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The Arkansas Trust Code: Good Law for Arkansas

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Lynn Foster*

I. INTRODUCTION

The trust is a legal entity whereby a settlor splits the “bundle of sticks” of property ownership into two bundles—responsibility and enjoyment—and transfers them to two persons—the trustee and the beneficiary. Extolled as a way to avoid probate, creditors, and taxes, the trust is a remarkably flexible means to a variety of ends. Trusts have never been more popular.¹ Notwithstanding the wide use of trusts, the trust law in many states is a patchwork comprised of statutes covering only selected areas of trust law and cases determining the law merely with regard to the narrow issues in dispute.² This has definitely been the case in Arkansas, which until now has had no comprehensive trust code. It could be argued that this lack of trust law had its advantages—trust drafters and trustees could perhaps exercise more flexibility and creativity. But these advantages were outweighed by

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1. Unfortunately, there are no statistics to conclusively prove this claim. In most states trusts are not recorded or filed, unlike deeds and probated wills. However, the American Association of Retired Persons estimates that as of 1999 twenty-three percent of Americans aged fifty or over had a living trust, up from 1991, when only twelve percent of persons forty-five or over reported having a living trust. AMERICAN ASSOCIATION OF RETIRED PERSONS, WHERE THERE IS A WILL 4 (2000), <http://research.aarp.org/econ/will.pdf> (last visited Nov. 21, 2004). See also the estimate that between 1998 and 2052 at least \$41 trillion will pass between generations in the United States, much of it in trust form. John J. Havens & Paul G. Schervish, *Why the \$41 Trillion Wealth Transfer Estimate is Still Valid: A Review of Challenges and Questions*, 7 J. GIFT PLAN., Jan. 2003, at 11–15, 47–50, <http://www.bc.edu/research/swri/meta-elements/pdf/41trillionreview.pdf> (predicting a “golden age” of philanthropy despite the downturn of the financial markets in the first half of this decade) (last visited Nov. 21, 2004).

2. A number of states do have trust codes. See, e.g., California, Florida, Georgia, Indiana, Iowa, Montana, New York, Texas, and Washington. CAL. PROB. CODE §§ 15000B18201 (West 1991 & Supp. 2005); FLA. STAT. ANN. §§ 737.101–627 (West 1995 & Supp. 2005); GA. CODE ANN. §§ 53-12-1 to 53-12-394 (Michie 1997 & Supp. 2004); IND. CODE ANN. §§ 30-1-1-9 to 30-5-10-4 (Michie 2000 & Supp. 2003); IOWA CODE ANN. §§ 633.1101–7101 (West 2003 & Supp. 2004); MONT. CODE ANN. §§ 72-33-101 to 72-33-705 (2003) N.Y. EST. POWERS & TRUSTS LAW §§ 7-1.1 to 7-5.7 (McKinney 2002 & Supp. 2005); TEX. PROP. CODE ANN. §§ 111.001–115.017 (Vernon 1995 & Supp. 2004–2005); WASH. REV. CODE ANN. §§ 11.98.009–920 (West 1998 & Supp. 2005).

the drawbacks of inconsistency and uncertainty, preventing settled expectations of settlors, trustees, and beneficiaries.

To remedy this problem, the National Conference of Commissioners on Uniform State Laws (NCCUSL) adopted the Uniform Trust Code (UTC) in 2000.³ At this writing, nine states and the District of Columbia have enacted the UTC.⁴ Arkansas is the latest addition, having enacted the UTC, retitled as the Arkansas Trust Code (ATC), on March 21, 2005.⁵

This article seeks to provide guidance to Arkansas practitioners and judges working with the ATC. Part I relates the history of the UTC, its relation to existing law and its review by the Arkansas Bar Association, and provides an overview. Part II discusses the ATC and reproduces pertinent sections in the footnotes. The article discusses Arkansas's changes to the UTC text and compares and contrasts the ATC with current Arkansas trust law. For convenience a brief description of current Arkansas trust law statutes is included at the end of the article. A caveat should be inserted here. This article is not a substitute for reading the ATC and—just as important—the accompanying commentary provided by the NCCUSL.⁶ Finally, some

3. UNIF. TRUST CODE (amended 2003), 7C U.L.A. 442 (Supp. 2004) [hereinafter UTC]. The text of the Uniform Trust Code, including comments, can be viewed at <http://www.law.upenn.edu/bll/ulc/ulc.htm>, which is the URL of the National Conference of Commissioners on Uniform State Laws Site. Viewers should take care that they are looking at the desired version of the Code because it was subsequently amended in 2001, 2003, and 2004. Probably the most helpful site, however, is the UTC Project website at <http://www.utcproject.org>. This website contains the text of the UTC, a list of the enacting states, and a semi-annual newsletter, among other features.

4. Jurisdictions that have enacted the UTC are the District of Columbia, Kansas, Maine, Missouri, Nebraska, New Hampshire, New Mexico, Tennessee, Utah, and Wyoming. D.C. CODE ANN. §§ 19-1301.01–1311.03 (LexisNexis Supp. 2004); KAN. STAT. ANN. §§ 58a-101 to 58a-1106 (Supp. 2003); ME. REV. STAT. ANN. tit. 18-B, §§ 101–1104 (Thompson Supp. 2004); MO. ANN. STAT. §§ 456.1-101–456.11-1106 (West, Westlaw through 2d Reg. Sess. of 92d Gen. Assembly (2004); NEBR. REV. STAT. §§ 30-3801–30-38110 (LEXIS Supp. 2004); N.H. REV. STAT. ANN §§ 564-B:1-101 to 564-B:11-1104 (LEXIS Supp. 2004); N.M. STAT. ANN. §§ 46A-1-101 to 46A-11-1104 (Thompson 2003 & Supp. 2004); TENN. CODE ANN. §§ 35-15-101 to 35-15-1103 (Supp. 2004); UTAH CODE ANN. §§ 75-7-101 to 75-7-1201 (LEXIS Supp. 2004); WYO. STAT. ANN. §§ 4-10-101 to 4-10-1103 (LEXIS 2003). Arizona enacted the UTC in 2003 but repealed it in 2004.

5. An Act to Adopt the Arkansas Trust Code, Act. No. 1031 (Mar. 21, 2005) (to be codified at ARK. CODE ANN. §§ 28-73-101–28-73-1105). Acts are available online at <http://www.arkleg.state.ar.us/> (last visited Mar. 23, 2005).

6. Commentary is most helpful when it is printed accompanying the statutes. Heretofore all commentary concerning Arkansas's uniform laws has been printed in two separate "Commentaries" volumes of the official *Arkansas Code Annotated* published by LexisNexis. Unfortunately, these volumes have not been updated since 1995, leaving the Arkansas bench and bar without access to NCCUSL commentary through its official state code. The author hopes that if the ATC is enacted we will see the statutes and commentary side by side in Title 28, as they are currently displayed in *West's Arkansas Code Annotated*. Other sources of the NCCUSL commentary are the NCCUSL website at

portions of the UTC, either because they have caused unforeseen tax ramifications or because they represent clear policy preferences on the part of the UTC drafters, have engendered controversy or have been amended by a significant number of the enacting states. This article endeavors to point out the sections in question that are relevant to the ATC.

II. THE UNIFORM TRUST CODE

A. The Adoption and Relation of the UTC to Other Uniform Laws

In the words of the drafters, the UTC is “the first national codification of the law of trusts.”⁷ Prior uniform acts have affected trusts, but none have dealt comprehensively with trust law. Two previously existing uniform laws are effectively superseded by the UTC: the Uniform Trusts Act⁸ and the Uniform Trustees’ Powers Act,⁹ neither of which were enacted by Arkansas. The Uniform Prudent Investor Act, which was adopted by Arkansas in 1997,¹⁰ is “reincorporated” as part of Article 8 and all of Article 9 of the UTC, and has been retained in this way as part of the ATC. Finally, the UTC supersedes most of Article VII of the Uniform Probate Code,¹¹ dealing with the powers of trustees. Arkansas has not adopted the Uniform Probate Code. A number of other uniform laws adopted by Arkansas concern trusts but are not affected in any way by the UTC.¹² A third uniform law, The Uniform Principal and Income Act (enacted in Arkansas in 1999),¹³ together with the Uniform Prudent Investor Act and the UTC, comprise a comprehensive code of trust law.

B. The Relation of the UTC to the Restatements

Restatements of Law are promulgated by the American Law Institute (ALI) in an attempt to provide summaries of the law (or in some cases, what

http://www.law.upenn.edu/bll/ulc/ulc_final.htm, *Uniform Laws Annotated* and Westlaw.

7. UTC prefatory note.

8. UNIF. TRUSTS ACT, 7C U.L.A. 388 (2000).

9. UNIF. TRUSTEES’ POWERS ACT, 7C U.L.A. 401 (2000).

10. ARK. CODE ANN. §§ 23-51-200–23-51-211 (LEXIS 2000) (to be repealed Sept. 1, 2005). In other words, the Uniform Prudent Investor Act has moved from Title 23 to Title 28 of the Arkansas code.

11. UNIF. PROBATE CODE, 8 U.L.A. Pt. II 486 (1998 & Supp. 2004).

12. They are: the Unif. Disclaimer of Property Interests Act, ARK. CODE ANN. §§ 28-2-201–28-2-218; the Unif. Testamentary Additions to Trusts Act, *id.* §§ 28-27-101–28-27-106; the Unif. Management of Institutional Funds Act, *id.* §§ 28-69-601–28-69-611; and the Unif. Custodial Trust Act of 1987, *id.* §§ 28-72-401–28-72-422. These acts are summarized in the Appendix.

13. ARK. CODE ANN. §§ 28-70-101–28-70-605.

the ALI believes should be the law) in particular areas for the benefit of legislators, judges, and practitioners. Less than a year after the passage of the UTC, the ALI promulgated the Restatement (Third) of Trusts. The UTC drafters worked in close cooperation with the drafters of the Restatement (Third) of Trusts to such an extent that the UTC Reporter has stated that “a significant minority, if not majority, of the UTC provisions could be described as a codification of the Restatement.”¹⁴ Most of the UTC Comments cite the Restatements (Third) and (Second). In other words, the UTC and the Restatement (Third) are a companion set, the former for legislative adoption and the latter for judicial adoption on a case-by-case basis. In Arkansas, the Restatement (Second) of Trusts, promulgated in 1957, has long been followed by the Arkansas Supreme Court.¹⁵ The Restatement (Third) is so new that the Supreme Court has not taken any position on it as a whole,¹⁶ although there is no reason to doubt that most, if not all, of it will be followed by the court.

C. Review of the UTC by the Arkansas Bar

The UTC was first approved by the Arkansas Bar Association’s Uniform Laws Committee in 2002. Subsequently it was reviewed by the Jurisprudence and Law Reform Committee, which referred it to the Probate and Trust Section for review by practitioners who specialized in trusts. In 2003 a volunteer ten-person committee (the Study Committee) consisting of past and present Probate and Trust Section officers, American College of Trust and Estate Counsel Fellows, and a trust company attorney, among others, closely reviewed the UTC in light of Arkansas law. The Study Committee evaluated each section in light of current Arkansas law and revised it where it was in clear conflict. The revised UTC was submitted to the Probate and Trust Section in January 2004, which in turn forwarded it to the Jurisprudence and Law Reform Committee. One further minor modification¹⁷ was made at this point, after which the Committee approved it for inclusion in

14. David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143, 148 (2002). Professor English was the Reporter for the Uniform Trust Code.

15. “When reviewing trust cases in Arkansas, we have followed the Restatement Second of Trusts.” *Wisener v. Burns*, 345 Ark. 84, 89, 44 S.W.3d 289, 292 (2001).

16. It has cited Section 59 in *Med. Park Hosp. v. Bancorpsouth Bank of Hope*, No. 03-1199, 2004 WL 965927 (Ark. May 6, 2004).. One Arkansas Court of Appeals case has also cited Restatement (Third) of Trusts Sections 10(c) and 16(1) favorably. *Trott v. Jones*, No. CA 03-584, 2004 WL 739964 (Ark. Ct. App. Apr. 7, 2004).

17. The Jurisprudence and Law Reform Committee added the definition of “community property.” Letter from William Haught, member, Arkansas Bar Association Probate and Trust Section Study Committee on the Uniform Trust Code, to Tom D. Womack, Committee Chair 1 (May 25, 2004) (on file with author).

the Bar Association's legislative package.¹⁸ It was approved by the Arkansas Bar Association's House of Delegates in 2004, and in late January 2005 the House of Delegates additionally approved the NCCUSL's 2004 amendments.

D. Enactment by the Legislature

Senator Jim Luker and Representatives Bruce Maloch and Will Bond sponsored the ATC as Senate Bill 336. It had been amended slightly from the Bar Association's version before its introduction, but once introduced, was amended only once in the House of Representatives. These changes are discussed below. Governor Huckabee signed the bill on March 21, 2005, whereupon it became Act 1031.

E. Overview of the Arkansas Trust Code

The drafters of the UTC worked with several purposes in mind. The first was to codify the common law of trusts.¹⁹ The second was to create a "default statute."²⁰ Except for a few mandatory rules,²¹ trust drafters are free to override the provisions in the ATC and provide their own provisions.²²

Finally, the ATC includes some "innovations." Many of these are neutral and work to improve the administration of trusts. Some of them represent policy decisions of the drafters in such areas as notice to beneficiaries, rights of creditors against spendthrift trusts, and asset protection trusts. Some of the enacting states have modified or deleted such provisions. They are discussed in detail below.

The highlights of the new law contained in the ATC are:

1. The idea of "qualified beneficiaries."²³
2. The definition and regulation of a trust's "principal place of administration."²⁴
3. The authorization of out-of-court settlements.²⁵

18. This sequence of events is taken from Tom D. Womack, *The Proposed Arkansas Trust Code, 2004 PROBATE LAW INSTITUTE 2-3* (Ark. Bar Assoc., 2004).

19. UTC prefatory note.

20. UTC prefatory note.

21. ATC § 28-73-105.

22. UTC § 105 cmt. *See also infra* notes 49-56 and accompanying text (discussing section 105).

23. ATC § 28-73-103(13)); *see infra* notes 43-48 and accompanying text.

24. *Id.* § 28-73-108; *see infra* notes 68-72 and accompanying text.

25. *Id.* § 28-73-111; *see infra* notes 73-75 and accompanying text.

4. The clarification and expansion of the concept of representation.²⁶
5. The recognition of "honorary trusts" as valid.²⁷
6. The expansion and increased flexibility of the rules for the modification and termination of irrevocable trusts, including the expansion of the cy pres doctrine.²⁸
7. The clarification of the effect of spendthrift and discretionary trusts on the rights of creditors.²⁹
8. The reversal of the common law presumption of the irrevocability of a trust.³⁰
9. The expanded duties of a trustee to account, and the clarification of the duties and powers of trustees.³¹
10. The clarification of the law of trusts with respect to third persons.³²
11. The partial retroactivity of the ATC.³³

III. ARTICLE 1—GENERAL PROVISIONS AND DEFINITIONS

Article 1 covers the scope of the ATC, definitions, default provisions not subject to override, and other basic provisions such as the governing law of a trust and the jurisdiction whose law will govern a trust.

26. *Id.* §§ 28-73-301–28-73-305; *see infra* notes 86–114 and accompanying text.

27. *Id.* §§ 28-73-408–28-73-409; *see infra* notes 149–50 and accompanying text.

28. *Id.* §§ 28-73-410–28-73-417; *see infra* notes 151–98 and accompanying text.

29. ATC §§ 28-73-501–28-73-507; *see infra* notes 199–251 and accompanying text.

30. *Id.* § 28-73-602–28-73-603; *see infra* notes 255–61 and accompanying text.

31. *Id.* §§ 28-73-801–28-73-817; *see infra* notes 289–349 and accompanying text.

32. *Id.* §§ 28-73-1001–28-73-1013; *see infra* notes 361–87 and accompanying text.

33. *Id.* § 28-73-1105; *see infra* notes 389–97 and accompanying text.

A. Scope—Section 102³⁴

The ATC applies to express trusts, whether charitable or non-charitable, and to any trust required to be administered in the manner of an express trust. An express trust is created by a settlor who makes a transfer of property, either inter vivos or testamentary, to a trustee for the benefit of a beneficiary. The primary focus of the ATC is trusts that arise in a gratuitous transfer context, including estate planning. However, the drafters intend the Code to apply to commercial trusts³⁵ as well, such as pension trusts, to the extent that it is not displaced by other statutes.³⁶ Additionally, the ATC would also apply to trusts such as those created pursuant to a divorce decree, or trusts created to hold proceeds of personal injury recoveries.³⁷ The ATC does not pertain to two types of “implied trusts”—resulting trusts and constructive trusts—which are really not trusts at all but types of judicial remedies.³⁸ In addition, the ATC, in an amendment to the UTC, further excludes “public trusts”—express trusts created with the state or local government as beneficiary—that are regulated by Arkansas statute.³⁹

34. This section reads as follows:

(a) This chapter applies to express trusts, charitable or noncharitable, and trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust.

(b) Notwithstanding subsection (a) of this section, this chapter does not apply to public trusts that are governed by §§ 28-72-201–28-72-207.

ATC § 28-73-102.

35. A commercial, or business trust, is “a trust that implements bargained-for exchange, in contrast to a donative transfer.” John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165, 167 (1997). Professor Langbein provides a helpful description of the different types of commercial trusts in his article—some examples are pension trusts and investment trusts—and also clarifies that some misleadingly labeled “trusts” are not part of the trust regime at all, such as deeds of trust. *See, e.g.*, *First United Bank v. Phase II*, 347 Ark. 879, 894–95, 69 S.W.3d 33, 43–44 (2002) (distinguishing between a donative trust and a “trust indenture contract,” and applying contract law).

36. UTC § 102 cmt.

37. *Id.*

38. A resulting trust arises in one of the following situations: where a private or charitable trust fails in whole or in part; where a private or charitable trust is fully performed without exhausting the trust estate; and, where property is purchased and the purchase price is paid by one person and at his direction the vendor transfers the property to another person. *Bottenfield v. Wood*, 264 Ark. 505, 509, 573 S.W.2d 307, 309 (1978) (citing the Restatement (Second) of Trusts § 404 (1959)). A constructive trust is a legal fiction that is a court’s characterization of a relationship between two persons and property for equitable reasons. The wrongdoer is deemed a constructive trustee by the court and conveys the trust property to the wronged constructive beneficiary. *Betts v. Betts*, 326 Ark. 544, 547, 932 S.W.2d 336, 337 (1996).

39. ARK. CODE ANN. §§ 28-72-201–28-72-207 (LEXIS 2004); *see City of Barling v. Fort Chaffee Redevelopment Auth.*, 347 Ark. 105, 114, 60 S.W.3d 443, 447 (2001) (explaining how the execution of a public trust indenture creates a binding contract).

B. Definitions—Section 103

Of particular importance are the definitions concerning beneficiaries. "Beneficiary"⁴⁰ includes not only beneficiaries under the terms of a trust, but also those who received their interests by other means, such as assignment, operation of an antilapse statute, or termination of the trust.⁴¹ In a change from the common law, holders of powers of appointment⁴² are now classified as beneficiaries under the ATC, unless they are holders in the capacity of trustees.

EXAMPLE: *S* creates a testamentary trust that benefits his children *A* and *B*. *S*'s wife *W* has a power of appointment to direct Trustee *T* to distribute income to *A* and *B* at *W*'s discretion. Under the ATC, *W* is a beneficiary. However, if instead, Trustee *T* was the holder of that power to appoint the trust property to *A* and *B*, *T* would not be a beneficiary.

Trusts often have beneficiaries whose interests are remote and contingent. One innovation of the ATC is the idea of the "qualified beneficiary."⁴³

40. "In this chapter: . . .

(3) "Beneficiary" means a person that:

(A) has a present or future beneficial interest in a trust, vested or contingent; or

(B) in a capacity other than that of trustee, holds a power of appointment over trust property . . ."

ATC § 28-73-103.

41. UTC § 103 cmt.

42. "Power of appointment" is not defined in the ATC. A power of appointment is authority, other than as an incident of the beneficial ownership of property, to designate recipients of beneficial interests in property. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 11.1 (1986). For tax purposes, powers of appointment can usually be classified as "general" if they allow the holder of the power to appoint the property to herself, her creditors, her estate, or the creditors of her estate. I.R.C. §§ 2041(b) & 2514(c) (2000). "Nongeneral" or "special" powers prohibit appointment to any of the previous four possible objects. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 11.4 (1986). For estate tax purposes, the holder of a general power is usually considered the owner of the property in question. I.R.C. § 2041. However, if the power is subject to an "ascertainable standard" (often stated as the "health, education, support or maintenance of the power holder), it will not be treated as a general power of appointment. I.R.C. §§ 2041(b)(1)(A), 2514(c)(1).

43. In this chapter: . . .

(14) "Qualified beneficiary" means a living beneficiary who, on the date the beneficiary's qualification is determined:

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

(B) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subdivision (14) (C) of this section terminated on that date, but the termination of those interests would not cause the trust to terminate; or

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

Qualified beneficiaries are those who are “currently eligible to receive a distribution from the trust together with those who might be termed the first-line remaindermen.”⁴⁴

EXAMPLE: *S* creates a testamentary trust. Income will be paid to Wife *W* and Children *A* and *B* for life at the discretion of Trustee. At their deaths the trust will terminate and be paid out to the issue of *A* and *B*. If *A* and *B* have no issue, then the trust will be paid out to Charity *C*. At *S*'s death, if *W*, *A* and *B* are alive, who are qualified beneficiaries? ANSWER: *W*, *A*, *B*, any living issue of *A* and *B*, and *C*. Permissible distributees⁴⁵ and contingent distributees may be qualified beneficiaries.

EXAMPLE: *S* creates a testamentary trust. Income will be paid to Wife *W* for her life, and after her death, to Children *A* and *B* for life, and at their deaths, to grandchildren. At *S*'s death, if *W*, *A* and *B* and two grandchildren are alive, who are qualified beneficiaries? ANSWER: *W*, *A* and *B*. The grandchildren would not receive a distribution if *W* died, and so are not “first-line” remaindermen.

The difference between a beneficiary and a qualified beneficiary is important. Under the ATC, qualified beneficiaries of irrevocable trusts must receive certain notices, such as notice of a trustee's resignation,⁴⁶ and may be asked to give their consent in certain circumstances, such as the modification or termination of a trust.⁴⁷ The Arkansas Attorney General has the rights of a qualified beneficiary with respect to charitable trusts whose principal place of administration is Arkansas.⁴⁸

ATC § 28-73-103.

44. UTC § 103 cmt.

45. “A permissible distributee” is one whose distribution is discretionary but not mandatory. For example, if a trust calls for *A* to receive a specified monthly income, but for *B* and *C* to receive income only at the discretion of the trustee, *B* and *C* are permissible distributees.

46. ATC § 28-73-705.

47. *Id.* § 28-73-411.

48. *Id.* Historically, the Arkansas Attorney General has not been active in the enforcement of charitable trusts. The Arkansas Attorney General does not have a statutory duty imposed by state law to enforce charitable trusts, although the Uniform Institutional Management of Funds Act, which applies to charitable institutions, requires institutions to notify the Attorney General if the institution seeks to modify the terms of a charitable disposition and the donor is unavailable to give consent. The Attorney General has a right to be heard. ARK. CODE ANN. § 28-69-608. With regard to a common law duty, it appears that there is only one appellate decision in which the Attorney General sued to enforce a charitable trust. *State ex rel. Attorney Gen. v. Van Buren Sch.* Dist. No. 42, 191 Ark. 1096, 1102, 89 S.W.2d 605, 607 (1936)(affirming that the Attorney General may file suits to enforce public trusts or charities).

C. Default Rules—Section 105⁴⁹

The UTC is largely a codification of default rules. Trust drafters have essentially free range, limited only in a few areas which are listed in section 105 and discussed in its Comment. Some of the default rules that cannot be drafted away are the requirements for creating a trust;⁵⁰ certain powers of courts, including the power to modify or terminate a trust⁵¹ and to adjust a trustee's compensation;⁵² the duty of a trustee to act in good faith and in accordance with the purposes of the trust;⁵³ the effect of a spendthrift provision;⁵⁴ and rights of third parties dealing with the trust.⁵⁵ Mandatory notice provisions and limits on exculpatory clauses were removed by the legislature.

These mandatory rules are discussed below, in the context of the particular ATC articles in which they occur. Drafters of trust instruments

49. This section reads as follows:

- (a) Except as otherwise provided in the terms of the trust, this chapter governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.
- (b) The terms of a trust prevail over any provision of this chapter except:
 - (1) the requirements for creating a trust;
 - (2) the duty of a trustee to act in good faith and in accordance with the purposes of the trust;
 - (3) the requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve;
 - (4) the power of a court to modify or terminate a trust under §§ 28-73-410–28-73-416;
 - (5) the effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in subchapter 5 of this chapter;
 - (6) the power of a court under § 28-73-702 to require, dispense with, or modify or terminate a bond;
 - (7) the power of a court under § 28-73-708(b) to adjust a trustee's compensation specified in the terms of the trust which is unreasonably low or high;
 - (8) the rights under §§ 28-73-1010–28-73-1013 of a person other than a trustee or beneficiary;
 - (9) periods of limitation for commencing a judicial proceeding;
 - (10) the power of a court to take such action and exercise such jurisdiction as may be necessary in the interests of justice; and
 - (11) the subject-matter jurisdiction of a court for commencing a proceeding as provided in § 28-73-203.

ATC § 28-73-105.

50. *Id.* § 28-73-402; *see infra* notes 127–32 and accompanying text.

51. *Id.* §§ 28-73-410–28-73-416; *see infra* notes 151–93 and accompanying text.

52. *Id.* § 28-73-708(b); *see infra* note 284 and accompanying text.

53. *Id.* § 28-73-801; *see infra* note 289 and accompanying text.

54. *Id.* §§ 28-73-501–28-73-507; *see infra* notes 199–251 and accompanying text.

55. *Id.* §§ 28-73-1010–28-73-1013; *see infra* notes 375–87 and accompanying text.

should pay particular heed to these default rules and their accompanying comments.⁵⁶

D. Common Law and Equity—Section 106⁵⁷

Even a comprehensive code cannot cover all eventualities. The UTC expressly states that it is supplemented by the common law of trusts and principles of equity. As possible sources of such principles, the drafters list the Restatements and the Comments to the UTC.

E. Governing Law of Trusts—Section 107⁵⁸

This section concerns the law that will govern the meaning and effect of the trust terms themselves, as distinguished from determining whether a trust has been validly created,⁵⁹ or where a suit regarding the trust can be brought.⁶⁰ The settlor is free to determine the governing law unless the jurisdiction having the most significant relationship to the trust has a strong public policy against the law of the jurisdiction the settlor chooses. If the trust is silent, the law of the jurisdiction having the most significant relationship to the matter at hand will govern. Here, factors such as the location of the trust property and the domicile of the settlor, trustee, and beneficiaries are important.⁶¹

There is no significant precedent on this issue with respect to trusts: only one unpublished court of appeals case and two federal court decisions, one from each district. In two cases, the trust property consisted of land. In

56. The noted authority Professor John Langbein has been the chief proponent of this idea of trust law as “default law.” See John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105 (2004); John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 664 (1995) (emphasizing the similarity of trusts to contracts rather than to property).

57. This section reads as follows: “The common law of trusts and principles of equity supplement this chapter, except to the extent modified by this chapter or another statute of this state.” ATC § 28-73-106.

58. This section reads as follows:

The meaning and effect of the terms of a trust are determined by:

(1) the law of the jurisdiction designated in the terms unless the designation of that jurisdiction’s law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue; or

(2) in the absence of a controlling designation in the terms of the trust, the law of the jurisdiction having the most significant relationship to the matter at issue.

ATC § 28-73-107.

59. See *id.* § 28-73-403.

60. See *id.* § 28-73-108.

61. UTC § 107 cmt.

Rainey v. Holland,⁶² the land was located in Mississippi. The testamentary trust was silent as to the governing law, although the testator's will directed Mississippi law to apply when determining the identity of "heirs." The Arkansas Court of Appeals applied Mississippi law to construe the trust, citing treatises by Leflar and Scott as authority.⁶³ In *Hartsfield v. Lescher*,⁶⁴ the land was located in Arkansas, and so the court, also citing Scott, applied Arkansas law, even though the will creating the trust was probated in Tennessee.

The third case involved a married couple who had created several trusts while residing in Florida.⁶⁵ The trust of the now-deceased wife was at issue. The couple had relocated to Arkansas and the surviving husband, trustee (mostly personal property), and trustee were all located in Arkansas, until the husband convinced the trustee to distribute the trust assets to him, whereupon he moved to Wisconsin. The trust, however, stated that the governing law of the trust was to be that of Florida. The court, also citing Scott as authority, applied Florida law to determine that the trustee had committed breach of trust.⁶⁶

On the other hand, the law with respect to wills is clear.

In sum, Arkansas law has consistently followed the rule that the law of the situs of real property governs the effect and interpretation of wills purporting to devise such land. Thus, any will, regardless of where it was executed or where the testator resided at the time of his or her death, that purports to devise real property located in this state will be interpreted and construed under the laws of this state.⁶⁷

62. "We recognize that there is ample authority for the proposition that, in the case of a testamentary trust involving land, the law of the situs of the land applies." *Rainey v. Holland*, No. CA98-1112, 1999 WL 318060, at *2 (Ark. Ct. App. May 12, 1999).

63. *Id.*

64. *Hartsfield v. Lescher*, 721 F. Supp. 1052, 1056 (E.D. Ark. 1989).

65. *Dunkley v. Peoples Bank & Trust Co.*, 728 F. Supp. 547 (W.D. Ark. 1989).

66. *Id.* at 555-56.

67. *Craig v. Carrigo*, 353 Ark. 761, 770, 121 S.W.3d 154, 159 (2003).

F. Principal Place of Administration—Section 108⁶⁸

A trust's principal place of administration will ordinarily determine which court has jurisdiction over the trust; in other words, where the trustees and beneficiaries have consented to be sued.⁶⁹ The principal place of administration may also determine where state income taxes will be paid.⁷⁰ The principal place of administration will normally be where the trustee is located, although this can be difficult to determine if a trustee has several offices in different states, or if there are co-trustees located in different states.⁷¹ Trustees who wish to transfer the principal place of administration may have to give notice, and seek court approval if a beneficiary objects,

68. This section reads as follows:

(a) Without precluding other means for establishing a sufficient connection with the designated jurisdiction, terms of a trust designating the principal place of administration are valid and controlling if:

(1) a trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction; or

(2) all or part of the administration occurs in the designated jurisdiction.

(b) A trustee is under a continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries.

(c) Without precluding the right of a court to order, approve, or disapprove a transfer, the trustee, in furtherance of the duty prescribed by subsection (b) of this section, may transfer the trust's principal place of administration to another state or to a jurisdiction outside of the United States.

(d) The trustee shall notify the qualified beneficiaries of a proposed transfer of a trust's principal place of administration not less than sixty (60) days before initiating the transfer. The notice of proposed transfer must include:

(1) the name of the jurisdiction to which the principal place of administration is to be transferred;

(2) the address and telephone number at the new location at which the trustee can be contacted;

(3) an explanation of the reasons for the proposed transfer;

(4) the date on which the proposed transfer is anticipated to occur; and

(5) the date, not less than sixty (60) days after the giving of the notice, by which the qualified beneficiary must notify the trustee of an objection to the proposed transfer.

(e) The authority of a trustee under this section to transfer a trust's principal place of administration terminates if a qualified beneficiary notifies the trustee of an objection to the proposed transfer on or before the date specified in the notice.

(f) In connection with a transfer of the trust's principal place of administration, the trustee may transfer some or all of the trust property to a successor trustee designated in the terms of the trust or appointed pursuant to § 28-73-704.

(g) Subsections (d) and (e) of this section apply only to irrevocable trusts created on or after September 1, 2005 and to revocable trusts which become irrevocable on or after September 1, 2005.

ATC § 28-73-108.

69. UTC § 108 cmt.

70. *Id.*

71. *Id.*

unless the trust was irrevocable before September 1, 2005. Arkansas law on this question is nonexistent, and thus enactment of the ATC will provide clarity. The law of the principal place of administration is not necessarily the same as the law governing the interpretation of the trust. A settlor is free to designate one jurisdiction as the principal place of administration and another to govern the interpretation of the trust.⁷²

EXAMPLE: Settlor and qualified beneficiary *S*, a resident of Arizona, establishes a revocable trust whose res is 6,000 acres in Chicot County, Arkansas. Trustee *T* is an Arizona licensed trust company. Qualified beneficiaries *A* and *B* live in Arkansas. Can the trust's principal place of administration be Arizona and can the law governing the trust be that of Arkansas? ANSWER: Yes. A suit over the trust would probably have to be brought in Arizona, but if the dispute was over the interpretation of the trust, the Arizona court would apply Arkansas law.

G. Nonjudicial Settlements—Section 111⁷³

In the laudable furtherance of out-of-court settlements, another important section of the ATC sets out rules for these types of agreements. The same persons who would have to consent to a binding judicial settlement may enter into a nonjudicial settlement. There are limits: the settlement may

72. *Id.*

73. This section reads as follows:

- (a) For purposes of this section, "interested persons" means persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court.
- (b) Except as otherwise provided in subsection (c) of this section, interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust.
- (c) A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this chapter or other applicable law.
- (d) Matters that may be resolved by a nonjudicial settlement agreement include:
 - (1) the interpretation or construction of the terms of the trust;
 - (2) the approval of a trustee's report or accounting;
 - (3) direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power;
 - (4) the resignation or appointment of a trustee and the determination of a trustee's compensation;
 - (5) transfer of a trust's principal place of administration; and
 - (6) liability of a trustee for an action relating to the trust.
- (e) Any interested person may request a court to approve a nonjudicial settlement agreement, to determine whether the representation as provided in subchapter 3 of this chapter was adequate, and to determine whether the agreement contains terms and conditions a court could have properly approved.

not violate a material purpose of the trust (in Arkansas this would include a spendthrift provision),⁷⁴ and it must include terms that could be approved by the court, that is, terms that are valid under the ATC. Indeed, any interested person may petition the court to approve such a settlement. The statutory list of matters that can be resolved by such a settlement is nonexclusive.⁷⁵ This section codifies and clarifies this area of the law and should facilitate more trust settlements.

H. Rules of Construction—Same for Wills and Trusts—Section 112

The ATC extends rules of construction for wills to trusts. This does not change already-existing Arkansas law, as the Supreme Court has stated that when construing a trust, it applies the same rules applicable to the construction of wills.⁷⁶ Construction of wills and trusts hinges on the intent of the testator or settlor and the wording of the instrument. The most important principle is that the intent of the testator governs.⁷⁷ Intent “is to be determined from viewing the four corners of the instrument, considering the language used, and giving meaning to all of its provisions.”⁷⁸ The court may interpret the trust language in light of the settlor’s knowledge at the time the trust was executed.⁷⁹ The court should give effect to each clause; only when two clauses irreconcilably conflict must one give way to the other.⁸⁰ In both wills and trusts, directions are mandatory when words direct or require something to be done; but directions are held to be *precatory* when the words merely express a hope or wish, and leave it uncertain as to whether the desires will be accomplished.⁸¹

IV. ARTICLE 2—JUDICIAL PROCEEDINGS

Article 2 of the ATC covers selected issues involving judicial proceedings, especially those where the trust has contacts in more than one state or country. It may apply in conjunction with other statutes, for example, the

74. ATC § 28-73-411(c).

75. UTC § 111 cmt.

76. *Aycock Pontiac, Inc. v. Aycock*, 335 Ark. 456, 463, 983 S.W.2d 915, 919 (1998). In fact, the court has stated that the same rules of construction apply to deeds as well. *Murphy v. Morris*, 200 Ark. 932, 937, 141 S.W.2d 518, 521 (1940).

77. *Aycock*, 335 Ark. at 463, 983 S.W.2d at 919 (citing *In re Estate of Lindsey*, 309 Ark. 596, 832 S.W.2d 808 (1992) and *In re Estate of Conover*, 304 Ark. 268; 801 S.W.2d 299 (1990)).

78. *Id.*

79. *Id.*

80. *Id.* at 463, 983 S.W.2d at 919–20.

81. *Patterson v. Polk*, 229 Ark. 272, 282, 317 S.W.2d 286, 292 (1958).

Arkansas Rules of Civil Procedure. Section 201⁸² allows courts to intervene in the administration of trusts, but does not require routine or mandatory court supervision of all trusts. The ATC does not require trusts to be registered, that is, recorded.⁸³ This section does not preclude a judicial proceeding to receive instructions from the court or to declare the rights of the parties.

Section 202⁸⁴ clarifies that if the trust's principal place of administration is, for example, Arkansas, the trustee and beneficiary have submitted personally to the Arkansas courts' jurisdiction over trust matters. However, this section does not preclude jurisdiction by courts elsewhere on some other basis. Section 203⁸⁵ confers jurisdiction over trusts to Arkansas circuit courts. Section 204 contained the rules for setting the venue for a trust case, but it was removed by House amendment, thus leaving the current rules for venue in place.

82. This section reads as follows:

- (a) A court may intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law.
- (b) A trust is not subject to continuing judicial supervision unless ordered by the court.
- (c) A judicial proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and an action to declare rights.

ATC § 28-73-201.

83. Article VII of the Uniform Probate Code provides for the registration of trusts. This article, except for the registration provisions, has been superseded by the UTC. UTC prefatory note. A number of states, not including Arkansas, allow or require the registration of trusts. *See, e.g.*, NEB. REV. STAT. § 30-3816 (Supp. 2003); COLO. REV. STAT. §§ 15-16-101 to-105 (2003).

84. This section reads as follows:

- (a) By accepting the trusteeship of a trust having its principal place of administration in this state or by moving the principal place of administration to this state, the trustee submits personally to the jurisdiction of a court of this state regarding any matter involving the trust.
- (b) With respect to their interests in the trust, the beneficiaries of a trust having its principal place of administration in this state are subject to the jurisdiction of the courts of this state regarding any matter involving the trust. By accepting a distribution from such a trust, the recipient submits personally to the jurisdiction of a court of this state regarding any matter involving the trust.
- (c) This section does not preclude other methods of obtaining jurisdiction over a trustee, beneficiary, or other person receiving property from the trust.

ATC § 28-73-202.

85. This section reads as follows: "The circuit court has exclusive jurisdiction of proceedings in this state brought by a trustee or beneficiary concerning the administration of a trust or of other proceedings involving a trust." ATC § 28-73-203.

V. ARTICLE 3—REPRESENTATION

Article 3 concerns representation of settlors and beneficiaries. Representation is the power of a representative to receive notice or to consent and so bind the settlor or beneficiary represented. As the modern trend to weaken or abolish the Rule Against Perpetuities and to allow dynastic trusts continues,⁸⁶—albeit not in Arkansas⁸⁷—representation becomes more important with respect to the unborn, because trust law requires notice to, or consent by, beneficiaries, for certain actions to occur.⁸⁸ Representation is also an issue with respect to incompetent settlors and beneficiaries.

86. As of 2001, only Alabama, Arkansas, the District of Columbia and Wyoming preserved the “pure,” unreformed common law Rule Against Perpetuities. Twenty-four states had enacted the Uniform Statutory Rule Against Perpetuities, which extends the common law “21 years beyond a life in being” period to ninety years after the creation of the interest. Alaska, Idaho, New Jersey, Rhode Island, South Dakota, and Wisconsin had abolished any type of Rule Against Perpetuities. The remaining states had enacted some type of reform of the Rule, usually a “wait-and-see” approach. JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 334 (5th ed. 2002); see also Note, *Dynasty Trusts and the Rule Against Perpetuities*, 116 *HARV. L. REV.* 2588, 2590–95 (2003) (stating the trend in state law, summarizing arguments for and against the Rule Against Perpetuities, and exploring how estate planning attorneys use dynasty trusts).

87. “Perpetuities and monopolies are contrary to the genius of a republic, and shall not be allowed . . .” *ARK. CONST.* art. 2, § 19. This provision makes the abolition of the Rule Against Perpetuities impossible without a constitutional amendment, but would allow the passage of the Uniform Statutory Rule Against Perpetuities (USRAP). USRAP allows for a “wait-and-see” period of ninety years after the creation of an interest. At that point, if an interest is still contingent, it is invalid.

88. Under the ATC, these actions include, for example: transfer of a trust’s principal place of administration to another state, § 28-73-108; modification or termination of a trust, § 28-73-411; combination of trusts into one, or division of one trust into two or more, § 28-73-417; resignation of a trustee, § 28-73-705; and release of a trustee from potential liability, § 28-73-1009.

A. The Basic Effect of Representation—Section 301⁸⁹

Notice to or consent by the representative binds the person represented, unless the person represented objects before the consent would have become effective. A person such as a conservator or agent representing a settlor who lacks capacity may receive notice and give consent on the settlor's behalf, unless the action to be taken is the termination or revocation of a revocable trust, in which case express authority is needed. Due to some concerns regarding possible negative tax implications, section 301 was amended by the NCCUSL in July 2004. Subsection (d) was added, which prevents a settlor from representing a beneficiary with respect to the termination or modification of a trust under section 411(a).⁹⁰

B. Different Types of Representation—Sections 302 through 305

Section 302⁹¹ allows the holder of a general testamentary power of appointment to represent and bind persons whose interests are subject to the power if there is no conflict of interest. The conflict of interest exception will preclude from this section the numerous trusts where the holder of the power is also a life income beneficiary, and thus would be in conflict with the appointees or takers in default.⁹² Section 303⁹³ applies to both benefi-

89. This section reads as follows:

(a) Notice to a person who may represent and bind another person under this subchapter has the same effect as if notice were given directly to the other person.

(b) The consent of a person who may represent and bind another person under this subchapter is binding on the person represented unless the person represented objects to the representation before the consent would otherwise have become effective.

(c) Except as otherwise provided in §§ 28-73-411 and 28-73-602, a person who under this subchapter may represent a settlor who lacks capacity may receive notice and give a binding consent on the settlor's behalf.

(d) A settlor may not represent and bind a beneficiary under this subchapter with respect to the termination or modification of a trust under § 28-73-411(a).

ATC § 28-73-301.

90. See *infra* notes 158–60 and accompanying text (providing a more detailed discussion).

91. This section reads as follows:

To the extent there is no conflict of interest between the holder of a general testamentary power of appointment and the persons represented with respect to the particular question or dispute, the holder may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power.

ATC § 28-73-302.

92. UTC § 302 cmt.

93. This section reads as follows:

aries and settlors. It mostly codifies the common law⁹⁴ in stating that, absent any conflicts of interest, conservators⁹⁵ and guardians may represent and bind their wards;⁹⁶ agents with authority may represent and bind their principals; trustees may represent and bind the trust beneficiaries; and personal representatives may represent and bind persons with interests in the estate.

New to Arkansas law, however, is section 303(6), which empowers a parent to represent and bind her own minor and unborn children without the appointment of a guardian ad litem. However, this section does not prevent a court from appointing a guardian ad litem if it decides that one is necessary. This section is broader than current Arkansas law in one respect: The existing Arkansas statutes on trust revocation, modification and termination require the court to first appoint a guardian ad litem for unborn beneficiaries, if any, before the court can consent to any type of change in the trust.⁹⁷ So in this circumstance, if the section 28-69-401 procedure is being followed, arguably a parent could not represent unborn or minor children.

To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:

- (1) a conservator may represent and bind the estate that the conservator controls;
- (2) a guardian may represent and bind the ward if a conservator of the ward's estate has not been appointed;
- (3) an agent having authority to act with respect to the particular question or dispute may represent and bind the principal;
- (4) a trustee may represent and bind the beneficiaries of the trust;
- (5) a personal representative of a decedent's estate may represent and bind persons interested in the estate; and
- (6) a parent may represent and bind the parent's minor or unborn child if a guardian for the child has not been appointed.

ATC § 28-73-303.

94. See, e.g., *Drayer v. Wright*, 301 Ark. 144, 782 S.W.2d 582 (1990) (holding that a trust beneficiary was bound by a judgment where she was represented in court by a guardian ad litem); *Selig v. Barnett*, 233 Ark. 900, 350 S.W.2d 176 (1961) (holding that a ward was bound by a judgment where he was legally represented by a guardian in court).

95. A conservator is the more recent term for a "guardian of the estate." Under Arkansas statutory law, "conservators" may be appointed for persons of advanced age or with physical disabilities who cannot manage their property. ARK. CODE ANN. § 28-67-103 (LEXIS 2004). All other wards, such as minors or mentally ill persons, have guardians of the estate. *Id.* §§ 28-65-101, -104.

96. Under the ATC, a guardian, or "guardian of the person" may only bind a ward in trust matters if no conservator has been appointed. ATC § 28-78-303 (2).

97. "For purposes of this section, consent to the revocation, modification, or termination may be given by the court on behalf of unnamed, legally incapacitated, unascertained, or unborn beneficiaries after a hearing in which the interests of such beneficiaries are represented by a guardian ad litem." ARK. CODE ANN. § 28-69-401(b)(1) (LEXIS 2004). The power to appoint a guardian ad litem is not discretionary.

Section 304⁹⁸ concerns the doctrine of “virtual representation.” It allows for minors, incapacitated persons, unborn individuals, or persons whose identity or location is unknown to be represented by another person with a substantially identical interest as long as there is no conflict of interest. This representative is not a guardian ad litem, but is instead another beneficiary or contingent beneficiary. In other words, a virtual representative is an alternative to a guardian ad litem. Some states have virtual representation statutes⁹⁹—Arkansas does not. Arkansas law is thin in this area—only two cases discuss the doctrine with respect to probate law. In the most recent case, a decedent devised his estate “absolutely” to his spouse but also devised “whatever she may leave undisposed of” to his and her heirs.¹⁰⁰ During the probate of his estate, she listed herself as life beneficiary in the accounting, and the probate court’s decree split the remainder between the two sets of heirs.¹⁰¹ The Arkansas Supreme Court construed the will as devising a fee simple in all property to the wife.¹⁰² The husband’s heirs argued that the wife’s heirs were bound by the wife’s statement and the probate court’s decree under the doctrine of virtual representation, but the Supreme Court disagreed, because the wife did not represent the same interest as theirs.¹⁰³

In a second case, a decedent executed a will and a testamentary trust, providing income to some (but not all) of his siblings and at their death, the remainder to go to the siblings’ children and other nieces and nephews.¹⁰⁴ At his death the siblings and the other nieces and nephews sued to construe the trust.¹⁰⁵ The probate court held that the trust failed and that the will was void.¹⁰⁶ It ruled that the petitioners were the decedent’s heirs and ordered the property (land) to be distributed among them.¹⁰⁷ These heirs attempted to

98. This section reads as follows:

Unless otherwise represented, a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person represented.

ATC § 28-73-304.

99. *See, e.g.*, 760 ILL. COMP. STAT. ANN. 5/16.1 (West Supp. 2004); S.D. CODIFIED LAWS §§ 55-3-31–55-3-38 (LEXIS 2001 & Supp. 2003). The Uniform Probate Code also allows representation. UNIF. PROBATE CODE § 1-403, 8 U.L.A. 69 (1998).

100. *Collie v. Tucker*, 229 Ark. 606, 607–08, 317 S.W.2d 137, 139 (1958).

101. *Id.* at 609, 317 S.W.2d at 140.

102. *Id.* at 610, 317 S.W.2d at 140.

103. *Id.*, 317 S.W.2d at 140.

104. *Crow Creek Gravel & Sand Co. v. Dooley*, 182 Ark. 1009, 33 S.W.2d 369 (1930).

105. *Id.* at 1011, 33 S.W.2d at 369.

106. *Id.*, 33 S.W.2d at 369.

107. *Id.*, 33 S.W.2d at 369–70.

sell the land to a purchaser who refused to go through with the deal, asserting that title was not merchantable because the decree of the probate court could be attacked by the children of the siblings, who were trust remainder beneficiaries but were not parties in the suit.¹⁰⁸ The sellers, the heirs, argued that the children were bound by the decree under the doctrine of virtual representation.¹⁰⁹ The court disagreed.¹¹⁰ Since the children were named in the trust and will, they did not stand in privity to their parents, and should have been included as necessary parties.¹¹¹ The doctrine of virtual representation did not apply.¹¹²

Under common law, virtual representation in the probate and trust sphere has been allowed with respect to the unborn, although there are no Arkansas cases on this point. The ATC extends it to minors and incapacitated individuals.¹¹³

Section 305¹¹⁴ allows the court to appoint a guardian ad litem for anyone if the other alternatives under this article are nonexistent or inadequate. The UTC calls the appointee a “representative.” The ATC has changed this label to “guardian ad litem.” The Comment to UTC Section 305 explained how a representative is different from a guardian ad litem: A representative can serve in a nonjudicial settlement, or can receive notice on behalf of a beneficiary. This section, like Section 303, will thus expand somewhat the role of the guardian ad litem in Arkansas.

108. *Id.*, 33 S.W.2d at 370.

109. *Crow Creek*, 182 Ark. at 1012, 33 S.W.2d at 370.

110. *Id.* at 1009, 1014, 33 S.W.2d at 370.

111. *Id.* at 1013–14, 33 S.W.2d at 370.

112. The court also noted that even if it had agreed with the virtual representation argument, the sibling omitted from the will would be an heir at law and thus was also entitled to attack the judgment, rendering title unmarketable. *Id.*, 33 S.W.2d 370.

113. UTC § 304 cmt. For more on virtual representation, see RESTATEMENT (THIRD) OF TRUSTS § 65 cmts. b-c (2001); Martin D. Begleiter, *The Guardian Ad Litem in Estate Proceedings*, 20 WILLAMETTE L. REV. 643, 721–39 (1984).

114. This section reads as follows:

(a) If a court determines that an interest is not represented under this subchapter, or that the otherwise available representation might be inadequate, the court may appoint a guardian ad litem to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown. A guardian ad litem may be appointed to represent several persons or interests.

(b) A guardian ad litem may act on behalf of the individual represented with respect to any matter arising under this chapter, whether or not a judicial proceeding concerning the trust is pending.

(c) In making decisions, a guardian ad litem may consider general benefit accruing to the living members of the individual's family.

VI. ARTICLE 4—CREATION, VALIDITY, MODIFICATION, AND
TERMINATION OF TRUSTS

Article 4 concerns the creation, validity, modification and termination of trusts. Sections 401 through 409 cover the requirements for the creation of a trust, and “largely codify traditional doctrine.”¹¹⁵ Arkansas statutes currently allow for the modification, revocation, or termination of trusts if the settlor’s purpose has become impossible to carry out,¹¹⁶ and their interaction with the ATC are discussed below.

A. Methods of Creating a Trust—Section 401¹¹⁷

This section codifies the common law. It specifies the methods for creating inter vivos, testamentary, and self-settled trusts (trusts where the settlor is also beneficiary, and, often, a trustee). Property may be transferred inter vivos, either to a trustee or to oneself as a trustee. It may be devised to a trust, either one already existing or one to come into being at death. Finally, a power of appointment may be exercised in favor of a trustee, in either an inter vivos or testamentary manner. The methods in this section are not exclusive—a trust can also be created by special statute, court order, or by a promise that creates enforceable rights in a person who then holds the rights as a trustee.¹¹⁸

Under the ATC, a trust does not come into existence until it receives property. The drafters note that the property interest necessary to fund and create a trust need not be substantial. For instance, both the ATC and current Arkansas law recognize the life insurance trust—a trust created by revocably designating a trustee as the beneficiary of a life insurance policy—as valid.¹¹⁹ Also, a pourover devise taking place at death to a previ-

115. UTC art. 4 general cmt.

116. ARK. CODE ANN. §§ 28-69-401–28-69-403 (LEXIS 2004).

117. This section reads as follows:

A trust may be created by:

- (1) Transfer of property to another person as trustee during the settlor’s lifetime or by will or other disposition taking effect upon the settlor’s death;
- (2) Declaration by the owner of property that the owner holds identifiable property as trustee; or
- (3) Exercise of a power of appointment in favor of a trustee.

ATC § 28-73-401.

118. UTC § 401 cmt.

119. Life insurance trusts are not uncommon in divorce settlements in Arkansas, where they are established for the benefit of minor children. They are specifically validated by the Uniform Testamentary Additions to Trusts Act. ARK. CODE ANN. §§ 28-27-101–28-27-106 (LEXIS 2004).

ously executed but unfunded trust is valid under Arkansas law,¹²⁰ as it is in virtually all states.

With the number of self-settled, revocable inter vivos trusts increasing, litigation over their creation is likely to grow. The Comment makes clear that if such property is merely listed with the declaration of trust, the actual transfer need not be made,¹²¹ although lack of the transfer is an invitation to litigation after the settlor's death. The ATC thus liberalizes Arkansas law somewhat. The Arkansas Supreme Court addressed this issue recently in an opinion concerning a settlor who had executed a declaration of trust to establish an inter vivos trust, naming himself as the beneficiary.¹²² He owned nine tracts of real estate and deeded the tracts to himself, attaching the quitclaim deeds to the declaration of trusts.¹²³ A disinherited grandchild sued, attacking the validity of the deeds to transfer the land into the trust, since the deeds did not convey the property either to a trust or to the grantee as trustee.¹²⁴ The court held that a valid inter vivos trust had been established and that considered altogether, the declaration, attached schedule of trust assets, and quitclaim deeds were sufficient to prove the existence of the trust and the transfer of the property into the trust.¹²⁵

Nonetheless, a prudent settlor of a self-settled trust should execute a declaration of trust and transfer all of the desired property to herself as trustee for the trust, attaching a list of the property to the trust instrument.¹²⁶

120. *Id.* § 28-27-101.

121. "A declaration of trust can be funded merely by attaching a schedule listing the assets that are to be subject to the trust without executing separate instruments of transfer." UTC § 401 cmt.

122. *Sutter v. Sutter*, 345 Ark. 12, 43 S.W.3d 736 (2001).

123. *Id.* at 15, 43 S.W.3d at 738.

124. *Id.* at 17, 43 S.W.3d at 739.

125. *Id.*; see also *Trott v. Jones*, ___ Ark. App. ___ (CA 03-584, Apr. 7, 2004, 2004 WL 739964), for a slightly different fact situation. In this case, the settlor executed an instrument titled "General Testamentary Trust" declaring herself a life beneficiary of the trust and a husband and wife (not her heirs) to be trustees during her life, and remainder beneficiaries at her death. *Id.* The settlor owned a house and bank account at her death, but had not transferred them to the trust or the trustees during her life. *Id.* Citing the RESTATEMENT (THIRD) OF TRUSTS §16(1) (2003), the court held that no trust existed in either the house or bank account. In dictum, the court, citing the RESTATEMENT (THIRD) OF TRUSTS §10(c) (2003) comment, stated that a simple declaration would suffice where a settlor was creating a self-settled trust—no transfer of property is necessary. *Id.*

126. The procedure for deeding real property to a trust differs from state to state. In Arkansas, a deed to a trustee must also state the name of the trust to be effective. ARK. CODE ANN. § 18-12-604 (LEXIS 2003).

B. The Basic Requirements for Creation of a Trust—Section 402¹²⁷

The first requirements for the creation of a trust are that the settlor must have the capacity and intent to create a trust. What capacity is necessary to create a trust? The Comment to this section states that the capacity to create a will is necessary to create either a revocable or a testamentary trust. To create an irrevocable trust, the settlor must have the capacity to execute a deed. The elements that make up the capacity necessary to deed or will property are found in numerous Arkansas cases, although they do not always say the same thing. Only one case has stated that the capacity test for wills, deeds and testamentary trusts are identical. "The law regarding mental capacity in the execution of a will is also applicable to the execution of a deed and the creation of a trust."¹²⁸ A maker of deeds, wills and "other instruments" must have the knowledge, without prompting, of the extent and condition of her property and the understanding how she is disposing of it, to whom, and upon what consideration.¹²⁹ Another line of cases, concerning wills only, has phrased the requirements of capacity slightly differently and adds the requirement that the testator must know whom she is excluding from the will.¹³⁰

Beyond these requirements, to be valid under common law a trust had to have either an ascertainable beneficiary or be a charitable trust. Section

127. This section reads as follows:

(a) A trust is created only if:

- (1) the settlor has capacity to create a trust;
- (2) the settlor indicates an intention to create the trust;
- (3) the trust has a definite beneficiary or is:
 - (A) a charitable trust;
 - (B) a trust for the care of an animal, as provided in § 28-73-408; or
 - (C) a trust for a noncharitable purpose, as provided in § 28-73-409;
- (4) the trustee has duties to perform; and
- (5) the same person is not the sole trustee and sole beneficiary.

(b) A beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities.

(c) A power in a trustee to select a beneficiary from an indefinite class is valid. If the power is not exercised within a reasonable time, the power fails and the property subject to the power passes to the persons who would have taken the property had the power not been conferred.

ATC § 28-73-402.

128. *Rose v. Dunn*, 284 Ark. 42, 46, 679 S.W.2d 180, 182 (1984).

129. *Garis v. Massey*, 270 Ark. 646, 648, 606 S.W.2d 109, 110 (Ark. Ct. App. 1980); *Pledger v. Birkhead*, 156 Ark. 443, 455, 246 S.W. 510, 515 (1923).

130. "Our generally expressed rule for testamentary capacity is that the testatrix must be able to know the natural objects of her bounty and the extent of her property; to understand to whom the property is being given; and to realize those who are being excluded from the will." *In re Estate of Davidson*, 310 Ark. 639, 643, 839 S.W.2d 214, 217 (1992).

402 repeats these requirements and, in addition, validates two new types of “honorary” trusts unknown at common law: the trust for the care of an animal and the noncharitable trust without an ascertainable beneficiary.¹³¹

Further, for a trust to be valid, this section requires the trustee to have duties, codifying the common law that a trust must be active as opposed to passive. The ATC also codifies the common law prohibition against merger: The same person cannot be the sole trustee and the sole beneficiary of a trust.¹³²

C. Validity of Trusts Created in Other Jurisdictions—Section 403¹³³

At common law, a trust was valid if its creation complied with the law of the state having the most significant contacts with the trust.¹³⁴ The ATC expands the common law rule to include the possibility of other jurisdictions. Trusts created by will are not included in this section because the common law rule with respect to testamentary trusts is that the validity of their creation is determined by the law of the decedent’s domicile.¹³⁵ Arkansas has a wills statute that is the equivalent of this section¹³⁶ but has no trust law directly on point.

131. One commentator labels these “noncharitable purpose trusts.” Alexander A. Bove, Jr., *The Purpose of Purpose Trusts*, PROB. & PROP. 34 (May/June 2004) (discussing the origin and treatment by the UTC of purpose trusts).

132. See *McCullum v. McCullum* 328 Ark. 607, 612 n.3, 946 S.W.2d 181, 183 n.3 (1997) (recognizing the doctrine of merger but not applying it in the instant case).

133. This section reads as follows:

A trust not created by will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which, at the time of creation:

- (1) the settlor was domiciled, had a place of abode, or was a national;
- (2) a trustee was domiciled or had a place of business; or
- (3) any trust property was located.

ATC § 28-73-403.

134. UTC § 403 cmt.

135. *Id.*

136. ARK. CODE ANN. § 28-25-105 (LEXIS 2004).

D. Trust Purposes—Sections 404¹³⁷ and 405¹³⁸

Section 404 simply codifies the common law rules that to be valid, trust purposes must be lawful, not contrary to public policy, and possible to achieve; and that trusts must benefit their beneficiaries. These rules are also found in the Restatement (Second) of Trusts,¹³⁹ and have been cited with approval by one Arkansas case.¹⁴⁰

Section 405 codifies the “well-established categories of charitable purposes . . . that ultimately derive from the Statute of Charitable Uses, 43 Eliz. I, c. 4 (1601).”¹⁴¹ These are already a part of Arkansas common law by virtue of our reception statute.¹⁴² In addition, this section allows a court to choose a charitable purpose or beneficiary if the terms of the trust state a general charitable purpose without any specificity. Subsection (c) is an innovation, allowing a settlor of a charitable trust to maintain a proceeding to enforce the trust. Traditionally, only the beneficiaries of a trust have had standing to enforce the trust; the settlor has not. This subsection contravenes the Restatement (Second), but Arkansas has no case law on this point. The argument for the new rule is that in cases where the trustees are breaching their fiduciary duty and the attorney general does not act, the settlor may

137. This section reads as follows: “A trust may be created only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve. A trust and its terms must be for the benefit of its beneficiaries.” ATC § 28-73-404.

138. This section reads as follows:

(a) 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.

(b) If the terms of a charitable trust do not indicate a particular charitable purpose or beneficiary, the court may select one or more charitable purposes or beneficiaries. The selection must be consistent with the settlor’s intention to the extent it can be ascertained.

(c) The settlor of a charitable trust, among others, may maintain a proceeding to enforce the trust.

ATC § 28-73-405.

139. RESTATEMENT (SECOND) OF TRUSTS §§ 59–65 (1959).

140. *Lytle v. Zebold*, 227 Ark. 431, 434, 299 S.W.2d 74, 76 (1957) (stating that a trust can be valid even if some of its material purposes are impossible to achieve).

141. UTC § 405 cmt. The Statute is a part of Arkansas’s common law by means of our reception statute.

142. The common law of England, so far as it is applicable and of a general nature, and all statutes of the British Parliament in aid of or to supply the defects of the common law made prior to March 24, 1606, which are applicable to our own form of government, of a general nature and not local to that kingdom, and not inconsistent with the Constitution and laws of the United States or the Constitution and laws of this state, shall be the rule of decision in this state unless altered or repealed by the General Assembly of this state.

ARK. CODE ANN. § 1-2-119 (Michie 1996); *see also* *Biscoe v. Thweatt*, 74 Ark. 545, 549, 86 S.W. 432, 433 (1905) (affirming the reception of the statute and adoption of the doctrine).

bring a suit. This right of the settlor does not diminish the rights of the attorney general, or other parties with interests, to sue.¹⁴³

E. Fraud and Oral Trusts—Sections 406¹⁴⁴ and 407¹⁴⁵

Section 406 codifies Arkansas common law and voids trusts to the extent that their creation was induced by fraud, duress or undue influence.¹⁴⁶ Section 407 validates oral trusts if their terms can be established by clear and convincing evidence, unless another statute is in conflict. The most obvious example of this would be the Statute of Frauds, if the trust concerns real property. This section is in accord with current Arkansas law, which recognizes the creation of an oral trust in personal property if the proof is clear and convincing,¹⁴⁷ but will not recognize an oral express trust in real property because of the Statute of Frauds.¹⁴⁸

143. Apparently the standing given the settlor of a charitable trust does not extend to the settlor's successors in interest, arguably rendering it of little value. See Ronald Chester, *Grantor Standing to Enforce Charitable Transfers under 405(c) of the Uniform Trust Code and Related Law: How Important Is It and How Extensive Should It Be?* 37 REAL PROP., PROB. & TR. J. 611 (2003) (arguing that the settlor's standing to enforce charitable trusts should extend to the settlor's successors in interest). For information about the Arkansas Attorney General's role in enforcing charitable trusts, see *supra* note 48.

144. This section reads as follows: "A trust is void to the extent its creation was induced by fraud, duress, or undue influence." ATC § 28-73-406.

145. This section reads as follows: "Except as required by a statute other than this chapter, a trust need not be evidenced by a trust instrument, but the creation of an oral trust and its terms may be established only by clear and convincing evidence." ATC § 28-73-407.

146. See *Hughes v. Coffey*, 222 Ark. 945, 946, 263 S.W.2d 689, 690 (1954) (holding that a trust cannot be invalidated where there was no evidence of fraud, duress, or undue influence).

147. *Moore v. Lawrence*, 252 Ark. 759, 766, 480 S.W.2d 941, 945 (1972).

148. *Bottenfield v. Wood*, 264 Ark. 505, 509, 573 S.W.2d 307, 309 (1978).

F. Honorary Trusts—New to Arkansas—Sections 408¹⁴⁹ and 409¹⁵⁰

Section 408 introduces the first type of honorary trust—a trust for care of an animal. Impossible under common law because an animal was a legally insufficient beneficiary, the trust rendered valid under the ATC by appointing a person to enforce it. Such a trust terminates on the death of the animal. Section 409 likewise expands the common law by allowing trusts for general but noncharitable purposes, such as care of a cemetery plot, or for specific noncharitable purposes, such as money to be distributed to such objects as the trustee desires. Note that the ATC caps the lifetime of section 409 trusts at twenty-one years.

149. This section reads as follows:

(a) A trust may be created to provide for the care of an animal alive during the settlor's lifetime. The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one animal alive during the settlor's lifetime, upon the death of the last surviving animal.

(b) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by a court. A person having an interest in the welfare of the animal may request the court to appoint a person to enforce the trust or to remove a person appointed.

(c) Property of a trust authorized by this section may be applied only to its intended use, except to the extent a court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor's successors in interest.

ATC § 28-73-408.

150. This section reads as follows:

Except as otherwise provided in § 28-73-408 or by another statute, the following rules apply:

(1) a trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the trustee. The trust may not be enforced for more than twenty-one (21) years;

(2) a trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by a court; and

(3) property of a trust authorized by this section may be applied only to its intended use, except to the extent a court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor's successors in interest.

ATC § 28-73-409.

G. Modification, Revocation, and Termination of Trusts—Sections 410 through 417

Sections 410 through 417 deal with modification, revocation, and termination of trusts, including their combination and division. The ATC facilitates the modification, revocation and termination of trusts. This is almost the only area covered by the ATC in which Arkansas currently has statutes.¹⁵¹ They have not been repealed; therefore, attorneys dealing with these issues should take care to familiarize themselves with both sets of statutes.

Section 410¹⁵² of the ATC codifies common law and for various reasons terminates certain trusts by operation of law. The section sets out which parties may commence proceedings to approve or disapprove modifications, terminations, combinations, or divisions. One change from common law allows the settlor of a charitable trust to bring a proceeding to modify the trust. Arkansas has no law on this latter point.

Section 411¹⁵³ applies to the modification or termination of noncharitable irrevocable trusts at the request of the beneficiaries in three circum-

151. Modification, revocation and termination of trusts are covered at ARK. CODE ANN. §§ 28-69-401–28-69-403. Division of trusts are addressed at *id.* §§ 28-69-701–28-69-706.

152. This section reads as follows:

(a) In addition to the methods of termination prescribed by §§ 28-73-411–28-73-414, a trust terminates to the extent the trust is revoked or expires pursuant to its terms, no purpose of the trust remains to be achieved, or the purposes of the trust have become unlawful, contrary to public policy, or impossible to achieve.

(b) A proceeding to approve or disapprove a proposed modification or termination under §§ 28-73-411–28-73-416, or trust combination or division under § 28-73-417, may be commenced by a trustee or beneficiary, and a proceeding to approve or disapprove a proposed modification or termination under § 28-73-411 may be commenced by the settlor. The settlor of a charitable trust may maintain a proceeding to modify the trust under § 28-73-413.

ATC § 28-73-410.

153. This section reads as follows:

(a) (1) A noncharitable irrevocable trust may be modified or terminated upon consent of the settlor and all beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust.

(2) A settlor's power to consent to a trust's modification or termination may be exercised by:

(A) an agent under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust;

(B) the settlor's conservator with the approval of the court supervising the conservatorship if an agent is not so authorized; or

(C) the settlor's guardian with the approval of the court supervising the guardianship if an agent is not so authorized and a conservator has not been appointed.

(b) A noncharitable irrevocable trust may be:

stances: if the settlor and beneficiaries agree to the change; if the beneficiaries, but not the settlor, agree; and if only some of the beneficiaries agree.

Cases where the settlor and all of the beneficiaries wish to modify or terminate a trust are rare.¹⁵⁴ Usually the settlor is deceased by the time that beneficiaries ask for modification or termination. Unanimous consent of all beneficiaries, including contingent beneficiaries, may be impossible to obtain.¹⁵⁵ Section 411(a) is notable because, unlike the requirements of our current statute,¹⁵⁶ no showing need be made that the trust is not carrying out the settlor's purposes. All that is required is unanimous consent. Court approval is not required. If the settlor is represented by another, such as a conservator, note that additional conditions must be met.¹⁵⁷

(1) terminated upon consent of all of the beneficiaries if a court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust; or

(2) modified upon consent of all of the beneficiaries if a court concludes that modification is not inconsistent with a material purpose of the trust.

(c) A spendthrift provision in the terms of the trust is presumed to constitute a material purpose of the trust.

(d) Upon termination of a trust under subsections (a) or (b) of this section, the trustee shall distribute the trust property as agreed by the beneficiaries.

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

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

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

ATC § 28-73-411.

154. *But see* Union Nat'l Bank of Little Rock v. Smith, 240 Ark. 354, 400 S.W.2d 652 (1966). Here a settlor established an irrevocable inter vivos trust for the benefit of himself, his spouse, and his children with a church the ultimate remainder beneficiary. *Id.* at 355, 400, S.W.2d at 652-53. The settlor later sued the trustee and the beneficiaries to set aside the trust. *Id.*, 400 S.W.2d at 653. The court held that, failing proof of incompetency (the evidence was held to be insufficient), the settlor could not set aside the trust. *Id.* at 369, 400 S.W.2d at 660. The only authority cited was several cases involving the irrevocability of deeds. The opinion did not make clear whether the beneficiaries were opposed to the revocation. Only the trustee appealed from the unfavorable trial court ruling that was overturned on appeal. The ATC would allow revocation of the trust if all beneficiaries agreed.

155. *See* RESTATEMENT (THIRD) OF TRUSTS, § 65(1) cmt. b (2001) for a discussion of this issue.

156. By written consent of the settlor and all named beneficiaries of a trust or any part thereof, regardless of any spendthrift or similar protective provisions, the trust or part thereof may be revoked, modified, or terminated upon a finding by the court having jurisdiction over the trust, or otherwise being of competent jurisdiction, that the trust's purposes, as expressed in or implied by the circumstances surrounding the trust, as a result of circumstances not foreseen to the settlor are not effectively being fulfilled or are frustrated.

ARK. CODE ANN. § 28-69-401(a) (LEXIS 2004).

157. If the settlor is represented by an attorney in fact, the power of attorney or terms of the trust must authorize the power to consent to modification or termination. If the represen-

Unlike section 402, which requires the settlor herself to have the capacity to create a trust, under Section 411 the settlor may be incapacitated and her representative can still consent to the modification or termination of a trust.

Nationally, section 411(a) of the UTC has been the subject of some debate. There was some concern that the ability of a settlor to modify or terminate an irrevocable trust would cause the Internal Revenue Service to view the trust as essentially revocable and thus taxable as a revocable trust for estate tax purposes.¹⁵⁸ However, the NCCUSL is of the opinion that “[m]any, if not most, practitioners do not believe that there is likely to be a problem with Section 411, since the provision is basically acknowledged common law already.”¹⁵⁹ In 2004 the NCCUSL modified section 411 to apply only to new irrevocable trusts. At the same time section 301 was modified to prevent a settlor from representing a beneficiary with respect to 411(a) terminations and modifications. The NCCUSL believes these changes have solved whatever possible tax problems might have existed.¹⁶⁰ The Arkansas legislature adopted the latter modification, but not the former.

Even without the consent of the settlor, section 411(b)¹⁶¹ of the ATC allows a court to modify or terminate a trust if all beneficiaries consent and if termination will not frustrate any material purpose of the trust. This provision codifies the “Claflin rule,” which denies the termination of a trust ahead of time, even when beneficiaries unanimously consent, if termination would contravene a material purpose of the settlor.¹⁶² Subsection (b) covers the same issue as a current Arkansas statute.¹⁶³ Arkansas prevents modifica-

tative is a conservator, the supervising court must approve; and if the representative is a guardian, the supervising court must approve and no conservator must have been appointed. ATC § 28-73-411(a).

158. *Legislative Update 2004*, UTC NOTES, Summer 2004, at 1, 2, http://www.utctrust.org/utc/uploads/UTCnotes_Jul04_print.pdf.

159. *Id.*; see also Treas. Reg. § 20.2038-1(a)(2) (as amended in 1962), which states that “[i]f the decedent's power could be exercised only with the consent of all parties having an interest (vested or contingent) in the transferred property, and if the power adds nothing to the rights of the parties under local law” then the trust property will not be considered part of the decedent's taxable estate.

160. E-mail from David English, W.F. Fratcher Professor of Law, University of Missouri-Columbia and Reporter for the Uniform Trust Code, to Lynn Foster, (Nov. 30, 2004) (on file with author).

161. See *supra* note 153 for the text of the section.

162. *Claflin v. Claflin*, 20 N.E. 454 (Mass. 1889); see Ronald Chester, *Modification and Termination of Trusts in the 21st Century: The Trust Code Leads a Quiet Revolution*, 35 REAL PROP. PROB. & TR. J. 697, 716-17 (2001) (tracing the history of the rules for modification and termination of charitable and non-charitable trusts and exploring the effect of the UTC).

163. ARK. CODE ANN. § 28-69-401 (LEXIS 2004).

tion or termination if the settlor is alive and does not consent.¹⁶⁴ If the settlor is deceased, the court may consent on behalf of the settlor's estate if modification or termination will benefit the living.¹⁶⁵ The ATC, allowing modification or termination without the consent of a living settlor, is broader.

At section 411(c), the UTC and the ATC diverge. With a goal of increasing flexibility, the original UTC stated that "a spendthrift provision is *not* presumed to constitute a material purpose,"¹⁶⁶ obviously reflecting a policy decision on the part of the drafters. This would result in a definite break from Arkansas law that the Study Committee declined to make.¹⁶⁷ Instead, the Study Committee *reversed* this presumption, so that in the ATC, a spendthrift provision *is* presumed to constitute a material purpose. The 2004 amendments to the UTC placed this subsection in brackets, leaving it up to the states as to whether to adopt it, since two enacting states deleted it¹⁶⁸ and two, like Arkansas, reversed it.¹⁶⁹

EXAMPLE: Settlor *S* establishes an irrevocable trust that is administered by Trustee *T*, and provides educational expenses for his two children *A* and *B*. *S* becomes incapacitated and a conservator is appointed for him. *A* and *B* hold advanced degrees and wish to terminate the trust. *S*'s conservator objects. What result? ANSWER: Since the material purpose of the trust has been fulfilled, *S*'s conservator's consent is not necessary, and the court should order the trust's termination.

EXAMPLE: Settlor *S* establishes an irrevocable spendthrift trust that is administered by Trustee *T*, and provides income for his two children *A* and *B*. *S* becomes incapacitated and a conservator is appointed for him. *A* and *B* have income of their own and wish to terminate the trust. *S*'s conservator objects. What result? ANSWER: The ATC makes a spendthrift provision a material purpose of the trust; therefore, *S*'s conservator's consent is necessary for termination.

164. *Id.*

165. *Id.*

166. UTC § 411(c) (2001) (emphasis added).

167. Letter from Tom Wornack, Chair, Arkansas Bar Association Probate and Trust Section Study Committee on the Uniform Trust Code, to Scott Stafford, Professor of Law and Chair, Arkansas Bar Association Jurisprudence and Law Reform Committee (Apr. 26, 2004) (on file with the author).

168. Missouri and Tennessee omitted it. Kansas and Nebraska reversed the presumption so that a spendthrift provision is presumed to be a material provision. KAN. STAT. ANN. §§ 58a-411(c) (Supp. 2003); NEBR. REV. STAT. § 30-3837 (c) (LEXIS Supp. 2004).

169. 2004 Amendments to be Approved in August, UTC NOTES, Summer 2004, at 5, 7, www.utctrust.org/utc/uploads/UTCnotes_Jul04_print.pdf. The proposed amendments show that originally deletion of the subsection was planned. However, the final amendments merely bracket the subsection.

Finally, Section 411(e)¹⁷⁰ provides that even if all of the beneficiaries do not consent to a modification of the trust, the court can approve it anyway if a two-pronged test is passed: first, the other conditions for modification or termination must be met, and second, the interests of the non-consenting beneficiary will be adequately protected.¹⁷¹

EXAMPLE: A testamentary trust pays a fixed income to Settlor's children *A* and *B* and Settlor's friend *F* for life, with the remainder to charity *C*. *C*, *A* and *B* petition the court to discontinue the trust. *F* and Trustee *T* refuse to consent to termination. What result? ANSWER: In order for this trust to be terminated, a court will have to find that, first, if *F* had agreed, the trust could have been terminated (yes); and second, that if the trust is terminated, *F*'s interest will be adequately protected. *F*'s interest could be protected, for example, by the purchase of an annuity. A court could so order and terminate the trust. *T* does not have veto power, although *T* has standing to object. Section 411 strikes a balance between the desire of the beneficiaries to modify or terminate a noncharitable trust and the settlor's material purpose. Section 412¹⁷² applies to both charitable and noncharitable trusts and codifies the doctrine of "equitable deviation," which empowers a court to modify either the administrative or dispositive terms of a trust, or even to terminate it, if, because of circumstances unforeseen by the settlor, this will further the purposes of the trust. In theory, equitable deviation should become more frequent given the modern trend of the abolition of the Rule Against Perpetuities and the establishment of perpetual trusts.¹⁷³ Arkansas has already codified the doctrine of equitable deviation, and the ATC cross-references readers to the relevant code sections.¹⁷⁴ The Study Committee originally planned to repeal 28-69-401 et seq. and replace them with the ATC, but after considerable discussion, the Committee retained both versions. The current procedures are used extensively, and the Study Committee members believed that if attorneys wished to continue to do so and made

170. See *supra* note 153 for the text of the section.

171. See UTC § 411 cmt. (2001) for a discussion of types of protection.

172. This section reads as follows:

(a) In addition to the procedure available under §§ 28-69-401–28-69-403, a court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.

(b) A court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.

(c) Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.

ATC § 28-73-412.

173. See Chester, *supra* note 143, at 701–03.

174. ARK. CODE ANN. §§ 28-69-401–28-69-403 (LEXIS 2004).

it clear in their pleadings, that this would not cause a problem.¹⁷⁵ The current Arkansas statutes allow for the application of other law,¹⁷⁶ so seemingly attorneys could choose between the ATC procedure and the existing procedure. The ATC is broader, so it will apply in more instances.

EXAMPLE (under the ATC): A testamentary trust pays *A* and *B*, cousins, income on a quarterly basis. At the death of *A* and *B*, the trust will terminate and be paid out to their issue, as yet unborn, or to charity *C* if there is no issue. The trustee *T* does not have the power to invade the principal. *A* becomes disabled, and to carry out the settlor's primary purpose, *T* should be given the power to invade the principal on *A*'s behalf. *A*, *B* or *T* can petition the court to modify the trust terms to allow *T* to invade the principal. The court can do so.

EXAMPLE (under Section 28-69-401): A testamentary trust pays *A* and *B*, cousins, income on a quarterly basis. At the death of *A* and *B*, the trust will terminate and be paid out to their issue, as yet unborn, or to charity *C*. The trustee *T* does not have the power to invade the principal. *A* becomes disabled, and to carry out the settlor's primary purpose, *T* should be given the power to invade the principal on *A*'s behalf. *A*, *B* or *T* can petition the court to modify the trust terms to allow *T* to invade the principal. The court must first make a finding that the trust's purposes are not being fulfilled because of circumstances unforeseen by the settlor. *A*, *B* and *C* must agree to the modification. A guardian ad litem must be appointed for the unborn remaindermen and must agree. Since the settlor is deceased, the court can agree on her behalf. The court need not be stopped by the objection of the guardian ad litem if there is a finding that there is general family benefit to the living. But *A*, *B*, and *C* must consent.

Section 413¹⁷⁷ codifies and expands the equitable doctrine of "cy pres," which applies to the modification of charitable trusts. The Arkansas Supreme Court has used the following definition of cy pres:

175. E-mail from William Haight, member, Arkansas Bar Association Probate and Trust Section Study Committee on the Uniform Trust Code, to Lynn Foster (Dec. 15, 2004) (on file with author).

176. "Nothing in this subchapter shall prevent revocation, modification, or termination of a trust pursuant to its terms, or otherwise in accordance with applicable law." ARK. CODE ANN. § 28-69-403 (LEXIS 2004).

177. This section reads as follows:

(a) Except as otherwise provided in subsection (b) of this section, if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful:

- (1) the trust does not fail, in whole or in part;
- (2) the trust property does not revert to the settlor or the settlor's successors in interest; and

[T]he cy pres doctrine is: ‘. . . the principle that equity will, when a charity originally or later becomes impossible or impracticable of fulfillment, substitute another charitable object which is believed to approach the original purpose as closely as possible. It is the theory that equity has the power to mould the charitable trust to meet emergencies.’¹⁷⁸

Another element often found in the definition of cy pres is that the settlor have a general (not a specific) charitable purpose or intent.¹⁷⁹ Often proving “general charitable intent” is difficult.¹⁸⁰ Easing the application of cy pres, the Restatement (Third) of Trusts presumes the presence of general charitable intent,¹⁸¹ as does the ATC. Thus, if the trust fails because a particular charitable purpose has become impossible or impracticable to achieve, and if the trust does not contain a gift over provision, a court can find general charitable intent and apply cy pres more easily.

(3) a court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor’s charitable purposes.

(b) A provision in the terms of a charitable trust that would result in distribution of the trust property to a noncharitable beneficiary prevails over the power of a court under subsection (a) of this section to apply cy pres to modify or terminate the trust only if, when the provision takes effect:

- (1) The trust property is to revert to the settlor and the settlor is still living; or
- (2) Less than thirty (30) years have elapsed since the date of the trust’s creation.

ATC § 28-73-413.

178. *Trevathan v. Ringgold-Noland Found., Inc.* 241 Ark. 758, 763, 410 S.W.2d 132, 135 (1967) (quoting GEORGE BOGERT, 2A THE LAW OF TRUSTS AND TRUSTEES § 431 (1953)).

171. If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.

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

180. In most Arkansas cases that have discussed the cy pres doctrine, the doctrine is usually applied with no discussion of the “general charitable intent” element. However, for an example of a case where a court used the cy pres analysis and could not find general or “dominant” intent, *see Sloan v. Robert Jack Post No. 1322 V.F.W.*, 218 Ark. 917, 239 S.W.2d 591 (1951) (holding that where the public donated money to two different veterans organizations to be used for a “veterans’ hut” and the outcome would be either a building only for veterans who had foreign service or a community building to admit non-veterans, the court refused to apply the cy pres analysis but did not find the intent to be general enough to encompass either alternative, and ordered the money refunded). *See also McCarroll v. Grand Lodge, I.O.O.F.*, 154 Ark. 376, 394, 243 S.W. 870, 876 (1922) (dissenting opinion) (arguing that the decedent had no general charitable intent and thus the majority was wrong to apply the cy pres doctrine).

181. RESTATEMENT (THIRD) OF TRUSTS § 67, Reporter’s Notes (2001).

Even if the trust contains a noncharitable gift over provision, subsection (b) only allows it to prevail over the court's cy pres power in two narrow circumstances.¹⁸² This is another expansion of cy pres. The cy pres doctrine has a laudable underlying policy: that of supporting charitable gifts. It has been criticized for its narrowness.¹⁸³ The ATC will provide much-needed reforms.

Section 414¹⁸⁴ addresses the problem of the trust that does not consist of enough property to carry out the purpose of the testator, or even to justify the cost of its own administration. Many trusts contain provisions that allow the trustee to terminate the trust if its continued existence becomes uneconomical. The ATC codifies the "bottom amount" at \$100,000—if the trust property has total value of less than \$100,000, the trustee or court may terminate the trust, or the trustee can be changed, presumably to one that is less expensive. Also note that this section does not require court approval if the beneficiaries do not object.

Section 415¹⁸⁵ allows courts to reform the terms of a trust to carry out the settlor's intent if clear and convincing evidence is produced to show that there was a mistake of fact or law. This is a change from Arkansas law¹⁸⁶ although it accords with the Restatement (Third) of Property Section 12.1. The statute applies to the full spectrum of mistakes—mistakes of law, of

182. See *supra* note 177 for the text of the section.

183. See, e.g., Alex M. Johnson, Jr., *Limiting Dead Hand Control of Charitable Trusts: Expanding the Use of the Cy Pres Doctrine*, 21 U. HAW. L. REV. 353 (1999) (arguing that the cy pres doctrine is too narrow, has been misused by the courts, and should be merged with the doctrine of equitable deviation); Ronald Chester, *Cy Pres or Gift Over?: The Search for Coherence in Judicial Reform of Failed Charitable Trusts*, 23 SUFFOLK U. L. REV. 41 (1989) (recommending that the requirement of general charitable intent be dropped and that non-charitable gift-overs be regarded less favorably).

184. This section reads as follows:

(a) After notice to the qualified beneficiaries, the trustee of a trust consisting of trust property having a total value less than one hundred thousand dollars (\$100,000) may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration.

(b) A court may modify or terminate a trust or remove the trustee and appoint a different trustee if it determines that the value of the trust property is insufficient to justify the cost of administration.

(c) Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.

(d) This section does not apply to an easement for conservation or preservation.

ATC § 28-73-414.

185. ATC § 28-73-415 (reading as follows: "A court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.")

186. "But the courts do not possess the prerogative power of creating trusts or of altering the terms of instruments creating them." *Morris v. Boyd*, 110 Ark. 468, 476, 162 S.W. 69, 71 (1913).

fact, in expression,¹⁸⁷ and in inducement.¹⁸⁸ The Comment to this section distinguishes “reformation” from the “resolution of ambiguities.” However, the case law in this area is often confusing. Because common law prohibited almost all reformation of wills and trusts for mistake,¹⁸⁹ yet allowed the resolution of some ambiguities,¹⁹⁰ attorneys tend to argue ambiguity.¹⁹¹ The ATC will bring some needed flexibility to courts in this regard. However, adoption of this section may cause some tension between the law of wills and that of testamentary trusts, since the law of wills is not changing.

Section 416¹⁹² of the ATC also allows courts to modify the terms of a trust to achieve the settlor’s tax objectives.

EXAMPLE: Settlor *S* establishes an inter vivos revocable trust, providing that on her death the trust residue will be distributed to charity *A*. The trust agreement does not provide for exoneration of the residue from taxes and expenses. Similar trusts of *S* give similar gifts to other charities, and each of them provides for exoneration. The trustee petitions the court for modification and introduces evidence of *S*’s intent. The court can modify the trust and provide for exoneration.

187. “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.” UTC § 415 cmt. (2001). For example, if settlor wanted *A* to receive \$500,000 at the termination of the trust and the trust gave \$50,000 to *A*, this would be a mistake of expression.

188. “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.” *Id.* For examples of mistakes in inducement, see RESTATEMENT (THIRD) OF PROPERTY, WILLS AND DONATIVE TRANSFERS § 12.1 cmt. i illustrations (2003).

189. Generally, a will may not be set aside for mistake where the testator knew and approved its contents Some courts, however, have created an exception. When the grounds upon which the testator proceeded in revoking a bequest appear in the instrument itself, some courts allow parol evidence to show that the error upon which the revocation was based is the nonexistence of that fact, and refuse to allow the revocation Even so, when the misstatement is one which is peculiarly within the testator’s knowledge or determination, the falsity of such assertion will not prevent the operation of the clause of revocation. *Witt v. Rosen*, 298 Ark. 187, 189–91, 765 S.W.2d 956, 957–59 (1989) (declining to reform the will in question).

190. See *Smith v. Smith*, 229 Ark. 579, 584–85, 317 S.W.2d 275 (1958) (explaining the doctrine of allowing extrinsic evidence to resolve latent, but not patent, ambiguities with respect to a will). No Arkansas trust law cases exist on the issues of reformation and resolution of ambiguities.

191. “Although the courts subscribe to an inflexible rule against reformation of a will, it seems that they have often strained a point in matters of identification of property or beneficiaries in order to reach a desired result by way of construction.” *In re Gibbs’ Estate*, 14 Wis. 2d 490, 497, 111 N.W.2d 413, 418 (1961) (refusing to call a mistake an ambiguity, and reforming the will anyway).

192. This section reads as follows: “To achieve the settlor’s tax objectives, a court may modify the terms of a trust in a manner that is not contrary to the settlor’s probable intention. The court may provide that the modification has retroactive effect.” ATC § 28-73-416.

No current Arkansas law exists on this topic other than Arkansas's codification of the Claflin rule already discussed, which is not so specific.¹⁹³ Section 417¹⁹⁴ allows trustees to combine or divide trusts, subject to any contrary provision in the trust, if the result does not harm any beneficiaries. The section refers readers to a corresponding statute already in force,¹⁹⁵ which also concern the division of trusts. Neither the ATC nor the existing Arkansas statutes require judicial approval. The Arkansas statutes are somewhat more detailed with respect to the division of trusts.¹⁹⁶ Division of trusts is fairly common and is usually undertaken for tax purposes.¹⁹⁷ Combination of trusts may enable more efficient or less expensive administration, and may cure the problem of an uneconomic trust.¹⁹⁸

VII. ARTICLE 5—CREDITOR'S CLAIMS: SPENDTHRIFT AND DISCRETIONARY TRUSTS

Article 5 covers the rights of creditors of either settlors or beneficiaries to reach trust property. There are two modern trends with regard to creditors' rights against trusts. The first is the erosion of the spendthrift trust's protection against creditors. Both the Restatements (Second) and (Third) of Trusts allow a spendthrift trust to be reached by a creditor if the claim is one for alimony and child support; necessary services or supplies for the benefit of the beneficiary; services and materials furnished to preserve or benefit the beneficiary's interest in the trust (e.g., an attorney's services); or lastly if the creditor is the United States or a state.¹⁹⁹ The UTC recognizes all of these exceptions except claims for necessities;²⁰⁰ the ATC recognizes none of them, although it does not expressly exclude them.²⁰¹ A fifth category of

193. ARK. CODE ANN. § 28-69-401 (LEXIS 2004).

194. This section reads as follows:

(a) (1) After notice to the qualified beneficiaries, a trustee may combine two (2) or more trusts into a single trust or divide a trust into two (2) or more separate trusts, if the result does not impair rights of any beneficiary or adversely affect achievement of the purposes of the trust.

(2) A trustee may exercise the authority granted in this section without court approval.

(b) This section does not repeal §§ 28-69-701–28-69-706.

ATC § 28-73-417.

195. ARK. CODE ANN. §§ 28-69-705–28-69-706 (LEXIS 2004).

196. For example, current Arkansas law allows the divided trusts to contain dissimilar terms. Differing tax elections may be made for each. *Id.* § 28-69-705.

197. UTC § 417 cmt. (2001).

198. *Id.*

199. RESTATEMENT (SECOND) OF TRUSTS § 157 (1959); RESTATEMENT (THIRD) OF TRUSTS § 59 (2001).

200. UTC § 503 (2001).

201. See discussion *infra* at notes 215–19 and accompanying text.

such creditors, tort claimants, is just now appearing on the horizon. Although finding favor in some quarters, tort claimants are not included as exceptions in either the UTC or the ATC.²⁰²

The second modern trend allows the settlor/beneficiary of a self settled trust to protect her trust assets from her own creditors. These “asset protection trusts” began their existence in off-shore jurisdictions and have now been legalized in several states.²⁰³ The ATC follows traditional law and rejects asset protection trusts.²⁰⁴

Another limiting factor on transfers into trust is Arkansas’s Fraudulent Transfer Act,²⁰⁵ which is outside the scope of this article, but which may apply to both self settled trusts and gratuitous trusts for the benefit of another.

A. Rights When No Spendthrift Provision—Section 501²⁰⁶

This section clarifies that a court order obtained by a creditor against a trustee may extend to future distributions. Courts or statutes (Arkansas has no such statutes) may limit creditors to specified percentages or other restrictions. Note that the ATC extends a creditor’s right to reach distributions “for the benefit of” as well as “to” the beneficiary, subject to the court’s discretion. The ATC uses the word “attachment” in this section to describe the method of reaching trust assets. Arkansas does not currently recognize the prejudgment remedy of attachment.²⁰⁷ To reach trust assets in Arkansas, a creditor must garnish or execute on the trustee after obtaining a judgment.²⁰⁸

202. See generally Alan Newman, *The Rights of Creditors of Beneficiaries Under the Uniform Trust Code: An Examination of the Compromise*, 69 TENN. L. REV. 771 (2002) (discussing the policy considerations that led to the resulting UTC statutes).

203. See *infra* the definition and discussion of asset protection trusts at notes 240–48 and accompanying text.

204. UTC § 505 cmt. (2001).

205. ARK. CODE ANN. §§ 4-59-201–4-59-213 (LEXIS 2001).

206. This section reads as follows:

To the extent a beneficiary’s interest is not protected by a spendthrift provision, a court may authorize a creditor or assignee of the beneficiary to reach the beneficiary’s interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means. The court may limit the award to such relief as is appropriate under the circumstances.

ATC § 28-73-501.

207. *McCroy v. Johnson*, 296 Ark. 231, 755 S.W.2d 566 (1988) (holding Arkansas prejudgment attachment statute unconstitutional).

208. ARK. CODE ANN. §§ 16-110-401–417 (LEXIS 1999) (writs of garnishment); *Id.* §§ 16-66-101–507 (writs of execution, levy, and sale).

B. Spendthrift Provision—Section 502²⁰⁹

This section allows the phrase “spendthrift trust” or similar wording to be sufficient to restrain both voluntary²¹⁰ and involuntary transfers²¹¹ of the beneficiary’s interest. A spendthrift provision must restrain both types of transfers to be valid. The ATC codifies the common law that a beneficiary may not transfer an interest in a spendthrift trust, and a creditor or assignee of a beneficiary may not reach the interest before the beneficiary receives it.²¹² A spendthrift trust valid under the ATC will also be recognized as valid in bankruptcy proceedings.²¹³ Beneficiaries may disclaim property or release or exercise powers of appointment with no restrictions because these actions are not “transfers” of property and thus are not affected by a spendthrift clause.²¹⁴

C. Arkansas Omission from the UTC—UTC Section 503

In accord with the modern trend of case and statutory law and the Restatements (Second) and (Third) of Trusts,²¹⁵ section 503 of the UTC allows spouses, former spouses, or children of the beneficiary who have a judgment or court order for support or maintenance, or judgment creditors who have provided services for the protection of a beneficiary’s interest in the trust (for example, lawyers), to reach spendthrift trust distributions. A second subsection renders spendthrift provisions invalid against state and fed-

209. This section reads as follows:

(a) A spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary’s interest.

(b) A term of a trust providing that the interest of a beneficiary is held subject to a “spendthrift trust,” or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary’s interest.

(c) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this chapter, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.

ATC § 28-73-502.

210. A voluntary transfer, for example, would be a beneficiary’s assignment of her interest to a creditor to voluntarily pay off a debt.

211. An example of an involuntary transfer would be a levy of execution on the trustee by a judgment creditor of the beneficiary.

212. *Med. Park Hosp. v. Bancorpsouth Bank of Hope*, 2004 WL 965927 (Ark. No. 03-1199 May 6, 2004); *Bowlin v. Citizens’ Bank & Trust Co.*, 131 Ark. 97, 198 S.W. 288 (1917). Note, however, that this limitation on creditors does not apply to self-settled spendthrift trusts. See *infra* note 232 for the text of section 505.

213. UTC § 502 cmt.

214. *Id.*

215. RESTATEMENT (THIRD) OF TRUSTS § 59(a) (2001); RESTATEMENT (SECOND) OF TRUSTS § 157(a) (1959).

eral government claims. The ATC omits all of UTC section 503.²¹⁶ The members of the Study Committee believed that “recognition of the exceptions allowed by the original section 503 would amount to a change in what is believed to be existing Arkansas law.”²¹⁷ However, Arkansas already has case law to the effect of UTC section 503(b), which allows a former spouse with a judgment for alimony to reach a spendthrift trust.²¹⁸ In *Council v. Owens*, the divorced wife of a trust beneficiary received a judgment for a debt of \$26,800 in unpaid alimony and claimed a right to the beneficiary’s trust interest. The trustee sued for a declaratory judgment. The trust had a spendthrift provision, but the trustee was required to pay annual distributions to the ex-husband. The Court of Appeals decided, in accord with the “prevailing view” of cases in other jurisdictions, and the Restatement (Second) of Trusts, which the Arkansas Supreme Court follows, that as a last resort the ex-wife could garnish the trust, stating, “In sum, we find that the legal obligation for support, regardless of whether it is for alimony or child support, is more compelling and outweighs the intent of the settlor to shelter the beneficiary’s interest in the trust.”²¹⁹

The chair of the Study Committee has stated that it is not the intent of the Committee to weaken *Council v. Owens*,²²⁰ but if the section does not become law, how can the legislature’s rejection of this section not have that effect? A compelling argument can certainly be made that if the legislature refuses to enact a provision, it is because it does not wish the content of that provision to become statutory law. If the spouse and child portion of section 503 was adopted, to better coincide with the opinion of the Court of Appeals, language could be inserted to require the creditor to exhaust all other avenues before proceeding against a trust.

216. Arkansas is not alone in its omission of this section. Kansas and Maine also omit it. The District of Columbia allows only children to reach spendthrift trusts. D.C. CODE ANN. § 19-1305.03(b) (LEXIS Supp. 2004). Tennessee allows only the state of Tennessee the exception. TENN. CODE ANN. § 35-15-503 (2004). Utah and Wyoming allow all categories of creditors except for spouses and former spouses. UTAH CODE ANN. § 75-7-503 (LEXIS Supp. 2004); WYO. STAT. ANN. § 4-10-503 (Michie 2004). Missouri, Nebraska, New Hampshire and New Mexico retain the same categories of creditors as does the UTC.

217. Letter from Tom Womack, *supra* note 167.

218. *Council v. Owens*, 28 Ark. App. 49, 770 S.W.2d 193 (1989).

219. *Id.* at 55, 770 S.W.2d at 197.

220. Tom Womack, Presentation on the Proposed Arkansas Trust Code, 2004 Arkansas Bar Association Probate Law Institute (Oct. 29, 2004).

D. Discretionary and Support Trusts—ATC Section 504²²¹

Under the ATC, a creditor cannot compel a trustee to make a distribution that is within the trustee's discretion. As the Comment explains, this section "eliminates the distinction between discretionary and support trusts, unifying the rules for all trusts fitting within either of the former categories."²²² Section 504 applies whether or not the trust has a spendthrift provision, although as the Comment notes, this section is not relevant to a trust with a spendthrift provision. It applies even if the discretion is expressed in the form of a standard, and even if the trustee has abused the discretion. It does not, however, prevent a beneficiary from going to court because a trustee has failed to comply with a standard or abused its discretion.²²³

EXAMPLE: A trust allows Trustee *T* to distribute income and principal to *B*, at *T*'s discretion, for *B*'s "support" (support is a standard). The trust does not contain a spendthrift provision. *C* obtains a judgment against *B* and *B*'s other property is insufficient to satisfy the judgment. *C* garnishes the trust. *T* stops making payments to *B*. Can *C* compel payments? ANSWER: No, not even if *T* has abused her discretion.

In July 2004, NCCUSL amended section 504 and added a new subsection that prevents creditors from reaching the interest of a beneficiary who is also a trustee or co-trustee if the trustee/beneficiary's discretion to make distributions for her own benefit is limited by an "ascertainable standard."²²⁴ The definition of this term was removed from section 814 and added to the

221. This section reads as follows:

(a) Whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion, even if:

- (1) the discretion is expressed in the form of a standard of distribution; or
- (2) the trustee has abused the discretion.

(b) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution. Under § 26-78-814(a), a trustee must always exercise a discretionary power in good faith and with regard to the purposes of the trust and the interests of the beneficiaries.

(c) A creditor may not reach the interest of a beneficiary who is also a trustee or co-trustee, or otherwise compel a distribution, if the trustee's discretion to make distributions for the trustee's own benefit is limited by an ascertainable standard.

ATC § 28-73-504.

222. UTC § 504 cmt. For more on this point, see RESTATEMENT (THIRD) OF TRUSTS § 60 reporter's notes to cmt. a (2001).

223. Again, note that this section does not apply to self-settled trusts. See *infra* note 232 (discussing section 505 and this issue).

224. An ascertainable standard is one "relating to the trustee's individual health, education, support or maintenance within the meaning of Section 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code . . ." ATC § 28-73-814.

definitions in section 103. This amendment is intended to clarify the law with respect to “bypass trusts” in which the settlor’s spouse is often both a beneficiary and a trustee. An “ascertainable standard” takes the property in the trust out of the beneficiary/trustee’s estate for estate tax purposes.²²⁵

This section of the UTC has also stirred some controversy. At least one commentator has accused the abolition of the distinction between discretionary and support trusts as enabling government agencies to garnish “disability trusts”²²⁶ and “special needs trusts.”²²⁷ The argument is that if a trust does not contain special needs language, but the common law of its state allows it to operate as a disability or special needs trust, then the abolition of the difference between support and discretionary trusts will allow the government to reach the trust assets.²²⁸ Other commentators are more sanguine with regard to the existence of disability trusts and special needs trusts under the UTC.²²⁹ A Colorado committee “co-chaired by a leading special needs trust expert” concluded that the UTC would have no impact on either type of trusts created by third parties.²³⁰ Therefore at the present time, the NCCUSL has not amended the UTC in this regard, but is watching the situation.²³¹

225. See generally Richard W. Harris, *Ascertainable Standard Restrictions of Trust Powers under the Estate, Gift, and Income Tax*, 50 TAX LAW. 489 (1997) (discussing the nature of ascertainable standards, and exploring their different treatment by different types of taxes). This issue of taxation of trusts and powers of appointment is beyond the scope of this article.

226. The phrase “disability trusts” is used in this article to denote trusts established to qualify persons over 65 for government health benefits. These types of trusts may vary somewhat from state to state but generally they cap the income available and provide that at the income beneficiary’s death the trust will reimburse the state for Medicaid expenses. See 42 U.S.C. § 1396p(d)(4)(B) (2000).

227. “Special needs trusts” are established to qualify persons under sixty-five with certain disabilities for government health benefits. These types of trusts may vary somewhat from state to state as well. In general, they seek to preserve the beneficiary’s eligibility for government health benefits but also enhance their quality of life. At the income beneficiary’s death the trust will reimburse the state for Medicaid expenses. See 42 U.S.C. § 1396p(d)(4)(A) (2000).

228. Mark Merric & Douglas W. Stein, *A Threat to All SNTs*, TR. & EST., Nov. 2004, at 38.

229. Alan Newman states that “a provider of Medicaid or other public benefits to a beneficiary of a discretionary trust created by a third party, including one with support or other standards for distributions [which would include a special needs trust], will be unable to force distributions from the trust that it could reach to reimburse it for benefits it had provided to the beneficiary.” see Newman *supra* 202, at 812. He cautions that such a trust should also contain a spendthrift provision. *Id.* at 812 n.223. However, he notes that arguably public support providers could argue take into account trust assets, thus denying Medicaid eligibility to beneficiaries, and that this denial is not prohibited under the UTC. *Id.* at 813.

230. *Legislative Update 2004*, *supra* note 158, at 2.

231. *Id.* at 3.

E. Creditors' Rights Against Settlers—Section 505²³²

Can the creditor of a settlor reach trust assets? The answer depends on whether the trust is revocable or irrevocable. Subsection (a)(1) affirms the modern rule with respect to revocable trusts that a creditor can reach trust assets, since they are essentially under the settlor's control by virtue of her power of revocation. In most trusts of this type, the settlor has reserved a beneficial interest. This was the case in *Halliburton Co. v. E.H. Owen Family Trust*.²³³ The settlor had transferred his own and his company's assets into a revocable trust.²³⁴ He was a co-trustee and the sole lifetime beneficiary.²³⁵ The Arkansas Court of Appeals ruled that not only were the transfers into the trust void under the fraudulent transfer statute, but also the trust itself was void with respect to the creditor.²³⁶

Additionally, the UTC extends creditors' rights to a revocable trust after the settlor's death,²³⁷ but the Study Committee declined to change existing Arkansas law,²³⁸ stating that it was well settled and not in need of change.²³⁹

232. This section reads as follows:

(a) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

(1) during the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.

(2) with respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.

(b) For purposes of this section:

(1) during the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and

(2) upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in Section 2041(b)(2) or 2514(e) of the Internal Revenue Code of 1986, or Section 2503(b) of the Internal Revenue Code of 1986, in each case as in effect on January 1, 2005.

ATC § 28-73-505.

233. *Halliburton Company v. E.H. Owen Family Trust*, 28 Ark. App. 314, 773 S.W.2d 453 (1989).

234. *Id.* at 316, 773 S.W.2d 454.

235. *Id.*, 773 S.W.2d at 454.

236. *Id.* at 324–25, 773 S.W.2d at 458–59.

237. UTC § 505(a)(3).

238. “[W]ithin two (2) months after his or her qualification or as the court may direct, a personal representative shall file a true and complete inventory of all property owned by the decedent at the time of his or her death, except such interests as terminated by reason of his

Subsection 505(a)(2) prevents settlors from establishing “asset protection” trusts, following Arkansas and the majority, although not the modern trend. Creditors may reach as much of the self-settled trust assets as the settlor/beneficiary is entitled to.

EXAMPLE: Settlor S creates an irrevocable trust with herself as the life-time income beneficiary, and her children as the remainder beneficiaries. The trust contains a spendthrift provision. S’s creditors can reach as much of the trust property as can S, that is, her income.

The asset protection trust is a fairly recent phenomenon.²⁴⁰ It first surfaced offshore, is now available in 18 countries,²⁴¹ and has spread to Alaska, Delaware, Missouri, Nevada, Oklahoma, Rhode Island and Utah.²⁴² The United States jurisdictions that have enacted asset protection trust statutes have in general abolished the Rule Against Perpetuities, abrogated the common law rule denying self settled trust beneficiaries protection from creditors, and provided a favorable no-income tax environment for such trusts.²⁴³ In this type of a trust,²⁴⁴ at least one trustee must be present in the host state; the trust instrument must choose the law of the host state; some or all of the trust administration must be performed in the host state; and some or all of the trust property must be located within the trust state.²⁴⁵

or her death . . .” ARK. CODE ANN. § 28-49-110(a)(1). Of the ten jurisdictions that have enacted the UTC, only Missouri has similarly deleted this subsection.

239. Letter from Tom Womack, *supra* note 167.

240. For an introduction to both offshore and domestic asset protection trusts, *see generally* Henry J. Lischer, *Domestic Asset Trusts: Pallbearers to Liability?* 35 REAL PROP. PROB. & TR. J. 479 (2000). Academic commentators have almost unanimously criticized asset protection trusts. *See generally* Stuart E. Sterk, *Asset Protection Trusts: Trust Law’s Race to the Bottom?* 85 CORNELL L. REV. 1035 (2000); Randall A. Gingiss, *Putting a Stop to “Asset Protection” Trusts*, 51 BAYLOR L. REV. 987 (1999). In a now-often-cited article, Professor Lynn LoPucki lists asset protection trusts as one factor contributing to the possible failure of the system by which money judgments are enforced. Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 32–38 (1996).

241. Bahamas, Cayman Islands, Gibraltar and Channel Islands are just a few of the jurisdictions that offer asset protection trusts.

242. ALASKA STAT. § 34.40.110 (LEXIS 2002); DEL. CODE ANN. tit. 12, §§ 3570–3576 (Michie 2001 & Supp. 2002); MO. ANN. STAT. § 456.5-505.3 (West, Westlaw through 2d Reg. Sess. of 92d Gen. Assembly (2004)) NEV. REV. STAT. 166.040–166.120 (West 2000); OKLA. STAT. ANN., tit. 31, §§ 10–18 (West, Westlaw through end of 2004 Session); (R.I. GEN. LAWS § 18-9.2-2 (Lexis 2000). For a comparison of the legislation of some of these states and a thorough treatment of the history and policy debates concerning APTs, *see generally* Lischer, *supra* note 240.

243. Lischer, *supra* note 240, at 508.

244. The following description focuses on domestic asset protection trusts as opposed to those in foreign jurisdictions. For a description of typical offshore asset protection trusts, *see id.* at 506–08.

245. *Id.* at 516.

Trustees may be authorized to make discretionary distributions to settlor/beneficiaries; settlor/beneficiaries may veto distributions to themselves, and settlor/beneficiaries may be given testamentary special powers of appointment over the trust property.²⁴⁶

A lengthy discussion of APTs is outside the scope of this article. Settlor/beneficiaries of offshore APTs have not fared well in the handful of United States court cases existing at this time.²⁴⁷ Domestic APTs are so new that as of this writing, not a single published opinion exists in which they are at issue, but commentators have raised some serious grounds on which to attack them.²⁴⁸

F. Creditors and Overdue Distributions—Section 506²⁴⁹

What if the trustee simply refuses to distribute trust property? Under section 504, if the trustee has discretionary powers, a creditor cannot garnish or execute against the property, even if the trustee has abused her discretion. But if the distribution is mandatory and a reasonable time has elapsed after the distribution was supposed to occur, this section clarifies that creditors can reach the amount of the distribution, whether or not the trust contains a spendthrift provision.

246. *Id.*

247. *See, e.g.,* In re Lawrence, 279 F.3d 1294 (11th Cir. 2002) (affirming a bankruptcy judge's contempt order against a debtor for refusing to turn over assets of an offshore APT, and applying Florida law and not the law of Mauritius); F.T.C. v. Affordable Media, 179 F.3d 1228 (9th Cir. 1999) (affirming a district court judge's contempt order against a couple for refusing to turn over assets of offshore APT when sued for fraud); Breitenstine v. Breitenstine, 62 P.3d 587 (Wyo. 2003) (affirming finding that offshore APT was created to defraud creditors, including ex-wife).

248. No matter where the creditor sues, violation of fraudulent transfer laws may work, particularly if the transfer is made in connection with the creditor's claim. If the creditor sues under the law of a sister state without an APT statute (e.g. Arkansas), the creditor can argue that the Full Faith and Credit Clause of the United States Constitution applies to the Arkansas judgment, and because APTs are against the strong public policy of Arkansas, the Arkansas judgment should prevail over the law of the APT state. For a fuller discussion of methods to attack APTs, see Duncan E. Osborne, Jack E. Owen, Jr., & Arthur T. Catterall, Possibilities and Limitations of Asset Protection 355-361 (ALI-ABA Course of Study, June 20-25, 2004), WL SJ066 ALI-ABA 323. For a practitioner's view of the academy's attack on such trusts, see *id.* at 331-33.

249. This section reads as follows: "Whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal, including a distribution upon termination of the trust, if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date." ATC § 28-73-506.

G. Creditors of the Trustee—Section 507²⁵⁰

This section affirms the common law that trust property cannot be reached by creditors of the trustee under any circumstances. The Comment notes that it is consistent with the Bankruptcy Code.²⁵¹

VIII. ARTICLE 6—REVOCABLE TRUSTS

Revocable trusts have increased in popularity, chiefly as a substitute for wills, but the law has not kept up. The UTC drafters view Article 6 as “one of the more important articles of the Code.”²⁵² The drafters have attempted to settle issues still in question under common law. It is in this article that the common law presumption of irrevocability of a trust is reversed.

A. The Settlor’s Capacity—Section 601²⁵³

This section codifies current Arkansas case law, stating that the capacity to create a revocable trust is the same as that required to make a will. This is logical, since most revocable trusts are will substitutes.²⁵⁴

250. This section reads as follows: “Trust property is not subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt.” ATC § 28-73-507.

251. 11 U.S.C. § 541(d).

252. UTC Art. 6 general cmt.

253. This section reads as follows: “The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will.” ATC § 28-73-601.

254. See *supra* notes 127–32 and accompanying text (discussing section 402).

B. Presumption Reversal—Toward Revocable—Section 602²⁵⁵

Section 602 reverses the common law presumption, followed by Arkansas, that a trust instrument that is silent will be presumed to be irrevocable.²⁵⁶ However, this presumption only applies if the trust was executed after the ATC is adopted. In the opinion of the Study Committee, this is the most important change that the UTC makes to Arkansas trust law.²⁵⁷ Section 602 also sets out the methods for revoking or amending a trust. Arkansas law in this area is sparse; this section will be a particularly good addition.

255. This section reads as follows:

- (a) Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust. This subsection does not apply to a trust created under an instrument executed before September 1, 2005.
- (b) If a revocable trust is created or funded by more than one settlor:
 - (1) to the extent the trust consists of community property, the trust may be revoked by either spouse acting alone but may be amended only by joint action of both spouses; and
 - (2) to the extent the trust consists of property other than community property, each settlor may revoke or amend the trust with regard to the portion of the trust property attributable to that settlor's contribution; and
 - (3) upon the revocation or amendment of the trust by fewer than all of the settlors, the trustee shall promptly notify the other settlors of the revocation or amendment.
- (c) The settlor may revoke or amend a revocable trust:
 - (1) by substantial compliance with a method provided in the terms of the trust; or
 - (2) if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by:
 - (A) executing a later will or codicil that expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust; or
 - (B) any other method manifesting clear and convincing evidence of the settlor's intent.
- (d) Upon revocation of a revocable trust, the trustee shall deliver the trust property as the settlor directs.
- (e) A settlor's powers with respect to revocation, amendment, or distribution of trust property may be exercised by an agent under a power of attorney only to the extent expressly authorized by the terms of the trust or the power.
- (f) A conservator of the settlor or, if no conservator has been appointed, a guardian of the settlor may exercise a settlor's powers with respect to revocation, amendment, or distribution of trust property only with the approval of the court supervising the conservatorship or guardianship.
- (g) A trustee who does not know that a trust has been revoked or amended is not liable to the settlor or settlor's successors in interest for distributions made and other actions taken on the assumption that the trust had not been amended or revoked.

ATC § 28-73-602.

256. Rogoski v. McLaughlin, 228 Ark. 1157, 312 S.W.2d 912 (1958).

257. Letter from Tom Womack, *supra* note 167.

C. The Settlor's Powers and Powers of Withdrawal—Section 603²⁵⁸

Since the settlor of a revocable trust essentially retains control of the trust, this section subjects the rights of beneficiaries and the duties of the trustee to the settlor who has the power to revoke. What does this mean? Analogizing a revocable trust to a will, while the settlor has capacity, she has the same control over the trust that a testator has over a will. Notice that would normally be given to the beneficiaries must instead be given to the settlor. Consent required of the beneficiaries for various actions is instead required of the settlor. This section states that the beneficiaries come into their rights at the settlor's loss of capacity or death. However, since this is a default and not a mandatory provision, the trust can be drafted so that the beneficiaries' rights to information are postponed until the death of the settlor.²⁵⁹

Section 603 also gives the holder of a power of withdrawal²⁶⁰ over a revocable trust the same powers as a settlor. This is logical given a holder's similar power to control the trust.²⁶¹

258. This section reads as follows:

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

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

ATC § 28-73-603.

259. UTC § 603 cmt. For a clearer explanation, see English, *supra* note 14, at 187–88.

260. A power of withdrawal is a presently exercisable general power of appointment that does not depend for its exercise on the consent of the trustee or a person holding an adverse interest. ATC § 28-73-103(10).

261. UTC § 603 cmt.

D. Statutes of Limitation for Trust Contests—Section 604²⁶²

As the number of revocable trusts increases, litigation over revocable trusts will also increase. One question that has not been clearly answered in many jurisdictions, including Arkansas, concerns the statute of limitations for contesting the validity of a revocable trust. The ATC sets the limit at the earlier of three years after the settlor's death or ninety days after the trustee has sent the plaintiff a copy of the trust instrument and notice as set out in section 813.

IX. ARTICLE 7—OFFICE OF THE TRUSTEE

Article 7 contains mostly default rules that can be modified by the terms of a trust. A well-drafted trust will provide for the subjects covered in this article: acceptance or rejection of a trusteeship; bond; co-trustees; appointment of successor trustees; removal and resignation of trustees; and so on. However, if a trust is silent as to any of these issues, a court has ready-made guidance from the ATC. Additionally, drafters can incorporate these ATC provisions by reference into the trust. This article is a welcome addition to Arkansas trust law, which in general does not cover these issues. Article 7 also adds several new grounds for removal of a trustee, most significantly if the qualified beneficiaries unanimously request removal and certain conditions are met.

262. This section reads as follows:

(a) A person may commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor's death within the earlier of:

- (1) three (3) years after the settlor's death; or
- (2) ninety (90) days after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust's existence, the settlor's name, the trustee's name and address, the time allowed for commencing a proceeding, and a description of the beneficiary's interest, if any.

(b) Upon the death of the settlor of a trust that was revocable at the settlor's death, the trustee may proceed to distribute the trust property in accordance with the terms of the trust. The trustee is not subject to liability for the distribution unless:

- (1) the trustee knows of a pending judicial proceeding contesting the validity of the trust; or
- (2) a potential contestant has notified the trustee of a possible judicial proceeding to contest the trust and a judicial proceeding is commenced within sixty (60) days after the contestant sent the notification.

(c) A beneficiary of a trust that is determined to have been invalid is liable to return any distribution received.

ATC § 28-73-604.

A. Assuming or Declining the Office and Bond—Sections 701²⁶³ and 702²⁶⁴

These sections are fairly straightforward. A trustee can accept office by a number of means. A potential trustee can investigate the trust property for potential liability issues before accepting. Even if the trust does not specify a bond, a court may require one; on the other hand, even if the trust requires a bond, a bank or trust company licensed in Arkansas need not give it.

263. This section reads as follows:

(a) Except as otherwise provided in subsection (c) of this section, a person designated as trustee accepts the trusteeship:

(1) by substantially complying with a method of acceptance provided in the terms of the trust; or

(2) if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by accepting delivery of the trust property, exercising powers or performing duties as trustee, or otherwise indicating acceptance of the trusteeship.

(b) A person designated as trustee who has not yet accepted the trusteeship may reject the trusteeship. A designated trustee who does not accept the trusteeship within a reasonable time after knowing of the designation is deemed to have rejected the trusteeship.

(c) A person designated as trustee, without accepting the trusteeship, may:

(1) act to preserve the trust property if, within a reasonable time after acting, the person sends a rejection of the trusteeship to the settlor or, if the settlor is dead or lacks capacity, to a qualified beneficiary; and

(2) inspect or investigate trust property to determine potential liability under environmental or other law or for any other purpose.

ATC § 28-73-701.

264. This section reads as follows:

(a) A trustee shall give bond to secure performance of the trustee's duties only if a court finds that a bond is needed to protect the interests of the beneficiaries or is required by the terms of the trust and the court has not dispensed with the requirement.

(b) A court may specify the amount of a bond, its liabilities, and whether sureties are necessary. A court may modify or terminate a bond at any time.

(c) A regulated financial service institution qualified to do trust business in this State need not give bond, even if required by the terms of the trust.

ATC § 28-73-702.

B. Co-Trustees—Section 703²⁶⁵

Co-trustees may be appointed for a variety of reasons: to gain the advantage of differing skills, or to make certain that different factions of beneficiaries are represented.²⁶⁶ This section allows co-trustees who are unable to achieve unanimity to act by majority rule, although a trust instrument can require otherwise, and in general relieves a dissenting trustee from liability unless there is a serious breach. It allows the remaining co-trustees to act if a vacancy occurs or if a co-trustee is unavailable to perform. It allows for limited delegation by a co-trustee and places a duty on co-trustees to prevent and redress breaches of trust. The UTC drafters advise that co-trusteeships should not be called for without "careful reflection."²⁶⁷ Arkansas law attests to that statement. Even with our scarcity of trust law cases and the total absence of cases on some issues, there are at least five published appellate decisions resulting from co-trustees who could not agree.²⁶⁸

265. This section reads as follows:

- (a) Co-trustees who are unable to reach a unanimous decision may act by majority decision.
- (b) If a vacancy occurs in a co-trusteeship, the remaining co-trustees may act for the trust.
- (c) A co-trustee must participate in the performance of a trustee's function unless the co-trustee is unavailable to perform the function because of absence, illness, disqualification under other law, or other temporary incapacity or the co-trustee has properly delegated the performance of the function to another trustee.
- (d) If a co-trustee is unavailable to perform duties because of absence, illness, disqualification under other law, or other temporary incapacity, and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining co-trustee or a majority of the remaining co-trustees may act for the trust.
- (e) A trustee may not delegate to a co-trustee the performance of a function the settlor reasonably expected the trustees to perform jointly. Unless a delegation was irrevocable, a trustee may revoke a delegation previously made.
- (f) Except as otherwise provided in subsection (g) of this section, a trustee who does not join in an action of another trustee is not liable for the action.
- (g) Each trustee shall exercise reasonable care to:
 - (1) prevent a co-trustee from committing a serious breach of trust; and
 - (2) compel a co-trustee to redress a serious breach of trust.
- (h) A dissenting trustee who joins in an action at the direction of the majority of the trustees and who notified any co-trustee of the dissent at or before the time of the action is not liable for the action unless the action is a serious breach of trust.

ATC § 28-73-703.

266. UTC § 703 cmt.

267. *Id.*

268. *See, e.g.,* Selig v. Morrison, 230 Ark. 216, 321 S.W.2d 769 (1959) (affirming the appointment of a trustee ad litem to conduct trust litigation because the co-trustees couldn't get along); Festinger v. Kantor, 272 Ark. 411, 616 S.W.2d 455 (1981) (affirming removal of co-trustees because of hostility among family members).

Under common law, trustees of a private trust were required to act in unanimity, although trustees of a charitable trust could act by majority vote.²⁶⁹ Again, Arkansas law on this topic is sparse. The common law rule is cited by the dissent in one Supreme Court case.²⁷⁰ Allowing action by a majority brings trust law in line with Arkansas statutory law regarding co-executors, which allows action by majority vote.²⁷¹

C. Vacancies in Trusteeships—Section 704²⁷²

This section states the various ways in which a trusteeship may become vacant, and sets out default rules for fulfilling the vacancy. Categories of substitute trustees are prioritized. Note that if a noncharitable trust does not name a successor trustee, next in priority is a person appointed by unanimous agreement of the qualified beneficiaries—another example of

269. UTC § 703 cmt. (citing the RESTATEMENT (SECOND) OF TRUSTS §§ 194, 383 (1959)).

270. *Selig*, 230 Ark. at 223, 321 S.W.2d at 774 (Smith, J., dissenting).

271. ARK. CODE ANN. § 28-48-104 (LEXIS 2004).

272. This section reads as follows:

(a) A vacancy in a trusteeship occurs if:

- (1) a person designated as trustee rejects the trusteeship;
- (2) a person designated as trustee cannot be identified or does not exist;
- (3) a trustee resigns;
- (4) a trustee is disqualified or removed;
- (5) a trustee dies; or
- (6) a guardian of the person or conservator is appointed for an individual serving as trustee.

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

(c) A vacancy in a trusteeship of a non-charitable trust that is required to be filled must be filled in the following order of priority:

- (1) by a person designated in the terms of the trust to act as successor trustee;
- (2) by a person appointed by unanimous agreement of the qualified beneficiaries; or
- (3) by a person appointed by a court.

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

- (1) by a person designated in the terms of the trust to act as successor trustee;
- (2) by a person selected by the charitable organizations expressly designated to receive distributions under the terms of the trust if the attorney general concurs in the selection; or
- (3) by a person appointed by a court.

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

the distinction between qualified and non-qualified beneficiaries. Court approval is not needed for either of these types of successor trustees. Arkansas has virtually no law on this point.

D. Resignation of a Trustee—Section 705²⁷³

Under the common law, a trustee may resign only with the approval of the court.²⁷⁴ The Restatement (Third) of Trusts additionally allows resignation with the consent of all the beneficiaries.²⁷⁵ This section goes one step further and simply requires the trustee to give notice to the qualified beneficiaries, settlor and any trustees and wait thirty days before resigning. Only trustees of irrevocable trusts created after Sept. 1, 2005 have the benefit of this freedom to resign. Again, note that only the “qualified” beneficiaries must be notified. Arkansas currently has no law on this issue.

273. This section reads as follows:

(a) A trustee may resign:

(1) upon at least thirty (30) days' notice to the qualified beneficiaries, the settlor, if living, and all co-trustees; or

(2) with the approval of a court.

(b) In approving a resignation, a court may issue orders and impose conditions reasonably necessary for the protection of the trust property.

(c) Any liability of a resigning trustee or of any sureties on the trustee's bond for acts or omissions of the trustee is not discharged or affected by the trustee's resignation.

(d) Subsection (a) of this section applies only to irrevocable trusts created on or after September 1, 2005, and to revocable trusts which become irrevocable on or before September 1, 2005.

ATC § 28-73-705.

274. UTC § 705 cmt.

275. RESTATEMENT (THIRD) OF TRUSTS § 36 (2001).

E. Removal of a Trustee—Section 706²⁷⁶

Subsection (a) alters the common law rule by allowing the settlor of an irrevocable trust the right to petition for the removal of a trustee.²⁷⁷ While a trust is revocable, beneficiaries may not petition for removal unless the settlor loses capacity. The rest of the statute lists the grounds for removal of a trustee. In addition to the traditional grounds for removal, such as a serious breach of trust, the statute gives the court the power to remove a trustee if all of the qualified beneficiaries so request. Three findings must be made: removal must best serve the interests of all the beneficiaries; removal must not be inconsistent with a material purpose of the trust; and a suitable replacement or co-trustee must be available. This provision is analogous to Section 411, allowing beneficiaries to modify or terminate a trust if it is not inconsistent with a material purpose.²⁷⁸

Under current Arkansas law, the most prevalent reason for the removal of a trustee is lack of cooperation (usually characterized by the court as “hostility”) among co-trustees.²⁷⁹ This hostility may be joined with misconduct²⁸⁰ or lack of attention to the trust.²⁸¹ In only one removal case were no

276. This section reads as follows:

(a) The settlor, a co-trustee, or a beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.

(b) A court may remove a trustee if:

- (1) the trustee has committed a serious breach of trust;
- (2) lack of cooperation among co-trustees substantially impairs the administration of the trust;
- (3) because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or
- (4) there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable co-trustee or successor trustee is available.

(c) Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order such appropriate relief under § 28-73-1001(b) as may be necessary to protect the trust property or the interests of the beneficiaries.

ATC § 28-73-706.

277. UTC § 706 cmt.

278. *Id.*

279. See *Thinn v. Parks*, 79 Ark. App. 20, 83 S.W.3d 430 (2002) (citing Restatement (Second) of Trusts § 107(a) (1959) as authority); *Hargraves v. Hargraves*, 14 Ark. App. 230, 234–35, 686 S.W.2d 816, 818 (1985) (en banc); *Ashman v. Pickens*, 12 Ark. App. 233, 237, 674 S.W.2d 4, 5–6 (1984); *Blumenstiel v. Morris*, 207 Ark. 244, 250, 180 S.W.107, 109 (1944).

280. *Hargraves*, 14 Ark. App. at 234–35, 686 S.W.2d 818.

281. *Ashman*, 12 Ark. App. at 237, 674 S.W.2d at 5–6.

co-trustees involved.²⁸² Here, the trustee was removed for purchasing unproductive trust property without any authority, failing to comply with orders of the lower court for a number of years, refusing to account to the beneficiaries, and intentionally favoring his children as remaindermen over his former wife as income beneficiary.²⁸³

F. Compensation and Reimbursement of Trustees—Sections 708²⁸⁴ and 709²⁸⁵

If the trust is silent in this regard, the ATC sets a reasonable level of compensation. Even if the trust does specify a level of compensation, a court may adjust the level in light of surrounding circumstances. The ATC does not answer the question of whether trustees who hire their own lawyers can charge dual fees, but notes that the trend is affirmative as long as the overall fees are reasonable.²⁸⁶ Trustees can be reimbursed from trust property for authorized expenses, and even unauthorized expenses, if they benefited the trust, in order to prevent unjust enrichment of the trust. Trustees are not entitled to attorney's fees incurred if the outcome of the action is a finding that the trustee breached the trust.²⁸⁷

282. *Riegler v. Riegler*, 262 Ark. 70, 553 S.W.2d 37 (1977).

283. *Id.* at 78, 553 S.W.2d at 40.

284. This section reads as follows:

(a) If the terms of a trust do not specify the trustee's compensation, a trustee is entitled to compensation that is reasonable under the circumstances.

(b) If the terms of a trust specify the trustee's compensation, the trustee is entitled to be compensated as specified, but the court may allow more or less compensation if:

- (1) the duties of the trustee are substantially different from those contemplated when the trust was created; or
- (2) the compensation specified by the terms of the trust would be unreasonably low or high.

ATC § 28-73-708.

285. This section reads as follows:

(a) A trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, for:

- (1) expenses that were properly incurred in the administration of the trust; and
- (2) to the extent necessary to prevent unjust enrichment of the trust, expenses that were not properly incurred in the administration of the trust.

(b) An advance by the trustee of money for the protection of the trust gives rise to a lien against trust property to secure reimbursement with reasonable interest.

ATC § 28-73-709.

286. UTC § 708 cmt.

287. UTC § 709 cmt.

X. ARTICLE 8—THE DUTIES AND POWERS OF THE TRUSTEE

Article 8 states the duties and powers of a trustee. It provides guidance for those increasingly common situations involving family or self-settled trusts. It and Article 9 contain verbatim or slightly modified sections of the Uniform Prudent Investor Act, which was adopted by Arkansas in 1997.²⁸⁸ Section 813 has engendered some national controversy—the expansion of the duty of trustees to report regularly to beneficiaries has set the policy favoring the “dead hand” of the settlor on a collision course against policies favoring the rights of beneficiaries. The sections in Article 8 are discussed out of order because duties are grouped together and treated first, followed by powers.

A. Initial Duties of the Trustee—Sections 801 through 806

These sections lay out typical duties of the trustee: good faith administration of the trust according to its terms and for the interests of the beneficiaries;²⁸⁹ loyalty;²⁹⁰ impartiality as between beneficiaries;²⁹¹ prudent administration;²⁹² keeping administrative costs reasonable;²⁹³ and using special skills or expertise in the service of the trust.²⁹⁴ These duties have their grounding in common law and can be found in the Restatements. They are not mandatory (except for part of section 813); the settlor is free to modify them, but not to the extent that all trustee duties disappear.²⁹⁵ Arkansas case law has specifically recognized the duties of good faith administration,²⁹⁶ impartiality;²⁹⁷ prudent administration;²⁹⁸ and of course, loyalty.

288. Ark. Code Ann. §§ 23-51-200—23-51-211 (LEXIS 2000).

289. This section reads as follows: “Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this chapter.” ATC § 28-73-801.

290. For the text of Section 28-73-802 see *infra* note 300.

291. This section reads as follows: “If a trust has two (2) or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries’ respective interests.” ATC § 28-73-803.

292. This section reads as follows: “A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.” ATC § 28-73-804.

293. This section reads as follows: “In administering a trust, the trustee may incur only costs that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee.” ATC § 28-73-805.

294. This section reads as follows: “A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee’s representation that the trustee has special skills or expertise, shall use those special skills or expertise.” ATC § 28-73-806.

295. Langbein, *Mandatory Rules*, *supra* note 56 at 1122–23.

296. See, e.g., *Riegler*, 262 Ark. at 75–76, 553 S.W.2d at 40 (ruling a breach of duty where a trustee with neither authority nor court permission used trust funds to purchase un-

The most “fundamental” duty is loyalty,²⁹⁹ and the most extensive of these sections is 802.³⁰⁰ Black letter law forbids self-dealing by trustees.

productive land).

297. *Id.* at 78, 553 S.W.2d at 41 (finding a breach of duty where trustee favored remaindermen, his children, over the income beneficiary, his former wife).

298. *See, e.g.,* Gregory v. Moose, 266 Ark. App. 926, 930, 590 S.W.2d 665, 668 (1979) (ruling no breach of duty where trustee had land appraised and sold it at its fair market value, and land was offered to beneficiaries, who declined to buy).

299. *See generally* Karen E. Boxx, *Of Punctilios and Paybacks: The Duty of Loyalty Under the Uniform Trust Code*, 67 MO. L. REV. 279 (2002) (summarizing the development of the duty of loyalty and analyzing its treatment by the UTC).

300. This section reads as follows:

(a) A trustee shall administer the trust solely in the interests of the beneficiaries.

(b) Subject to the rights of persons dealing with or assisting the trustee as provided in § 28-73-1012, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee’s own personal account or which is otherwise affected by a conflict between the trustee’s fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless:

(1) the transaction was authorized by the terms of the trust;

(2) the transaction was approved by a court;

(3) the beneficiary did not commence a judicial proceeding within the time allowed by § 28-73-1005;

(4) the beneficiary consented to the trustee’s conduct, ratified the transaction, or released the trustee in compliance with § 28-73-1009; or

(5) the transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming trustee.

(c) A sale, encumbrance, or other transaction involving the investment or management of trust property is presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with:

(1) the trustee’s spouse;

(2) the trustee’s descendants, siblings, parents, or their spouses;

(3) an agent or attorney of the trustee; or

(4) a corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee’s best judgment.

(d) A transaction between a trustee and a beneficiary that does not concern trust property but that occurs during the existence of the trust or while the trustee retains significant influence over the beneficiary and from which the trustee obtains an advantage is voidable by the beneficiary unless the trustee establishes that the transaction was fair to the beneficiary.

(e) A transaction not concerning trust property in which the trustee engages in the trustee’s individual capacity involves a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust.

(f) (1) An investment by a trustee in securities of an investment company or investment trust to which the trustee, or its affiliate, provides services in a capacity other than as trustee is not presumed to be affected by a conflict between personal and fiduciary interests if the investment otherwise complies with the prudent investor rule of subchapter 9.

Trustees must subject their own interests to those of the trust. However, the Comment points out that often today, the trustee is a beneficiary, or the trustee is a family member who is an officer in a company in which the settlor owns stock.³⁰¹ In such instances, the trust should be written to address how such conflicts should be handled; a settlor can override particular duties in the terms of the trust.³⁰²

Self-dealing transactions entered into for the trustee's own personal account are voidable by the beneficiary. The ATC adopts the "no further inquiry" rule for irrevocable trusts created after Sept. 1, 2005, and does not require any further proof.³⁰³ However, transactions involving persons with close ties to the trustee are held to a looser standard: there is a rebuttable presumption of voidability. An exception to the "no further inquiry" rule applies to trustee investments in mutual funds, which allow trustees to gain additional compensation from the mutual funds in the form of fees for in-

(2) The trustee may be compensated by the investment company or investment trust for providing those services out of fees charged to the trust.

(3) If the trustee receives compensation from the investment company or investment trust for providing management services, the trustee shall at least annually notify the persons entitled under § 28-73-813 to receive a copy of the trustee's annual report of the rate and method by which the compensation was determined.

(g) In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, the trustee shall act in the best interests of the beneficiaries. If the trust is the sole owner of a corporation or other form of enterprise, the trustee shall elect or appoint directors or other managers who will manage the corporation or enterprise in the best interests of the beneficiaries.

(h) This section does not preclude the following transactions, if fair to the beneficiaries:

(1) an agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee;

(2) payment of reasonable compensation to the trustee;

(3) a transaction between a trust and another trust, decedent's estate, or conservatorship of which the trustee is a fiduciary or in which a beneficiary has an interest;

(4) a deposit of trust money in a regulated financial service institution operated by the trustee; or

(5) an advance by the trustee of money for the protection of the trust.

(i) A court may appoint a special fiduciary to make a decision with respect to any proposed transaction that might violate this section if entered into by the trustee.

(j) Subsections (b)–(e) of this section apply only to irrevocable trusts created on or after September 1, 2005, and to revocable trusts which become irrevocable on or after September 1, 2005.

ATC § 28-73-802.

301. UTC § 802 cmt.

302. *Id.*

303. *Id.* For more discussion of the "no further inquiry" rule, see *Boxx, supra* note 299, at 282–91, 298–305.

vestment advice and other services.³⁰⁴ “Subsection (f) attempts to retain the advantages of mutual funds while at the same time making clear that such investments are subject to traditional fiduciary responsibilities.”³⁰⁵ Most states, including Arkansas, have statutes authorizing trustees to invest in mutual funds.³⁰⁶ Finally, in support of the “corporate opportunity doctrine,” this section makes voidable transactions by trustees that involve opportunities rightfully belonging to the trust.³⁰⁷

The duty of loyalty is the subject of more Arkansas case law than any other trustee’s duty, but nonetheless, as the reader may have guessed by now, it is sparse. Only a handful of cases discuss the duty of loyalty in any detail, and most of them employ stock phrases of black letter law. *Hardy v. Hardy*³⁰⁸ is one of the most-cited. In this case involving the litigious Hardy family, the mother was a trustee of her husband’s testamentary trust for the benefit of her three children. She had declined to petition for dower and had taken her testamentary share of the estate, which was considerable. Nonetheless, for several years she had sold timber on trust land and, acting on the advice of her attorney-accountant, had taken a dower share of the proceeds. The chancery court had issued orders approving her annual administration of the trust and share of the proceeds. The Supreme Court held that the chancery court’s orders were interlocutory and not final, and that even though she acted in good faith, she had breached the trust and would have to repay it.³⁰⁹

In *Riegler v. Riegler*, a trustee borrowed trust money to purchase unproductive, vacant land for his medical practice.³¹⁰ He failed to reimburse the trust and later requested additional loans to purchase yet more unproductive land and to construct a building.³¹¹ For these and other reasons he was

304. UTC § 802 cmt.

305. *Id.*

306. Under pre-ATC Arkansas law, a trustee has a duty to diversify. ARK. CODE ANN. § 23-51-202 (LEXIS 2000) (to be repealed Sept. 1, 2005). A trustee also has the duty of loyalty, but “[t]his duty is consistent with and shall not be construed to abrogate the powers granted to banks and trust companies pursuant to § 28-71-104.” *Id.* § 23-51-204. The section referred to authorizes trustees to invest in the securities of an investment trust or investment company, notwithstanding the fact that the trustee is receiving compensation for services to the investment trust or investment company. *Id.* § 28-71-104.

307. UTC § 802 cmt.

308. 217 Ark. 296, 230 S.W.2d 6 (1950).

309. *Id.* at 302, 230 S.W.2d at 10. Four years later, the same trust came before the Arkansas Supreme Court again. After sixteen years of administering the trust gratis, the mother submitted an invoice for trustees’ fees for sixteen years. Ultimately the Supreme Court denied her compensation. This was the third suit between the son and his mother over her administration of the trust. *Hardy v. Hardy*, 222 Ark. 932, 263 S.W.2d 690 (1954).

310. *Riegler v. Riegler*, 262 Ark. 70, 72–73, 553 S.W.2d 37, 38–39 (1977).

311. *Id.* at 75, 553 S.W.2d at 39.

removed as trustee and ordered to reimburse the trust for the cost of the land plus interest.³¹²

In *Gregory v. Moose*, a trustee-beneficiary sold some land to a third party after unsuccessfully offering it to other beneficiaries.³¹³ The other beneficiaries later attacked the sale on a number of different grounds.³¹⁴ The Arkansas Court of Appeals held that even though the trustee-beneficiary benefited from the sale, he had not breached the duty of loyalty, because the trustee had broad powers and the terms of the instrument clearly contemplated this kind of action. The court went on to say that before it would cancel a sale by a trustee with a power of sale, the price must be so low as to shock the conscience of the court.³¹⁵

This exception to the absolute ban on self-dealing when the trustee is also a beneficiary was unsuccessfully argued in *Hosey v. Burgess*.³¹⁶ Here, co-trustees who were also remainder beneficiaries leased land from the trust, paying an annual rental of approximately \$12,000.³¹⁷ They violated the terms of their lease by terminating their farming operation and subleasing the land, receiving \$88,000 annually for rent.³¹⁸ They breached the trust by keeping the difference, instead of paying it to the life income beneficiary.³¹⁹ The chancellor found that the self-dealing was "innocent," but nonetheless required the co-trustees to pay over the rent.³²⁰ The co-trustees unsuccessfully argued the same exception from *Moose*.³²¹ Ironically, family trusts where some relatives are solely beneficiaries and others are trustee/beneficiaries are the very types of trusts where the trustees must act most carefully to avoid later accusations of self-dealing, and the very type where they are probably least likely to.

Section 803,³²² impartiality, is similar to Section 6 of the Uniform Prudent Investor Act (UPIA),³²³ except that it has been broadened to include distribution as well as investment and management by the trustee. Section 804,³²⁴ prudent administration, is virtually identical to Section 2(a) of the

312. *Id.* at 77-78, 553 S.W.2d at 41.

313. *Gregory v. Moose*, 266 Ark. App. 926, 927-28, 590 S.W.2d 665, 667 (1979).

314. *Id.* at 928, 590 S.W.2d at 667.

315. *Id.* at 930, 590 S.W.2d at 668. (cited with approval in *McCollum v. McCollum*, 328 Ark. 607, 610, 946 S.W.2d 181, 183 (1997)).

316. *Hosey v. Burgess*, 319 Ark. 183, 890 S.W.2d 262 (1995).

317. *Id.* at 185, 890 S.W.2d at 263.

318. *Id.* at 188-189, 890 S.W.2d at 264-65.

319. *Id.*, 890 S.W.2d at 266.

320. *Id.* at 266-267, 890 S.W.2d at 191-92.

321. *Id.* at 191, 890 S.W.2d at 266.

322. This section reads as follows: "If a trust has two (2) or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests." ATC § 28-73-803.

323. ARK. CODE ANN. § 23-51-205 (LEXIS 2000) (to be repealed Sept. 1, 2005).

324. This section reads as follows: "A trustee shall administer the trust as a prudent per-

UPIA.³²⁵ Section 805,³²⁶ the duty not to incur unreasonable costs, tracks Section 7 of the UPIA.³²⁷ Finally, Section 806,³²⁸ the duty to use special skills, is similar to Section 2(f) of the UPIA.³²⁹

son would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution." ATC § 28-73-804.

325. ARK. CODE ANN. § 23-51-201(a) (LEXIS 2000) (to be repealed Sept. 1, 2005).

326. This section reads as follows: "In administering a trust, the trustee may incur only costs that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee." ATC § 28-73-805.

327. ARK. CODE ANN. § 23-51-206 (LEXIS 2000) (to be repealed Sept. 1, 2005).

328. This section reads as follows: "A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, shall use those special skills or expertise." ATC § 28-73-806.

329. ARK. CODE ANN. § 23-51-201(f). (LEXIS 2000) (to be repealed Sept. 1, 2005).

B. Duty to Inform and Report—Section 813³³⁰

This section clarifies and expands the trustee's fundamental duty to account with respect to trusts becoming or created irrevocable after September 1, 2005. The drafters have substituted the phrase "inform and report" to denote the idea that the information furnished need not be in any particular

330. This section reads as follows:

(a) A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust.

(b) A trustee:

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

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

(3) Within sixty (60) days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, shall notify the qualified beneficiaries:

(A) of the trust's existence;

(B) of the identity of the settlor or settlers;

(C) of the right to request a copy of the trust instrument; and

(D) of the right to a trustee's report as provided in subsection (c) of this section; and

(E) in advance of any change in the method or rate of the trustee's compensation.

(c) (1) A trustee shall send to the distributees or permissible distributees of trust income or principal, and to other qualified or nonqualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values.

(2) Upon a vacancy in a trusteeship, unless a co-trustee remains in office, a report must be sent to the qualified beneficiaries by the former trustee.

(3) A personal representative, conservator, or guardian may send the qualified beneficiaries a report on behalf of a deceased or incapacitated trustee.

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

(e) Subsections (a)–(c) of this section apply only to an irrevocable trust created on or after September 1, 2005, and to a revocable trust which becomes irrevocable on or after September 1, 2005.

format—the key is whether it provides beneficiaries with the information necessary to protect their interests.³³¹ What comprises the duty to report?

First, under the ATC, when a revocable trust becomes irrevocable, trustees must inform certain people of its existence. For many trusts, this event would occur at the death or incapacity of the settlor. Under the UTC, notification in the event of incapacity can be waived, but not in the event of death.³³² The Arkansas amendments, however, allow settlers to waive all such notice requirements.³³³

EXAMPLE: *S* creates a revocable trust that contains no provisions as to notice. *S* is the only current income beneficiary. At *S*'s death, income is to be paid out to *A* and *B*, and after their deaths the remainder to *C*. *S* becomes incompetent. Under Section 603 the trustee must inform *A* and *B* (*C* is not a qualified beneficiary while *S* is alive) of the trust's existence and their rights to request information.

EXAMPLE: Assume the same parties as above, and the same disposition, but this time *S*'s trust states that beneficiaries are not to be notified until her death (waiving Section 603), and waives all of Section 813. *S* becomes incompetent. The trustee may not notify anyone about the trust. Now *S* dies. *Under the UTC*, the trustee must notify *A* and *B*, who are now current distributees, of the trust's existence and their rights to request information, but may not notify *C*, who is neither a current nor permissible distributee at this point. *However, under the ATC, as Arkansas has amended it, the trustee has no statutory duty to provide any type of notice to A, B or C.*

A trustee has a duty—but one that can be waived—to furnish a beneficiary a copy of the trust instrument upon request.

All other duties of section 813 can be waived by the terms of the trust. These duties include provision of advance notice of any change in the rate of the trustee's compensation, an annual report containing information detailed in the statute, and a report if a vacancy in a sole trusteeship occurs. Beneficiaries may waive their right to reports.

Section 813 has generated some controversy nationally. Some settlers have a strong desire for as much secrecy about trust terms as possible. Proponents of these trusts argue that existing law gives great power to settlers over the disposition of their property and section 813 is too limiting.³³⁴ In

331. UTC § 813 cmt.

332. UTC § 603 cmt.

333. ATC § 28-73-105.

334. See Donald Kozusko, *In Defense of Quiet Trusts*, TR. & EST. at 20 (Mar. 2004) (suggesting alternatives such as the District of Columbia's alternative, where settlers can name a representative to receive UTC disclosures on behalf of a beneficiary). Cf. Robert Whitman, *Full Disclosure is Best*, TR. & EST. at 59 (July 2004).

July of 2004, NCCUSL bracketed section 105(b)(8) and (9), as a sign that uniformity is not expected with regard to those subsections and that states have a choice as to whether to enact them.³³⁵ In addition, NCCUSL made the notice requirements discussed above prospective only “in recognition of the difficulties in implementing notice provision to pre-UTC trusts.”³³⁶

335. Of the ten jurisdictions that have enacted the UTC, the District of Columbia, Maine, Nebraska, New Hampshire, and New Mexico keep the UTC wording for sections 105 and 813. Kansas, Tennessee, Utah, and Wyoming, like Arkansas, omit section 813 from the list of mandatory sections in section 105, thus allowing settlors to waive all of section 813. The District of Columbia amends section 105, allowing total waiver of section 813. D.C. CODE ANN. § 19-1301.05 (LEXIS Supp. 2004). Missouri’s approach is almost identical to that of the ATC: mandatory notice only extends to permissible distributees over the age of twenty-one. MO. ANN. STAT. § 456.1-105 (West, Westlaw through 2d Reg. Sess. of 92d Gen. Assembly (2004)).

336. *Legislative Update*, *supra* note 158, at 2.

C. Discretionary Powers and Tax Savings—Section 814³³⁷

Subsection (a) provides a statutory limit to “absolute discretion” on the part of the trustee. The remaining subsections are federal estate and gift tax curative provisions, which attempt to alleviate adverse consequences that arise with some frequency because of drafting errors.³³⁸

337. This section reads as follows:

(a) Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as “absolute,” “sole,” or “uncontrolled,” the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

(b) Subject to subsection (d) of this section, and unless the terms of the trust expressly indicate that a rule in this subsection does not apply:

(1) a person other than a settlor who is a beneficiary and trustee of a trust that confers on the trustee a power to make discretionary distributions to or for the trustee’s personal benefit may exercise the power only in accordance with an ascertainable standard; and

(2) a trustee may not exercise a power to make discretionary distributions to satisfy a legal obligation of support that the trustee personally owes another person.

(c) A power whose exercise is limited or prohibited by subsection (b) of this section may be exercised by a majority of the remaining trustees whose exercise of the power is not so limited or prohibited. If the power of all trustees is so limited or prohibited, a court may appoint a special fiduciary with authority to exercise the power.

(d) Subsection (b) of this section does not apply to:

(1) a power held by the settlor’s spouse who is the trustee of a trust for which a marital deduction, as defined in Section 2056(b)(5) or Section 2523(e) of the Internal Revenue Code of 1986, as in effect on January 1, 2005, was previously allowed;

(2) any trust during any period that the trust may be revoked or amended by its settlor; or

(3) a trust if contributions to the trust qualify for the annual exclusion under Section 2503(c) of the Internal Revenue Code of 1986, as in effect on January 1, 2005.

ATC § 28-73-814.

338. UTC § 814 cmt.

D. Delegation of Powers—Section 807³³⁹

One significant change that the UPIA made to the common law was to allow trustees to delegate duties and powers. The common law did not allow delegation of administrative and investment duties,³⁴⁰ thus severely curtailing investment possibilities in today's financial environment. The ATC basically adopts section 9 of the UPIA.³⁴¹ Trustees may delegate to agents. They must exercise reasonable care, skill and caution in selecting the agent, establishing the delegation, and monitoring the agent. The agents also owe a duty to the trust to carry out the delegation. A trustee who has complied with this section is not liable for an action of the agent. The drafters point out that this section only concerns delegation to agents, not to co-trustees, which is covered in section 703.

339. This section reads as follows:

(a) A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:

(1) selecting an agent;

(2) establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and

(3) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

(b) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

(c) A trustee who complies with subsection (a) of this subsection is not liable to the beneficiaries or to the trust for an action of the agent to whom the function was delegated.

(d) By accepting a delegation of powers or duties from the trustee of a trust that is subject to the law of this state, an agent submits to the jurisdiction of a court of this state.

ATC § 28-73-807.

340. *Walters-Southland Institute v. Walker*, 222 Ark. 857, 263 S.W.2d 83 (1954) (citing the rule but allowing a trustee to delegate bookkeeping).

341. ARK. CODE ANN. § 23-51-208 (LEXIS 2000) (to be repealed Sept. 1, 2005).

E. Power to Direct—Section 808³⁴²

This section allows settlors of revocable trusts to direct trustees to take actions contrary to the terms of the trust, or to confer powers of direction on persons other than the settlor or trustee. In the former case, the trustee may follow the direction of the settlor. In the latter, the trustee must act in accordance with the direction unless the exercise is significantly contrary to the terms of the trust or unless the action would constitute a breach of trust. A trust may allow someone other than a trustee to modify or terminate a trust. A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary and must act in good faith with regard to the purposes of the trust.

This section allows the use of trust protectors and advisers. "Advisers" may assist trustees in directing investments or managing a business of the trust.³⁴³ "Protectors" are associated with offshore asset protection trusts.³⁴⁴ This section does not address the power to veto, but the Comment makes clear that a power to direct is different than a power to veto. A trustee must receive approval from the person with the power to veto. Such a person is more like a co-trustee and therefore if the person uses the veto improperly, the trustee may have to take action if the veto will result in a serious breach of trust.³⁴⁵

342. This section reads as follows:

(a) While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.

(b) If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.

(c) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.

(d) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.

ATC § 28-73-808.

343. UTC § 808 cmt.

344. A trust protector acts to protect the trust from "threats." Protectors must consent to certain acts of the trustee and may have powers to remove and appoint trustees, change beneficiaries, and perform similar acts. Lischer, *supra* note 240, at 506-07.

345. UTC § 808 cmt.

F. General and Specific Powers of Trustees—Sections 815³⁴⁶ and 816³⁴⁷

346. This section reads as follows:

- (a) A trustee, without authorization by a court, may exercise:
 - (1) powers conferred by the terms of the trust; and
 - (2) except as limited by the terms of the trust:
 - (A) all powers over the trust property which an unmarried competent owner has over individually owned property;
 - (B) any other powers appropriate to achieve the proper investment, management, and distribution of the trust property; and
 - (C) any other powers conferred by this chapter.
- (b) The exercise of a power is subject to the fiduciary duties prescribed by this subchapter.

ATC § 28-73-815.

347. This section is extremely long. An abridged version follows:

Without limiting the authority conferred by § 28-73-815, a trustee may:

- (1) collect trust property . . . ;
- (2) acquire or sell property, for cash or on credit, at public or private sale;
- (3) exchange, partition, or otherwise change the character of trust property;
- (4) deposit trust money in an account in a regulated financial service institution;
- (5) borrow money, with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust;
- (6) with respect to an interest in a proprietorship, partnership, limited liability company, business trust, corporation, or other form of business or enterprise, continue the business or other enterprise . . . ;
- (7) with respect to stocks or other securities, exercise the rights of an absolute owner, including the right to:
 - (A) vote, or give proxies to vote . . . ;
 - (B) hold a security in the name of a nominee . . . ;
 - (C) pay calls, assessments, and other sums chargeable or accruing against the securities, and sell or exercise stock subscription or conversion rights; and
 - (D) deposit the securities with a depository or other regulated financial service institution;
- (8) with respect to an interest in real property, construct, or make ordinary or extraordinary repairs to, alterations to, or improvements in, buildings or other structures . . . ;
- (9) enter into a lease for any purpose as lessor or lessee . . . ;
- (10) grant an option involving a sale, lease, or other disposition of trust property or acquire an option for the acquisition of property . . . ;
- (11) insure the property of the trust against damage or loss . . . ;
- (12) abandon or decline to administer property of no value . . . ;
- (13) with respect to possible liability for violation of environmental law:
 - (A) inspect or investigate property the trustee holds or has been asked to hold . . . ;
 - (B) take action to prevent, abate, or otherwise remedy any actual or potential violation of any environmental law affecting property held directly or indirectly by the trustee . . . ;

The ATC includes extensive powers of trustees, eliminating the need for most drafters to incorporate powers by reference. Section 815 confers broad general powers on trustees. Powers are subject to fiduciary duties, and may be exercised without authorization of the court.

Specific powers are set out in section 816. Arkansas already has a fiduciary powers statute, which applies to all fiduciaries, including personal

- (C) decline to accept property into trust or disclaim any power with respect to property that is or may be burdened with liability for violation of environmental law;
- (D) compromise claims against the trust which may be asserted for an alleged violation of environmental law; and
- (E) pay the expense of any inspection, review, abatement, or remedial action to comply with environmental law;
- (14) pay or contest any claim, settle a claim by or against the trust, and release, in whole or in part, a claim belonging to the trust;
- (15) pay taxes, assessments, compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the administration of the trust;
- (16) exercise elections with respect to federal, state, and local taxes;
- (17) select a mode of payment under any employee benefit or retirement plan, annuity, or life insurance payable to the trustee . . . ;
- (18) make loans out of trust property . . . ;
- (19) pledge trust property to guarantee loans made by others to the beneficiary;
- (20) appoint a trustee to act in another jurisdiction with respect to trust property located in the other jurisdiction . . . ;
- (21) pay an amount distributable to a beneficiary who is under a legal disability . . . or by:
 - (A) paying it to the beneficiary's conservator or, if the beneficiary does not have a conservator, the beneficiary's guardian;
 - (B) paying it to the beneficiary's custodian . . . ;
 - (C) if the trustee does not know of a conservator, guardian, custodian, or custodial trustee, paying it to an adult relative . . . to be expended on the beneficiary's behalf; or
 - (D) managing it as a separate fund on the beneficiary's behalf . . . ;
- (22) on distribution of trust property or the division or termination of a trust, make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares, value the trust property for those purposes, and adjust for resulting differences in valuation;
- (23) resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternative dispute resolution;
- (24) prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties;
- (25) sign and deliver contracts and other instruments . . . ; and
- (26) on termination of the trust, exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to it.

representatives and trustees.³⁴⁸ However, it is an older list and must be incorporated by reference to apply. Are there conflicts between the two sets of powers? The answer is no, because each is a list of affirmative actions. They overlap to a large extent. Trust drafters who wish trustees to possess the maximum allowable extent of powers should be careful not to waive sections 815 and 816, and to incorporate the current Arkansas fiduciary powers. Trust drafters who wish to omit certain powers should not only fail to incorporate them by reference, but also specifically waive them by reference to section 816. Drafters of trusts where the trustee or co-trustee is a layperson may wish to expressly list the powers in the instrument, to lessen the ignorance or confusion of such a trustee.

G. Distribution Upon Termination—Section 817³⁴⁹

This section permits the trustee to carry out a distribution plan if she gives the beneficiaries notice of the plan and of their right to object and they do not timely raise any objections. It calls for “expeditious” distribution yet at the same time authorizes the trustee to retain a reserve for the payment of debts, expenses and taxes. This section also limits the validity of releases from liability obtained at the time of termination, applying the general release principles of section 1009.

XI. ARTICLE 9—THE PRUDENT INVESTOR RULE

Articles 8 and 9 of the ATC include the full text of the Uniform Prudent Investor Act (UPIA).³⁵⁰ The “integrated” UPIA has been enacted as a

348. ARK. CODE ANN. § 28-69-304. (LEXIS 2004).

349. This section reads as follows:

(a) Upon termination or partial termination of a trust, the trustee may send to the beneficiaries a proposal for distribution. The right of any beneficiary to object to the proposed distribution terminates if the beneficiary does not notify the trustee of an objection within thirty (30) days after the proposal was sent but only if the proposal informed the beneficiary of the right to object and of the time allowed for objection.

(b) Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes.

(c) A release by a beneficiary of a trustee from liability for breach of trust is invalid to the extent:

- (1) it was induced by improper conduct of the trustee; or
- (2) the beneficiary, at the time of the release, did not know of the beneficiary's rights or of the material facts relating to the breach.

ATC § 28-73-817.

350. ARK. CODE ANN. §§ 23-51-200–23-51-211 (LEXIS 2000) (to be repealed Sept. 1,

part of the ATC and the “old” UPIA in Title 23 has been repealed; thus the UPIA has moved from Title 23 to Title 28, which is more appropriate, since Title 28 deals with wills, estates, trusts and fiduciary relationships. Since some readers may not be familiar with the UPIA, the most important sections are included here. No Arkansas appellate decisions have interpreted the UPIA.

A. The Prudent Investor Rule—Section 901³⁵¹

This section replaces previous standards for prudence with the “prudent investor” rule. Attributes of the prudent investor are set out in the following sections. The section makes clear that the prudent investor rule is a default rule. Settlers are free to alter it in any lawful way.

2005).

351. This section reads as follows:

(a) Except as otherwise provided in subsection (b) of this section, a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in this subchapter.

(b) The prudent investor rule, a default rule, may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust. A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust.

ATC § 28-73-901.

B. Standard of Care—Portfolio Strategy—Risk and Return Objectives—
Section 902³⁵²

This is the most important section in the UPIA. Subsection (a) defines the prudent investor rule, an objective standard. Subsection (b) sets the “trust portfolio” as the context in which a trustee’s investment and management decisions will be evaluated. The UPIA was written in response to “modern portfolio theory,” a now-accepted view of the market that has proved that over time, the greater diversity in an investor’s portfolio, the greater return she will receive.³⁵³ This section also requires “risk and return” objectives suitable to the trust. Subsection (c) lists factors that may bear on risk and return decisions by trustee investors. Trustees are freed to invest in any type of property.

352. This section reads as follows:

- (a) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.
- (b) A trustee’s investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.
- (c) Among circumstances that a trustee shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries:
 - (1) general economic conditions;
 - (2) the possible effect of inflation or deflation;
 - (3) the expected tax consequences of investment decisions or strategies;
 - (4) the role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property;
 - (5) the expected total return from income and the appreciation of capital;
 - (6) other resources of the beneficiaries;
 - (7) needs for liquidity, regularity of income, and preservation or appreciation of capital; and
 - (8) an asset’s special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.
- (d) A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.
- (e) A trustee may invest in any kind of property or type of investment consistent with the standards of this subchapter.

ATC § 28-73-902.

353. For a brief history of standards for investment prudence and a discussion of the UPIA, see generally John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV. 641 (1996).

C. Duties of Trustees—Sections 903³⁵⁴ through 907

Section 903 imposes an essential duty following modern portfolio theory: the duty to diversify investments. It may be overridden by the purposes of the specific trust. Section 904³⁵⁵ requires trustees new to a trust to review the trust assets and make whatever changes are necessary to bring the trust into compliance with its terms and with the UPIA. Section 905³⁵⁶ clarifies the standard to be used in determining whether a trustee has complied with the prudent investor rule. Section 906³⁵⁷ sets out synonyms for “prudent investment.”

Trustees must fairly balance different and competing interest of beneficiaries, not only of beneficiaries with simultaneous interests but also those with successive interests. More on impartiality with respect to trust management can be found in the Uniform Principal and Income Act.³⁵⁸ Section 907³⁵⁹ imposes a duty on trustees not to waste trust property but to minimize investment costs.

354. This section reads as follows: “A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.” ATC § 28-73-903.

355. This section reads as follows:

Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of this subchapter.

ATC § 28-73-904.

356. This section reads as follows: “Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee’s decision or action and not by hindsight.” ATC § 28-73-905.

357. This section reads as follows:

The following terms or comparable language in the provisions of a trust, unless otherwise limited or modified, authorizes any investment or strategy permitted under this subchapter: “investments permissible by law for investment of trust funds,” “legal investments,” “authorized investments,” “using the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital,” “prudent man rule,” “prudent trustee rule,” “prudent person rule,” and “prudent investor rule.”

ATC § 28-73-906.

358. ARK. CODE ANN. §§ 28-70-101–605 (LEXIS 2004).

359. This section reads as follows: “In investing and managing trust assets, a trustee may only incur costs that are appropriate and reasonable in relation to the assets, the purposes of the trust, and the skills of the trustee.” ATC § 28-73-907.

XII. ARTICLE 10

Article 10 concerns the liability of trustees and the rights of third persons—persons other than trustees and beneficiaries. The drafters note that much of this article cannot be overridden by the terms of the trust, in particular the rights of third persons, and the court's ability to remedy a breach of trust.³⁶⁰

A. Breach of Trust—Definition and Remedies—Section 1001³⁶¹

The ATC defines a breach of trust simply as “[a] violation by a trustee of a duty the trustee owes to a beneficiary.” This definition is identical to that used by the Arkansas Supreme Court.³⁶² The section makes a wide variety of remedies available for breach, giving Arkansas law a statutory list. As well, this section codifies the parties who have standing to sue for breach.

360. UTC art. 10 general cmt.

361. This section reads as follows:

- (a) a violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust.
- (b) to remedy a breach of trust that has occurred or may occur, the court may:
 - (1) compel the trustee to perform the trustee's duties;
 - (2) enjoin the trustee from committing a breach of trust;
 - (3) compel the trustee to redress a breach of trust by paying money, restoring property, or other means;
 - (4) order a trustee to account;
 - (5) appoint a special fiduciary to take possession of the trust property and administer the trust;
 - (6) suspend the trustee;
 - (7) remove the trustee as provided in § 28-73-706;
 - (8) reduce or deny compensation to the trustee;
 - (9) subject to § 28-73-1012, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or
 - (10) order any other appropriate relief.

ATC § 28-73-1001.

362. Breach of trust is defined as a “violation by the trustee of any duty which as trustee he owes to the beneficiary.” *Dunklin v. Ramsay*, 328 Ark. 263, 275, 944 S.W.2d 76, 82 (1997) (quoting the RESTATEMENT (SECOND) OF TRUSTS § 201 (1959)).

B. Measure of Damages—Sections 1002³⁶³ and 1003³⁶⁴

This section sets out two possibilities for the measure of damages. Note that trustees are entitled to contribution from co-trustees unless the trustee was substantially more at fault, acted in bad faith, or acted in reckless indifference. Trustees are also liable for any profit from the trust (not including routine compensation), even if they have not committed any breach. However, should a trust depreciate or fail to make a profit, a trustee is not liable—in the words of the Comment, “[t]he trustee is not an insurer.”

C. Attorney’s Fees and Costs—Section 1004³⁶⁵

This section allows reasonable attorney’s fees to be paid, either by a party or by the trust, as the court considers to be fair.

363. This section reads as follows:

(a) A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of:

- (1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or
- (2) the profit the trustee made by reason of the breach.

(b) Except as otherwise provided in this subsection, if more than one trustee is liable to the beneficiaries for a breach of trust, a trustee is entitled to contribution from the other trustee or trustees. A trustee is not entitled to contribution if the trustee was substantially more at fault than another trustee or if the trustee committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. A trustee who received a benefit from the breach of trust is not entitled to contribution from another trustee to the extent of the benefit received.

ATC § 28-73-1002.

364. This section reads as follows:

(a) A trustee is accountable to an affected beneficiary for any profit made by the trustee arising from the administration of the trust, even absent a breach of trust.

(b) Absent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit.”

ATC § 28-73-1003.

365. This section reads as follows: “In a judicial proceeding involving the administration of a trust, a court, as justice and equity may require, may award costs and expenses, including reasonable attorney’s fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.” ATC § 28-73-1004.

D. Statute of Limitations Against Trustee—Section 1005³⁶⁶

If the beneficiary suing the trustee for breach receives a report from the trustee that adequately discloses the existence of a potential claim for breach and informs the beneficiary of the one-year time limit for commencing an action, the beneficiary has one year within the receipt of the report to file. However, the report must either disclose the existence of a potential claim for breach, or provide sufficient information so that the beneficiary should have inquired. If there is no report, the ATC gives beneficiaries a five-year period in which to sue—five years after the first to occur of the removal, resignation, or death of trustee; five years after the termination of the beneficiary's interest in the trust; or five years after the termination of the trust. This section is new law for Arkansas, which currently has no specific statute of limitations for suing a trustee unless the suit falls under the Uniform Custodial Trust Act.³⁶⁷ Thus, trust lawsuits would fall under the five year statute of limitations.³⁶⁸ However there is precedent to the effect that a statute of limitations does not run between a trustee and a beneficiary as long as the trust exists, unless the trustee repudiates the trust and this becomes known to the beneficiary.³⁶⁹ In keeping with equity's jurisdiction over trusts, laches has been a common, if unsuccessful, defense in trust lawsuits.³⁷⁰

366. This section reads as follows:

- (a) A beneficiary may not commence a proceeding against a trustee for breach of trust more than one (1) year after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding.
- (b) A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence.
- (c) If subsection (a) of this section does not apply, a judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within five (5) years after the first to occur of:
 - (1) the removal, resignation, or death of the trustee;
 - (2) the termination of the beneficiary's interest in the trust; or
 - (3) the termination of the trust.

ATC § 28-73-1005.

367. This statute sets out several different time periods depending on whether the suit is for accounting, breach, or fraud, but in general gives a shorter time period (two or three years for some types of actions) than does the ATC. ARK. CODE ANN. § 28-72-416 (LEXIS 2004).

368. Actions not provided for under a more specific statute must be filed within five years after the cause of action accrues. *Id.* § 16-56-115.

369. *McPherson v. McPherson*, 258 Ark. 257, 264, 523 S.W.2d 623, 627–28 (1975).

370. Only if the beneficiary delays too long after receiving knowledge of the breach will laches apply. *Id.*, 523 S.W.2d at 627–28.

E. Insulation of Good Faith Trustees—Sections 1006³⁷¹ and 1007³⁷²

A trustee who reasonably relies on unclear trust terms is not liable to a beneficiary for breach to the extent that the breach resulted from the reliance. Similarly, a trustee who exercises reasonable care to ascertain the happening of an event such as marriage, divorce or graduation is not liable from a loss due to her lack of knowledge.

F. Exculpatory Clauses for Trustees—Section 1008³⁷³

This section clarifies an area where no Arkansas law exists. An exculpatory clause in a trust is unenforceable against acts committed by the trustee in bad faith or with reckless indifference to the trust purposes or beneficiaries' interests. An exculpatory clause is also unenforceable if it was inserted as a result of an abuse of a fiduciary or confidential relationship by the trustee. Finally, such a clause drafted or caused to be drafted by the trustee is invalid unless the trustee can prove both that the term is fair and that its existence and contents were adequately communicated to the settlor. A clear and convincing level of proof is not required. If the settlor is represented by independent counsel, the clause is valid. Note that this section is not retroactive towards irrevocable trusts. It is mandatory in the UTC, but Arkansas allows it to be waived by the terms of a trust.

371. This section reads as follows: "A trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance." ATC § 28-73-1006.

372. This section reads as follows: "If the happening of an event, including marriage, divorce, performance of educational requirements, or death, affects the administration or distribution of a trust, a trustee who has exercised reasonable care to ascertain the happening of the event is not liable for a loss resulting from the trustee's lack of knowledge." ATC § 28-73-1007.

373. This section reads as follows:

(a) A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it:

(1) relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or

(2) was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.

(b) An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor.

(c) This section applies only to irrevocable trusts created on or after September 1, 2005, and to revocable trusts which became irrevocable on or after September 1, 2005.

ATC § 28-73-1008.

G. Limitations on Liability—Sections 1009 through 1011

Section 1009³⁷⁴ releases a trustee from liability if a beneficiary consented to the wrongful conduct, released the trustee from liability, or ratified the transaction. Two exceptions apply: if the action by the beneficiary was induced by improper conduct of the trustee, or if the beneficiary acted not knowing of her rights or of the material facts.

Section 1010³⁷⁵ relieves the trustee of liability from personal liability on a contract entered into as a trustee if the capacity of trustee is disclosed in the contract. It relieves a trustee of liability for torts committed while administering a trust, or for obligations arising from property interests, including violations of environmental law, unless the trustee is personally at fault. Finally, altering the common law rule,³⁷⁶ the statute allows claims against the trustees arising in these areas to be asserted in a judicial proceeding against a trustee (for example, in a proceeding to remove a trustee) even if a trustee is not personally liable.

What about a trustee who is a general partner in a general or limited partnership that breaches a contract or commits a tort while administering a trust? Section 1011³⁷⁷ extends the protection from personal liability to such

374. This section reads as follows:

A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless:

- (1) the consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or
- (2) 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.

ATC § 28-73-1009.

375. This section reads as follows:

(a) Except as otherwise provided in the contract, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administering the trust if the trustee in the contract disclosed the fiduciary capacity.

(b) A trustee is personally liable for torts committed in the course of administering a trust, or for obligations arising from ownership or control of trust property, including liability for violation of environmental law, only if the trustee is personally at fault.

(c) A claim based on a contract entered into by a trustee in the trustee's fiduciary capacity, on an obligation arising from ownership or control of trust property, or on a tort committed in the course of administering a trust, may be asserted in a judicial proceeding against the trustee in the trustee's fiduciary capacity, whether or not the trustee is personally liable for the claim.

ATC § 23-73-1010.

376. UTC § 1010 cmt.

377. This section reads as follows:

(a) Except as otherwise provided in subsection (c) of this section or unless personal liability is imposed in the contract, a trustee who holds an interest as a

a trustee. In case of breach of contract, the partnership's fiduciary capacity must be disclosed to the other parties to the contract for the protection to apply. In case of commission of a tort, the limitation is not valid if the trustee is personally at fault. Another subsection prevents forming such partnerships to shield assets from creditor claims. Finally, if the trust is revocable and the trustee holds an interest as a general partner, the settlor is personally liable for contracts and other obligations, so that a revocable trust cannot be used as a device for avoiding claims against the partnership. Limited partner interests, membership interests in an LLC and similar types of interests already shield the trustee from liability and thus are not included in this section.³⁷⁸

general partner in a general or limited partnership is not personally liable on a contract entered into by the partnership after the trust's acquisition of the interest if the fiduciary capacity was disclosed in the contract or in a statement previously filed pursuant to §§ 4-46-101-4-46-1207 or §§ 4-43-101-4-43-1206.

(b) Except as otherwise provided in subsection (c) of this section, a trustee who holds an interest as a general partner is not personally liable for torts committed by the partnership or for obligations arising from ownership or control of the interest unless the trustee is personally at fault.

(c) The immunity provided by this section does not apply if an interest in the partnership is held by the trustee in a capacity other than that of trustee or is held by the trustee's spouse or one or more of the trustee's descendants, siblings, or parents, or the spouse of any of them.

(d) If the trustee of a revocable trust holds an interest as a general partner, the settlor is personally liable for contracts and other obligations of the partnership as if the settlor were a general partner.

ATC § 28-73-1011.

378. UTC § 1011 cmt.

H. Persons Dealing with Trustee—Section 1012³⁷⁹

This section affords protection from liability to different types of third parties. It protects persons who in good faith assist a trustee, or who in good faith and for value deal with a trustee, without knowledge that the trustee is acting improperly. “Knowledge” is defined in section 104 with a definition based on that of the Uniform Commercial Code.³⁸⁰ This protection is also extended to those assisting or dealing with former trustees, without knowledge that the trusteeship has terminated. The section makes clear that persons are not required to inquire into the extent of the trustee’s powers, or the propriety of the trustee’s exercise of those powers. The section also clarifies that other statutes relating to commercial transactions could apply in this situation as well as the ATC, such as the Uniform Commercial Code. Rights under sections 1010 through 1013 cannot be waived by the terms of a trust; they are mandatory.³⁸¹

379. This section reads as follows:

(a) A person other than a beneficiary who in good faith assists a trustee, or who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee’s powers is protected from liability as if the trustee properly exercised the power.

(b) A person other than a beneficiary who in good faith deals with a trustee is not required to inquire into the extent of the trustee’s powers or the propriety of their exercise.

(c) A person who in good faith delivers assets to a trustee need not ensure their proper application.

(d) A person other than a beneficiary who in good faith assists a former trustee, or who in good faith and for value deals with a former trustee without knowledge that the trusteeship has terminated is protected from liability as if the former trustee were still a trustee.

(e) Comparable protective provisions of other laws relating to commercial transactions or transfer of securities by fiduciaries prevail over the protection provided by this section.

ATC § 28-73-1012.

380. UTC § 104 cmt.

381. ATC § 28-73-105(11).

I. Certification of Trust—Section 1013³⁸²

Often trustees must prove their authority to various persons or entities. This useful section allows trustees to disclose whatever information is necessary for that purpose while preserving the privacy of the trust. Testamentary trusts are matters of public record, as are the wills that create them. Inter vivos trusts, on the other hand, are private, and “[s]uch privacy is compromised . . . if the trust instrument must be distributed to third per-

382. This section reads as follows:

- (a) Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing the following information:
 - (1) a statement that the trust exists and the date the trust instrument was executed;
 - (2) the identity of the settlor;
 - (3) the identity and address of the currently acting trustee;
 - (4) the powers of the trustee;
 - (5) the revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;
 - (6) the authority of co-trustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee; and
 - (7) the manner of taking title to trust property.
- (b) A certification of trust may be signed or otherwise authenticated by any trustee.
- (c) A certification of trust must state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.
- (d) A certification of trust need not contain the dispositive terms of a trust.
- (e) A recipient of a certification of trust may require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments which designate the trustee and confer upon the trustee the power to act in the pending transaction.
- (f) (1) A person who acts in reliance upon a certification of trust without knowledge that the representations contained therein are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification.
 - (2) Knowledge of the terms of the trust may not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying upon the certification.
- (g) A person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.
- (h) A person making a demand for the trust instrument in addition to a certification of trust or excerpts is liable for damages if a court determines that the person did not act in good faith in demanding the trust instrument.
- (i) This section does not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust.

sons.”³⁸³ The statute requires the certification to contain certain information about the trust, not including any dispositive provisions, although normally it will contain the relevant administrative provisions of the trust. The ATC renders the certification conclusive evidence of the trust.

The rest of the section deals with third parties, protecting persons who in good faith rely on the certification in making a transaction. Subsection (h) should be noted: it subjects persons who demand a copy of the trust instrument in addition to the certification to liability for damages if a court determines that the person did not act in good faith in demanding the trust instrument. Thus the drafters hope to encourage compliance with this section. However, this section does not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust. Also, readers should recall that beneficiaries are free to request a copy of the trust instrument.³⁸⁴

The federal Patriot Act³⁸⁵ conflicts slightly with this statute. It authorizes regulations that require banks to verify the identity of their customers.³⁸⁶ For customers who are entities, the bank may require documents that prove the existence of the entity, such as a trust instrument.³⁸⁷ A trust certification may not provide sufficient information and thus the bank would seemingly have the right to examine the trust instrument.

XIII. ARTICLE 11—MISCELLANEOUS PROVISIONS

The most important Article 11 sections are the effective date and retroactivity sections. The Arkansas Trust Code takes effect on September 1, 2005.³⁸⁸ ATC Section 1105³⁸⁹ (UTC Section 1106) renders the ATC retroac-

383. UTC § 813 cmt.

384. ATC § 28-73-813.

385. Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended at 31 U.S.C. § 5318 (2003) and in scattered sections of the United States Code).

386. 31 C.F.R. § 103.121 (2004).

387. 31 C.F.R. § 103.121(b)(2)(ii)(A)(2).

388. ATC § 28-73-1104.

389. This section reads as follows:

(a) Except as otherwise provided in this chapter, on September 1, 2005:

(1) this chapter applies to all trusts created before, on, or after September 1, 2005;

(2) this chapter applies to all judicial proceedings concerning trusts commenced on or after September 1, 2005;

(3) this chapter applies to judicial proceedings concerning trusts commenced before September 1, 2005 unless the court finds that application of a particular provision of this chapter would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of this chapter does not apply and the superseded law applies;

tive, with a number of limitations on retroactivity. In addition to the exceptions listed in section 1105, recall that section 602(a) states that any trust executed prior to the effective date of the ATC is revocable or irrevocable under prior law; section 705(d) limits retroactivity with regard to resignation of trustees; section 802(j) with regard to certain aspects of trustee loyalty; section 813(e) with regard to the expanded duty to account; and section 1008(c) with regard to exculpatory provisions. In addition, constitutional limitations will preclude application of the ATC that will change property rights under trusts that became irrevocable prior to the ATC's effective date.³⁹⁰

The drafters' reason for retroactive application makes sense: "[b]y applying the Code to preexisting trusts, the need to know two bodies of law will quickly lessen." Otherwise, particularly in jurisdictions that have abolished the Rule Against Perpetuities, former legislation could continue to live on for centuries. The Study Committee noted that several Arkansas trust statutes have applied retroactively,³⁹¹ with no ill effects. It endorsed the drafters' reasoning, and agreed with the need to avoid having to learn two sets of rules, as was the case after the enactment of the Arkansas Business Corporation Act of 1987.³⁹²

This section has not been particularly controversial—only Wyoming has chosen to omit the entire retroactivity subsection. Yet the retroactive nature of the ATC may raise questions for the courts. In general, the legislature has the power to enact statutes that apply retroactively.³⁹³ However, such statutes are unconstitutional to the extent that they violate due process by disturbing vested or contractual rights.³⁹⁴ Unfortunately, neither the federal nor the state constitutions define "vested rights."³⁹⁵ This retroactivity of

(4) any rule of construction or presumption provided in this chapter applies to trust instruments executed before September 1, 2005, unless there is a clear indication of a contrary intent in the terms of the trust; and

(5) an act done before September 1, 2005 is not affected by this chapter.

(b) If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before September 1, 2005, that statute continues to apply to the right even if it has been repealed or superseded.

ATC § 28-73-1105.

390. UTC § 1105 cmt.

391. Such as the statutes on trust modification, revocation, and termination, Ark. Acts 1989, No. 841, § 4; on trust division, ARK. CODE ANN. § 28-69-706 (LEXIS 2004); the Uniform Prudent Investor Act *id.* § 23-51-210 (LEXIS 2000); and the Uniform Principal and Income Act, *id.* § 28-70-605 (LexisNexis 2004).

392. Letter from Tom Womack, *supra* note 167.

393. Ark. Dep't. of Human Servs. v. Walters, 315 Ark. 204, 209, 866 S.W.2d 823, 824 (1993).

394. *Id.* at 210, 866 S.W.2d at 824.

395. *Id.*, 866 S.W.2d at 824.

the UTC is the subject of a law review article discussing its possible effect on Nebraska law.³⁹⁶ In their conclusion, the authors list key sections of the UTC with regard to concerns about retroactivity: 411(c), 412(a), 413(a) and (b), 503(b), 504(c) and 814(b)(1).³⁹⁷ Arkansas's modifications to the ATC have eliminated concerns with respect to 411(c), 503(b), and 504(c).

XIV. CONCLUSION

The Arkansas Trust Code is a much-needed statute that will fill significant gaps in current Arkansas law. Its few mandatory rules allow drafters a great deal of freedom, yet it provides a workable, well-thought-out framework of default rules. The ATC represents a major step forward in the improvement of Arkansas trust law.

APPENDIX: CURRENT ARKANSAS TRUST STATUTES

THE ARKANSAS TRUST INSTITUTIONS ACT, INCLUDING THE UNIFORM PRUDENT INVESTOR ACT.³⁹⁸

This statute is an amalgam of two acts. The Arkansas Trust Institutions Act applies to depository institutions, state banks and trust companies. It regulates the establishment, operation and termination of state trust companies, provides for the exemption of private trust companies from the chapter if certain conditions are met, lists the types of entities that may serve as fiduciaries in Arkansas, and regulates the operation of trust institutions within this state.

Tacked onto the end like an afterthought is the Uniform Prudent Investor Act, which will now instead be codified in Title 28 of the Code with the rest of the trust statutes. Its previous location as part of an act regulating trust institutions raised the inference that it applied only to trust institutions, and not to other types of trustees. Nonetheless, the act applied to "trusts existing on and created after August 1, 1997." Adoption of the ATC will result in its repeal from Title 23 and addition to Title 28.

396. John M. Gradwohl & William H. Lyons, *Constitutional and Other Issues in the Application of the Nebraska Uniform Trust Code to Preexisting Trusts*, 82 NEB. L. REV. 312, (2003).

397. *Id.* at 364.

398. ARK. CODE ANN. §§ 23-51-101-211 (LEXIS 2000) (to be repealed Sept. 1, 2005).

UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACT³⁹⁹

Adopted by the NCCUSL in 1999 and enacted in Arkansas in 2003, this is “the most comprehensive disclaimer statute ever written.”⁴⁰⁰ It is not only comprehensive; it is complex. Unlike the old disclaimer statute, the new one contains several sections relating to trust law: disclaimer of interest in property (which includes disclaimers of future interests); disclaimer of interest by trustee; disclaimer of power of appointment or other power not held in fiduciary capacity; disclaimer by appointee, object, or taker in default of exercise of power of appointment; and disclaimer of power held in fiduciary capacity. Arkansas made only a few minor changes to the uniform text. The NCCUSL wrote extensive comments to this act with numerous examples, none of which are currently found in Arkansas’s official code.⁴⁰¹ This act is not intended to be affected by the ATC, but it is possible that some unintended interaction might arise.

UNIFORM TESTAMENTARY ADDITIONS TO TRUSTS ACT⁴⁰²

This act permits the pour-over of property by a will into a trust, even if the trust is modified after the execution of the will or funded after the death of the settlor/testator. It is not affected by the ATC.

MISCELLANEOUS STATUTES⁴⁰³

These unrelated statutes concern first, the deposit of security for bonds with fiduciary institutions, and second, Medicaid Qualifying Trusts—trusts that, despite their name, actually disqualify the beneficiary for Medicaid. The latter section concerning Medicaid Qualifying Trusts has been partially superseded by federal law that allows “special needs trusts,” and other types of disability trusts that supplement Medicaid without disqualifying the beneficiary.⁴⁰⁴ These statutes are not affected by the ATC.

THE UNIFORM COMMON TRUST FUND ACT⁴⁰⁵

This uniform act, adopted in 34 jurisdictions, was enacted by Arkansas in 1947, although Arkansas made substantial changes in the text of the uni-

399. ARK. CODE ANN. §§ 28-2-101–220 (LEXIS 2004).

400. UNIF. DISCLAIMER OF PROPERTY INTERESTS ACT, prefatory note (2003).

401. *See supra* note 6.

402. ARK. CODE ANN. §§ 28-27-101–106 (LEXIS 2004).

403. *Id.* §§ 28-69-101–28-69-102.

404. *See generally* discussion *supra* notes 226–31 and accompanying text.

405. ARK. CODE ANN. §§ 28-69-201–207 (LEXIS 2004).

form law. The act allows banks and trust companies to pool the trust property of different trusts in order to diversify investments. It is not affected by the adoption of the ATC.

FIDUCIARY POWERS ACT OF 1961⁴⁰⁶

This act lists powers that may be incorporated by reference into a will or trust for the benefit of the executor or trustee. It is unaffected by the adoption of the ATC, although there is some overlap.⁴⁰⁷

REVOCATION, MODIFICATION, AND TERMINATION OF TRUSTS⁴⁰⁸

This act is discussed above with relation to Article 4 of the ATC⁴⁰⁹

UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT⁴¹⁰

This uniform act has been adopted in 47 jurisdictions, and was enacted by Arkansas in 1992. It concerns trustees of endowment funds at charitable institutions, chiefly colleges and universities, and provides a standard of “prudent use of appreciation” of invested funds, as well as authority to delegate investment, release restrictions on use of funds, and a standard of care for governing boards. This act is not affected by the ATC.

TRUSTEE DIVISION OF TRUSTS ACT⁴¹¹

This act provides trustees with authority to divide trusts if division is in the best interests of beneficiaries or could result in a significant tax savings. The ATC gives trustees the power to either divide or combine trusts for the same purposes.⁴¹²

UNIFORM PRINCIPAL AND INCOME ACT⁴¹³

This act was adopted in 1997 by the NCCUSL⁴¹⁴ and enacted in 1999 by Arkansas. The commentary, currently unavailable in the official Arkan-

406. *Id.* §§ 28-69-301-305 (LEXIS 2004).

407. *See generally* discussion *supra* notes 346-48 and accompanying text.

408. ARK. CODE ANN. §§ 28-69-401-403 (LEXIS 2004).

409. *See generally* discussion *supra* notes 151-76 and accompanying text.

410. ARK. CODE ANN. §§ 28-69-601-611 (LEXIS 2004).

411. *Id.* §§ 28-69-701-706.

412. *See generally* discussion *supra* notes 194-98 and accompanying text.

413. ARK. CODE ANN. §§ 28-70-101-605 (LEXIS 2004).

414. The original Uniform Principal and Income Act was adopted in 1931 by the NC-CUSL, and the Revised Uniform Principal and Income Act in 1962.

sas code,⁴¹⁵ explains that the new act has several purposes: first, to regulate the disposition of income accrued during the probate process; second, to clarify what is income, to be distributed to income beneficiaries, and what is principal, to be held and distributed at the termination of the trust to the remainder beneficiaries; and third, when an income interest ends, to clarify who will get the income received but not yet distributed, or due but not yet collected, or accrued but not yet due. Together with the ATC and the Uniform Prudent Investor Act, these three acts form a comprehensive body of trust law for Arkansas.

INVESTMENT OF TRUST FUNDS ACT⁴¹⁶

This statute was adopted in 1955 to broaden the investment power of trustees. Section 28-71-105 originally contained the “prudent man rule” for investments, but when the Uniform Prudent Investor Act was adopted in 1993, the prudent man rule was changed to the “prudent investor rule” and limited to situations where the Uniform Prudent Investor Act does not apply.

TRUSTEES FOR MISSING PERSONS⁴¹⁷

These sections require circuit courts to appoint trustees for the estates of missing persons or persons imprisoned in foreign countries.

PUBLIC TRUSTS⁴¹⁸

These statutes concern the regulation of express trusts in which the state, or any subdivision or municipal subdivision of it, is the beneficiary, and the trust’s purpose is aiding or furthering lawful functions of the beneficiary. With regard to the ATC, the public trusts statute says that if the trust doesn’t contain the term, the general laws of the state shall control.⁴¹⁹ However, the ATC exempts these types of trusts from its coverage.⁴²⁰

415. *See supra* note 6.

416. ARK. CODE ANN. §§ 28-71-101–107 (LEXIS 2004).

417. *Id.* §§ 28-72-101–104 (LEXIS 2004).

418. *Id.* §§ 28-72-201–207.

419. *Id.* § 28-72-203.

420. *See generally* discussion *supra* note 39 and accompanying text.

MISCELLANEOUS CHARITABLE TRUST STATUTES⁴²¹

These statutes amend certain charitable trusts by operation of law and concern exclusions from federal income tax.

ARKANSAS CUSTODIAL TRUST ACT⁴²²

This uniform act allows for the creation of a statutory custodial trust for adults—the adult version of the Uniform Transfers to Minors Act. The act contemplates a beneficiary who is not very affluent or sophisticated, not employing a specialized estate planning attorney. Such a trust will protect the beneficiary from the “perils” of future incapacity without the necessity of a conservatorship. This act is unaffected by the ATC.

ARKANSAS LONG-TERM INTERGENERATIONAL SECURITY ACT OF 1995⁴²³

This statute allows the establishment of a trust whose beneficiary is under eighteen years of age. Beneficiaries cannot receive any type of distributions of the trust until the beneficiary reaches the age of 55. Contributions may not exceed \$4,000 per year, and the trust receives tax deferment until the time of distribution. This act is unaffected by the ATC.

421. ARK. CODE ANN. §§ 28-72-301–302 (LEXIS 2004).

422. *Id.* §§ 28-72-401–422.

423. *Id.* §§ 28-72-501–507.

