1), (C)(2)(b) (2003).

312. U.T.C. § 602(c)(2)(A); NMSA 1978, § 46A-6-602(C)(2)(a) (2003).

313. U.T.C. § 602(e)–(f); NMSA 1978, § 46A-6-602(E)–(F) (2003).

314. U.T.C. § 602(e); NMSA 1978, § 46A-6-602(E) (2003).

315. U.T.C. § 602(f); NMSA 1978, § 46A-6-602(F) (2003).

316. U.T.C. § 602(f); NMSA 1978, § 46A-6-602(F) (2003).

317. U.T.C. § 604(a).

318. *Id.*

319. *Id.* § 604 cmt. New Mexico requires that an informally probated will must be contested within the later of twelve months after the formal probate or three years from the decedent's death. See NMSA 1978, § 45-3-108(A)(3) (1995). A formally probated will must normally be contested no later than the court hearing to probate the will. See *id.* § 45-3-412.

320. New Mexico also deleted the Code's measure of damages and statute of limitations on actions against a trustee for breach of trust. For a discussion of the measure of damages, see *infra* notes 354–355 and accompanying text. For a discussion of the statute of limitations, see *infra* notes 363–368 and accompanying text.

trust later be ruled invalid.³²¹ Because no other New Mexico statute of limitations appears to be applicable to contests of revocable trusts, the only limit on contest is likely the equitable doctrine of laches.³²²

I. Removal of Trustee (Section 706)

New Mexico has no case law or statute on the standards for removing a trustee. Section 706 of the UTC, which addresses trustee removal, will, therefore, fill a major void.

Trustees in many states may be removed by the court only for breach of trust or other untoward act.³²³ This standard gives great weight to the settlor's particular selection of trustee. Because trust instruments typically place weight on a trustee's judgment and exercise of discretion, the particular trustee selected becomes an important term of the trust, a term that should not be changed easily. The UTC follows traditional doctrine by authorizing a trustee to be removed for acts of misconduct or other disqualification,³²⁴ which would include serious breach of trust, unfitness, and unwillingness or persistent failure to effectively perform the function.³²⁵ A trustee may also be removed due to lack of cooperation among cotrustees.³²⁶ Removal for serious breach of trust or lack of cooperation among the cotrustees requires no additional findings.³²⁷ Removal for unfitness, unwillingness, or persistent failure to effectively administer the trust requires an additional finding by the court that removal would best serve the interests of the beneficiaries.³²⁸ "Interests of the beneficiaries," a defined term, means the beneficial interests provided in the terms of the trust.³²⁹

The drafters of the UTC also concluded that in situations where the personal link between the settlor and trustee has been broken, the emphasis should turn on whether the particular trustee is appropriate to the trust, not whether the trustee has

321. U.T.C. § 604(b). Should the trust later be determined to be invalid, the beneficiaries of such trust are liable to return any distributions received. *Id.* § 604(c).

322. For a recent application of laches, see *In re Estate of Duran*, 133 N.M. 553, 559 n.3, 66 P.3d 326, 332 n.3 (2003). Laches is a far less certain guide than a statute of limitations. For laches to apply, the plaintiff must establish:

(1) Conduct on the part of the defendant, giving rise to the situation of which complaint is made and for which the complainant seeks a remedy; (2) delay in asserting the complainant's rights, the complainant having had knowledge or notice of the defendant's conduct and having been afforded an opportunity to institute a suit; (3) lack of knowledge or notice on the part of the defendant that the complainant would assert the right on which he bases his suit; and (4) injury or prejudice to the defendant in the event relief is accorded to the complainant or the suit is not held to be barred.

Baker v. Benedict, 92 N.M. 283, 286, 587 P.2d 430, 433 (1978).

323. For a discussion of the traditional grounds for trustee removal, see II AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* § 107 (4th ed. 1987). Among the grounds mentioned are incapacity, unfitness, dishonesty, serious breach of trust, and refusal to obey an order of court. *Id.*

324. U.T.C. § 706(b)(1)–(3); NMSA 1978, § 46A-7-706(B)(1)–(3). For a detailed discussion of the removal standards under the U.T.C., see Ronald Chester & Sarah Reid Ziomek, *Removal of Corporate Trustees Under the Uniform Trust Code and Other Current Law: Does a Contractual Lense Help Clarify the Rights of Beneficiaries?*, 67 Mo. L. REV. 241 (2002).

325. U.T.C. § 706(b)(1), (3); NMSA 1978, § 46A-7-706(B)(1), (3) (2003).

326. U.T.C. § 706(b)(2); NMSA 1978, § 46A-7-706(B)(2) (2003).

327. U.T.C. § 706(b)(1)–(2); NMSA 1978, § 46A-7-706(B)(1)–(2) (2003).

328. U.T.C. § 706(b)(3); NMSA 1978, § 46A-7-706(B)(3) (2003).

329. U.T.C. § 103(7); NMSA 1978, § 46A-1-103(G) (2003).

committed particular acts of misconduct or is totally unfit.³³⁰ Consequently, the UTC also allows the court to consider whether there has been a substantial change of circumstances or if the qualified beneficiaries unanimously requested removal.³³¹ In neither case, however, may the trustee be removed, unless the court also concludes that the selection of the particular trustee was not a material purpose of the trust, that removal of the trustee would best serve the interests of the beneficiaries, and that a suitable cotrustee or successor trustee is available.³³²

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

Section 813 of the UTC, which codifies the trustee's duty to inform the beneficiaries of administration, was enacted by New Mexico without change.³³³ The UTC is not the Commissioners' first effort to codify the trustee's duty to keep the beneficiaries informed; it was first codified in Article VII of the UPC, which New Mexico enacted but then repealed upon enactment of the UTC.³³⁴ In addition to codifying the trustee's duty to keep the beneficiaries informed, the UTC also addresses the extent to which a settlor may waive the reporting requirements.³³⁵ When doubt exists, the UTC favors disclosure to beneficiaries as being the better policy. The UTC imposes both a general obligation on the trustee to keep the qualified beneficiaries reasonably informed of administration, as well as several specific notice requirements.³³⁶ These requirements, however, do not generally apply to revocable trusts. While a trust is revocable and the settlor has capacity, the rights of the beneficiaries, including rights to information, are exclusively within the settlor's control.³³⁷

A trustee is required to notify the qualified beneficiaries of the trustee's acceptance of office and of any change in the method or rate of the trustee's

330. See U.T.C. § 706 cmt. (on the greater reluctance of the court to remove a trustee named by the settlor than a trustee appointed by other means). See II AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* § 107.1 (4th ed. 1987).

331. U.T.C. § 706(b)(4); NMSA 1978, § 46A-7-706(B)(4) (2003).

332. U.T.C. § 706(b)(4); NMSA 1978, § 46A-7-706(B)(4) (2003).

333. NMSA 1978, § 46A-8-813 (2003).

334. For a discussion of Article VII of the U.P.C., see *supra* notes 33–34 and accompanying text. Section 7-303 of the U.P.C. (NMSA 1978, § 45-7-303 (1995) (repealed 2003)) required the trustee to keep the beneficiaries of the trust reasonably informed of the trust and of its administration. Within thirty days after accepting office, the trustee was required to inform the current beneficiaries and, if possible, one or more beneficiaries holding future interests of the trustee's name and address. U.P.C. § 7-303(a); NMSA 1978, § 45-7-303(A) (1995) (repealed 2003). Upon a beneficiary's reasonable request, the trustee was required to provide a beneficiary with a copy of the trust terms that describe or affect the beneficiary's interest and with information on assets and other administrative details. U.P.C. § 7-303(b); NMSA 1978, § 45-7-303(B) (1995) (repealed 2003). Upon reasonable request, a beneficiary was also entitled to a trustee accounting annually on termination of the trust or upon a change of trustee. U.P.C. § 7-303(c); NMSA 1978, § 45-7-303(C) (1995) (repealed 2003).

335. On the obligations of the trustee to keep the beneficiaries informed, see U.P.C. § 813; NMSA 1978, § 46A-8-813, discussed *infra* notes 333–344 and accompanying text. On the extent to which a settlor may waive these obligations in the terms of the trust, see U.T.C. § 105(b)(8)–(9); NMSA 1978, § 46A-1-105(B)(8)–(9), discussed *infra* notes 345–351 and accompanying text.

336. U.T.C. § 813; NMSA 1978, § 46A-8-813 (2003). For an analysis of this section, see Joseph Kartiganer & Raymond H. Young, *The UTC: Help for Beneficiaries and Their Attorneys*, PROB. & PROP., Mar./Apr. 2003 at 18, 19–20.

337. U.T.C. § 603(a); NMSA 1978, § 46A-6-603(A) (2003). Section 603 is discussed in further detail *supra* notes 307–310 and accompanying text.

compensation.³³⁸ Regular reporting by the trustee is required. The trustee must furnish the distributes, and permissible distributes, at least annually, with a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation,³³⁹ although the beneficiaries may waive this requirement.³⁴⁰ The trustee must also promptly respond to any beneficiary's request for information, unless unreasonable under the circumstances.³⁴¹ This includes a requirement that the trustee provide a beneficiary with a copy of the trust instrument upon request.³⁴² The drafting committee rejected the more limited approach of letting the trustee decide which provisions are material to the beneficiary's interest; the trustee's version of what is material may differ markedly from what the beneficiary might find relevant.³⁴³ Requiring disclosure of the entire instrument upon demand is consistent with recent case law.³⁴⁴

The most discussed issue during the drafting of the UTC, and subsequent to its approval, has been the extent to which a settlor may waive the above disclosure requirements.³⁴⁵ All of the specific requirements are waivable except the trustee's obligation to notify the qualified beneficiaries of an irrevocable trust, who are age twenty-five or older, of the trust's existence³⁴⁶ and the trustee's obligation to respond to the request of any beneficiary for a trustee's report and other information reasonably related to the trust's administration.³⁴⁷

Early indications are that many states will modify the waiver provision. Of the five states that have enacted the UTC, only Nebraska and New Mexico enacted the UTC waiver provision without change.³⁴⁸ Both Kansas and Wyoming allow a settlor to totally dispense with reporting to beneficiaries.³⁴⁹ Arizona allows the settlor to waive the duty to respond to information requests by nonqualified beneficiaries and lowers the age limit from twenty-five to twenty-one.³⁵⁰

The waiver issue brings into direct conflict the policy of allowing a settlor to design a trust as the settlor wishes, with the goal of making certain the beneficiaries have sufficient information to enforce their interests. The dilemma is that by directing that information be withheld, the settlor may be denying the beneficiaries the very thing the beneficiaries need to make certain that the trustee will carry out the settlor's dispositive wishes. Placing restraints on a settlor's ability to waive

338. U.T.C. § 813(b)(2), (4); NMSA 1978, § 46A-8-813(B)(2), (4) (2003).

339. U.T.C. § 813(c); NMSA 1978, § 46A-8-813(C) (2003).

340. U.T.C. § 813(d); NMSA 1978, § 46A-8-813(D) (2003).

341. U.T.C. § 813(a); NMSA 1978, § 46A-8-813(A) (2003).

342. U.T.C. § 813(b)(1); NMSA 1978, § 46A-8-813(B)(1) (2003).

343. See U.T.C. § 813 cmt.

344. See *Taylor v. Nationsbank Corp.*, 481 S.E.2d 358 (N.C. Ct. App. 1997) (holding that absent provisions to the contrary, trust beneficiaries are entitled to view the trust instrument); *Fletcher v. Fletcher*, 480 S.E.2d 488 (Va. 1997) (same).

345. For the policy debate, see Kartiganer & Young, *supra* note 336.

346. U.T.C. § 105(b)(8); NMSA 1978, § 46A-1-105(B)(8) (2003).

347. U.T.C. § 105(b)(9); NMSA 1978, § 46A-1-105(B)(9) (2003).

348. See 2003 Neb. Laws L.B. 130, § 5; NMSA 1978, § 46A-1-105(B)(8)-(9) (2003).

349. See KAN. STAT. ANN. § 58a-105(b) (Supp. 2002); 2003 Wyo. Sess. Laws ch. 124 (enacting WYO. STAT. ANN. § 4-10-105 (2003)).

350. 2003 Ariz. Sess. Laws ch. 212, § 13 (enacting ARIZ. REV. STAT. § 14-10105(b)(9) (2003)).

disclosure is not a new concept,³⁵¹ but the UTC, by reducing the matter to the form of a statute, brings the issue into much sharper relief.

K. Remedies for Breach of Trust (Sections 204, 1001–1009)

The UTC contains comprehensive provisions both specifying and, at the same time, limiting a trustee's liability for breach of trust. At the insistence of the New Mexico Trial Lawyer's Association, however, the sponsors of House Bill 48 agreed to delete several of these provisions,³⁵² with the apparent purpose of making it easier to sue a trustee than under the unaltered UTC.³⁵³

Under the UTC, the measure of damages for breach of trust is designed to restore the trust property and distributions to what they would have been had the breach not occurred. But, it also serves another purpose: preventing the trustee from profiting from the breach. Consequently, under the UTC, the trustee is liable for the higher of the two amounts: the profit made by the trustee or the loss to the trust.³⁵⁴ The New Mexico Legislature, however, elected to delete this provision, thereby leaving uncertain the measure of damages for breach of trust.³⁵⁵ The UTC also contains a listing of non-monetary remedies for a breach or threatened breach of trust, including such actions as recovery of trust assets misappropriated by a trustee.³⁵⁶ The New Mexico Legislature similarly deleted this provision, although its deletion does not mean that the particular remedies listed are not part of the law. A remedy, such as removal of a trustee, is available whether or not it is also included on a separate listing.³⁵⁷

More significant is the legislature's deletion of the UTC's provision regarding where a trustee can be sued³⁵⁸ and the omission of the UTC's statute of limitations on when such a suit may be brought.³⁵⁹ This deletion significantly expands potential trustee liability, allowing trustees to be sued in more places and for longer time periods than under the UTC. Under the UTC, a trustee can generally be sued only

351. According to the RESTATEMENT (SECOND) OF TRUSTS § 173 cmt. c (1959),

Although the terms of the trust may regulate the amount of information which the trustee must give and the frequency with which it must be given, the beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust.

352. See Catron, *supra* note 96.

353. For a discussion of the deleted provisions and what law would now apply in their absence, see *infra* notes 355–368 and accompanying text.

354. U.T.C. § 1002(a). This provision is based on RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 205 (1992). U.T.C. § 1002 cmt.

355. New Mexico, however, did retain U.T.C. § 1002(b), dealing with apportionment of damages among cotrustees. See NMSA 1978, § 46A-10-1002 (2003). Assuming a New Mexico court would follow the most recent iteration of the *Restatement of Trusts*, the court would fashion a damages remedy similar to that of the deleted section 1002(a). For the most recent *Restatement* provision, see *supra* note 354.

356. U.T.C. § 1001(b). For a listing of the remedies available under this provision, see *supra* note 105.

357. U.T.C. § 1001(b) lists the traditional equitable remedies for breach of trust. Some of these remedies, such as the power to remove a trustee, are addressed by specific provision elsewhere in the Code. See U.T.C. § 706; NMSA 1978, § 46A-7-706 (2003). Other remedies, such as the imposition of a constructive trust, derive from the court's inherent equitable jurisdiction. Pursuant to section 106, such equitable principles supplement the Code and remain part of the law even though not codified. See U.T.C. § 106 and cmt.

358. U.T.C. § 204.

359. U.T.C. § 1005.

in the county of the trust's principal place of administration.³⁶⁰ Bringing the suit at the trustee's location was also the usual rule under Article VII of the UPC,³⁶¹ formerly in effect in New Mexico but repealed upon enactment of the UTC. The venue provisions of the New Mexico Rules of Civil Procedure, which will now, presumably, govern where trust suits may be brought, allow suit to be brought in the plaintiff's or defendant's counties of residence and perhaps in other locations.³⁶²

New Mexico also allows suits against a trustee to be brought for longer time periods than permitted under the UTC. By failing to enact the UTC's statute of limitation on actions against a trustee for breach of trust³⁶³ and by repealing the comparable statute of limitations under the UPC,³⁶⁴ the barring of actions against a trustee is now controlled by New Mexico's longer six-year statute of limitations on actions in contract.³⁶⁵

Under the UTC, an aggrieved beneficiary must commence an action against a trustee for breach of trust within one year following the furnishing of a trustee's report that adequately discloses the potential claim or within five years after termination of the fiduciary relationship between the trustee and beneficiary (termination of the trust, distribution of the beneficiary's interest, or the date the particular trustee complained of left office).³⁶⁶ Under Article VII of the UPC, formerly in effect in New Mexico but repealed upon enactment of the UTC, the statute of limitations did not commence to run upon the furnishing of an annual report, but only began to run upon termination of the fiduciary relationship between the trustee and beneficiary. The time periods were relatively short, however. The beneficiary had to bring an action within six months after the trustee furnished a final account or report that fully disclosed the matter, or if disclosure was inadequate, within three years after the furnishing of the final account or report.³⁶⁷ New Mexico's statute of limitations on actions in contract, which is now applicable to actions against a trustee, gives a beneficiary a much longer six years following termination of the trust relationship in which to bring the action.³⁶⁸

360. U.T.C. § 204 provides generally that venue is in the county in which the trust's principal place of administration is or will be located. If the trust is created by will and the estate is not yet closed, venue is also in the county in which the decedent's estate is being administered. U.T.C. § 204(a). Subsection (b) adds special rules on venue for a proceeding to appoint a trustee.

361. The venue provision of the U.P.C. was similar to that of the U.T.C. but less detailed. Compare U.T.C. § 204, with U.P.C. § 7-202 (1998); NMSA 1978, § 45-7-202 (1995) (repealed 2003)), which provided that venue on actions against a trustee was in the county where the trust had its principal place of administration or, if none, as otherwise provided by the Rules of Civil Procedure.

362. See NMSA 1978, § 38-3-1 (1998). For the application of this provision to an action involving a corporate fiduciary, see *Sunwest Bank v. Nelson*, 1998-NMSC-012, 958 P.2d 740.

363. For a summary of U.T.C. § 1005, which New Mexico failed to enact, see *infra* note 366 and accompanying text.

364. For the statute of limitations under the U.P.C., see *infra* note 367 and accompanying text.

365. For New Mexico's six-year statute of limitations, see *infra* note 368 and accompanying text.

366. For the furnishing of the report to start the one-year time limit, the report must adequately disclose the existence of a potential claim for breach of trust and inform the beneficiary of the time limit. U.T.C. § 1005(a). A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or beneficiary's representative knows of the potential claim or should have inquired into its existence. *Id.* § 1005(b).

367. U.P.C. § 7-307; NMSA 1978, § 45-7-307 (1995) (repealed 2003).

368. The controlling statute is NMSA 1978, § 37-1-3 (1975), which provides that actions on contract must be brought within six years. In *Craft v. Sunwest Bank*, 84 F. Supp. 2d 1226, 1234 (D.N.M. 1999), a case involving

New Mexico, however, did enact the remaining provisions of the UTC relating to remedies for breach of trust. Similar to any other action sounding in equity, the UTC authorizes the court, in any proceeding involving the trust's administration, to award counsel fees to any party, to be paid by another party or directly from the trust, as justice and equity may require.³⁶⁹ In addition, a beneficiary who has consented to a trustee's action is also precluded from suing for breach of trust.³⁷⁰

Even if the terms of the trust attempt to exculpate a trustee completely for the trustee's acts, the trustee must always comply with a certain minimum standard. An exculpatory term cannot be used to immunize a trustee for breach of trust if the breach was committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries.³⁷¹ Even absent bad faith or reckless indifference, the term is unenforceable if it was inserted as a result of the abuse of a confidential or fiduciary relationship between the trustee and settlor.³⁷² Because of the serious risk of abuse present when a trustee/scrivener inserts an exculpatory provision into the instrument, the drafting of such a provision is presumed to be an abuse of a fiduciary or confidential relationship. To overcome the presumption of abuse, the trustee must establish that the clause was fair and that its existence and contents were adequately communicated to the settlor.³⁷³ The presumption of abuse does not apply if independent counsel represented the settlor.³⁷⁴

A trustee is entitled to rely on the trust instrument. While the entire terms of a trust are normally contained in the trust instrument, extrinsic evidence may be admissible to clarify ambiguities, many of which may not be apparent from a reading of the instrument. Also, grounds may exist, such as reformation due to a mistake of fact or law, resulting in the reformation of apparently unambiguous

a commercial trust not subject to Article VII of the U.P.C., the court held that the statute began to run not on the date of the trustee's breach, but on the date the beneficiary learned of the injury. In *McDermott v. Sher*, 59 N.M. 142, 153, 280 P.2d 660, 666 (1955), the court held that the statute does not begin to run against the trustee as long as there is a continuing recognition of the trust. This concept of continuing recognition, which is derived from the doctrine of laches, prevents a statute from running until the trust relationship ends, either upon termination of the trust, the trustee leaving office, or the trustee's repudiation of the trust. See generally III AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* § 219 (4th ed. 1988).

369. U.T.C. § 1004; NMSA 1978, § 46A-10-1004 (2003). This section codifies the court's historic authority to award costs and fees, including reasonable attorney's fees, in judicial proceedings grounded in equity. U.T.C. § 1004 cmt. For a New Mexico case on award of attorney's fees in trust litigation, see *Bogle v. Bogle*, 51 N.M. 474, 477-78, 188 P.2d 181, 183-84 (1947) (trustee committing breach of trust denied award of attorney's fees from trust).

370. U.T.C. § 1009; NMSA 1978, § 46A-10-1008 (2003). The immunity provided by this section does not apply if the beneficiary's consent, release, or ratification was induced by improper conduct of the trustee or, if at the time of the consent, release, or ratification, the beneficiary did not know of the beneficiary's rights or of the material facts relating to the breach. U.T.C. § 1009; NMSA 1978, § 46A-10-1008 (2003). This provision is consistent with prior New Mexico law. See *Crutcher v. Joyce*, 134 F.2d 809, 816-17 (10th Cir. 1943).

371. U.T.C. § 1008(a)(1); NMSA 1978, § 46A-10-1007(A)(1) (2003).

372. U.T.C. § 1008(a)(2); NMSA 1978, § 46A-10-1007(A)(2) (2003).

373. U.T.C. § 1008(b); NMSA 1978, § 46A-10-1007(B) (2003). The drafters of the U.T.C. disapprove of cases such as *Marsman v. Nasca*, 573 N.E.2d 1025, 1031-33 (Mass. App. Ct. 1991), which upheld an exculpatory clause in a trust instrument drafted by the trustee because the beneficiary could not prove that the clause was inserted as a result of an abuse of a fiduciary relationship. Section 1008(b) responds to the risk that the insertion of such a clause by the fiduciary or its agent may have been undisclosed or inadequately understood by the settlor. U.T.C. § 1008 cmt.

374. If the settlor was represented by independent counsel, the settlor's attorney is considered the drafter of the instrument even if the attorney used the trustee's form. Because the settlor's attorney is an agent of the settlor, disclosure of an exculpatory term to the settlor's attorney is disclosure to the settlor. U.T.C. § 1008 cmt.

terms.³⁷⁵ To enable a trustee to administer a trust with some dispatch and without concern that reliance on the language of the trust instrument is misplaced, the UTC provides that a trustee is not liable for a breach of trust to the extent the breach resulted from reasonable reliance on the trust instrument.³⁷⁶

A trustee is also entitled to rely on reasonable inferences as to a beneficiary's family or other status. Whenever an event, including marriage, divorce, performance of education requirements, or death, affects the administration or distribution of the trust, a trustee who exercised reasonable care to determine that the event occurred, is not liable for any loss attributable to lack of knowledge.³⁷⁷

CONCLUSION

This article has reviewed the significant provisions of the UTC and the effect of its enactment in New Mexico. New Mexico's former trust statutes, although drawn primarily from previous uniform law enactments, were few in number and the number of reported trust cases is similarly sparse. The New Mexico UTC addresses numerous issues on which there is currently little or no New Mexico law. Despite some of the deletions that were made to the UTC, and which are noted in this article, enactment of the UTC has resulted in a New Mexico law of trusts that is more complete, accessible, and, as a consequence, more useful than former law.

375. U.T.C. § 415; NMSA 1978, § 46A-4-415 (2003); *supra* notes 268–269 and accompanying text.

376. U.T.C. § 1006; NMSA 1978, § 46A-10-1005 (2003).

377. U.T.C. § 1007; NMSA 1978, § 46A-10-1006 (2003). The common law imposed absolute liability against a trustee for misdelivering trust property. *See* RESTATEMENT (SECOND) OF TRUSTS § 226 (1959).