Uniform Trust Code
with
Revisions through October, 2005
as proposed by
the Trust and Estate Section
of the Colorado Bar Association

Table of contents

ARTICLE 8
DUTIES AND POWERS OF TRUSTEE

ARTICLE 9
UNIFORM PRUDENT INVESTOR ACT

ARTICLE 10
LIABILITY OF TRUSTEES AND RIGHTS
OF PERSONS DEALING WITH TRUSTEE

ARTICLE 11
MISCELLANEOUS PROVISIONS

UNIFORM TRUST CODE
ARTICLE 1
GENERAL PROVISIONS AND DEFINITIONS

1. UTC SECTION	**101**
2. SUBJECT	**SHORT TITLE**
3. UTC STATUTE	This [Act] may be cited as the Colorado Uniform Trust Code.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	None.
5. COLORADO COMMITTEE COMMENTS	We suggest that the Act be called the Colorado Uniform Trust Code.
6. COLORADO LAW	Most Colorado uniform laws use a citation such as "Uniform _____ Act," or "Colorado Uniform Act" or "Colorado _____ Act."
7. RECOMMENDATIONS	This Act may be cited as the COLORADO Uniform Trust Code.

UNIFORM TRUST CODE
ARTICLE 1
GENERAL PROVISIONS AND DEFINITIONS

1. UTC SECTION	102
2. SUBJECT	SCOPE
3. UTC STATUTE	This [Code] 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. This Code does not apply to a trust that is used primarily for business, employment, investment, or commercial transactions, such as a business trust, land trust, voting trust, common trust fund, security arrangement, liquidation trusts, trust created by a deposit arrangement in a financial institution, trust created for paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind, or any arrangement under which a person is a nominee or escrowee for another.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	The Uniform Trust Code, while comprehensive, applies only to express trusts. Excluded from the Code's coverage are resulting and constructive trusts, which are not express trusts but remedial devices imposed by law. For the requirements for creating an express trust and the methods by which express trusts are created, see Sections 401-402. The Code does not attempt to distinguish express trusts from other legal relationships with respect to property, such as agencies and contracts for the benefit of third parties. For the distinctions, see Restatement (Third) of Trusts §§ 2, 5 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts §§ 2, 5-16C (1959). The Uniform Trust Code is directed primarily at trusts that arise in an estate planning or other donative context, but express trusts can arise in other contexts. For example, a trust created pursuant to a divorce action would be included, even though such a trust is not donative but is created pursuant to a bargained-for exchange. Commercial trusts come in numerous forms, including trusts created pursuant to a state business trust act and trusts created to administer specified funds, such as to pay a pension or to manage pooled investments. Commercial trusts are often subject to special-purpose legislation and case law, which in some respects displace the usual rules stated in this Code. *See* John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 Yale L.J. 165 (1997). Express trusts also may be created by means of court judgment or decree. Examples include trusts created to hold the proceeds of personal injury recoveries and trusts created to hold the assets of a protected person in a conservatorship

	proceeding. *See, e.g.,* Uniform Probate Code §5-411(a)(4).
5. COLORADO COMMITTEE COMMENTS	The Colorado Probate Code specifically excludes constructive and resulting trusts. We recommend that these be specifically excluded from the Uniform Trust Code as well, even though the comments state they are excluded. We recommend adopting the definition from the January 1998 version, but deleting the requirement for donative transfers, and adding exclusions for resulting and constructive trusts. We believe it is important to continue to exclude business trusts, trusts for creditors, etc. The Restatement of Trusts (3rd) excludes constructive and business trusts, security interest trusts, etc., but includes resulting trusts. If business trusts are included, we would have to review many more statutes and we would have to run the Act past the Business Section and perhaps other sections. At the September 1998 general committee meeting, it was decided to wait to finalize this definition until the rest of the UTC has been reviewed and we can try to determine the effect of including business or creditors trusts. At the January 2001 meeting, it was decided to adopt the statutory language (specifically excluding business trusts but not adding an exclusion for constructive or resulting trusts) contained in the recommendation that follows. This section was originally included in the definition of "trust" but was later moved to its own section. The comments to the January 1998 version noted that the Act is primarily directed at trusts created in estate planning or other donative contexts. Constructive trusts were not included: they are not express trusts. Also excluded were business trusts and employee benefits. The July 1998 version deleted all of the specific exclusions, and also the requirement for a donative trust. Comments to the July version note that constructive trusts are still excluded, and even though the Act is directed primarily at express trusts which arise in a donative context, the definition of "trust" is not so limited. Trusts created pursuant to a divorce action would be included. "The extent to which even more commercially-oriented trusts are subject to the Act will vary depending on the type of trust and the laws, other than this Act, under which the trust was created. Commercial type trusts come in numerous different forms, including trusts created pursuant to a state business trust act and trusts created for special purposes, such as to pay a pension or managed pooled investments." The final version continues to take this approach.
6. COLORADO LAW	The Colorado Fiduciaries' Powers Act defines "trust" at 15-1-802(4) as "any express trust created by a will, trust instrument, or other instrument, whereby there is imposed upon a trustee the duty to administer a trust asset, for the benefit of a named or otherwise described income or principal beneficiary, or both. A trust shall not include trusts for the benefit of creditors, resulting or constructive trusts, business trusts where certificates of beneficial interest are issued to the

	beneficiary, investment trusts, voting trusts, security instruments such as deeds of trust and mortgages, trusts created by the judgment or decree of a court, liquidation or reorganization trusts, or trusts for the sole purpose of paying dividends, interest, interest coupons, salaries, wages, pensions, or profits, instruments wherein one or more persons are mere nominees for another, or trusts created in deposits in any banking institution or savings and loan institution." In Colorado's UPC II, "trust" is defined at 15-10-201(56) as follows: "'Trust' includes an express trust, private or charitable, with additions thereto, wherever and however created and any amendments to such trusts. "Trust" also includes a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. "Trust" excludes other constructive trusts and excludes resulting trusts; conservatorships; personal representatives; accounts as defined in section 15-15-201(1); custodial arrangements pursuant to the "Colorado Uniform Transfers to Minors Act," article 50 of title 11, C.R.S.; business trusts providing for certificates to be issued to beneficiaries; common trust funds; voting trusts; security arrangements; liquidation trusts; trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind; and any arrangement under which a person is a nominee or escrowee for another."
7. RECOMMENDATIONS	The committee recommends the adoption of this section with the modifications indicated.

UNIFORM TRUST CODE
ARTICLE 1
GENERAL PROVISIONS AND DEFINITIONS

1. UTC SECTION	103
2. SUBJECT	DEFINITIONS
3. UTC STATUTE	(1) "Action" with respect to an act of a trustee, includes a failure to act.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	A definition of "action" (paragraph (1)) is included for drafting convenience, to avoid having to clarify in the numerous places in the Uniform Trust Code where reference is made to an "action" by the trustee that the term includes a failure to act.
5. COLORADO COMMITTEE COMMENTS	None
6. COLORADO LAW	No provision
7. RECOMMENDATIONS	Recommend adopting as is. This was approved at the December 2000 meeting.
3. UTC STATUTE	(2) "Ascertainable standard" means a standard relating to an individual's health, education, support, or maintenance within the meaning of Section 2041(b)(1)(A) or 2514 (c)(1) of the Internal Revenue Code of 1986, as in effect on [the effective date of this [Code] [amendment] [,or as later amended].
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	**2004 Amendment.** Section 103(2) adds a definition of "ascertainable standard." The term was formerly used only in Section 814. Other 2004 amendments add the term to Sections 103(11) and 504. The amendment moves into this section the definition previously found in Section 814, thereby making it apply generally throughout the Code. Adding this definition required the renumbering of all subsequent definitions in the Section and corrections to cross-references to this Section throughout the Code and comments.
5. COLORADO COMMITTEE COMMENTS	This amendment does nothing more than remove the definition of "ascertainable standard" from UTC section 814(b)(1) and insert it in the definition section.

6. COLORADO LAW	15-1-1401(1)(a)(I) refers to a power to that may be exercised to "provide for that trustee's health, education, maintenance or support as described under sections 2041 and 2514 of the federal "Internal Revenue Code of 1986", as amended;"
7. RECOMMENDATIONS	This section should be enacted.
3. UTC STATUTE	(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. (C) "Beneficiary" does not include an appointee under a power of appointment unless and until the power is exercised and the trustee has knowledge of the exercise and the identity of the appointee.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	"Beneficiary" (paragraph (3)) refers only to a beneficiary of a trust as defined in the Uniform Trust Code. In addition to living and ascertained individuals, beneficiaries may be unborn or unascertained. Pursuant to Section 402(b), a trust is valid only if a beneficiary can be ascertained now or in the future. The term "beneficiary" includes not only beneficiaries who received their interests under the terms of the trust but also beneficiaries who received their interests by other means, including by assignment, exercise of a power of appointment, resulting trust upon the failure of an interest, gap in a disposition, operation of an antilapse statute upon the predecease of a named beneficiary, or upon termination of the trust. The fact that a person incidentally benefits from the trust does not mean that the person is a beneficiary. For example, neither a trustee nor persons hired by the trustee become beneficiaries merely because they receive compensation from the trust. *See* Restatement (Third) of Trusts ' 48 cmt. c (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts ' 126 cmt. c (1959). While the holder of a power of appointment is not considered a trust beneficiary under the common law of trusts, holders of powers are classified as beneficiaries under the Uniform Trust Code. Holders of powers are included on the assumption that their interests are significant enough that they should be afforded the rights of beneficiaries. A power of appointment as used in state trust law and this Code is as defined in state property law and not federal tax law although there is considerable overlap between the two definitions. A power of appointment is authority to designate the recipients of beneficial interests in property. *See* Restatement (Second) of Property: Donative Transfers '11.1 (1986). A power is either general or nongeneral and either presently exercisable or not presently exercisable. A general power of appointment is a power exercisable in favor of the holder of the power, the power holder's

creditors, the power holder's estate, or the creditors of the power holder's estate. *See* Restatement (Second) of Property: Donative Transfers '11.4 (1986). All other powers are nongeneral. A power is presently exercisable if the power holder can currently create an interest, present or future, in an object of the power. A power of appointment is not presently exercisable if exercisable only by the power holder's will or if its exercise is not effective for a specified period of time or until occurrence of some event. *See* Restatement (Second) of Property: Donative Transfers '11.5 (1986). Powers of appointment may be held in either a fiduciary or nonfiduciary capacity. The definition of "beneficiary" excludes powers held by a trustee but not powers held by others in a fiduciary capacity.

While all categories of powers of appointment are included within the definition of "beneficiary," the Uniform Trust Code elsewhere makes distinctions among types of powers. A "power of withdrawal" (paragraph (11)) is defined as a presently exercisable general power of appointment other than a power exercisable only upon consent of the trustee or a person holding an adverse interest. Under Section 302, the holder of a testamentary general power of appointment may represent and bind persons whose interests are subject to the power.

The definition of "beneficiary" includes only those who hold beneficial interests in the trust. Because a charitable trust is not created to benefit ascertainable beneficiaries but to benefit the community at large (*see* Section 405(a)), persons receiving distributions from a charitable trust are not beneficiaries as that term is defined in this Code. However, pursuant to Section 110(b), charitable organizations expressly designated to receive distributions under the terms of a charitable trust, even though not beneficiaries as defined, are granted the rights of qualified beneficiaries under the Code.

The Uniform Trust Code leaves certain issues concerning beneficiaries to the common law. Any person with capacity to take and hold legal title to intended trust property has capacity to be a beneficiary. *See* Restatement (Third) of Trusts ' 43 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts " 116-119 (1959). Except as limited by public policy, the extent of a beneficiary's interest is determined solely by the settlor's intent. *See* Restatement (Third) of Trusts ' 49 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts " 127-128 (1959). While most beneficial interests terminate upon a beneficiary's death, the interest of a beneficiary may devolve by will or intestate succession the same as a corresponding legal interest. *See* Restatement (Third) of Trusts ' 55(1) (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts " 140, 142 (1959).

5. COLORADO COMMITTEE COMMENTS	The wording of the UTC definition is similar to the first clause in the UPCII definition, but omits "and also includes the owner of an interest by assignment or other transfer." The comments state that such an interest holder is still a beneficiary, so apparently the UTC committee believed that clause is unnecessary. The UTC definition also omits the reference to someone who can enforce a charitable trust (such as the attorney general). The remainder of the UPCII definition appears to deal solely with governing instruments other than trusts. The subcommittee initially recommended that the phrase about charitable trusts be included, so that there is no change from the current definition, and also so that the Attorney General's role is clearly recognized. The later version of the UTC included the power of the attorney general in section 105(c), so it is not necessary in the definition of "beneficiary." Note: section 105(c) has been renumbered section 110 in final Code.
6. COLORADO LAW	The Colorado Probate Code definition of beneficiary at 15-10-201(5) is as follows: "Beneficiary," as it relates to a trust beneficiary, includes a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer; as it relates to a charitable trust, includes any person entitled to enforce the trust; as it relates to a "beneficiary of a beneficiary designation," includes a beneficiary of an insurance or annuity policy, of an account with payment on death (POD) designation, of a security registered in beneficiary form (TOD), or of a pension, profit sharing, retirement, or similar benefit plan, or other nonprobate transfer at death; and, as it relates to a "beneficiary designated in a governing instrument," includes a grantee of a deed, a devisee, a trust beneficiary, a beneficiary of a beneficiary designation, a donee, appointee, or taker in default of a power of appointment, and a person in whose favor a power of attorney or a power held in any individual, fiduciary, or representative capacity is exercised. The CPC definition is the same as the UPC II definition. "Beneficiary" was defined in the 1977 version of UPC as: as it relates to trust beneficiaries, includes a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer and as it relates to a charitable trust, includes any person entitled to enforce the trust. "Beneficiary" is also defined in 15-15-201(3) for multiple-person accounts as: a person named as one to whom sums on deposit in an account are payable on request after death of all parties or for whom a party is named as trustee.

7. RECOMMENDATIONS	The subcommittee initially recommended adopting the Code's definition as is. This was approved at the December 2000 meeting. The additional underlined language was approved at the February 2005 meeting.
3. UTC STATUTE	(4) "Charitable trust" means a trust, or a portion of a trust, created for a charitable purpose described in Section 405(a).
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	Under the Uniform Trust Code, when a trust has both charitable and noncharitable beneficiaries only the charitable portion qualifies as a "charitable trust" (paragraph (4)). The great majority of the Code's provisions apply to both charitable and noncharitable trusts without distinction. The distinctions between the two types of trusts are found in the requirements relating to trust creation and modification. Pursuant to Sections 405 and 413, a charitable trust must have a charitable purpose and charitable trusts may be modified or terminated under the doctrine of cy pres. Also, Section 411 allows a noncharitable trust to in certain instances be terminated by its beneficiaries while noncharitable trusts do not have beneficiaries in the usual sense. To the extent of these distinctions, a split-interest trust is subject to two sets of provisions, one applicable to the charitable interests, the other the noncharitable.
5. COLORADO COMMITTEE COMMENTS	Only the charitable portion of a split-interest trust is defined as a "charitable trust." Such a trust will be governed by two sets of rules, one for the charitable portion, and one for the noncharitable portion.
6. COLORADO LAW	No provision. Colorado has some special statutes with respect to charitable trusts in 15-1-1001 through 15-1-1007, but only to "save" defective charitable remainder trusts created before changes to the Internal Revenue Code of 1954 in 1971. 24-31-101(5) confirms that the attorney general has powers over trusts established for charitable, educational, religious, or benevolent purposes.
7. RECOMMENDATIONS	We recommend adopting the definition as is. The general committee agreed at the May 1998 meeting.
3. UTC STATUTE	(5) "Conservator" means a person appointed by ~~the~~ a court to administer the estate of a minor or adult individual.
4. NATIONAL CONFERENCE OF	For discussion of the definition of "conservator" (paragraph (5)), see the

COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	definition of "guardian" (paragraph (7)).
5. COLORADO COMMITTEE COMMENTS	In 1998, we recommended adopting the UTC provision as is. We believe it is a better definition than in Colorado's current statutes (which is circular and requires one to read three separate statutes). We also recommended that the definitions in the UTC and CPC be consistent. Because Colorado added a requirement in the UGPPA definition that the conservator be at least 21, we recommend adopting the UTC provision instead of the UGPPA definition. If a conservator is appointed in another state that does not require the age to be 21, that requirement should not be in the definition in this act. The current definition in the Colorado Probate Code for conservator forces one to review two separate statutes, and ends up being circular in nature. The committee believes the UTC definition is more precise. To clarify that the definition of conservator includes conservators appointed in other states, the reference to "the court" was changed in committee to "a court."
6. COLORADO LAW	15-10-201(9) defines "conservator" as a person who is appointed by a court to manage the estate of a protected person. "Protected person" is defined in 15-10-201(43) as having the same meaning as set forth in section 15-14-101(2). That section defines "protected person" as a person for whom a conservator has been appointed or other protective order has been made. In addition, conservator is defined in the Colorado Uniform Transfers to Minors Act at 11-50-102(4) as a person appointed or qualified by a court to act as general, limited, or temporary guardian of a minor's property or a person legally authorized to perform substantially the same functions. The new Colorado Uniform Guardianship and Protective Proceedings Act defines conservator as "a person **at least 21 years of age, resident or non-resident,** who is appointed by a court to manage the estate of a protected person. The term includes a limited conservator." The bold language was added in Colorado, and differs from the uniform act.
7. RECOMMENDATIONS	The statute should be adopted, as revised above.
3. UTC STATUTE	(6) "Environmental law" means a federal, state, or local law, rule, regulation, or

	ordinance relating to protection of the environment.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	To encourage trustees to accept and administer trusts containing real property, the Uniform Trust Code contains several provisions designed to limit exposure to possible liability for violation of "environmental law" (paragraph (6)). Section 701(c)(2) authorizes a nominated trustee to investigate trust property to determine potential liability for violation of environmental law or other law without accepting the trusteeship. Section 816(13) grants a trustee comprehensive and detailed powers to deal with property involving environmental risks. Section 1010(b) immunizes a trustee from personal liability for violation of environmental law arising from the ownership and control of trust property.
5. COLORADO COMMITTEE COMMENTS	The Code contains provisions limiting liability for trustees for violation of any environmental law.
6. COLORADO LAW	No provision
7. RECOMMENDATIONS	We recommend adopting this provision. This was approved at the December 2000 meeting.
3. UTC STATUTE	(7) "Guardian" means a person appointed by ~~the~~ a court ~~[, a parent, or a spouse]~~ to make decisions regarding the support, care, education, health, and welfare of a minor or adult individual. The term does not include a guardian ad litem.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	Under the Uniform Trust Code, a "guardian" (paragraph (7)) makes decisions with respect to personal care; a "conservator" (paragraph (4)) manages property. The terminology used is that employed in Article V of the Uniform Probate Code, and in its free-standing Uniform Guardianship and Protective Proceedings Act. Enacting jurisdictions not using these terms in the defined sense should substitute their own terminology. For this reason, both terms have been placed in brackets. The definition of "guardian" accommodates those jurisdictions which allow appointment of a guardian by a parent or spouse in addition to appointment by a court. Enacting jurisdictions which allow appointment of a guardian solely by a court should delete the bracketed language "a parent, or a spouse."
5. COLORADO COMMITTEE COMMENTS	The comments note that a conservator manages property, and a guardian makes decisions about personal care. This is the same in Colorado, as we have enacted the Uniform provisions. Colorado law also includes appointment by a parent or spouse, so those bracketed words are needed. In 1998, we recommended the definition be adopted as is. However, we also

	recommended the definition be consistent. At the May 1998 meeting, the question was asked whether the person granted powers under 15-14-104 is a "guardian." We believe that person would be included in the definition of "guardian" as someone appointed by a parent to make decisions regarding health, care, etc. Also at the May 1998 meeting, the recommendation to adopt the definition as is was approved, but it was noted that we may want to revisit the definition of guardian as we consider the virtual representation statute. Because Colorado added a requirement in the UGPPA definition that the guardian be at least 21, we recommend adopting the UTC provision instead of the UGPPA definition. If a guardian is appointed in another state that does not require the age to be 21, that requirement should not be in the definition in this act. Because of changes in the Colorado UGPPA, guardians are no longer appointed by parents or spouses; all appointments are by the court. Therefore the statutory language was changed. Also, because of that change, the 12-month parental delegation should no longer be included in the definition of guardian.
6. COLORADO LAW	In UPCII at 15-10-201(23), Guardian is defined as a person who has qualified as a guardian of a minor or incapacitated person pursuant to testamentary or court appointment, but excludes one who is merely a guardian ad litem. 15-14-104 gives a parent or guardian the power "by a properly executed power of attorney" to delegate to another person, for a period not exceeding nine months, any of his powers regarding care, custody, or property of the minor child or ward. The new Colorado Uniform Guardianship and Protective Proceedings Act defines guardian as "an ~~person~~ **individual at least 21 years of age, resident or non-resident**, who has qualified as a guardian of a minor or incapacitated person pursuant to appointment by a parent ~~or spouse~~, or by the court. The term includes a limited, emergency, or temporary substitute guardian but not a guardian ad litem.
7. RECOMMENDATIONS	We recommend adopting the statute with the noted revision.
3. UTC STATUTE	(8) "Interests of the beneficiaries" means the beneficial interests provided in the terms of the trust.
4. NATIONAL CONFERENCE OF	The phrase "interests of the beneficiaries" (paragraph (8)) is used with some

COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	frequency in the Uniform Trust Code. The definition clarifies that the interests are as provided in the terms of the trust and not as determined by the beneficiaries. Absent authority to do so in the terms of the trust, Section 108 prohibits a trustee from changing a trust's principal place of administration if the transfer would violate the trustee's duty to administer the trust at a place appropriate to the interests of the beneficiaries. Section 706(b) conditions certain of the grounds for removing a trustee on the court's finding that removal of the trustee will best serve the interests of the beneficiaries. Section 801 requires the trustee to administer the trust in the interests of the beneficiaries, and Section 802 makes clear that a trustee may not place its own interests above those of the beneficiaries. Section 808(d) requires the holder of a power to direct who is subject to a fiduciary obligation to act with regard to the interests of the beneficiaries. Section 1002(b) may impose greater liability on a cotrustee who commits a breach of trust with reckless indifference to the interests of the beneficiaries. Section 1008 invalidates an exculpatory term to the extent it relieves a trustee of liability for breach of trust committed with reckless indifference to the interests of the beneficiaries.
5. COLORADO COMMITTEE COMMENTS	This phrase is used frequently in the Code, so this definition was added in the March 2000 draft. The definition clarifies that the interests are determined by the settlor, and not by the beneficiaries.
6. COLORADO LAW	No provision
7. RECOMMENDATIONS	We recommend adopting this provision. This was approved at the December 2000 meeting.
3. UTC STATUTE	(9) "Jurisdiction," with respect to a geographic area, includes a State or country.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	"Jurisdiction" (paragraph (9)), when used with reference to a geographic area, includes a State or country but is not necessarily so limited. Its precise scope will depend on the context in which it is used. "Jurisdiction" is used in Sections 107 and 403 to refer to the place whose law will govern the trust. The term is used in Section 108 to refer to the trust's principal place of administration. The term is used in Section 816 to refer to the place where the trustee may appoint an ancillary trustee and to the place in whose courts the trustee can bring and defend legal proceedings.
5. COLORADO COMMITTEE COMMENTS	The term is used in several statutes, so a definition was added to the final version. It is not limited only to a state or country, but will be interpreted as the context requires.

6. COLORADO LAW	No provision
7. RECOMMENDATIONS	We recommend adopting this provision.
3. UTC STATUTE	(10) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	None.
5. COLORADO COMMITTEE COMMENTS	The July 1998 version added back in reference to governmental agencies, etc. that had been deleted in April 1998.
6. COLORADO LAW	UPCII defines "person" at 15-10-201(38) as an individual or an organization. "Organization" is defined as a corporation, business trust, estate, trust, partnership, joint venture, limited liability company, association, government or governmental subdivision or agency, or any other legal or commercial entity. In the CUTMA, "person" is defined at 11-50-102(12) as an individual, corporation, organization, or other legal entity. "Person" is defined in the Uniform Fiduciaries Law at 15-1-103(3) as including a corporation, partnership, or other association, or two or more persons having a joint or common interest.
7. RECOMMENDATIONS	We recommend that we adopt the definition as is. This was agreed at the September 1998 general meeting.
3. UTC STATUTE	(11) "Power of withdrawal" means a presently exercisable general power of appointment other than a power: (A) exercisable by a trustee and limited by an ascertainable standard; or (B) exercisable by another person only upon consent of the trustee or a person holding an adverse interest
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE	**2004 Amendment.** Section 103(11), the definition of "power of withdrawal" is amended to exclude a possible inference that the term includes a discretionary power in a trustee to make distributions for the trustee's own benefit which is

LAWS COMMENTS	limited by an ascertainable standard. For an explanation of the reason for this amendment, see the comment to the 2004 amendment to Section 504, which addresses a related issue.
5. COLORADO COMMITTEE COMMENTS	None.
6. COLORADO LAW	No provision.
7. RECOMMENDATIONS	This section should be enacted.
3. UTC STATUTE	(12) "Property" means anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	The definition of "property" (paragraph (12)) is intended to be as expansive as possible and to encompass anything that may be the subject of ownership. Included are choses in action, claims, and interests created by beneficiary designations under policies of insurance, financial instruments, and deferred compensation and other retirement arrangements, whether revocable or irrevocable. Any such property interest is sufficient to support creation of a trust. *See* Section 401 Comment.
5. COLORADO COMMITTEE COMMENTS	The comments mention that this definition is intended to be as expansive as possible. The UTC definition was more complete, with respect to revocable designations, but those additional phrases were deleted in the final version. This definition is important in the creation of a trust. See also CRS '15-11-511 that validates a gift from a will to a revocable trust.
6. COLORADO LAW	UPCII defines "property" in 15-10-201(42) as both real and personal property or any interest therein and anything that may be the subject of ownership.
7. RECOMMENDATIONS	We recommend adopting this definition as is. At the September 1998 general committee meeting, this definition was adopted, and the amended definition was approved at the December 2000 meeting.
3. UTC STATUTE	(13) "Qualified beneficiary" means a 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 in subparagraph (A) terminated on that date without causing the trust to terminate; or (C) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	Due to the difficulty of identifying beneficiaries whose interests are remote and contingent, and because such beneficiaries are not likely to have much interest in the day-to-day affairs of the trust, the Uniform Trust Code uses the concept of "qualified beneficiary" (paragraph (13)) to limit the class of beneficiaries to whom certain notices must be given or consents received. The definition of qualified beneficiaries is used in Section 705 to define the class to whom notice must be given of a trustee resignation. The term is used in Section 813 to define the class to be kept informed of the trust's administration. Section 417 requires that notice be given to the qualified beneficiaries before a trust may be combined or divided. Actions which may be accomplished by the consent of the qualified beneficiaries include the appointment of a successor trustee as provided in Section 704. Prior to transferring a trust's principal place of administration, Section 108(d) requires that the trustee give at least 60 days notice to the qualified beneficiaries. The qualified beneficiaries consist of the beneficiaries currently eligible to receive a distribution from the trust together with those who might be termed the first-line remaindermen. These are the beneficiaries who would become eligible to receive distributions were the event triggering the termination of a beneficiary's interest or of the trust itself to occur on the date in question. Such a terminating event will typically be the death or deaths of the beneficiaries currently eligible to receive the income. Should a qualified beneficiary be a minor, incapacitated, or unknown, or a beneficiary whose identity or location is not reasonably ascertainable, the representation and virtual representation principles of Article 3 may be employed, including the possible appointment by the court of a representative to represent the beneficiary's interest. The qualified beneficiaries who take upon termination of the beneficiary's interest or of the trust can include takers in default of the exercise of a power of appointment. The term can also include the persons entitled to receive the trust property pursuant to the exercise of a power of appointment. Because the exercise of a testamentary power of appointment is not effective until the testator's death

	and probate of the will, the qualified beneficiaries do not include appointees under the will of a living person. Nor would the term include the objects of an unexercised inter vivos power. Charitable trusts and trusts for a valid noncharitable purpose do not have beneficiaries in the usual sense. However, certain persons, while not technically beneficiaries, do have an interest in seeing that the trust is enforced. Section 110 expands the definition of qualified beneficiaries to encompass this wider group. Section 110(b) grants the rights of qualified beneficiaries to charitable organizations expressly designated under the terms of a charitable trust and whose beneficial interests are sufficient to satisfy the definition of qualified beneficiary for a noncharitable trust. Section 110(c) also grants the rights of qualified beneficiaries to a person appointed by the terms of the trust or by the court to enforce a trust created for an animal or other noncharitable purpose. Section 110(d) is an optional provision granting the rights of a qualified beneficiary with respect to a charitable trust to the attorney general of the enacting jurisdiction. **2004 Amendment.** Clarifying language is added to Section 103(13), the definition of "qualified beneficiary," to make clear that the second category in the definition refers to termination of an interest that is not associated with termination of the trust.
5. COLORADO COMMITTEE COMMENTS	The comments note that this term is used to limit the class of beneficiaries to whom certain notices must be given, annual reports, and notice before reformations, or division of trusts. This term will exclude beneficiaries with remote contingent interests. The comments also note that if a qualified beneficiary is a minor, the representation principles may apply. See UTC 813 for required reports. Annual reports must be given to remainder beneficiaries. UTC 104 provides that the settlor can change the duties of the trustee, other than the duty to act in good faith. Also in UTC 104, the settlor cannot change the duty to notify qualified beneficiaries age 25 or older of the existence of the trust or to give them reports. Note: section 104 has been renumbered section 105 in the final Code.
6. COLORADO LAW	No statutory definition, but the Uniform Principal and Income Act also uses the definition of Qualified Beneficiary that is the same as the 2001 UTC at C.R.S. §15-1-402(10.5): "Qualified beneficiary" means a beneficiary who, on the date the beneficiary's qualification is determined: (a) is a distributee or a permissible distributee of trust income or principal; (b) would be a distributee or permissible distributee of trust income or principal if the interest of the distributees described

	in paragraph (a) of this subsection (10.5) terminated on that date; or (c) would be a distributee or permissible distributee of trust income or principal if the trust terminated on said date.
7. RECOMMENDATIONS	This provision should be enacted.
3. UTC STATUTE	(14) "Revocable," as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	The definition of "revocable" (paragraph (14)) clarifies that revocable trusts include only trusts whose revocation is substantially within the settlor's control. The consequences of classifying a trust as revocable are many. The Uniform Trust Code contains provisions relating to liability of a revocable trust for payment of the settlor's debts (Section 505), the standard of capacity for creating a revocable trust (Section 601), the procedure for revocation (Section 602), the subjecting of the beneficiaries' rights to the settlor's control (Section 603), the period for contesting a revocable trust (Section 604), the power of the settlor of a revocable trust to direct the actions of a trustee (Section 808(a)), notice to the qualified beneficiaries upon the settlor's death (Section 813(b)), and the liability of a trustee of a revocable trust for the obligations of a partnership of which the trustee is a general partner (Section 1011(d)). Because under Section 603(d) the holder of a power of withdrawal has the rights of a settlor of a revocable trust, the definition of "power of withdrawal" (paragraph (11)), and "revocable" (paragraph (14)) are similar. Both exclude individuals who can exercise their power only with the consent of the trustee or person having an adverse interest although the definition of "power of withdrawal" excludes powers subject to an ascertainable standard, a limitation which is not present in the definition of "revocable."
5. COLORADO COMMITTEE COMMENTS	This definition was added in the July 2000 draft to clarify that revocable trusts only include trusts whose revocation is substantially within the settlor's control.
6. COLORADO LAW	No provision.
7. RECOMMENDATIONS	We recommend adopting this provision. It was approved at the December 2000 meeting.
3. UTC STATUTE	(15) "Settlor" means a person, including a testator, who creates, or contributes property to, a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that

	person's contribution except to the extent another person has the power to revoke or withdraw that portion.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	The definition of "settlor" (paragraph (15)) refers to the person who creates, or contributes property to, a trust, whether by will, self-declaration, transfer of property to another person as trustee, or exercise of a power of appointment. For the requirements for creating a trust, see Section 401. Determining the identity of the "settlor" is usually not an issue. The same person will both sign the trust instrument and fund the trust. Ascertaining the identity of the settlor becomes more difficult when more than one person signs the trust instrument or funds the trust. The fact that a person is designated as the "settlor" by the terms of the trust is not necessarily determinative. For example, the person who executes the trust instrument may be acting as the agent for the person who will be funding the trust. In that case, the person funding the trust, and not the person signing the trust instrument, will be the settlor. Should more than one person contribute to a trust, all of the contributors will ordinarily be treated as settlors in proportion to their respective contributions, regardless of which one signed the trust instrument. *See* Section 602(b). In the case of a revocable trust employed as a will substitute, gifts to the trust's creator are sometimes made by placing the gifted property directly into the trust. To recognize that such a donor is not intended to be treated as a settlor, the definition of "settlor" excludes a contributor to a trust that is revocable by another person or over which another person has a power of withdrawal. Thus, a parent who contributes to a child's revocable trust would not be treated as one of the trust's settlors. The definition of settlor would treat the child as the sole settlor of the trust to the extent of the child's proportionate contribution. Pursuant to Section 603(c), the child's power of withdrawal over the trust would also result in the child being treated as the settlor with respect to the portion of the trust attributable to the parent's contribution. Ascertaining the identity of the settlor is important for a variety of reasons. It is important for determining rights in revocable trusts. *See* Sections 505(a)(1), (3) (creditor claims against settlor of revocable trust), 602 (revocation or modification of revocable trust), and 604 (limitation on contest of revocable trust). It is also important for determining rights of creditors in irrevocable trusts. *See* Section 505(a)(2) (creditors of settlor can reach maximum amount trustee can distribute to settlor). While the settlor of an irrevocable trust traditionally has no continuing rights over the trust except for the right under Section 411 to terminate the trust with the beneficiaries' consent, the Uniform Trust Code also authorizes

	the settlor of an irrevocable trust to petition for removal of the trustee and to enforce or modify a charitable trust. *See* Sections 405(c) (standing to enforce charitable trust), 413 (doctrine of cy pres), and 706 (removal of trustee).
5. COLORADO COMMITTEE COMMENTS	The comments note that anyone contributing to a trust will be treated as a settlor in proportion to his or her respective contribution, and this phrase was added to the definition in the February 1999 draft. But, for a revocable trust, if someone else makes a transfer to the trust, that will often be intended as a gift to the person who originally created the trust, and the donor will not be a settlor of that trust. The identity of the settlor is very important for rights in trusts (such as modification, revocation), and rights of creditors.
6. COLORADO LAW	No statutory definition for settlor. "Testator" is defined in 15-10-201(55) as including an individual of either sex.
7. RECOMMENDATIONS	We recommend adopting this definition as is. At the September 1998 general committee meeting, this definition was adopted.
3. UTC STATUTE	(16) "Spendthrift provision" means a term of a trust which restrains both voluntary and involuntary transfer of a beneficiary's interest.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	"Spendthrift provision" (paragraph (16)) means a term of a trust which restrains the transfer of a beneficiary's interest, whether by a voluntary act of the beneficiary or by an action of a beneficiary's creditor or assignee, which at least as far as the beneficiary is concerned, would be involuntary. A spendthrift provision is valid under the Uniform Trust Code only if it restrains both voluntary and involuntary transfer. For a discussion of this requirement and the effect of a spendthrift provision in general, see Section 502. The insertion of a spendthrift provision in the terms of the trust may also constitute a material purpose sufficient to prevent termination of the trust by agreement of the beneficiaries under Section 411, although the Code does not presume this result.
5. COLORADO COMMITTEE COMMENTS	This definition was added after the July 1998 Annual Meeting. The comments note that the effect of a spendthrift provision is addressed in Section 501. The presence of a spendthrift provision may also constitute a material purpose sufficient to prevent the termination of a trust by agreement of the beneficiaries, although the Act does not presume this result.
6. COLORADO LAW	No current definition. Spendthrift trusts are recognized. *See* comments to section 501.

7. RECOMMENDATIONS	We recommend adopting the definition as is. At the September 1998 general committee meeting, this definition was adopted.
3. UTC STATUTE	(17) "State" means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band recognized by federal law or formally acknowledged by a State.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	None
5. COLORADO COMMITTEE COMMENTS	None
6. COLORADO LAW	UPCII defines "state" in 15-10-201(49) as any state of the United States, the District of Columbia, the commonwealth of Puerto Rico, and any territory or insular possession subject to the jurisdiction of the United States.
7. RECOMMENDATIONS	We recommend adopting this definition as is. At the September 1998 general committee meeting, this definition was adopted.
3. UTC STATUTE	(18) "Terms of a trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	"Terms of a trust" (paragraph (18)) is a defined term used frequently in the Uniform Trust Code. While the wording of a written trust instrument is almost always the most important determinant of a trust's terms, the definition is not so limited. Oral statements, the situation of the beneficiaries, the purposes of the trust, the circumstances under which the trust is to be administered, and, to the extent the settlor was otherwise silent, rules of construction, all may have a bearing on determining a trust's meaning. *See* Restatement (Third) of Trusts ' 4 cmt. a (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts ' 4 cmt. a (1959). If a trust established by order of court is to be administered as an express trust, the terms of the trust are determined from the court order as interpreted in light of the general rules governing interpretation of judgments. *See* Restatement (Third) of Trusts ' 4 cmt. f (Tentative Draft No. 1, approved 1996). A manifestation of a settlor's intention does not constitute evidence of a trust's terms if it would be inadmissible in a judicial proceeding in which the trust's

	terms are in question. *See* Restatement (Third) of Trusts ' 4 cmt. b (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts ' 4 cmt. b (1959). *See also* Restatement (Third) Property: Donative Transfers " 10.2, 11.1-11.3 (Tentative Draft No. 1, approved 1995). For example, in many States a trust of real property is unenforceable unless evidenced by a writing, although Section 407 of this Code does not so require, leaving this issue to be covered by separate statute if the enacting jurisdiction so elects. Evidence otherwise relevant to determining the terms of a trust may also be excluded under other principles of law, such as the parol evidence rule.
5. COLORADO COMMITTEE COMMENTS	The comments note that this term is used frequently in the Act. Wording in a trust instrument is important, but the definition is not limited to that. Extrinsic evidence and rules of construction may establish meaning. However, the comments also note that the evidence must be admissible in a court proceeding. This is part of the focus of the UTC: carry out the intent of the settlor. This broad definition is also used in the draft of the 3rd Restatement. There, the author notes that factors to consider may include (1) the situations of the settlor, beneficiaries and trustee, including age, legal and practical competence; (2) value and character of trust property; (3) purposes for which the trust is created; (4) relevant business and financial practices at the time; (5) the circumstances under which the trust is to be administered; (6) the skill or lack of skill with which any instrument was drawn. The intention of the settlor at the time of creation of the trust is important; not subsequent intention.
6. COLORADO LAW	No statutory definition.
7. RECOMMENDATIONS	We recommend adopting this definition as is. At the September 1998 general committee meeting, this definition was adopted.
3. UTC STATUTE	(19) "Trust instrument" means an instrument executed by the settlor that contains terms of the trust, including any amendments thereto.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	"Trust instrument" (paragraph (19)) is a subset of the definition of "terms of a trust" (paragraph (18)), referring to only such terms as are found in an instrument executed by the settlor. Section 403 provides that a trust is validly created if created in compliance with the law of the place where the trust instrument was executed. Pursuant to Section 604(a)(2), the contest period for a revocable trust can be shortened by providing the potential contestant with a copy of the trust instrument plus other information. Section 813(b)(1) requires that the trustee upon request furnish a beneficiary with a copy of the trust instrument. To allow a trustee to administer a trust with some dispatch without concern about liability

	if the terms of a trust instrument are contradicted by evidence outside of the instrument, Section 1006 protects a trustee from liability to the extent a breach of trust resulted from reasonable reliance on those terms. Section 1013 allows a trustee to substitute a certification of trust in lieu of providing a third person with a copy of the trust instrument. Section 1106(a)(4) provides that unless there is a clear indication of a contrary intent, rules of construction and presumptions provided in the Uniform Trust Code apply to trust instruments executed before the effective date of the Code.
5. COLORADO COMMITTEE COMMENTS	In the March 2000 draft, a definition of "record" was included (deleted in July 2000 draft) that was very broad: information inscribed on a tangible medium that is retrievable in any form. The definition of Trust Instrument was also broad: a writing *or other record.* This broad definition of a trust instrument has been dropped in the July 2000 draft.
6. COLORADO LAW	No provision.
7. RECOMMENDATIONS	The July 2000 version of this definition is noncontroversial, and we recommend adopting it. This was adopted at the December 2000 meeting.
3. UTC STATUTE	(20) "Trustee" includes an original, additional, and successor trustee, and a cotrustee.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	The definition of "trustee" (paragraph (19)) includes not only the original trustee but also an additional and successor trustee as well as a cotrustee. Because the definition of trustee includes trustees of all types, any trustee, whether original or succeeding, single or cotrustee, has the powers of a trustee and is subject to the duties imposed on trustees under the Uniform Trust Code. Any natural person, including a settlor or beneficiary, has capacity to act as trustee if the person has capacity to hold title to property free of trust. *See* Restatement (Third) of Trusts ' 32 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts ' 89 (1959). State banking statutes normally impose additional requirements before a corporation can act as trustee.
5. COLORADO COMMITTEE COMMENTS	None.
6. COLORADO LAW	Colorado's UPC II defines "trustee" in 15-10-201(57) as including an original, additional, or successor trustee, whether or not appointed or confirmed by court. Colorado's Principal and Income Act defines "trustee" at 15-1-403(g) as including the original trustee of any trust to which the principal may be subject and also any

	succeeding or added trustee.
7. RECOMMENDATIONS	We recommend adopting this definition as is. At the September 1998 general committee meeting, this definition was adopted.

UNIFORM TRUST CODE
ARTICLE 1
GENERAL PROVISIONS AND DEFINITIONS

1. UTC SECTION	**104**
2. SUBJECT	**KNOWLEDGE**
3. UTC STATUTE	(a) Subject to subsection (b), a person has knowledge of a fact if the person: (1) has actual knowledge of it; (2) has received a notice or notification of it; or (3) from all the facts and circumstances known to the person at the time in question, has reason to know it. (b) An organization that conducts activities through employees has notice or knowledge of a fact involving a trust only from the time the information was received by an employee having responsibility to act for the trust, or would have been brought to the employee's attention if the organization had exercised reasonable diligence. An organization exercises reasonable diligence if it maintains reasonable routines for communicating significant information to the employee having responsibility to act for the trust and there is reasonable compliance with the routines. Reasonable diligence does not require an employee of the organization to communicate information unless the communication is part of the individual's regular duties or the individual knows a matter involving the trust would be materially affected by the information.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section specifies when a person is deemed to know a fact. Subsection (a) states the general rule. Subsection (b) provides a special rule dealing with notice to organizations. Pursuant to subsection (a), a fact is known to a person if the person had actual knowledge of the fact, received notification of it, or had reason to know of the fact's existence based on all of the circumstances and other facts known to the person at the time. Under subsection (b), notice to an organization is not necessarily achieved by giving notice to a branch office. Nor does the organization necessarily acquire knowledge at the moment the notice arrives in the organization's mailroom. Rather, the organization has notice or knowledge of a fact only when the information is received by an employee having responsibility to act for the trust, or would have been brought to the employee's attention had the organization exercised reasonable diligence.

	"Know" is used in its defined sense in Sections 109 (methods and waiver of notice), 305 (appointment of representative), 604(b) (limitation on contest of revocable trust), 812 (collecting trust property), 1009 (nonliability of trustee upon beneficiary's consent, release, or ratification), and 1012 (protection of person dealing with trustee). But as to certain actions, a person is charged with knowledge of facts the person would have discovered upon reasonable inquiry. *See* Section 1005 (limitation of action against trustee following report of trustee). This section is based on Uniform Commercial Code § 1-202 (2000 Annual Meeting Draft).
5. COLORADO COMMITTEE COMMENTS	The comments note that this section specifies when a person is deemed to know a fact. This section was originally included in definitions, but moved to its own section. Subsection (b) about organizations was added in 2000.
6. COLORADO LAW	No Colorado statutory definition.
7. RECOMMENDATIONS	We recommend adopting the section as is. This was approved at the May 1998 meeting, when considering definitions, but the committee did not consider subsection (b) at that time. At the January 2001 meeting, the committee discussed the organization addition at length, but ultimately approved it as written.

UNIFORM TRUST CODE
ARTICLE 1
GENERAL PROVISIONS AND DEFINITIONS

1. UTC SECTION	**105**
2. SUBJECT	**DEFAULT AND MANDATORY RULES**
3. UTC STATUTE	(A) Except as otherwise provided in the terms of the trust, this [Code] 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 [Code] except: (1) the requirements for creating a trust; (2) the duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries; (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 the court to modify or terminate a trust under sections 410 through 416; (5) the effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in [Article] 5; (6) the power of the court under section 702 to require, dispense with, or modify or terminate a bond; (7) the power of the court under section 708(b) to adjust a trustee's compensation specified in the terms of the trust which is unreasonably low or high; [(8) the duty under Section 813(b)(2) and (3) to notify qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, of the identify of the trustee, and of their right to request trustee's reports;]

	[(9) the duty under Section 813(a) to respond to the request of a [qualified] beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust;] (10) the effect of an exculpatory term under Section 1008; (11) the rights under sections 1010 through 1013 of a person other than a trustee or beneficiary; (12) periods of limitation for commencing a judicial proceeding; ~~[and]~~ (13) the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice; and (14) the subject-matter jurisdiction of the court and venue for commencing a proceeding as provided in sections 203 and 204.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	Subsection (a) emphasizes that the Uniform Trust Code is primarily a default statute. While this Code provides numerous procedural rules on which a settlor may wish to rely, the settlor is generally free to override these rules and to prescribe the conditions under which the trust is to be administered. With only limited exceptions, the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary are as specified in the terms of the trust. Subsection (b) lists the items not subject to override in the terms of the trust. Because subsection (b) refers specifically to other sections of the Code, enacting jurisdictions modifying these other sections may also need to modify subsection (b). Subsection (b)(1) confirms that the requirements for a trust's creation, such as the necessary level of capacity and the requirement that a trust have a legal purpose, are controlled by statute and common law, not by the settlor. For the requirements for creating a trust, see Sections 401-409. Subsection (b)(12) makes clear that the settlor may not reduce any otherwise applicable period of limitations for commencing a judicial proceeding. *See* Sections 604 (period of limitations for contesting validity of revocable trust) and 1005 (period of limitation on action for breach of trust). Similarly, a settlor may not so negate the responsibilities of a trustee that the trustee would no longer be acting in a fiduciary capacity.

	Subsection (b)(2) provides that the terms may not eliminate a trustee's duty to act in good faith and in accordance with the purposes of the trust. For this duty, see Sections 801 and 814(a). Subsection (b)(3) provides that the terms may not eliminate the requirement that a trust and its terms must be for the benefit of the beneficiaries. Subsection (b)(2)-(3) are echoed in Sections 404 (trust and its terms must be for benefit of beneficiaries; trust must have a purpose that is lawful, not contrary to public policy, and possible to achieve), 801 (trustee must administer trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries), 814 (trustee must exercise discretionary power in good faith and in accordance with its terms and purposes and the interests of the beneficiaries), and 1008 (exculpatory term unenforceable to extent it relieves trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust and the interests of the beneficiaries). The terms of a trust may not deny a court authority to take such action as necessary in the interests of justice, including requiring that a trustee furnish bond. Subsection (b)(6), (13). Additionally, should the jurisdiction adopting this Code enact the optional provisions on subject-matter jurisdiction and venue, subsection (b)(14) similarly provides that such provisions cannot be altered in the terms of the trust. The power of the court to modify or terminate a trust under Sections 410 through 416 is not subject to variation in the terms of the trust. Subsection (b)(4). However, all of these Code sections involve situations which the settlor could have addressed had the settlor had sufficient foresight. These include situations where the purpose of the trust has been achieved, a mistake was made in the trust's creation, or circumstances have arisen that were not anticipated by the settlor. Section 813 imposes a general obligation to keep the beneficiaries informed as well as several specific notice requirements. Subsections (b)(8) and (b)(9), which were placed in brackets and made optional provisions by a 2004 amendment, specify limits on the settlor's ability to waive these information requirements. With respect to beneficiaries age 25 or older, a settlor may dispense with all of the requirements of Section 813 except for the duties to inform the beneficiaries of the existence of the trust, of the identify of the trustee, and to provide a beneficiary upon request with such reports as the trustee may have prepared. Among the specific requirements that a settlor may waive include the duty to provide a beneficiary upon request with a copy of the trust instrument (Section 813(b)(1)), and the requirement that the trustee provide annual reports to the qualified beneficiaries (Section 813(c)). The furnishing of a copy of the entire trust instrument and preparation of annual reports may be required in a particular

case, however, if such information is requested by a beneficiary and is reasonably related to the trust's administration.

Responding to the desire of some settlors that younger beneficiaries not know of the trust's bounty until they have reached an age of maturity and self-sufficiency, subsection (b)(8) allows a settlor to provide that the trustee need not even inform beneficiaries under age 25 of the existence of the trust. However, pursuant to subsection (b)(9), if the younger beneficiary learns of the trust and requests information, the trustee must respond. More generally, subsection (b)(9) prohibits a settlor from overriding the right provided to a beneficiary in Section 813(a) to request from the trustee of an irrevocable trust copies of trustee reports and other information reasonably related to the trust's administration.

During the drafting of the Uniform Trust Code, the Drafting Committee discussed and rejected a proposal that the ability of the settlor to waive required notice be based on the nature of the beneficiaries' interest and not on the beneficiaries' age. Advocates of this alternative approach concluded that a settlor should be able to waive required notices to the remainder beneficiaries, regardless of their age. Enacting jurisdictions preferring this alternative should substitute the language "adult and current or permissible distributees of trust income or principal" for the reference to "qualified beneficiaries" in subsection (b)(8). They should also delete the reference to beneficiaries "who have attained the age of 25 years."

Waiver by a settlor of the trustee's duty to keep the beneficiaries informed of the trust's administration does not otherwise affect the trustee's duties. The trustee remains accountable to the beneficiaries for the trustee's actions.

Neither subsection (b)(8) nor (b)(9) apply to revocable trusts. The settlor of a revocable trust may waive all reporting to the beneficiaries, even in the event the settlor loses capacity. If the settlor is silent about the subject, reporting to the beneficiaries will be required upon the settlor's loss of capacity. *See* Section 603.

In conformity with traditional doctrine, the Uniform Trust Code limits the ability of a settlor to exculpate a trustee from liability for breach of trust. The limits are specified in Section 1008. Subsection (b)(10) of this section provides a cross-reference. Similarly, subsection (b)(7) provides a cross-reference to Section 708(b), which limits the binding effect of a provision specifying the trustee's compensation.

Finally, subsection (b)(11) clarifies that a settlor is not free to limit the rights of

third persons, such as purchasers of trust property. Subsection (b)(5) clarifies that a settlor may not restrict the rights of a beneficiary's creditors except to the extent a spendthrift restriction is allowed as provided in Article 5.

2001 Amendment. By amendment in 2001, subsections (b)(3), (c) and (9) were revised. The language in subsection (b)(3) "that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve" is new. This addition clarifies that the settlor may not waive this common law requirement, which is codified in the Code at Section 404.

Subsection (b)(8) and (9) formerly provided:

> (8) the duty to notify the qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, and of their right to request trustee's reports and other information reasonably related to the administration of the trust;
>
> (9) the duty to respond to the request of a beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust.

The amendment clarifies that the information requirements not subject to waiver are requirements specified in Section 813 of the Code.

2003 Amendment. By amendment in 2003, subsection (b)(8) was revised. Under the previous provision, as amended in 2001, the presence of two "excepts" in the same sentence, the first in the introductory language to subsection (b) and the second at the beginning of subsection (b)(8), has caused considerable confusion. The revision eliminates the second "except" in (b)(8) without changing the meaning of the provision.

2004 Amendment. Sections 105(b)(8) and 105(b0(9) address the extent to which a settlor may waive trustee notices and other disclosures to beneficiaries otherwise required under the Code. These subsections have generated more discussion in jurisdictions considering enactment of the UTC than have any other provisions of the Code. A majority of the enacting jurisdictions have modified these provisions but not in a consistent way. This lack of agreement and resulting variety of approach is expected to continue as additional states enact the Code.

Placing these sections in brackets signals that uniformity is not expected. States

may elect to enact these provisions without change, delete these provisions, or enact them with modifications. In Section 105(b)(9), an internal bracket has been added to make clear that an enacting jurisdiction may limit to the qualified beneficiaries the obligation to respond to a beneficiary's request for information.

The placing of these provisions in brackets does not mean that the Drafting Committee recommends that an enacting jurisdiction delete Sections 105(b)(8) and 105(b)(9). The Committee continues to believe that Sections 105(b)(8) and (b)(9), enacted as is, represent the best balance of competing policy considerations. Rather, the provisiosn were placed in brackets out of a recognition that there is a lack of consensus on the extent to which a settlor ought to be able to waive reporting to beneficiaries, and that there is little change that the states will enact Sections 105(b)(8) and (b)(9) with any uniformity.

The policy debate is succintly states in Joseph Kartiganer & Raymond H. Young, *The UTC: Help for Beneficiaries and Their Attorneys*, Prob. & Prop., Mar./April 2003, at 18, 20:

> The beneficiaries' rights to information and reports are among the most important provisions in the UTC. They also are among the provisions that have attracted the most attention. The UTC provisions reflect a compromise position between opposing viewpoints. Objections raised to beneficiaries' rights to information include the wishes of some settlors who believe that knowledge of trust benefits would not be good for younger beneficiaries, encouraging them to take up a life of ease rather than work and be productive citizens. Sometimes trustees themselves desire secrecy and freedom from interference by beneficiaries. The policy arguments on the other side are: that the essence of the trust relationship is accounting to the beneficiaries; that it is wise administration to account and inform beneficiaries, to avoid the greater danger of the beneficiary learning of a breach or possible breach long after the event; and that there are practical difficulties with secrecy (for example, the trustee must tell a child that he or she is not eligible for financial aid at college because the trust will pay, and must determine whether to accumulate income at high income tax rates or pay it out for inclusion in the beneficiary's own return). Furthermore, there is the practical advantage of a one-year statute of limitations when the beneficiary is informed of the trust transactions and advised of the bar if no claim is made within the year. UTC §1005. In the absence of notice, the trustee is exposed to liability until five years after the trustee ceases to serve, the interests of beneficiaries end, or the

	trust terminates. UTC §1005(c). **2005 Amendment.** Subsection (b)(2) is revised to make the language consistent with the corresponding duties in Sections 801 and 814(a), which require that a trustee act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries. Previously, subsection (b)(2) provided that the settlor could not waive the duty of a trustee to act in good faith and in accordance with the purposes of the trust. The amendment adds that the settlor also cannot waive the obligation to act in accordance with the terms of the trust and the interests of the beneficiaries. The purpose of the amendment is to make the language consistent, not to change the substance of the section. Absent some other restriction, a settlor is always free to specify the trust's terms to which the trustee must comply. Also, "interests of the beneficiaries" is a defined term in Section 103(8) meaning the beneficial interests as provided in the terms of the trust, which the settlor is also free to specify.
5. COLORADO COMMITTEE COMMENTS	This section lists the matters the settlor cannot alter in the trust instrument. The duty of loyalty and to act in good faith is so fundamental for a trustee, that it cannot be changed. This section emphasizes that the Code is primarily a default statute, but certain principles cannot be changed. Colorado currently imposes a duty on Trustees to notify beneficiaries of the existence of a trust, and to keep beneficiaries reasonably informed of the administration of a trust, as discussed below. However, in order to facilitate passing of the Code, the Committee notes that there are several options that could be adopted, based upon what other states have done to date: (1) Subsections 8 and 9 could simply be deleted from section 105 so that they would no longer be mandatory provisions (KS, WY, UT and TN followed this option); (2) Following the Washington, D.C. model, the statute could permit the settlor to waive notice while the settlor is alive, and possibly while the surviving spouse is alive (although we concluded this should only apply if the spouse is a beneficiary of the trust); (3) also following Washington, D.C., the statute could permit notice to be given to a surrogate (but the committee recommends defining whether a surrogate is a fiduciary and the duties of such a position); (4) change the age in section 813 from 25 to an older age for a qualified beneficiary to obtain information about the trust; or (5) leave the sections as they are, with the suggested 2004 amendment (Maine followed this option). NH, NM and NE adopted section 105 without

	making any changes. If any option except (5) is adopted, then the Trust Registration statutes should also be amended. Just for information, Missouri changed the age to 21 from 25 in subsection 8. *See also* Millard, "The Trustee's Duty to Inform and Report Under the Uniform Trust Code," 40 *Real Property, Probate and Trust Journal*, Summer, 2005, pages 373-401.
6. COLORADO LAW	The duty to notify beneficiaries of the existence of the trust, the name and address of the trustees, and the type of trust is currently required in Colorado under C.R.S. §15-16-101 (duty to register trusts). The duty to keep beneficiaries reasonably informed, to provide beneficiaries with a copy of the trust agreement, information about the trust assets, and the duty of a trustee to account to beneficiaries, is currently required in Colorado under C.R.S. §15-16-303 (duty to inform and account to beneficiaries).
7. RECOMMENDATIONS	If current Colorado law is to be followed, then the committee recommends adopting the word "qualified" in 105(b)(9) as suggested in the 2004 amendments, but otherwise leaving both (8) and (9) in the statute as mandatory. Because of the controversy, however, and the belief by a number of Colorado lawyers that notice to beneficiaries is not required under current law, the committee recommends that this issue be discussed at Statutory Revisions Committee, and that the committee as a whole choose which option to place in Colorado's version of the UTC.

UNIFORM TRUST CODE
ARTICLE 1
GENERAL PROVISIONS AND DEFINITIONS

1. UTC SECTION	**106**
2. SUBJECT	**COMMON LAW OF TRUSTS; PRINCIPLES OF EQUITY**
3. UTC STATUTE	The common law of trusts and principles of equity supplement this [Code], except to the extent modified by this [Code] or another statute of this State.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	The Uniform Trust Code codifies those portions of the law of express trusts that are most amenable to codification. The Code is supplemented by the common law of trusts, including principles of equity. To determine the common law and principles of equity in a particular state, a court should look first to prior case law in the state and then to more general sources, such as the Restatement of Trusts, Restatement (Third) of Property: Wills and Other Donative Transfers, and the Restatement of Restitution. The common law of trusts is not static but includes the contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and changing conditions. It also includes the traditional and broad equitable jurisdiction of the court, which the Code in no way restricts. The statutory text of the Uniform Trust Code is also supplemented by these Comments, which, like the Comments to any Uniform Act, may be relied on as a guide for interpretation., 656 A.2d 1085, 1090 (Del. 1995) (interpreting Uniform Commercial Code); *Yale University v. Blumenthal*, 621 A.2d 1304, 1307 (Conn. 1993) (interpreting Uniform Management of Institutional Funds Act); 2 Norman Singer, Statutory Construction § 52.05 (6th ed. 2000); Jack Davies, Legislative Law and Process in a Nutshell § 55-4 (2d ed. 1986).
5. COLORADO COMMITTEE COMMENTS	None
6. COLORADO LAW	Similar to 15-10-103 (which was based on UPC 1-103). 15-10-103 reads as follows: Unless displaced by the particular provisions of this code, the principles of law and equity supplement its provisions.

	See also CRS 2-4-211, which provides as follows: *Common Law of England.* The common law of England so far as the same is applicable and of a general nature, and all acts and statutes of the British parliament, made in aid of or to supply the defects of the common law prior to the fourth year of James the First, excepting the second section of the sixth chapter of forty-third Elizabeth, the eighth chapter of thirteenth Elizabeth, and the ninth chapter of thirty-seventh Henry the Eighth, and which are of a general nature, and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority.
7. RECOMMENDATIONS	The general committee adopted this section as is, at the May 1998 meeting.

UNIFORM TRUST CODE
ARTICLE 1
GENERAL PROVISIONS AND DEFINITIONS

1. UTC SECTION	**107**
2. SUBJECT	**GOVERNING LAW**
3. UTC STATUTE	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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section provides rules for determining the law that will govern the meaning and effect of particular trust terms. The law to apply to determine whether a trust has been validly created is determined under Section 403. Paragraph (1) allows a settlor to select the law that will govern the meaning and effect of the terms of the trust. The jurisdiction selected need not have any other connection to the trust. The settlor is free to select the governing law regardless of where the trust property may be physically located, whether it consists of real or personal property, and whether the trust was created by will or during the settlor's lifetime. This section does not attempt to specify the strong public policies sufficient to invalidate a settlor's choice of governing law. These public policies will vary depending upon the locale and may change over time. Paragraph (2) provides a rule for trusts without governing law provisions - the meaning and effect of the trust's terms are to be determined by the law of the jurisdiction having the most significant relationship to the matter at issue. Factors to consider in determining the governing law include the place of the trust's creation, the location of the trust property, and the domicile of the settlor, the trustee, and the beneficiaries. *See* Restatement (Second) of Conflict of Laws §§ 270 cmt. c and 272 cmt. d (1971). Other more general factors that may be pertinent in particular cases include the relevant policies of the forum, the relevant policies of other interested jurisdictions and degree of their interest, the protection of justified expectations and certainty, and predictability and

	uniformity of result. *See* Restatement (Second) of Conflict of Laws § 6 (1971). Usually, the law of the trust's principal place of administration will govern administrative matters and the law of the place having the most significant relationship to the trust's creation will govern the dispositive provisions. This section is consistent with and was partially patterned on the Hague Convention on the Law Applicable to Trusts and on their Recognition, signed on July 1, 1985. Like this section, the Hague Convention allows the settlor to designate the governing law. Hague Convention art. 6. Absent a designation, the Convention provides that the trust is to be governed by the law of the place having the closest connection to the trust. Hague Convention art. 7. The Convention also lists particular public policies for which the forum may decide to override the choice of law that would otherwise apply. These policies are protection of minors and incapable parties, personal and proprietary effects of marriage, succession rights, transfer of title and security interests in property, protection of creditors in matters of insolvency, and, more generally, protection of third parties acting in good faith. Hague Convention art. 15. For the authority of a settlor to designate a trust's principal place of administration, see Section 108(a).
5. COLORADO COMMITTEE COMMENTS	This statute permits the settlor to select the law of a particular state for interpreting the trust provisions. CRS 15-10-201(22) includes a trust under the definition of governing instrument. Therefore, the UTC provision and the CPC provision as to choice of law would both apply to a trust. There does not appear to be a conflict between the two statutes, except that the UTC provision is more broad.
6. COLORADO LAW	This section is similar to 15-11-703 (which was based on UPC 2-703). CRS 15-11-703 reads as follows: "The meaning and legal effect of a governing instrument is determined by the local law of the state selected by the transferor in the governing instrument, unless the application of that law is contrary to the provisions relating to the elective share described in part 2 of this article, the provisions relating to exempt property and allowances described in part 4 of this article, or any other public policy of this state otherwise applicable to the disposition."
7. RECOMMENDATIONS	The general committee voted in the May 1998 meeting to adopt this statute as is.

UNIFORM TRUST CODE
ARTICLE 1
GENERAL PROVISIONS AND DEFINITIONS

1. UTC SECTION	**108**
2. SUBJECT	**PRINCIPAL PLACE OF ADMINISTRATION**
3. UTC STATUTE	(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 the court to order, approve, or disapprove a transfer, the trustee, in furtherance of the duty prescribed by subsection (b), may 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 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 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 Section 704.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section prescribes rules relating to a trust's principal place of administration. Locating a trust's principal place of administration will ordinarily determine which court has primary if not exclusive jurisdiction over the trust. It may also be important for other matters, such as payment of state income tax or determining the jurisdiction whose laws will govern the trust. *See* Section 107 Comment. Because of the difficult and variable situations sometimes involved, the Uniform Trust Code does not attempt to further define principal place of administration. A trust's principal place of administration ordinarily will be the place where the trustee is located. Determining the principal place of administration becomes more difficult, however, when cotrustees are located in different States or when a single institutional trustee has trust operations in more than one State. In such cases, other factors may become relevant, including the place where the trust records are kept or trust assets held, or in the case of an institutional trustee, the place where the trust officer responsible for supervising the account is located. A concept akin to principal place of administration is used by the Office of the Comptroller of the Currency. Reserves that national banks are required to deposit with state authorities is based on the location of the office where trust assets are primarily administered. *See* 12 C.F.R. § 9.14(b). Under the Uniform Trust Code, the fixing of a trust's principal place of administration will determine where the trustee and beneficiaries have consented to suit (Section 202), and the rules for locating venue within a particular State (Section 204). It may also be considered by a court in
	another jurisdiction in determining whether it has jurisdiction, and if so, whether it is a convenient forum. A settlor expecting to name a trustee or cotrustees with significant contacts in more than one State may eliminate possible uncertainty about the location of the trust's principal place of administration by specifying the jurisdiction in the

	terms of the trust. Under subsection (a), a designation in the terms of the trust is controlling if (1) a trustee is a resident of or has its principal place of business in the designated jurisdiction, or (2) all or part of the administration should be distinguished from designating the law to determine the meaning and effect of the trust's terms, as authorized by Section 107. A settlor is free to designate one jurisdiction as the principal place of administration and another to govern the meaning and effect of the trust's provisions. Subsection (b) provides that 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. "Interests of the beneficiaries," defined in Section 103(7), means the beneficial interests provided in the terms of the trust. Ordinarily, absent a substantial change or circumstances, the trustee may assume that the original place of administration is also the appropriate place of administration. The duty to administer the trust at an appropriate place may also dictate that the trustee not move the trust. Subsections (c)-(f) provide a procedure for changing the principal place of administration to another State or country. Such changes are often beneficial. A change may be desirable to secure a lower state income tax rate, or because of relocation of the trustee or beneficiaries, the appointment of a new trustee, or a change in the location of the trust investments. The procedure for transfer specified in this section applies only in the absence of a contrary provision in the terms of the trust. *See* Section 105. To facilitate transfer in the typical case, where all concur that a transfer is either desirable or is at least not harmful, a transfer can be accomplished without court approval unless a qualified beneficiary objects. To allow the qualified beneficiaries sufficient time to review a proposed transfer, the trustee must give the qualified beneficiaries at least 60 days prior notice of the transfer. Notice must be given not only to qualified beneficiaries as defined in Section 103(12) but also to those granted the rights of qualified beneficiaries under Section 110. To assure that those
	receiving notice have sufficient information upon which to make a decision, minimum contents of the notice are specified. If a qualified beneficiary objects, a trustee wishing to proceed with the transfer must seek court approval. In connection with a transfer of the principal place of administration, the trustee may transfer some or all of the trust property to a new trustee located outside of the State. The appointment of a new trustee may also be essential if the current trustee is ineligible to administer the trust in the new place. Subsection (f) clarifies that the appointment of the new trustee must comply

	with the provisions on appointment of successor trustees as provided in the terms of the trust or under Section 704. Absent an order of succession in the terms of the trust, Section 704(c) provides for an appointment if approved by all of the qualified beneficiaries or by the court. While transfer of the principal place of administration will normally change the governing law with respect to administrative matters, a transfer does not normally alter the controlling law with respect to the validity of the trust and the construction of its dispositive provisions. See 5A Austin W. Scott & William F. Fratcher, The Law of Trusts Section 615 (4th ed. 1989).
5. COLORADO COMMITTEE COMMENTS	This section proscribes the rules relating to a trust's principal place of administration. The settlor is free to designate one jurisdiction as the principal place of administration and another to control the meaning of the dispositive provisions. The settlor's designation of principal place of administration must comply with requirements (a) (1) and (2). Subsection (b) provides that the trustee is under a continuing duty to administer the trust at its appropriate place in light of the purposes of the trust. Subsections (c)-(f) set forth the procedure for transfer of the principal place of administration if consistent with the trustee's duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of beneficiaries gives the Trustee discretion, with the consent of the qualified beneficiaries. While the transfer of the principal place of administration will normally control the governing law with respect to administrative matters, a transfer does not alter the controlling law with respect to the validity of the trust construction of its dispositive provisions. See 5A Austin W. Scott & Will Fratcher, The Law of Trusts 615 (4th ed. 1989).
6. COLORADO LAW	Colorado Probate Code §15-16-101, C.R.S., provides that a trustee of a trust trust having its principal place of business in the state, within thirty days after his acceptance, must register the trust in the court of Colorado at the principal place of administration. Principal place of administration is defined as the trustee's usual place of business where records pertaining to the trust are kept or at the trustee's residence. The October 1999 draft was consistent with the Colorado law requiring trust registration. Section 205 of the October 1999 draft specifies that a proceeding concerning a trust may be commenced in the county in which the trust is registered, providing a clear rule for venue purposes. Section204 of the October 2000 draft removed the trust registration requirement and provides that venue is where the trust's principal place of administration is or will be located, if the trust is created by will and the estate is not yet closed, in

	the [county] in which the decedent's estate is being administered. To remain with current Colorado law the Committee elected to retain trust registration provision requirements. This section is also consistent with Section 15-16-101,C.R.S. Section 15-16-305, C.R.S., provides that the principal place of administration may be changed if determined by the court to be inconvenient.
7. RECOMMENDATIONS	To the extent that Section 108 is consistent with current Colorado law, the general committee approved adopting this section as is.

UNIFORM TRUST CODE
ARTICLE 1
GENERAL PROVISIONS AND DEFINITIONS

1. UTC SECTION	**109**
2. SUBJECT	**METHODS AND WAIVER OF NOTICE**
3. UTC STATUTE	(a) Notice to a person under this [Code] or the sending of a document to a person under this [Code] must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document. Permissible methods of notice or for sending a document include first-class mail, personal delivery, delivery to the person's last known place of residence or place of business, or a properly directed electronic message. ~~(b) Notice otherwise required under this [Code] or a document otherwise required to be sent under this [Code] need not be provided to a person whose identity or location is unknown to and not reasonably ascertainable by the trustee.~~ (~~a~~b) Notice under this [Code] or the sending of a document under this [Code] may be waived by the person to be notified or sent the document. (~~d~~c) Notice of a judicial proceeding must be given as provided in the applicable rules of civil procedure.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	Subsection (a) clarifies that notices under the Uniform Trust Code may be given by any method likely to result in its receipt by the person to be notified. The specific methods listed in the subsection are illustrative, not exhaustive. Subsection (b) relieves a trustee of responsibility for what would otherwise be an impossible task, the giving of notice to a person whose identity or location is unknown and not reasonably ascertainable by the trustee. The section does not define when a notice is deemed to have been sent or delivered or person deemed to be unknown or not reasonably ascertainable, the drafters preferring to leave this issue to the enacting jurisdiction's rules of civil procedure. Under the Uniform Trust Code, certain actions can be taken upon unanimous consent of the beneficiaries or qualified beneficiaries. *See* Sections 411

	Sections 411 (termination of noncharitable irrevocable trust) and 704 (appointment of successor trustee). Subsection (b) of this section only authorizes waiver of notice. A consent required from a beneficiary in order to achieve unanimity is not waived because the beneficiary is missing. But the fact a beneficiary cannot be located may be a sufficient basis for a substitute consent to be given by another person on the beneficiary's behalf under the representation principles of Article 3. To facilitate administration, subsection (c) allows waiver of notice by the person to be notified or sent the document. Among the notices and documents to which this subsection can be applied are notice of a proposed transfer of principal place of administration (Section 108(d)) or of a trustee's report (Section 813(c)). This subsection also applies to notice to qualified beneficiaries of a proposed trust combination or division (Section 417), of a temporary assumption of duties without accepting trusteeship (Section 701(c)(1)), and of a trustee's resignation (Section 705(a)(1)). Notices under the Uniform Trust Code are nonjudicial. Pursuant to subsection (d), notice of a judicial proceeding must be given as provided in the applicable rules of civil procedure.
5. COLORADO COMMITTEE COMMENTS	This section sets forth the methods for notice. Subsection (a) clarifies that notices under the Uniform Trust Code may be given by any method likely to result in its receipt by the person to be notified. The specific methods listed in the subsection are illustrative, not exhaustive. Subsection (b) relieves a trustee of responsibility for what would otherwise be an impossible task, the giving of notice to a person whose identity or location is unknown and not reasonably ascertainable by the trustee. The section does not define when a notice is deemed to have been sent or delivered or person deemed to be unknown or not reasonably ascertainable, the drafters preferring to leave this issue to the enacting jurisdiction's rules of civil procedure. Under the Uniform Trust Code, certain actions can be taken upon unanimous consent of the beneficiaries or qualified beneficiaries. *See* Sections 409 (termination of noncharitable irrevocable trust) and 704

	(vacancy in trusteeship; appointment of successor trustee). Subsection (b) of this section only authorizes waiver of notice. A consent required from a beneficiary in order to achieve unanimity is not waived because the beneficiary is missing. But the fact a beneficiary cannot be located may be a sufficient basis for a substitute consent to be given by another person on the beneficiary's behalf under the representation principles of Article 3. To facilitate administration, subsection (c) allows waiver of notice by the person to be notified or sent the document. Among the notices and documents to which this subsection can be applied are notice of a proposed transfer of principal place of administration (Section 108) or of a trustee's report (Section 813). This subsection also applies to notice to qualified beneficiaries of a proposed trust combination or division (Section 417), of a temporary assumption of duties without accepting trusteeship (Section 701), and of a trustee's resignation (Section 705). Notices under the Uniform Trust Code are non-judicial. Pursuant to subsection (d), notice of a judicial proceeding must be given as provided in the applicable rules of civil procedure.
6. COLORADO LAW	Subsection (b) appears inconsistent with C.R.S. §§ 15- -206 and 15-10-401, both of which specify that if the identity of a person is not known or cannot be ascertained, notice is to be given to such persons by publication when proceedings concerning the affairs of a trust are initiated. Accordingly, the committee recommends that subsection 109(b) be deleted and with this deletion, the committee believes that Section 109 is consistent with Colorado Probate Code §§15-10-401 and 15-16-206, C.R.S., regarding notice to "interested parties". It is also consistent with Colorado Probate Code Rule 1 which provides that the probate rules apply unless there is no rule, then the Rules of Civil Procedure apply. There is no rule under the probate rules regarding service by facsimile. C.R.C.P. Rule 5 provides service upon an attorney or upon a party shall be made by delivering a copy to the attorney or by mailing to him at his address as given in the pleadings or by sending it via facsimile machine transmission to a facsimile number.
7. RECOMMENDATIONS	To the extent that Section 109 is consistent with current Colorado law, the general committee approved adopting this section with the deletion of subsection (b).

UNIFORM TRUST CODE
ARTICLE 1
GENERAL PROVISIONS AND DEFINITIONS

1. UTC SECTION	110
2. SUBJECT	OTHERS TREATED AS QUALIFIED BENEFICIARIES
3. UTC STATUTE	(a) Whenever notice to qualified beneficiaries of a trust is required under this [Code], the trustee must also give notice to any other beneficiary who has sent the trustee a request for notice. (b) A charitable organization expressly mandated to receive distributions under the terms of a charitable trust or a person appointed to enforce a trust created for the care of an animal or another noncharitable purpose as provided in Section 408 or 409 has the rights of a qualified beneficiary under this [Code]. (c) The [attorney general of this State] has the rights of a qualified beneficiary with respect to a charitable trust having its principal place of administration in this State.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	Under the Uniform Trust Code, certain notices need be given only to the "qualified" beneficiaries. For the definition of "qualified beneficiary," see Section 103(12). Among these notices are notice of a transfer of the trust's principal place of administration (Section 108(d)), notice of a trust division or combination (Section 417), notice of a trustee resignation (Section 705(a)(1)), and notice of a trustee's annual report (Section 813(c)). Subsection (a) of this section authorizes other beneficiaries to receive one or more of these notices by filing a request for notice with the trustee. Under the Code, certain actions, such as the appointment of a successor trustee, can be accomplished by the consent of the qualified beneficiaries. *See, e.g.*, Section 704 (filling vacancy in trusteeship). Subsection (a) only addresses notice, not required consent. A person who requests notice under subsection (a) does not thereby acquire a right to participate in actions that can be taken only upon consent of the qualified beneficiaries.

	Charitable trusts do not have beneficiaries in the usual sense. However, certain persons, while not technically beneficiaries, do have an interest in seeing that the trust is enforced. In the case of a charitable trust, this includes the State's attorney general and charitable organizations expressly designated to receive distributions under the terms of the trust, who under subsections (b)-(c) are granted the rights of qualified beneficiaries. Because the charitable organization must be named in the terms of the trust, excluded are organizations who may receive distributions only in the trustee's discretion and organizations holding remainder interests subject to a contingency Subsection (b) similarly grants the rights of qualified beneficiaries to persons appointed by the terms of the trust or by the court to enforce a trust created for an animal or other trust with a valid purpose but no ascertainable beneficiary. For the requirements for creating such trusts, see Sections 408 and 409. Subsection (b) revised to avoid an implication that a charitable organization with a remote interest in the trust has the right of a qualified beneficiary. "Attorney general" is placed in brackets in subsection (c) to accommodate jurisdictions which grant enforcement authority over charitable trusts to another designated official. This section does not limit other means by which the attorney general or other designated official can enforce a charitable trust. **2001 Amendment.** By amendment in 2001, "charitable organization expressly designated to receive distributions" was substituted for "charitable organization expressly entitled to receive benefits" in subsection (b). The amendment conforms the language of this section to terminology used elsewhere in the Code. **2004 Amendment.** Subsection (b) is amended to better conform this provision to the Drafting Committee's intent. Charitable trusts do not have beneficiaries in the usual sense. Yet, such trusts are often created to benefit named charitable organizations. Under this amendment, which is based on the definition of qualified beneficiary in Section 103, a designated charitable organization has the rights of a qualified beneficiary only if it holds an interest similar to that of a qualified beneficiary in a noncharitable trust. The effect of the amendment is to exclude charitable organizations that might receive

	charitable organizations that hold only remote remainder interests. The previous version of subsection (b) had a similar intent but the language could be read more broadly. The placing of subsection (d) in brackets recognizes that the rule of the attorney general in the enforcement of charitable trusts varies greatly in the states. In some states, the legislature may prefer that the attorney general be granted the rights of a qualified beneficiary. In other states, the attorney general may play a lesser role in enforcement. The expectation is that states considering enactment will adapt this provision to the particular role that the attorney general plays in the enforcement of charitable trusts in their state. Some states may prefer to delete this provision. Other states might provide that the attorney general has the rights of a qualified beneficiary only for trusts in which no charitable organization has been designated to receive distributions. Yet other states may prefer to enact the provision without change.
5. COLORADO COMMITTEE COMMENTS	This Section of the Uniform Trust Code requires certain notices need be given only to the "qualified" beneficiaries. For the definition of "qualified beneficiary," see Section 103(12). Among these notices are notice of a transfer of the trust's principal place of administration (Section 108(d)). Whenever notice to the qualified beneficiaries of a trust is required under this [Act], the trustee must also give notice to a beneficiary not otherwise entitled to notice who has delivered to the trustee a request for special notice.
6. COLORADO LAW	Section 15-16-303, C.R.S., addresses duty of trustee to report and account. Section 15-16-206, C.R.S., provides that proceedings under §15-16-201, C.R.S., (proceedings initiated concerning affairs of trust) are initiated by filing a petition in the court and giving notice pursuant to §15-10-401, C.R.S., to "interested parties". Section 15-10-401, C.R.S., provides that notice shall be given by mailing or personal service ten days prior to the time set for hearing, unless the identity of any person is not known or cannot be ascertained, then by publication.
7. RECOMMENDATIONS	To the extent that Section 110 is consistent with current Colorado law the general committee approved and adopted this section as is.

UNIFORM TRUST CODE
ARTICLE 1
GENERAL PROVISIONS AND DEFINITIONS

1. UTC SECTION	**111**
2. SUBJECT	**NON-JUDICIAL SETTLEMENT AGREEMENTS**
3. UTC STATUTE	(a) For purposes of this section, "interested persons" means person 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), 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 [Code] 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 the court to approve a nonjudicial settlement agreement, to determine whether the representation as provided in [article] 3 was adequate, and to determine whether the agreement contains terms and conditions the court could have properly approved.

4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	While the Uniform Trust Code recognizes that a court may intervene in the administration of a trust to the extent its jurisdiction is invoked by interested persons or otherwise provided by law (*see* Section 201(a)), resolution of disputes by nonjudicial means is encouraged. This section facilitates the making of such agreements by giving them the same effect as if approved by the court. To achieve such certainty, however, subsection (c) requires that the nonjudicial settlement must contain terms and conditions that a court could properly approve. Under this section, a nonjudicial settlement cannot be used to produce a result not authorized by law, such as to terminate a trust in an impermissible manner. Trusts ordinarily have beneficiaries who are minors, incapacitated, unborn or unascertained. Because such beneficiaries cannot signify their consent to an agreement, binding settlements can ordinarily be achieved only through the application of doctrines such as virtual representation or appointment of a guardian ad litem, doctrines traditionally available only in the case of judicial settlements. The effect of this section and the Uniform Trust Code more generally is to allow for such binding representation even if the agreement is not submitted for approval to a court. For the rules on representation, including appointments of representatives by the court to approve particular settlements, see Article 3. Subsection (d) is a nonexclusive list of matters to which a nonjudicial settlement may pertain. Other matters which may be made the subject of a nonjudicial settlement are listed in the Article 3 General Comment. The fact that the trustee and beneficiaries may resolve a matter nonjudicially does not mean that beneficiary approval is required. For example, a trustee may resign pursuant to Section 705 solely by giving notice to the qualified beneficiaries and any cotrustees. But a nonjudicial settlement between the trustee and beneficiaries will frequently prove helpful in working out the terms of the resignation. Because of the great variety of matters to which a nonjudicial settlement may be applied, this section does not attempt to precisely define the "interested persons" whose consent is required to obtain a binding settlement as provided in subsection (a). However, the consent of the

	trustee would ordinarily be required to obtain a binding settlement with respect to maters involving a trustee's administration, such as approval of a trustee's report or resignation.
5. COLORADO COMMITTEE COMMENTS	This section encourages non-judicial settlements by way of private agreements. Non-judicial settlements must concern a matter that the court has jurisdiction over. A non-judicial settlement cannot be used to produce a result not authorized by law, i.e., defeat the rights of creditors, including the Internal Revenue Service or to terminate a trust or defeat the material purpose of the trust. Where beneficiaries are minors, incapacitated, unborn or unascertained, the doctrine of "virtual representation" is applicable. UTC Article 3 provides that a guardian, conservator, trustee, agent or parent may bind a minor or incapacitated or unborn so long as a beneficiary is not otherwise represented and there are no conflicts of interest between the representative and the person represented.
6. COLORADO LAW	Colorado Probate Code §15-12-912, C.R.S., permits trustees of testamentary trusts to enter into private agreements as successors regarding decedents' estates. This section of the Code requires that the written agreement be executed by all who are affected by its provisions. Section 15-10-403, C.R.S., governs when parties may be bound by others. The Colorado Court of Appeals, in *Byers v. First National Bank*, 843 P.2d 53 (Colo. App. 1992), recognized that settlors' reliance on specific authorizations to the adult beneficiaries to act in their children's interest was binding and independently exonerated the claims of the minor beneficiaries.
7. RECOMMENDATIONS	To the extent that Section 111 is consistent with current Colorado law, the general committee approved adopting this section as is.

UNIFORM TRUST CODE
ARTICLE 1
GENERAL PROVISIONS AND DEFINITIONS

1. UTC SECTION	**112**
2. SUBJECT	**RULES OF CONSTRUCTION**
3. UTC STATUTE	[The rules of construction that apply in this State to the interpretation of and disposition of property by will or other Governing Instrument (as defined in the Colorado Probate Code) also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property.]
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section is patterned after Restatement (Third) of Trusts § 25(2) and comment e (Tentative Draft No. 1, approved 1996), although this section, unlike the Restatement, also applies to irrevocable trusts. The revocable trust is used primarily as a will substitute, with its key provision being the determination of the persons to receive the trust property upon the settlor's death. Given this functional equivalence between the revocable trust and a will, the rules for interpreting the disposition of property at death should be the same whether the individual has chosen a will or revocable trust as the individual's primary estate planning instrument. Over the years, the legislatures of the States and the courts have developed a series of rules of construction reflecting the legislative or judicial understanding of how the average testator would wish to dispose of property in cases where the will is silent or insufficiently clear. Few legislatures have yet to extend these rules of construction to revocable trusts, and even fewer to irrevocable trusts, although a number of courts have done so as a matter of judicial construction. *See* Restatement (Third) of Trusts § 25, Reporter's Notes to cmt. d and e (Tentative Draft No. 1, approved 1996). Because of the wide variation among the States on the rules of construction applicable to wills, this Code does not attempt to prescribe the exact rules to be applied to trusts but instead adopts the philosophy of the Restatement that the rules applicable to trusts ought to be the same, whatever those rules might be. Rules of construction are not the same as constructional preferences. A constructional preference is general in nature, providing general guidance for resolving a wide variety of ambiguities. An example is a

	preference for a construction that results in a complete disposition and avoid illegality. Rules of construction, on the other hand, are specific in nature, providing guidance for resolving specific situation or construing specific terms. Unlike a constructional preference, a rule of construction, when applicable, can lead to only one result. *See* Restatement (Third) of Property: Donative Transfers § 11.3 and cmt. b (Tentative Draft No. 1, approved 1995). Rules of construction attribute intention to individual donors based on assumptions of common intention. Rules of construction are found both in enacted statutes and in judicial decisions. Rules of construction can involve the meaning to be given to particular language in the document, such as the meaning to be given to "heirs" or "issue." Rules of construction also address situations the donor failed to anticipate. These include the failure to anticipate the predecease of a beneficiary or to specify the source from which expenses are to be paid. Rules of construction can also concern assumptions as to how a donor would have revised donative documents in light of certain events occurring after execution. These include rules dealing with the effect of a divorce and whether a specific devisee will receive a substitute gift if the subject matter of the devise is disposed of during the testator's lifetime. Instead of enacting this section, a jurisdiction enacting this Code may wish to enact detailed rules on the construction of trusts, either in addition to its rules on the construction of wills or as part of one comprehensive statute applicable to both wills and trusts. For this reason and to encourage this alternative, the section has been made optional. For possible models, see Uniform Probate Code, Article 2, Parts 7 and 8, which was added to the UPC in 1990, and California Probate Code Sections 21101-21630, enacted in 1994.
5. **COLORADO COMMITTEE COMMENTS**	"This section was prompted by the fact that everyone seems to agree that the rules for wills and revocable trusts ought to be the same but no one can agree on what the rules ought to be." *Memorandum from David English, Reporter, to Commissioners, Advisors, Observers, Drafting Committee on Uniform Trust Act*, 2/12/99 at 13. The section is derived from *Restatement (Third) of Trusts* § 25(2) (Tentative Draft No. 1, approved 1996), which provides that, although a revocable living trust is not subject to the formal requirements for creation of a testamentary trust nor to probate administration:

UNIFORM TRUST CODE COMMITTEE
ARTICLE 2
JUDICIAL PROCEEDINGS

1. UTC SECTION	**201**
2. SUBJECT	**ROLE OF COURT IN ADMINISTRATION OF TRUST**
3. UTC STATUTE	(a) The 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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	While the Uniform Trust Code encourages the resolution of disputes without resort to the courts by providing such options as the nonjudicial settlement authorized by Section 111, the court is always available to the extent its jurisdiction is invoked by interested persons. The jurisdiction of the court with respect to trust matters is inherent and historical and also includes the ability to act on its own initiative, to appoint a special master to investigate the facts of a case, and to provide a trustee with instructions even in the absence of an actual dispute. Contrary to the trust statutes in some States, the Uniform Trust Code does not create a system of routine or mandatory court supervision. While subsection (b) authorizes a court to direct that a particular trust be subject to continuing court supervision, the court's intervention will normally be confined to the particular matter brought before it. Subsection (c) makes clear that the court's jurisdiction may be invoked even absent an actual dispute. Traditionally, courts in equity have heard petitions for instructions and have issued declaratory judgments if there is a reasonable doubt as to the extent of the trustee's powers or duties. The court will not ordinarily instruct trustees on how to exercise discretion, however. *See* Restatement (Second) of Trusts §§ 187, 259 (1959). This section does not limit the court's equity jurisdiction. Beyond mentioning petitions for instructions and actions to declare rights, subsection (c) does not attempt to list the types of judicial proceedings involving trust administration that might be brought by a trustee or beneficiary. Such an effort is made in California Probate Code § 17200. Excluding matters not germane to the Uniform Trust Code, the California statute

	(2) C.R.S. § 15-11-603 is the anti-lapse statue for wills. C.R.S. § 15-11-706 is a self-contained anti- lapse statute applicable to governing instruments other than wills (and other than certain other kinds of documents), including trusts. The subcommittee is of the view that C.R.S. § 15-11-706 (and not C.R.S. § 15-11-603) should continue to apply to revocable trusts. While the subcommittee believes that the concept of expressly applying "wills rules of construction" to trusts is, in general, laudable, the UTC incorporation by cross-reference approach leaves it to case law to develop when doing so is appropriate. On the other hand, drafting specific separate rules of construction for trusts is a large task, which would delay the committee's ability to finish work on the UTC. Therefore, the committee recommends that section 112 be adopted with the modification indicated. Following enactment of the UTC, it would be desirable for the committee to continue in order to draft separate rules of construction for trusts. These would include rules dealing with after acquired property (the second clause of C.R.S. § 15-11-602), the rules for the disposition of a failed gift where anti-lapse does not apply (C.R.S. § 15-11-604), increases in securities and accessions (C.R.S. § 15-11-605), nonademption (C.R.S. § 15-11-606), nonexoneration (C.R.S. § 15-11-607), and ademption by satisfaction (C.R.S. § 15-11-609).

	nevertheless, a revocable inter vivos trust is ordinarily subject to substantive restrictions on testation and to rules of construction and other rules applicable to testamentary dispositions . . . . This provision extends the concept to irrevocable as well as revocable trusts, but adds the limitation that the rules of construction applicable to wills apply to trusts only "as appropriate."
6. COLORADO LAW	C.R.S. §§ 15-11-701 through 15-11-713 contain rules of construction applicable to wills and "other governing instruments." A governing instrument includes a trust. C.R.S. §§ 15-11-701 and 15-10-201(22). Therefore, the following rules of construction are currently applicable to trusts: 120 hour survival requirement (C.R.S. § 15-11-702); Choice of law (C.R.S. § 15-11-703); Power of appointment and meaning of specific reference (C.R.S. § 15-11-704); Class gifts (C.R.S. § 15-11-705); Anti-lapse (C.R.S. §§ 15-11-706 and 15-11-707); Class gifts to "descendants," "issue," or "heirs of the body" (C.R.S. § 15-11-708); Definitions of "by representation," "per capita at each generation," and "per stirpes" (C.R.S. § 15-11-709); Abolition of the doctrine of worthier title (C.R.S. § 15-11-710); Definition of "heirs" contained in a dispositive provision (C.R.S. § 15-11-711); Simultaneous death (C.R.S. § 15-11-712);

	Construction of pre-September 12, 1981 wills and trusts containing formula marital deduction clauses to obtain unlimited marital deduction (C.R.S. § 15-11- 702). UTC § 112 would make the following rules of construction contained in C.R.S. § 15-11-601 through 15-11-609 ("Rules of Construction Applicable Only to Wills") applicable to trusts "as appropriate": After-acquired property (C.R.S. § 15-11-602); Anti-lapse (C.R.S. § 15-11-603); Failure of a testamentary provision (where anti-lapse does not apply) (C.R.S. § 15-11-603); Increases in securities; accessions (C.R.S. § 15-11- 605); Nonademption of certain devises (C.R.S. § 15-11- 606); Nonexoneration (C.R.S. § 15-11-607); Exercise of a power of appointment (C.R.S. § 15-11- 608); Ademption by satisfaction (C.R.S. § 15-11-609).
7. RECOMMENDATIONS	**The UTC approach of simply incorporating by a cross- reference the rules of construction now applicable only to wills creates some conceptual difficulties. Those that occur to the committee include:** (1) C.R.S. § 15-11-602 provides that a will may pass (1) all property the testator owns at death and (2) all property acquired by the estate after the testator's death. The second clause could and should be applied to allow a revocable living trust to pass property acquired by the trust after the settlor's death (for example, a "pour-over" from the settlor's estate or the proceeds of a life insurance policy payable to the trust). The first clause cannot mean that a revocable living trust passes all property owned by the settlor at death; rather, that clause, as applied to a revocable trust, should simply mean that the trust passes property held as part of the trust estate at the time of the settlor's death.

jurisdiction concerning internal affairs of a trust. Colorado Probate Code §15-16-204, C.R.S., recognizes concurrent jurisdiction of Courts for certain types of action involving determinations as to the existence or non-existence of trusts created other than by will or actions and proceedings involving creditors and debtors of the trust or other actions and proceedings involving trustees and their parties.

15-16-201, C.R.S. Court - exclusive jurisdiction of trusts. (1) The court has exclusive jurisdiction of proceedings initiated by interested parties concerning the internal affairs of trusts. Proceedings which may be maintained under this section are those concerning the administration and distribution of trusts, the declaration of rights, and the determination of other matters involving trustees and beneficiaries of trusts. These include, but are not limited to, proceedings to:

(a) Appoint or remove a trustee;

(b) Review trustee's fees and to review and settle interim or final accounts;

(c) Ascertain beneficiaries, determine any question arising in the administration or distribution of any trust including questions of construction of trust instruments, instruct trustees, and determine the existence or nonexistence of any immunity, power, privilege, duty, or right; and

(d) Release registration of a trust.

15-16-204, C.R.S. Court - concurrent jurisdiction of litigation involving trusts and third parties. The court of the place in which the trust is registered has concurrent jurisdiction with other courts of this state of actions and proceedings to determine the existence or nonexistence of trusts created other than by will, of actions by or against creditors or debtors of trusts, and of other actions and proceedings involving trustees and third parties. Venue is determined by the rules generally applicable to civil actions.

The committee also reviewed this section in the context of the default and mandatory rule under Uniform Trust Code Section 105(14). The mandatory rule would preclude trust terms from overriding the power of a Court to exercise jurisdiction. For example, a trust could not mandate by its terms that all disputes concerning the internal administration of the trust be arbitrated. Because the mandatory rule would mandate the application of Section 203 which is consistent with current Colorado Probate Code sections, the committee felt that the application of this mandatory rule to trusts currently in existence on the effective date of the UTC is appropriate. For an explanation of types of proceedings

	which may be brought concerning the administration of a trust, see the Comment to Section 201.
7. RECOMMENDATIONS	Mandating, irrespective of the terms of the trust, that district courts retain both exclusive and concurrent jurisdiction of trusts is consistent with the Colorado Probate Code §§15-16-201 and 15-16-204, C.R.S., and therefore the general committee recommends adopting Section 203 with the addition of Subsection "c" below which addresses judicial and non-judicial dispute resolution.

	lists the following as items relating to the "internal affairs" of a trust: determining
	questions of construction; determining the existence or nonexistence of any immunity, power, privilege, duty, or right; determining the validity of a trust provision; ascertaining beneficiaries and determining to whom property will pass upon final or partial termination of the trust; settling accounts and passing upon the acts of a trustee, including the exercise of discretionary powers; instructing the trustee; compelling the trustee to report information about the trust or account to the beneficiary; granting powers to the trustee; fixing or allowing payment of the trustee's compensation or reviewing the reasonableness of the compensation; appointing or removing a trustee; accepting the resignation of a trustee; compelling redress of a breach of trust by any available remedy; approving or directing the modification or termination of a trust; approving or directing the combination or division of trusts; and authorizing or directing transfer of a trust or trust property to or from another jurisdiction.
5. COLORADO COMMITTEE COMMENTS	A court's involvement will not subject the trust to court supervision. Courts in equity can entertain petitions for instructions and declaratory judgment. While the Uniform Trust Code encourages the resolution of disputes without resort to the courts by providing such options as the nonjudicial settlement authorized by Section 111, the court is always available to the extent its jurisdiction is invoked by interested persons. The jurisdiction of the court with respect to trust matters is inherent and historical and also includes the ability to act on its own initiative, to appoint a special master to investigate the facts of a case, and to provide a trustee with instructions even in the absence of an actual dispute. The Uniform Trust Code does not create a system of routine or mandatory court supervision. While subsection (b) authorizes a court to direct that a particular trust be subject to continuing court supervision, the court's intervention will normally be confined to the particular matter brought before it. This section does not limit the court's equity jurisdiction. Subsection (c) makes clear that the court's jurisdiction may be invoked even absent an actual dispute. Traditionally, courts in equity have heard petitions for instructions and have issued declaratory judgments if there is a reasonable doubt as to the extent of the trustee's powers or duties. The court will not ordinarily instruct trustees on how to exercise discretion. *See* Restatement (Second) of Trusts §§ 187, 259 (1959).
6. COLORADO LAW	This section of the Uniform Trust Code is based on the Uniform Probate Code § 7-201(d). The Court may not intervene in the administration of a trust except to the extent that jurisdiction of the court is invoked by persons interested in the trust or otherwise exercised by law.

	Colorado Probate Code §15-16-204, C.R.S., discusses the jurisdiction of courts concerning trusts. Generally, courts do not have active involvement in the day-
	to-day administration of trusts. The court will generally become involved only when the court's jurisdiction is invoked by the trustee, beneficiary, or some other interested person. Colorado Probate Code §15-16-201(1), C.R.S, sets forth the grounds for court intervention which include: (a) appointment or removal of a trustee; (b) review of trustee fees and to review and settle interim final accounts; (c) ascertain beneficiaries, determine any questions arising in the administration or distribution of any trust, including questions of construction of trust instruments, instruct trustees, and determining the existence or non-existence of any immunity, power, privilege, duty, or right; and (d) release registration of trust; (2) sets forth that neither registration of a trust nor a proceeding under this section results in continuing supervisory proceedings. The management and distribution of a trust estate, submission of account reports to beneficiaries, payment of trustee fees or other obligations of a trust, acceptance and change of trusteeship, and other aspects of the administration of a trust shall proceed expeditiously consistent with the terms of the trust, free of judicial intervention and without order approval or other action of any court subject to the jurisdiction of the court as invoked by interested parties or as provided by law.
7. RECOMMENDATIONS	To the extent that Section 201 is consistent with current Colorado law, the general committee approved adopting this section as is.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 2
JUDICIAL PROCEEDINGS

1. UTC SECTION	**202**
2. SUBJECT	**JURISDICTION OVER TRUSTEE AND BENEFICIARY**
3. UTC STATUTE	(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, or by registering the trust in this State, the trustee submits personally to the jurisdiction of the courts 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 or which is properly registered 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 the courts 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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section clarifies that the courts of the principal place of administration have jurisdiction to enter orders relating to the trust that will be binding on both the trustee and beneficiaries. Consent to jurisdiction does not dispense with any required notice, however. With respect to jurisdiction over a beneficiary, the Comment to Uniform Probate Code § 7-103, upon which portions of this section are based, is instructive: It also seems reasonable to require beneficiaries to go to the seat of the trust when litigation has been instituted there concerning a trust in which they claim beneficial interests, much as the rights of shareholders of a corporation can be determined at a corporate seat. The settlor has indicated a principal place of administration by its selection of a trustee or otherwise, and it is reasonable to subject rights under the trust to the jurisdiction of the Court where the trust is properly administered. The jurisdiction conferred over the trustee and beneficiaries by this section does not preclude jurisdiction by courts elsewhere on some other basis. Furthermore, the fact that the courts in a new State acquire jurisdiction under this section following a change in a trust's principal place of administration does not

	necessarily mean that the courts of the former principal place of administration lose jurisdiction, particularly as to matters involving events occurring prior to the transfer. The jurisdiction conferred by this section is limited. Pursuant to subsection (b), until a distribution is made, jurisdiction over a beneficiary is limited to the beneficiary's interests in the trust. Personal jurisdiction over a beneficiary is conferred only upon the making of a distribution. Subsection (b) also gives the court jurisdiction over other recipients of distributions. This would include individuals who receive distributions in the mistaken belief they are beneficiaries. For a discussion of jurisdictional issues concerning trusts, see 5A Austin W. Scott & William F. Fratcher, The Law of Trusts §§ 556-573 (4th ed. 1989).
5. COLORADO COMMITTEE COMMENTS	This section sets forth the minimum contacts test for Court jurisdiction in this State. This section clarifies that the courts of the principal place of administration have jurisdiction to enter orders relating to the trust that will be binding on both the trustee and beneficiaries. Consent to jurisdiction does not dispense with any required notice, however. Beneficiaries are required to go to the seat of the trust when litigation has been instituted there concerning a trust in which they claim beneficial interests. The settlor has indicated a principal place of administration by its selection of a trustee or otherwise, and it is reasonable to subject rights under the trust to the jurisdiction of the Court where the trust is properly administered. The jurisdiction conferred over the trustee and beneficiaries by this section does not preclude jurisdiction by courts elsewhere on some other basis. Furthermore, the fact that the courts in a new State acquire jurisdiction under this section following a change in a trust's principal place of administration does not necessarily mean that the courts of the former principal place of administration lose jurisdiction, particularly as to matters involving events occurring prior to the transfer. The jurisdiction conferred by this section is limited. Pursuant to subsection (b), until a distribution is made, jurisdiction over a beneficiary is limited to the beneficiary's interests in the trust. Personal jurisdiction over a beneficiary is conferred only upon the making of a distribution. Subsection (b) also gives the court jurisdiction over other recipients of distributions. This would include individuals who receive distributions in the mistaken belief they are beneficiaries. For a discussion of jurisdictional issues concerning trusts, see 5A Austin W. Scott

	& William F. Fratcher, The Law of Trusts §§ 556-573 (4th ed. 1989).
	Note that the UTC deviates from the U.P.C. and Colorado Probate Code to the extent that the Commissioners have elected not to adopt the provisions relating to trust registration.
6. COLORADO LAW	Under Colorado law, Colorado Probate Code § 15-16-101 and Colorado Probate Rule 8.6, requires trust registration within thirty days after the trustee's acceptance of an irrevocable trust. "The purpose of trust registration is not to make a public record of the contents of trust instruments, but to provide those having an interest thereunder with an opportunity to become aware of the existence of the trust, and to provide a means of knowing the venue for proceedings involving the trust." (Wade/Parks § 46.2). Section 15-16-305, C.R.S., provides that the principal place of administration may be changed if determined by a court that it is no longer efficient or in the best interests of beneficiaries. The doctrine of *Form Non Conveniens* is suggested by this section of the Colorado Probate Code. The Colorado Court of Appeals listed the variety of factors which are reviewed in order to determine whether a forum is so inconvenient as to warrant dismissal of an action. *PMI Mortgage Ins. v. Deseret Fed. Sav. & Loan*, 757 P.2d 1156, 1158 (Colo. App. 1988).
7. RECOMMENDATIONS	The general committee recommended adopting Section 202 of the October 1999 version of the UTC with the retention of the registration requirement, consistent with current Colorado law, as set forth above.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 2
JUDICIAL PROCEEDINGS

1. UTC SECTION	**203**
2. SUBJECT	**SUBJECT-MATTER JURISDICTION**
3. UTC STATUTE	(a) The [designate] court has exclusive jurisdiction of proceedings in this State brought by a trustee or beneficiary concerning the administration of a trust. (b) The [designate] court has concurrent jurisdiction with other courts of this State of other proceedings involving a trust. (c) This section does not preclude judicial or non-judicial alternative dispute resolution.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section provides a means for distinguishing the jurisdiction of the court having primary jurisdiction for trust matters, whether denominated the probate court, chancery court, or by some other name, from other courts in a State that may on occasion resolve disputes concerning trusts. The section has been placed in brackets because the enacting jurisdiction may already address subject-matter jurisdiction by other statute or court rule. The topic also need not be addressed in States having unified court systems. For an explanation of types of proceedings which may be brought concerning the administration of a trust, see the Comment to Section 201.
5. COLORADO COMMITTEE COMMENTS	This section is derived from UPC §§ 7-201(c) and 7-204. This section is designed to distinguish the primary jurisdiction of the courts for internal trust matters from the concurrent jurisdiction of other courts. The court would have exclusive jurisdiction of proceedings concerning administration of trusts, but concurrent jurisdiction with other courts of the state regarding matters that do not involve the internal administration of the trust, such as creditors' claims. The mandatory rule under UTC Section 105 (b)(14) would mandate that district courts, where the trust is registered or the principal place of administration, would have exclusive jurisdiction concerning the internal affairs of trust and concurrent jurisdiction regarding other actions which do not directly impact on the internal administration of the trust.
6. COLORADO LAW	With the exception of the Denver Probate Court, which is mandated by Section 25 of Article VI of the State Constitution, Colorado District Courts (where the trust is registered or the principal place of administration) have exclusive jurisdiction concerning the internal affairs of the trust. Colorado Probate Code §15-16-201, C.R.S., provides a list of actions which the Court has exclusive

UNIFORM TRUST CODE COMMITTEE
ARTICLE 2
JUDICIAL PROCEEDINGS

1. UTC SECTION	**204**
2. SUBJECT	**VENUE**
3. UTC STATUTE	(a) ~~Except as otherwise provided in subsection (b), venue for~~ A judicial proceeding concerning a trust may be commenced in the [county] in which the trust is registered. If the trust is not registered, a judicial proceeding ~~involving a trust is~~ concerning a trust may be commenced in the [county] ~~of this State~~ in which the trust's principal place of administration is or ~~will~~ is to be located and, if the trust is created by will ~~and the estate is not yet closed~~, in the [county] in which the decedent's estate is being administered. (b) If a trust has no trustee, ~~venue for~~ a judicial proceeding for the appointment of a trustee must be commenced in the [county] in which the trust is registered, or if the trust is not registered, in a [county] ~~of this State~~ in which a beneficiary resides, in a [county] in which ~~any trust property~~ the trust property, or some portion of the trust property, is located, and if the trust is created by will, in the [county] in which the decedent's estate was or is being administered. (c) A judicial proceeding other than one described in subsection (a) or (b) must be commenced in accordance with the rules of venue applicable to civil actions.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This optional, bracketed section is made available for jurisdictions that conclude that venue for a judicial proceeding involving a trust is not adequately addressed in local rules of civil procedure. For jurisdictions enacting this section, general rules governing venue continue to apply in cases not covered by this section. This includes most proceedings where jurisdiction over a trust, trust property, or parties to a trust is based on a factor other than the trust's principal place of administration. The general rules governing venue also apply when the principal place of administration of a trust is in another locale, but jurisdiction is proper in the enacting State.
5. COLORADO COMMITTEE COMMENTS	This section determines the venue for judicial proceedings. This optional, bracketed section, is made available for jurisdictions that conclude that venue for a judicial proceeding involving a trust is not adequately addressed in local rules of civil procedure. For jurisdictions enacting this section, general rules of civil procedure governing venue continue to apply in cases not covered by this section. This includes most proceedings where jurisdiction over a trust, trust property, or

	parties to a trust is based on a factor other than the trust's principal place of administration. The general rules governing venue also apply when the principal place of administration of a trust is in another locale, but jurisdiction is proper in the enacting State.
6. COLORADO LAW	Colorado Probate Code §15-16-202, C.R.S., provides that venue is proper where a trust is registered and if not registered any place where the trust could properly have been registered or otherwise provided by the Colorado Rules of Civil Procedure. The Committee elected to retain the trust registration requirements of Section 202. Section 15-16-203, C.R.S., provides for dismissal of actions where the principal place of administration is in another state except where interests of justice would otherwise be seriously impaired or a consent of the parties. The Colo. Court of Appeals recognized a doctrine "forum non-convenience" in *PMI Mortgage Insurance v. Desert Federal Savings and Loan*, 757 P.2d 1156 (Colo. App. 1988). The Court of Appeals considered factors in determining convenient forum.
7. RECOMMENDATIONS	To the extent that Section 204 was amended consistent with current Colorado law requiring trust registration, the general committee adopted this section.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 3
REPRESENTATION OF OTHERS

1. UTC SECTION	**301**
2. SUBJECT	**REPRESENTATION: BASIC EFFECT**
3. UTC STATUTE	(a) Notice to a 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 [article] 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 Sections [411 and] 602, a person who under this [article] 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 [Article] with respect to the termination or modification of a trust under Section 411(a).]
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section is general and introductory, laying out the scope of the article. Subsection (a) validates substitute notice to a person who may represent and bind another person as provided in the succeeding sections of this article. Notice to the substitute has the same effect as if given directly to the other person. Subsection (a) does not apply to notice of a judicial proceeding. Pursuant to Section 109(d), notice of a judicial proceeding must be given as provided in the applicable rules of civil procedure, which may require that notice not only be given to the representative but also to the person represented. For a model statute for the giving of notice in such cases, see Uniform Probate Code § 1-403(3). Subsection (a) may be used to facilitate the giving of notice to the qualified beneficiaries of a proposed transfer of principal place of administration (Section 108(d)), of a proposed trust combination or division (Section 417), of a temporary assumption of duties without accepting trusteeship (Section 701(c)(1)), of a trustee's resignation (Section 705(a)(1)), and of a trustee's report (Section 813(c)). Subsection (b) deals with the effect of a consent, whether by actual or virtual representation. Subsection (b) may be used to facilitate consent of the beneficiaries to modification or termination of a trust, with or without the consent of the settlor (Section 411), agreement of the qualified beneficiaries on

	appointment of a successor trustee (Section 704(c)(2)), and consent, release or affirmance of a beneficiary's actions of trustee (Section 1009). A consent by a representative bars a later objection by the person represented, but a consent is not binding if the person represented raises an objection prior to the date the consent would otherwise become effective. The possibility that a beneficiary might object to a consent given on the beneficiary's behalf will not be germane in many cases because the person represented will be unborn or unascertained. However, the representation principles of this article will sometimes apply to adult and competent beneficiaries. For example, while the trustee of a revocable trust entitled to a pourover devise has authority under Section 303 to approve the personal representative's account on behalf of the trust beneficiaries, such consent would not be binding on a trust beneficiary who registers an objection. Subsection (b) implements cases such as *Barber v. Barber*, 837 P.2d 714 (Alaska 1992), which held that the a [sic] refusal to allow an objection by an adult competent remainder beneficiary violated due process. Subsection (c) implements the policy of Sections 411 and 602 that a conservator or guardian may represent a settlor with respect to the revocation or termination of a trust only with the approval of the court supervising the conservatorship or guardianship. **2004 Amendment.** For an explanation of the new subsection (d) and of the bracketed language in subsection (c), see the comment to the amendment to Section 411.
5. COLORADO COMMITTEE COMMENTS	This section sets forth notice to a person who may represent and bind another person. Notice of a judicial proceeding must be given in accordance to the rules of civil procedure (See UTC Section 109). Subsection (b) deals with the effect of consent, whether by actual or virtual representation. It permits an agent with authority, a conservator, and a guardian, if no conservator has been appointed may receive notices and get consents on behalf of the person represented. Subsection (c) implements the policy of Sections 411 and 602 that a conservator or guardian may represent a settlor with respect to revocation or termination of a trust only with the approval of court.
6. COLORADO LAW	Colorado Probate Code §15-10-403(3), C.R.S., provides persons are bound by orders binding others in the following cases: (a) sole holder's or co-holder's power of revocation or a presently-exercisable general power of appointment, including one in the form of power of amendment;

	(b) to the extent that there is no conflict of interest between them, orders binding a conservator binding the person whose estate he controls; or is a guardian binding a ward; orders binding a trustee binding beneficiaries of the trust; (c) if there is no conflict of interest and no conservator or guardian has been appointed, a parent may represent his minor child; and (d) where an unborn, ascertained person is not otherwise represented is bound by an order to the extent that his interests are adequately represented by another party having substantial, identical interests in the proceedings.
7. RECOMMENDATIONS	To the extent that Section 301 is consistent with current Colorado law, the committee approved adopting this section as is.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 3
REPRESENTATION OF OTHERS

1. UTC SECTION	**302**
2. SUBJECT	**REPRESENTATION BY HOLDER OF GENERAL TESTAMENTARY POWER OF APPOINTMENT**
3. UTC STATUTE	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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section specifies the circumstances under which a holder of a general testamentary power of appointment may receive notices on behalf of and otherwise represent and bind persons whose interests are subject to the power, whether as permissible appointees, takers in default, or otherwise. Such representation is allowed except to the extent there is a conflict of interest with respect to the particular matter or dispute. Typically, the holder of a general testamentary power of appointment is also a life income beneficiary of the trust, often times of a trust intended to qualify for the federal estate tax marital deduction. *See* I.R.C. § 2056(b)(5). Without the exception for conflict of interest, the holder of the power could act in a way that could enhance the holder's income interests to the detriment of the appointees or takers in default, whoever they may be.
5. COLORADO COMMITTEE COMMENTS	This section deals with the effects of the consent by a holder of general testamentary power of appointment (revocable trust) and presently-exercisable general powers of appointment are covered by § 604 of the UTC which grants the settlor or holder of the power all rights of the beneficiaries or persons whose interests are subject to the power. In the absent of conflict of interest, the holder of a general testamentary power of appointment may bind those whose interests are subject to the power. This section specifies the circumstances under which a holder of a general testamentary power of appointment may receive notices on behalf of and otherwise represent and bind persons whose interests are subject to the power, whether as permissible appointees, takers in default, or otherwise. Such representation is allowed except to the extent there is a conflict of interest with respect to the particular matter or dispute. Typically, the holder of a general testamentary power of appointment is also a life income beneficiary of the trust, often times of a trust intended to qualify for the federal estate tax marital deduction. *See* I.R.C. § 2056(b)(5). Without the
	exception for conflict of interest, the holder of the power could act in a way that could enhance the holder's income interests to the detriment of the appointees or takers in default, whoever they may be.

6. COLORADO LAW	Section 15-10-403(3)(a), C.R.S. provides that persons are bound by orders binding others where they are the sole holder or co-holder of a power of revocation or a presently-exercisable general power of appointment, including one in the form of power of amendment to bind other persons to the extent that their interests are subject to the power and to the extent that there is no conflict of interest.
7. RECOMMENDATIONS	To the extent that Section 302 is consistent with current Colorado law, the general committee approved adopting this section as is.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 3
REPRESENTATION OF OTHERS

1. UTC SECTION	**303**
2. SUBJECT	**REPRESENTATION BY FIDUCIARIES AND PARENTS**
3. UTC STATUTE	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 protected person whose estate 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 [conservator] or [guardian] for the child has not been appointed.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section allows for representation of persons by their fiduciaries (conservators, guardians, agents, trustees, and personal representatives), a principle that has long been part of the law. Paragraph (6), which allows parents to represent their children, is more recent, having originated in 1969 upon approval of the Uniform Probate Code. This section is not limited to representation of beneficiaries. It also applies to representation of the settlor. Representation is not available if the fiduciary or parent is in a conflict position with respect to the particular matter or dispute, however. A typical conflict would be where the fiduciary or parent seeking to represent the beneficiary is either the trustee or holds an adverse beneficial interest. Paragraph (2) authorizes a guardian to bind and represent a ward if a conservator of the ward's estate has not been appointed. Granting a guardian authority to represent the ward with respect to interests in the trust can avoid the need to seek

	appointment of a conservator. This grant of authority to act with respect to the ward's trust interest may broaden the authority of a guardian in some States although not in States that have adopted the Section 1-403 of the Uniform Probate Code, from which this section was derived. Under the Uniform Trust Code, a "conservator" is appointed by the court to manage the ward's property, a "guardian" to make decisions with respect to the ward's personal affairs. *See* Section 103. Paragraph (3) authorizes an agent to represent a principal only to the extent the agent has authority to act with respect to the particular question or dispute. Pursuant to Sections 411 and 602, an agent may represent a settlor with respect to the amendment, revocation or termination of the trust only to the extent this authority is expressly granted either in the trust or the power. Otherwise, depending on the particular question or dispute, a general grant of authority in the power may be sufficient to confer the necessary authority.
5. COLORADO COMMITTEE COMMENTS	This section provides that a fiduciary, absent of conflict of interest, may represent and bind the beneficiary or beneficiaries, whether of an estate, trust, conservatorship or guardianship. It is identical to Uniform Probate Code § 1-403.
6. COLORADO LAW	Colorado Probate Code §15-10-403(3)(b), C.R.S., provides that so long as there is no conflict of interest, a guardian, conservator, trustee, personal representative or other agent or parent may bind their respective beneficiary.
7. RECOMMENDATIONS	To the extent that Section 303 is consistent with current Colorado law, the general committee approved adopting this section with the modification indicated to clarify that the protected person and not just the estate of the protected-person is being bound.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 3
REPRESENTATION OF OTHERS

1. UTC SECTION	**304**
2. SUBJECT	**REPRESENTATION BY PERSON HAVING SUBSTANTIALLY IDENTICAL INTEREST**
3. UTC STATUTE	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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section authorizes a person with a substantially identically interest with respect to a particular question or dispute to represent and bind an otherwise unrepresented minor, incapacitated or unborn individual, or person whose location is unknown and not reasonably ascertainable. This section is derived from Section 1-403(2)(iii) of the Uniform Probate Code, but with several modifications. Unlike the UPC, this section does not expressly require that the representation be adequate, the drafters preferring to leave this issue to the courts. Furthermore, this section extends the doctrine of virtual representation to representation of minors and incapacitated individuals. Finally, this section does not apply to the extent there is a conflict of interest between the representative and the person represented. Restatement (First) of Property §§ 181 and 185 (1936) provide that virtual representation is inapplicable if the interest represented was not sufficiently protected. Representation is deemed sufficiently protective as long as it does not appear that the representative acted in hostility to the interest of the person represented. Restatement (First) of Property § 185 (1936). Evidence of inactivity or lack of skill is material only to the extent it establishes such hostility. Restatement (First) of Property § 185 cmt. b (1936). Typically, the interests of the representative and the person represented will be identical. A common example would be a trust providing for distribution to the settlor's children as a class, with an adult child being able to represent the interests of children who are either minors or unborn. Exact identity of interests is not required, only substantial identity with respect to the particular question or dispute. Whether such identity is present may depend on the nature of the interest. For example, a presumptive remaindermen may be able to represent

	alternative remaindermen with respect to approval of a trustee's report but not with respect to interpretation of the remainder provision or termination of the trust. Even if the beneficial interests of the representative and person represented are identical, representation is not allowed in the event of conflict of interest. The representative may have interests outside of the trust that are adverse to the interest of the person represented, such as a prior relationship with the trustee or other beneficiaries. *See* Restatement (First) of Property § 185 cmt. d (1936).
5. COLORADO COMMITTEE COMMENTS	This section adopts a doctrine of virtual representation. It provides for representation of and the giving of binding consent by another person having substantially identical interest with a minor, incapacitated or unborn person whose identity or location is unknown and not reasonably ascertained can be bound by virtual representation if there is no conflict of interest between the representative and the person represented. Restatement (First) of Property §§181 and 185 (1936) provide that virtual representation is inapplicable if the interest represented was not sufficiently protected. Representation is deemed sufficiently protective as long as it does not appear that the representative acted in hostility to the interest of the person represented. Restatement (First) of Property §185 (1936).
6. COLORADO LAW	Section 15-10-403(3)(d), C.R.S., is similar to this UTC section. In James R. Wade's opinion, the Colorado Probate Code limits the application of the doctrine in the "virtual representation" to jurisdictional issues surrounding notice. The UTC provision is broader and more useful than the Colorado Probate Code Statute in that it applies the doctrine to settlements permitting horizontal and vertical representation. The Colorado Court of Appeals held in *Beyer v. First National Bank*, 843 P.2d 53 (Colo. App. 1992) that an adult beneficiary's consent and ratification barred their recovery as well as the recovery of minor beneficiaries for loss sustained as a result of the bank pursuing an aggressive and risky investment policy.
7. RECOMMENDATIONS	To the extent that Section 304 is consistent and not in conflict with current Colorado law, the committee approved adopting this section as is.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 3
REPRESENTATION OF OTHERS

1. UTC SECTION	**305**
2. SUBJECT	**APPOINTMENT OF REPRESENTATIVE**
3. UTC STATUTE	(a) If the court determines that an interest is not represented under this [article], or that the otherwise available representation might be inadequate, the court may appoint a [representative] to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, incapacitated, protected person, or unborn individual, or a person whose identity or location is unknown. A [representative] may be appointed to represent several persons or interests. (b) A [representative] may act on behalf of the individual represented with respect to any matter arising under this [Code], whether or not a judicial proceeding concerning the trust is pending. (c) In making decisions, a [representative] may consider general benefit accruing to the living members of the individual's family.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section is derived from Section 1-403(4) of the Uniform Probate Code. However, this section substitutes " representative" for "guardian ad litem" to signal that a representative under this Code serves a different role. Unlike a guardian ad litem, under this section a representative can be appointed to act with respect to a nonjudicial settlement or to receive a notice on a beneficiary's behalf. Furthermore, in making decisions, a representative may consider general benefit accruing to living members of the family. "Representative" is placed in brackets in case the enacting jurisdiction prefers a different term. The court may appoint a representative to act for a person even if the person could be represented under another section of this article.
5. COLORADO COMMITTEE COMMENTS	This section grants the court discretion to appoint a Guardian Ad Litem or other representative to represent the interests and approve agreements of minors, incapacitated, unborn or otherwise unrepresented person or persons for whom the court concludes that other available representation might be inadequate.
6. COLORADO LAW	Section 15-10-403(5), C.R.S., is similar to this section and provides that the court may appoint a guardian ad litem to represent the interests of a minor, an incapacitated, unborn, or unascertained person, or a person whose identity or address is unknown if the court determines that a need for such representation appears. A guardian ad litem may also be appointed to represent several persons.
	The committee recommended the inclusion of the term "protected person" to subsection (a) to make it consistent with the Colorado Probate Code §15-10-201(43), C.R.S.

7. RECOMMENDATIONS	This section should be enacted with the inclusion of the term "protected person" consistent with the Colorado Probate Code.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 3
REPRESENTATION OF OTHERS

1. UTC SECTION	**306**
2. SUBJECT	**JUDICIALLY APPROVED SETTLEMENT**
3. UTC STATUTE	(a) A settlement of any controversy as to the administration of a trust, the construction, validity, or effect of any trust, the rights or interests of the beneficiaries or persons having claims against the trust, if approved in a formal proceeding in the court for that purpose is binding on all parties thereto including any unborn, unascertained, or who could not be located. An approved settlement does not impair the rights of creditors or taxing authorities who are not parties to it. (b) Notice of a judicially approved settlement must be given to every interested person or to one who can bind an interested person as provided in [article] 3. For purposes of this section, interested person means the trustee and any beneficiary whose interest in the trust might be affected by the settlement. (c) The procedure for securing court approval or a settlement is as follows: 1) The terms of the settlement shall be set forth in an agreement in writing which shall be executed by all competent persons and parents of any minor child having a beneficial interest or having claims which will or may be affected by the settlement. Execution is not required by any person whose identity cannot be ascertained or whose whereabouts is unknown and cannot be ascertained. (2) Any interested person, including a trustee, then may submit the settlement to the court for its approval and for execution by the trustee, the trustee of every affected testamentary trust, other fiduciaries and representatives. (3) After notice to all interested persons or their representative, the court, if it finds that the contest or controversy is in good faith and that the effect of the settlement upon the interests of the persons represented by the fiduciaries or representatives is just and reasonable, shall make an order approving the settlement and directing all fiduciaries under its supervision to execute the agreement. A minor child represented only by his parents may be bound, only if there is not conflict or interest between the parent and child. Upon the making of the order and the execution of the settlement, all further disposition of trust property affected by the settlement shall be in accordance with the terms of the settlement.

	(d) Notice to a person who may be represented and bound under [article] 3 of an agreement to be approved by the court must be given: (1) directly to the person or to one who may bind the person if the person may be represented and bound under Section 302 or 303; or (2) in the case of a person who may be represented and bound under §304 and who is unborn or whose identity or location is unknown and not reasonably ascertainable, to all person whose interests in the judicial proceedings are substantially identical and whose identities and locations are known. (3) in the case of other persons who may be represented and bound under §304, directly to the person.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section, which owes its origins to Section 1-403(3) of the Uniform Probate Code, specifies the notice that must be provided to achieve a binding judicial settlement when one or more interested persons are being represented by others as authorized by Article 3. If, as authorized by Section 302, the holder of a general testamentary power of appointment is representing those whose interests are subject to the power, notice to the permissible appointees, takers in default, or others whose interests are subject to the power is achieved by giving notice to the holder. If, as authorized by Section 303, the person to be bound is represented by a conservator, guardian, agent, trustee, personal representative, or parent, notice to the person represented is achieved by giving notice to the fiduciary or parent. If virtual representation is being relied on, as authorized by Section 304, notice to the person represented is required if the person's identity and location is known or reasonably ascertainable. Otherwise, notice must be given to all persons whose interests in the judicial proceedings are substantially identical and whose identities and locations are known.
5. COLORADO COMMITTEE COMMENTS	This section appeared in the October 1999 interim draft but was removed from the final draft. This section requires notice of judicially approved settlements to holder of general testamentary power of appointment (302), minors represented by fiduciaries or parents (303), and appointed representatives, to those represented by virtual representatives, i.e., those who are unborn or whose identities are unknown, to all persons whose interest in the judicial proceeding are substantially identical and whose identities are known (304). Notice to an appointed representative may be made directly to the person.
6. COLORADO LAW	This section tracts Uniform Probate Code §1-403(3) and permits approved judicial settlements so long as proper notice directly to those having beneficial interests or those who have authority to bind and represent others, including

	Section 302 (holder of general testamentary power of appointment); Section 303 (person represented by conservator, guardian, agent, trustee, personal representative, or parent); and Section 304 (representation by persons having substantially identical interests). This section embodies the doctrine of "virtual representation". See comment Section 203, October 1999 Draft. Colorado Probate Code §15-12-1102, C.R.S., provides the procedure for securing court approval of compromises in decedent's estates. It provides that compromise agreements shall be executed by all competent persons and parents acting for minors or having claims which will or may be affected by the compromise. See also Colorado Probate Code §15-10-403, C.R.S., entitled *When Parties are Bound by Others Notice*: Informal proceedings involving trusts, estates of decedents, minors, protected persons, or incapacitated persons and in judicially supervised settlements. The Committee elected to retain this section as it is consistent with the Colorado Probate Code. (Note UTA 203 has been removed from Article 2 of the March 10, 2000 interim draft and moved to Article 3, § 306. Section 306 was then removed from final draft.) The general committee determined that this provision would have a definite utility and benefit and should be included in the Colorado Trust Code.
7. RECOMMENDATIONS	To the extent that Section 306 is consistent with Colorado Law, the committee approved adopting this section with the addition of the definition of "interested person."

UNIFORM TRUST CODE COMMITTEE
ARTICLE 4
CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUST

1. UTC SECTION	**401**
2. SUBJECT	**METHODS OF CREATING TRUST**
3. UTC STATUTE	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; or (4) a statute, judgment or decree authorizing the creation of a trust.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section is based on Restatement (Third) of Trusts §10 (Tentative Draft No. 1, approved 1996), and Restatement (Second) of Trusts § 17 (1959). Under the methods specified for creating a trust in this section, a trust is not created until it receives property. For what constitutes an adequate property interest, see Restatement (Third) of Trusts §§ 40-41 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts §§ 74-86 (1959). The property interest necessary to fund and create a trust need not be substantial. A revocable designation of the trustee as beneficiary of a life insurance policy or employee benefit plan has long been understood to be a property interest sufficient to create a trust. *See* Section 103(11) ("property" defined). Furthermore, the property interest need not be transferred contemporaneously with the signing of the trust instrument. A trust instrument signed during the settlor's lifetime is not rendered invalid simply because the trust was not created until property was transferred to the trustee at a much later date, including by contract after the settlor's death. A pourover devise to a previously unfunded trust is also valid and may constitute the property interest creating the trust. *See* Uniform Testamentary Additions to Trusts Act § 1 (1991), *codified at* Uniform Probate Code § 2-511 (pourover devise to trust valid regardless of existence, size, or character of trust corpus). *See also* Restatement (Third) of Trusts § 19

(Tentative Draft No. 1, approved 1996).

While this section refers to transfer of property to a trustee, a trust can be created even though for a period of time no trustee is in office. *See* Restatement (Third) of Trusts § 2 cmt. g (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts § 2 cmt. i (1959). A trust can also be created without notice to or acceptance by a trustee or beneficiary. *See* Restatement (Third) of Trusts § 14 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts §§ 35-36 (1959).

The methods specified in this section are not exclusive. Section 102 recognizes that trusts can also be created by special statute or court order. *See also* Restatement (Third) of Trusts § 1 cmt. a (Tentative Draft No. 1, approved 1996); Uniform Probate Code § 2-212 (elective share of incapacitated surviving spouse to be held in trust on terms specified in statute); Uniform Probate Code § 5-411(a)(4) (conservator may create trust with court approval); Restatement (Second) of Trusts § 17 cmt. i (1959) (trusts created by statutory right to bring wrongful death action).

A trust can also be created by a promise that creates enforceable rights in a person who immediately or later holds these rights as trustee. *See* Restatement (Third) of Trusts §10(e) (Tentative Draft No. 1, approved 1996). A trust thus created is valid notwithstanding that the trustee may resign or die before the promise is fulfilled. Unless expressly made personal, the promise can be enforced by a successor trustee. For examples of trusts created by means of promises enforceable by the trustee, see Restatement (Third) of Trusts § 10 cmt. g (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts §§ 14 cmt. h, 26 cmt. n (1959). A trust created by self-declaration is best created by reregistering each of the assets that comprise the trust into the settlor's name as trustee. However, such reregistration is not necessary to create the trust. *See, e.g., In re Estate of Heggstad*, 20 Cal. Rptr. 2d 433 (Ct. App. 1993); Restatement (Third) of Trusts§ 10 cmt. e (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts § 17 cmt. a (1959).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. But such practice can make it difficult to later confirm title with third party transferees and for this reason is not recommended.

	While a trust created by will may come into existence immediately at the testator's death and not necessarily only upon the later transfer of title from the personal representative, Section 701 makes clear that the nominated trustee does not have a duty to act until there is an acceptance of the trusteeship, express or implied. To avoid an implied acceptance, a nominated testamentary trustee who is monitoring the actions of the personal representative but who has not yet made a final decision on acceptance should inform the beneficiaries that the nominated trustee has assumed only a limited role. The failure so to inform the beneficiaries could result in liability if misleading conduct by the nominated trustee causes harm to the trust beneficiaries. *See* Restatement (Third) of Trusts § 35 cmt. b (Tentative Draft No. 2, approved 1999). While this section confirms the familiar principle that a trust may be created by means of the exercise of a power of appointment (paragraph (3)), this Code does not legislate comprehensively on the subject of powers of appointment but addresses only selected issues. *See* Sections 302 (representation by holder of general testamentary power of appointment); 505(b) (creditor claims against holder of power of withdrawal); and 603(d) (rights of holder of power of withdrawal). For the law on powers of appointment generally, see Restatement (Second) of Property: Donative Transfers §§ 11.1-24.4 (1986); Restatement (Third) of Property: Wills and Other Donative Transfers (in progress).
5. COLORADO COMMITTEE COMMENTS	This section describes the various methods by which a trust may be created, the funding of trusts and conveyance of trust property. The comment to this section notes that this section follows the Restatement of Trust sections. *See* Restatement (Second) of Trusts §17 (1959); Restatement (Third) of Trusts §10 (Tentative Draft No. 1, 1996). Additionally, the comments explain that while creation of a trust through exercise of a power of appointment is recognized under subsection (3), the UTC only addresses certain issues regarding powers of appointment. Although not specifically stated in 401, the comments state that creation of a trust will require receipt of property by the trust to be valid. The drafters refer to the Restatement (Third) of Trust §41 (Preliminary Draft No. 3, 1997) and UTC definition of property in §1-105(10) to determine the adequacy of property interest. The comments also note that courts and special statutes may also create trusts, citing as examples UPC §2-212 (relating to trusts to hold elective share where the surviving spouse is incapacitated) and UPC §5-407 (relating to conservatorship trusts created with court approval).

This section also closely follows the description by Professor Scott regarding Methods of Creating a Trust. See 1 Scott of Trusts §17-17.5 (Fratcher ed. 1987).

Subsection (b) was deleted in 2000. It addressed funding concerns for both self-declarations of trusts and trusts where the settlor is not the trustee. That subsection recognized that no separate documents of transfer are required to convey property to the trust, and allow an attached schedule listing trust property. However, the comments recommended that separate instruments of transfer be executed whenever possible.

This section expands and clarifies existing Colorado common law regarding creation of trusts. This section tracks the Restatement provisions regarding methods of creating trusts. Subsection (b) (that was deleted) essentially followed the Colorado Court of Appeals approach in *Granberry* by allowing property to be identified in the terms of the trust when the trust is created by a declaration of trust. Comments to the Restatement (Third) of Trusts and other jurisdictions have followed the rule set forth in subsection (b) and have not required separate conveyance documents to transfer property to a trustee. *See Taliaferro v. Taliaferro*, 921 P.2d 803 (Kan. 1996) (holding no separate conveyance documents necessary to fund trust created by declaration of trust); *Ballard v. McCoy*, 247 Va. 513, 443 S.E.2d 146 (Va. 1994) (holding same); *Estate of Heggstad*, 16 Cal. App. 4th 943, 20 Cal. Rptr. 443 (1993) (holding same); Restatement (Third) of Trusts (Tentative Draft No. 1, 1996) §10, cmt. e on clause (c). The comments to Restatement (Third) of Trusts §10 states that no transfer of title to property is necessary in a declaration of trust, and that language declaring the owner as trustee of property listed in an attached schedule will establish a trust. However, allowing a trust instrument to serve as a deed of conveyance as contemplated under subsection (b) when the trust is not created by a declaration of trust, is somewhat more controversial as this issue has not been addressed by statute or case law in Colorado. It should be noted that although subsection (b) allows a trust instrument to serve as a deed of conveyance, the comments suggest separate documents be used.

2005 Amendment

Subsection (4) has been added to make it clear that a trust can also be created

	by operation of a statute or by a judgment or decree such as, but not limited to, a trust created in accordance with OBRA 93 (e.g. a disability trust authorized under 15-14-412.8 C.R.S.)
6. COLORADO LAW	There are no Colorado statutes regarding methods of creating a trust per se, however there are statutes regarding transferring ownership of property to a trust. Under C.R.S. §38-10-106, any conveyance of land must be in writing subscribed by the party creating the interest. If property is conveyed to a trustee, the provisions of C.R.S. §38-30-108 apply, and the instrument must name the beneficiary of the trust and define the trust agreement, or refer to "an instrument, order, decree, or other writing which is of public record in the county in which the land so conveyed is located in which such matters appear."Colo. Rev. Stat. §38-30-108 (1998). If the provisions of C.R.S. §38-30-108 are not complied with, the conveyance will be deemed to have been made to the trustee in his or her individual capacity. *See Lackner v. King,* 1998 WL 326899 (Colo. App. Jun.11, 1998), 98 Colo.J. C.A.R. 3037. If property is conveyed directly to the trust, rather than to the trustee, the provisions of C.R.S. §38-30-166 apply, and a trust affidavit containing the information in C.R.S. §38-30-166(2) must be recorded prior to the time the deed is recorded. Effective August 2001, C.R.S. §38-30-166 was amended to only apply to joint ventures, C.R.S. §38-30-108 was amended, and C.R.S. §38-30-108.5 was adopted, making clear that real and personal property may be acquired in the name of a trust. Although there is very little Colorado case law directly related to conveyances to trusts, Colorado does require the settlor to "'indicate with reasonable definiteness an intention to sever the legal from the equitable estate.'" *The Exchange Nat'l Bank of Colo. Springs v. Sparkman*, 191 Colo. 534, 537, 554 P.2d 1090, 1092 (1976). Colorado courts have often combined the requirements regarding methods of creating a trust with the general requirements for creation of a trust. In *Estate of Granberry*, the Colorado Court of Appeals stated that the elements to create an express private trust in property include capacity, intent, "declaration of trust or a present disposition of the res, an identifiable trust res" and identifiable beneficiaries. 30 Colo.App. 590, 596, 498P.2d 960, 963 (1972). A few years after *Granberry*, the Court of Appeals in *Estate of Brenner* stated that the creation of a valid express trust also required "taking steps necessary to declare a trust." 37 Colo.App. 271, 273, 547 P.2d 938, 941 (1976). It should be noted that the issue of whether the language in a trust instrument effectively transfers property to the trust has not been addressed by Colorado courts.

7. RECOMMENDATIONS	At the September 1998 meeting, the general committee adopted this section as is. After the July 2000 draft deleted subsection (b), the controversial provision was no longer an issue, and the statute was affirmed as is at the January 2001 meeting. At the September 2005 meeting the committee approved the 2005 amendment.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 4
CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUST

1. UTC SECTION	402
2. SUBJECT	REQUIREMENTS FOR CREATION
3. UTC STATUTE	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;~~ (1) Either: (A) The settlor has capacity to create a trust and indicates an intention to create a trust; or (B) a statute, judgment or decree authorizes creation of a trust; ~~(3)~~(2) the trust has a definite beneficiary or is: (A) a charitable trust; (B) a trust for the care of an animal, as provided in Section ~~408~~15-11-901; or (C) a trust for a noncharitable purpose, as provided in Section ~~409~~ 15-11-901; ~~(4)~~ (3) the trustee has duties to perform; and ~~(5)~~(4) 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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	Subsection (a) codifies the basic requirements for the creation of a trust. To create a valid trust, the settlor must indicate an intention to create a trust. *See* Restatement (Third) of Trusts § 13 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts § 23 (1959). But only such manifestations of intent as are admissible as proof in a judicial proceeding may be considered. *See* Section 103(17) ("terms of a trust" defined).

To create a trust, a settlor must have the requisite mental capacity. To create a revocable or testamentary trust, the settlor must have the capacity to make a will. To create an irrevocable trust, the settlor must have capacity during lifetime to transfer the property free of trust. *See* Section 601 (capacity of settlor to create revocable trust), and *see generally* Restatement (Third) of Trusts § 11 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts §§ 18-22 (1959); and Restatement (Third) of Property: Wills and Other Donative Transfers §8.1 (Tentative Draft No. 3, 2001).

Subsection (a)(3) requires that a trust, other than a charitable trust, a trust for the care of an animal, or a trust for another valid noncharitable purpose, have a definite beneficiary. While some beneficiaries will be definitely ascertained as of the trust's creation, subsection (b) recognizes that others may be ascertained in the future as long as this occurs within the applicable perpetuities period. The definite beneficiary requirement does not prevent a settlor from making a disposition in favor of a class of persons. Class designations are valid as long as the membership of the class will be finally determined within the applicable perpetuities period. For background on the definite beneficiary requirement, see Restatement (Third) of Trusts §§ 44-46 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 112-122 (1959).

Subsection (a)(4) recites standard doctrine that a trust is created only if the trustee has duties to perform. *See* Restatement (Third) of Trusts § 2 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts § 2 (1959). Trustee duties are usually active, but a validating duty may also be passive, implying only that the trustee has anobligation not to interfere with the trustee's enjoyment of the trust property. Such passive trusts, while valid under this Code, may be terminable underthe enacting jurisdiction's Statute of Uses. *See* Restatement (Third) of Trusts § 6 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts §§ 67-72 (1959).

Subsection (a)(5) addresses the doctrine of merger, which, as traditionally stated, provides that a trust is not created if the settlor is the sole trustee and sole beneficiary of *all* beneficial interests. The doctrine of merger has been inappropriately applied by the courts in some jurisdictions to invalidate self-declarations of trust in which the settlor is the sole life beneficiary but other persons are designated as beneficiaries of the remainder. The doctrine of merger is properly applicable only if all beneficial interests, both life interests and remainders, are vested in the same person, whether in the settlor or someone else. An example of a trust to which the doctrine of merger would apply is a trust of which the settlor is sole trustee, sole beneficiary for

	life, and with the remainder payable to the settlor's probate estate. On the doctrine of merger generally, see Restatement (Third) of Trusts § 69 (Tentative Draft No. 3, 2001); Restatement (Second) of Trusts § 341 (1959). Subsection (c) allows a settlor to empower the trustee to select the beneficiaries even if the class from whom the selection may be made cannot be ascertained. Such a provision would fail under traditional doctrine; it is an imperative power with no designated beneficiary capable of enforcement. Such a provision is valid, however, under both this Code and the Restatement, if there is at least one person who can meet the description. If the trustee does not exercise the power within a reasonable time, the power fails and the property will pass by resulting trust. *See* Restatement (Third) of Trusts § 46 (Tentative Draft No. 2, approved 1999). *See also* Restatement (Second) of Trusts § 122 (1959); Restatement (Second) of Property: Donative Transfers § 12.1 cmt. e (1986).
5. COLORADO COMMITTEE COMMENTS	This section addresses the requirements for trust creation regardless of the method used under UTC §401. Subsection (a) is substantially similar to the Restatement of Trusts requirements for the creation of a trust. *See* Restatement (Second) of Trusts §23, 25 (1959); Restatement (Third) of Trusts §13 (Tentative Draft No. 1, 1996). The comments cross reference the definition of "terms of a trust" in UTC 1-105(17), noting that the manifestations of intent considered must be admissible. Citing Restatement (Third) of Trusts §11 (Tentative Draft No. 1, 1996) and UTC §3-101, the UTC comments note that the settlor must have the requisite mental capacity to create a trust, including the capacity to make a will in the case of a revocable or testamentary trust, and the capacity to transfer property free of trust in the case of an irrevocable trust. Under the Restatement, testamentary trusts and revocable inter vivos trusts require the capacity necessary to "devise or bequeath the property free of trust" and irrevocable inter vivos trusts and declarations of trust require the capacity necessary to make an inter vivos transfer free of Trust. Restatement (Third) of Trusts §11(a) (Tentative Draft No. 1, 1996). Additionally, a trust created by a power of appointment requires the capacity necessary "to make an effective transfer of owned property of like type to the trustee of a trust that is similar in testamentary, revocable or irrevocable character." Restatement (Third) of Trusts §11, cmt. d. (Tentative Draft No. 1, 1996); Restatement (Second) of Trusts §§18-22 (1959). Subsection (a)(3) requires definite or definitely ascertainable beneficiaries for trusts other than charitable trusts, pet trusts, and other noncharitable purpose trusts. So long as the beneficiary can be ascertained within the perpetuities period, or is a member of a class which can be

	determined within the perpetuities period, the trust will be valid. The UTC comments note that the Subsection (c) provision validating a trustee's power to select beneficiaries from an indefinite class would fail under traditional doctrine, but that it is valid under the UTC and the Restatement of Trusts. This section recognizes only trusts created voluntarily and not those established by court order. **2005 Amendment** This section has been modified by the Colorado committee to make it clear that a trust may be created by judgment or decree pursuant to a statute. For example, but not in limitation, a trust may be created on behalf of an incapacitated settlor per OBRA 93. In Colorado such a trust is authorized under section 15-14-412.8 C.R.S. For example, a disability trust on behalf of an incapacitated settlor per Title XIX of the federal "Social Security Act," 42 U.S.C. See section 1396 p(d)(4) is valid.
6. COLORADO LAW	There are no Colorado statutes regarding requirements for creation of a trust. As mentioned above, Colorado courts have tended to combine the methods of trust creation and the elements necessary to create a trust. However, it is well established that capacity, intent to create a trust and identifiable or ascertainable beneficiaries are requirements for a valid trust in Colorado. *In re Estate of Daniels*, 665 P.2d 594, 595 (1983); *In re Estate of Brenner*, 37 Colo.App. 271, 547 P.2d 938 (1976); *In re Estate of Granberry*, 30 Colo.App. 590, 498 P.2d 960 (1972). Colorado courts have not addressed capacity to create a revocable trust or a trust through exercise of a power of appointment. However, Colorado courts have held that testamentary capacity is required to make an inter vivos gift. *See Columbia Savings & Loan Ass'n v. Carpenter*, 33 Colo.App. 360, 521 P.2d 1299 (Colo.App. 1974). Additionally, it appears that contractual capacity is required to create an irrevocable inter vivos trust or a trust by declaration. *See* Susan Fox Buchanan and James W. Buchanan, III, "Mental Competence and Legal Capacity Under Colorado Law: A Question of Consistency," *The Colorado Lawyer*, Vol. I9, No. 9 (Sept. 1990), p. 1813. *See also,* 1 Scott on Trusts, §§18-22 (Fratcher ed. 1985); Restatement (Second) of Trusts §19. *Accord, Estate of Granberry*, 30 Colo.App. 590, 498 P.2d 960 (1972). *Citing Hanks v. McNeil Coal Corp.*, 114 Colo. 578, 168 P.2d 256 (1946), the Colorado Supreme Court in *Davis v. Colorado Kentworth Corp.*, held that a person has contractual capacity if he or she is "capable of understanding and appreciating the extent and effect of business transactions in which he

	engaged." *Davis*, 156 Colo. 98, 103, 396 P.2d 958, 961 (1964).
	The mental capacity required for creation of trusts is not clearly addressed in the language of the UTC. The capacity required for declarations of trust and trusts created by power of appointment are not specifically addressed by the UTC. However the UTC comments refrence Section 601 relating to capacity for creation of revocable and testamentary trusts and go on to state the capacity required for the creation of irrevocable trusts. Additionally, the Restatement (Second and Third) of Trusts addresses the capacity necessary to create trusts. It is noted that the UTC capacity standards stated in §601 and the comments to §402 essentially codify Colorado common law regarding trust capacity and clarify areas that Colorado has not addressed. Under the UTC and Restatement approach, testamentary capacity will be required for revocable inter vivos trusts, testamentary trusts and gifts, while contractual capacity will be required for irrevocable inter vivos trusts and declaration of trusts, and trusts created by power of appointment will require the capacity necessary for the type of trust being created by the power. Traditionally, trusts giving unrestrained discretion to the trustee to select beneficiaries from an indefinite class have failed. However, both the Restatement and other jurisdictions have allowed a trustee to make a distribution where the trust is distributable among an indefinite class. *See In re Rowland's Estate*, 73 Ariz. 337, 241 P.2d 781 (1952); *In re Estate of Schaff*, 19 Ill.App.3d 662, 312 N.E.2d 348 (1974) and *Estate of Stewart*, 325 Pa. Super 545, 473 A.2d 572 (1984)(*aff'd* 485 A.2d 391 (1984)); *See also*, Restatement (Second) of Trusts, §122 cmt. e and notes; Restatement (Second) of Property (Donative Transfers) §12.1, cmt. e and nt. 7. Although the Restatement approach does not validate the trust, it does suggest that instead of allowing a disposition to fail, the provision should be interpreted as creating a power of appointment for the trustee or executor. With regard to determining the settlor's intent to create a trust, Colorado courts have held that "objective expressions [of intent,] such as written documents, words and conduct," are relevant. *In re Estate of Daniels*, 665 P.2d 594, 595 (1983). Although intent may be inferred "from the nature of property transactions, the circumstances surrounding the holding and transfer of property, the particular documents or language used, and the conduct of the parties," the words or conduct must clearly establish intent. *In re Estate of Vallery*, 883 P.2d 24, 27 (Ct. App. 1994). Colorado has traditionally allowed a trustee to select from an indefinite class of beneficiaries where the beneficiaries are charities. *Galiger v. Armstrong et al.*,

	114 Colo. 397, 165 P.2d 1019 (1946). However, there is no Colorado case law addressing whether such a trust would be upheld if the beneficiaries were not charities.
7. RECOMMENDATIONS	We recommend adopting the UTC provision with the above modification to §1-201(a)(2) 402(a)(2)]. The general committee adopted this section with that change in the September 1998 meeting, and reaffirmed it at the January 2001 meeting. At the September 2005 meeting the commitee adopted the 2005 amendment.

UNIFORM TRUST CODE
ARTICLE 4
CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUST

1. UTC SECTION	**403**
2. SUBJECT	**TRUSTS CREATED IN OTHER JURISDICTIONS**
3. UTC STATUTE	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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	The validity of a trust created by will is ordinarily determined by the law of the decedent's domicile. No such certainty exists with respect to determining the law governing the validity of inter vivos trusts. Generally, at common law a trust was created if it complied with the law of the state having the most significant contacts to the trust. Contacts for making this determination include the domicile of the trustee, the domicile of the settlor at the time of trust creation, the location of the trust property, the place where the trust instrument was executed, and the domicile of the beneficiary. *See* 5A Austin Wakeman Scott & William Franklin Fratcher, The Law of Trusts Sections 597, 599 (4th ed. 1987). Furthermore, if the trust has contacts with two or more states, one of which would validate the trust's creation and the other of which would deny the trust's validity, the tendency is to select the law upholding the validity of the trust. *See* 5A Austin Wakeman Scott & William Franklin Fratcher, The Law of Trusts Section 600 (4th ed. 1987). Section 403 extends the common law rule by validating a trust if its creation complies with the law of any of a variety of states in which the settlor or trustee had significant contacts. Pursuant to Section 403, 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 the settlor was domiciled, had a place of abode, or was a national; the trustee was domiciled or had a place of business; or any trust property was located. This section is comparable to Section 2-506 of the Uniform Probate Code,

	which validates wills executed in compliance with the law of a variety of
	places in which the testator had a significant contact. Unlike the UPC, however, Section 403 is not limited to execution of the instrument but applies to the entire process of a trust's creation, including compliance with the requirement that there be trust property. In addition, unlike the UPC, Section 403 validates a trust valid under the law of the domicile or place of business of the designated trustee, or if valid under the law of the place where any of the trust property is located. The section does not supercede local law requirements for the transfer of real property, such that title can be transferred only by recorded deed.
5. COLORADO COMMITTEE COMMENTS	The comments note that this section is similar to the Probate Code, but applies to the entire process of a trust's creation, including compliance with the requirement that there be trust property.
6. COLORADO LAW	This section is similar to 15-11-506, relating to execution of wills in other jurisdictions. That statute reads as follows: "A written will is valid if executed in compliance with section 15-11-502 or 15-11-503 or if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where, at the time of execution or at the time of death, the testator is domiciled, has a place of abode, or is a national."
7. RECOMMENDATIONS	This was added in the February 1999 draft. The committee adopted it as is at the January 2001 meeting.

UNIFORM TRUST CODE
ARTICLE 4
CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUST

1. UTC SECTION	**404**
2. SUBJECT	**TRUST PURPOSES**
3. UTC STATUTE	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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	For an explication of the requirement that a trust must not have a purpose that is unlawful or against public policy, see Restatement (Third) of Trusts §§ 27-30 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts §§ 59-65 (1959). A trust with a purpose that is unlawful or against public policy is invalid. Depending on when the violation occurred, the trust may be invalid at its inception or it may become invalid at a later date. The invalidity may also affect only particular provisions. Generally, a trust has a purpose which is illegal if (1) its performance involves the commission of a criminal or tortious act by the trustee; (2) the settlor's purpose in creating the trust was to defraud creditors or others; or (3) the consideration for the creation of the trust was illegal. *See* Restatement (Third) of Trusts § 28 cmt. a (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 60 cmt. a (1959). Purposes violative of public policy include those that tend to encourage criminal or tortious conduct, that interfere with freedom to marry or encourage divorce, that limit religious freedom, or which are frivolous or capricious. *See* Restatement (Third) of Trusts § 29 cmt. d-h (Tentative Draft No. 2, 1999); Restatement (Second) of Trusts § 62 (1959). does not have beneficiaries in the usual sense, such as a charitable trust or, as provided in Sections 408 and 409, trusts for the care of an animal or other valid noncharitable purpose. The general purpose of trusts having identifiable beneficiaries is to benefit those beneficiaries in accordance with their interests as defined in the trust's terms. The requirement of this section that a trust and its terms be for the benefit of its beneficiaries, which is derived from Restatement (Third) of Trusts § 27(2) (Tentative Draft No. 2, appr. Pursuant to Section 402(a), a trust must have an identifiable beneficiary unless the trust is of a type that moved 1999), implements this general purpose. While a settlor has considerable latitude in specifying how a particular trust purpose is to be pursued, the administrative and other nondispositive trust terms must reasonably relate to this purpose and not divert the trust property to achieve a trust purpose

	that is invalid, such as one which is frivolous or capricious. *See* Restatement (Third) of Trusts § 27 cmt. b (Tentative Draft No. 2, approved 1999). Section 412(b), which allows the court to modify administrative terms that are impracticable, wasteful, or impair the trust's administration, is a specific application of the requirement that a trust and its terms be for the benefit of the beneficiaries. The fact that a settlor suggests or directs an unlawful or other inappropriate means for performing a trust does not invalidate the trust if the trust has a substantial purpose that can be achieved by other methods. *See* Restatement (Third) of Trusts § 28 cmt. e (Tentative Draft No. 2, approved 1999).
5. COLORADO COMMITTEE COMMENTS	This section closely follows both the second and third Restatement of Trusts provisions regarding purposes of a trust. Restatement (Third) of Trusts §§28-29 (Preliminary Draft No. 3, 1997) address the requirement that the purpose not be illegal or against public policy, and section 27 and comment b address the need for a noncharitable trust to benefit its beneficiaries. Charitable trusts, trusts for pets and honorary trusts are not required to have ascertainable beneficiaries. Charitable purpose is defined in UTC to include "the relief of poverty, the advancement of education or religion, the promotion of health, or any other purpose the accomplishment of which is beneficial to the community."
6. COLORADO LAW	There are no Colorado statutes regarding trust purposes. Additionally, trust purposes have been mentioned by the Colorado courts infrequently. In 1892, the Colorado Court of Appeals stated that no trust would be valid when the "conveyance is made for a colorable, illegal or fraudulent purpose." *First Nat'l Bank v. Campbell*, 2 Colo.App. 271, 283, 30 P. 357, 361 (1892) (*rev'd on other grounds*, 22 Colo. 177, 43 P. 1007 (1896)). No other Colorado cases have referenced trust purposes other than those of charitable trusts since that time. The only guidance from Colorado courts regarding charitable trust purposes is a general indication that a charitable purpose is an essential requirement for a valid charitable trust. *See In re Estate of Gardner*, 31 Colo.App. 361, 367, 505 P.2d 50, 52 (1972); *Galiger v. Armstrong*, 114 Colo. 397, 402, 165 P.2d 1019, 1021 (1946).
7. RECOMMENDATIONS	This section clearly states the boundaries of allowable trust purposes, and will add clarity to the current Colorado case law as it addresses purposes for all trusts. The committee adopted this section as is at the September 1998 meeting.

UNIFORM TRUST CODE
ARTICLE 4
CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUST

1. UTC SECTION	**405**
2. SUBJECT	**CHARITABLE PURPOSES; ENFORCEMENT**
3. UTC STATUTE	(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 trustee if authorized by the terms of the trust, or if not, 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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	The required purposes of a charitable trust specified in subsection (a) restate the well-established categories of charitable purposes listed in Restatement (Third) of Trusts § 28 (Tentative Draft No. 3, 2001), and Restatement (Second) of Trusts § 368 (1959), which ultimately derive from the Statute of Charitable Uses, 43 Eliz. I, c.4 (1601). The directive to the courts to validate purposes the achievement of which are beneficial to the community has proved to be remarkably adaptable over the centuries. The drafters concluded that it should not be disturbed. Charitable trusts are subject to the restriction in Section 404 that a trust purpose must be legal and not contrary to public policy. This would include trusts that involve invidious discrimination. *See* Restatement (Third) of Trusts § 28 cmt. f (Tentative Draft No. 3, 2001). Under subsection (b), a trust that states a general charitable purpose does not fail if the settlor neglected to specify a particular charitable purpose or organization to receive distributions. The court may instead validate the trust by specifying particular charitable purposes or recipients, or delegate to the trustee the framing of an appropriate scheme. *See* Restatement (Second) of Trusts § 397 cmt. d (1959). Subsection (b) of this section is a corollary to Section 413, which states the doctrine of cy pres. Under Section 413(a), a trust failing to state a general charitable purpose does not fail upon failure of

	the particular means specified in the terms of the trust. The court must instead
	apply the trust property in a manner consistent with the settlor's charitable purposes to the extent they can be ascertained. Subsection (b) does not apply to the long-established estate planning technique of delegating to the trustee the selection of the charitable purposes or recipients. In that case, judicial intervention to supply particular terms is not necessary to validate the creation of the trust. The necessary terms instead will be supplied by the trustee. *See* Restatement (Second) of Trusts § 396 (1959). Judicial intervention under subsection (b) will become necessary only if the trustee fails to make a selection. *See* Restatement (Second) of Trusts § 397 cmt. d (1959). Pursuant to Section 110(b), the charitable organizations selected by the trustee would not have the rights of qualified beneficiaries under this Code because they are not expressly designated to receive distributions under the terms of the trust. Contrary to Restatement (Second) of Trusts § 391 (1959), subsection (c) grants a settlor standing to maintain an action to enforce a charitable trust. The grant of standing to the settlor does not negate the right of the state attorney general or persons with special interests to enforce either the trust or their interests. For the law on the enforcement of charitable trusts, see Susan N. Gary, *Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law*, 21 U. Hawaii L. Rev. 593 (1999).
5. COLORADO COMMITTEE COMMENTS	Restatement of the Law Second (which has been embraced by the Colorado Supreme Court) requires court approval unless under the terms of the trust the trustee is authorized to apply the trust property to any charitable purpose which he may select. Section 396. The burden of contesting the charitable selection by trustee should be left to the objecting party to have court review rather than requiring trustee to apply first to the court, incurring an additional expense in each case.
6. COLORADO LAW	Estate of Gardner v. First National Bank, 31 Colo. App. 361, 505 P.2d 50, cert denied 1-29-73, indicated that if the testator provides some method or means of selecting from a class or group, the trustee has the authority to select particular beneficiaries.

7. RECOMMENDATIONS	The committee recommends adopting Section 405 with the addition of language clearly enabling the trustee, if authorized by the terms of the trust, to select charitable beneficiaries or purposes.

UNIFORM TRUST CODE
ARTICLE 4
CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUST

1. UTC SECTION	406
2. SUBJECT	CREATION OF TRUST INDUCED BY FRAUD, DURESS OR UNDUE INFLUENCE
3. UTC STATUTE	A trust is void to the extent its creation was induced by fraud, duress, or undue influence.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section is a specific application of Restatement (Third) of Trusts § 12 (Tentative Draft No. 1, approved 1996), and Restatement (Second) of Trusts § 333 (1959), which provide that a trust can be set aside or reformed on the same grounds as those which apply to a transfer of property not in trust, among which include undue influence, duress, and fraud, and mistake. This section addresses undue influence, duress, and fraud. For reformation of a trust on grounds of mistake, see Section 415. See also Restatement (Third) of Property: Wills and Other Donative Transfers § 8.3 (Tentative Draft No. 3, 2001), which closely tracks the language above. Similar to a will, the invalidity of a trust on grounds of undue influence, duress, or fraud may be in whole or in part.
5. COLORADO COMMITTEE COMMENTS	This section was added in the February 1999 draft. The comments note that a trust is void if created under undue influence, duress or fraud, but that it can be reformed on grounds of mistake (section 414). The invalidity may be in whole or in part. This statute deleted reference to "mistake" and only addresses fraud, duress and undue influence. Mistake is addressed in section 415.
6. COLORADO LAW	Colorado does not have a statutory provision on this issue. Colorado courts have long recognized undue influence as a reason to attack the validity of a will. *Blackman v. Edsall*, 17 Colo.App. 429, 68 p. 790 (1902). A presumption of undue influence arises where there is a confidential or fiduciary relationship between the beneficiary and the person making the will. This concept has also been applied to inter vivos transfers, so it should be applicable to trusts. *Judkins v. Carpenter*, 189 Colo. 95, 537 P.2d 737 (1975) (concerned joint tenancy bank account). Colorado courts have also recognized fraud, duress and mistake as reasons to hold a will invalid. Fraud involves action by the testator based on a false or mistaken belief resulting from another person's misconduct with the intent to deceive the testator. There may be fraud in the execution (testator does not know he is signing his will), or fraud in the

	inducement (the terms of the will are not what the testator thinks they are).
	Duress is the use of force to destroy the intent of the testator, and is often confused with undue influence. Mistake results from the testator's reliance on false data and is not necessarily based upon the actions of a beneficiary or other person who may benefit. If these elements are found to exist, the will may be found to be completely invalid, or only as to part. In *in re Holmes*, 98 Colo. 360, 56 P.2d 1333 (1936), the will was void as to the beneficiary guilty of fraud, but not as to the innocent beneficiary.
7. RECOMMENDATIONS	The committee adopted this statute as is at the January 2001 meeting.

UNIFORM TRUST CODE
ARTICLE 4
CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUST

1. UTC SECTION	**407**
2. SUBJECT	**EVIDENCE OF ORAL TRUST**
3. UTC STATUTE	Except as required by a statute other than this [Code], 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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	While it is always advisable for a settlor to reduce a trust to writing, the Uniform Trust Code follows established law in recognizing oral trusts. Such trusts are viewed with caution, however. The requirement of this section that an oral trust can be established only by clear and convincing evidence is a higher standard than is in effect in many States. *See* Restatement (Third) of Trusts § 20 Reporter's Notes (Tentative Draft No. 1, approved 1996). Absent some specific statutory provision, such as a provision requiring that transfers of real property be in writing, a trust need not be evidenced by a writing. States with statutes of frauds or other provisions requiring that the creation of certain trusts must be evidenced by a writing may wish specifically to cite such provisions. For the Statute of Frauds generally, see Restatement (Second) of Trusts §§ 40-52 (1959). For a description of what the writing must contain, assuming that a writing is required, see Restatement (Third) of Trusts § 22 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts § 46-49 (1959). For a discussion of when the writing must be signed, see Restatement (Third) of Trusts § 23 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts § 41-42 (1959). For the law of oral trusts, see Restatement (Third) of Trusts § 20 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts §§ 43-45 (1959).
5. COLORADO COMMITTEE COMMENTS	This provision codifies the Restatement (Second) of Trusts, §39, which recognizes that a trust can be created without a writing if no other statute requires a writing. The comments to the Restatement indicate that clear and convincing evidence is generally required to prove an oral trust in states not requiring a writing for a trust in land. Restatement (Second) of Trusts §39, cmt. a (1959). Additionally, Scott recognizes that no writing is required at common law, but then explains that states allowing creation of an oral trust in land require that the trust be proven by clear and convincing evidence. 1 Scott on Trusts §40-40.1 (Fratcher ed. 1985). The UTC comments note that states which do

	require writings under other provisions such as the Statute of Frauds may want
	to specifically reference those provisions in this section. This section acknowledges that other statutes, such as the Statute of Frauds or Statute of Wills may require a writing to validate a trust, but recognizes that courts have enforced oral trusts where evidence supports such a finding. Although the standard of proof is high to establish oral trusts, the lack of certainty where there is no writing requires this level of proof in order to avoid fraud and other abuses. Additionally, this standard is in line with the Colorado Probate Code requirement of clear and convincing evidence with regard to decedent's intent.
6. COLORADO LAW	There are no Colorado statutes regarding evidence of an oral trust. Additionally, Colorado courts have not addressed this issue in much detail. Although there are no cases specifically stating that oral trusts are allowable, the requirements commonly cited by Colorado courts to establish a trust indicate that language or conduct of the parties can be used to create a trust. *See, Goemmer v. Hartman,*791 P.2d 1238 (Ct. App. 1990); *Bishop and Diocese of Colo. v. Mote*, 716 P.2d 85 (Colo. 1986); and *Estate of Daniels*, 665 p.2d 594 (Colo. 1983). Colorado has required clear and convincing evidence to establish an oral trust, especially where the statute of frauds applies. *See, Nesmith v. Martin,* 32 Colo. 77, 75 P. 590 (1904). The court has even required that there be proof beyond a reasonable doubt where a party attempts to "establish an oral express trust for the use of one, other than the beneficiary, in the proceeds of a life insurance policy..." holding that the evidence "should be equally as strong as parol evidence to establish a resulting trust in real property." *Fee v. Wells*, 65 Colo. 348, 354, 176 P. 829, 832 (Colo. 1918). The burden of establishing clear and convincing evidence has also been required to establish a constructive trust. *See, Austin v. Wysowatcky*, 511 P.2d 526 (Colo.App. 1973). Note that the burden of proof for all civil actions initiated after July 1, 1971, including most probate matters is a preponderance of the evidence. C.R.S. §13-25-12 (1998). However, the Colorado Probate Code does apply the clear and convincing standard to ascertain the decedent's intent under both §15-11-503 (relating to writings intended as Wills) and §15-11-507 (revocation by writing or act).
7. RECOMMENDATIONS	The committee recommends that specific citations to the statutory requirements of writings under Colorado Revised Statutes §38-10-101, et. seq., the Statute of Frauds, and §15-11-502 and 15-11-503, relating to the writing requirement of wills, should be included in official comments to this section. The general committee approved

	adopting this section as is, with those cross references, at the September 1998 meeting.

UNIFORM TRUST CODE
ARTICLE 4
CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUST

1. UTC SECTION	**408**
2. SUBJECT	**TRUST FOR CARE OF ANIMAL**
3. UTC STATUTE	[RESERVED] ~~(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 the 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 the 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.~~
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section and the next section of the Code validate so called honorary trusts. Unlike honorary trusts created pursuant to the common law of trusts, which are arguably no more than powers of appointment, the trusts created by this and the next section are valid and enforceable. For a discussion of the common law doctrine, see Restatement (Third) of Trusts § 47 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 124 (1959). This section addresses a particular type of honorary trust, the trust for the care of an animal. Section 409 specifies the requirements for trusts without ascertainable beneficiaries that are created for other noncharitable purposes. A trust for the care of an animal may last for the life of the animal. While the animal will ordinarily be alive on the date the trust is created, an animal may be added as a beneficiary after that date as long as the addition is made prior to the settlor's death. Animals in gestation but not yet born at the time of the trust's creation may also be covered by its terms. A trust authorized by this section may be created to benefit one designated animal or several

	designated animals.
	Subsection (b) addresses enforcement. Noncharitable trusts ordinarily may be enforced by their beneficiaries. Charitable trusts may be enforced by the State's attorney general or by a person deemed to have a special interest. *See* Restatement (Second) of Trusts § 391 (1959). But at common law, a trust for the care of an animal or a trust without an ascertainable beneficiary created for a noncharitable purpose was unenforceable because there was no person authorized to enforce the trustee's obligations. Sections 408 and 409 close this gap. The intended use of a trust authorized by either section may be enforced by a person designated in the terms of the trust or, if none, by a person appointed by the court. In either case, Section 110(b) grants to the person appointed the rights of a qualified beneficiary for the purpose of receiving notices and providing consents. If the trust is created for the care of an animal, a person with an interest in the welfare of the animal has standing to petition for an appointment. The person appointed by the court to enforce the trust should also be a person who has exhibited an interest in the animal's welfare. The concept of granting standing to a person with a demonstrated interest in the animal's welfare is derived from the Uniform Guardianship and Protective Proceedings Act, which allows a person interested in the welfare of a ward or protected person to file petitions on behalf of the ward or protected person. *See, e.g.*, Uniform Probate Code §§ 5-210(b), 5-414(a). Subsection (c) addresses the problem of excess funds. If the court determines that the trust property exceeds the amount needed for the intended purpose and that the terms of the trust do not direct the disposition, a resulting trust is ordinarily created in the settlor or settlor's successors in interest. *See* Restatement (Third) of Trusts § 47 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 124 (1959.) Successors in interest include the beneficiaries under the settlor's will if the settlor has a will, or in the absence of an effective will provison, the settlor's heirs. The settlor may also anticipate the problem of excess funds by directing their disposition in the terms of the trus. The disposition of excess funds is within the settlor's control. *See* Section 105(a). While a trust for an animal is usually not created until the settlor's death, subsection (a) allows such a trust to be created during the settlor's lifetime. Accordingly, if the settlor is still living, subsection (c) provides for distribution of excess funds to the settlor, and not to the settlor's successors in interest.

	Should the means chosen not be particularly efficient, a trust created for the care of an animal can also be terminated by the trustee or court under Section 414. Termination of a trust under that section, however, requires that the trustee or court develop an alternative means for carrying out the trust purposes. *See* Section 414(c). This section and the next section are suggested by Section 2-907 of the Uniform Probate Code, but much of this and the following section is new.
5. COLORADO COMMITTEE COMMENTS	This section and section 409 validate the so-called honorary trusts. Unlike honorary trusts created under the common law of trusts, which are arguably no more than unenforceable powers of appointment, the trusts created by this section are valid and enforceable and not dependent on the trustee deciding on whether to honor the settlor's wishes. For a discussion of the common law doctrine, see Restatement (Third) of Trusts Sec. 48 (Prel. Draft No. 3, 1997). Section 408 addresses a particular type of honorary trust, the trust for the care of a pet animal. A trust for the care of a pet animal may last for the life of the animal. Upon termination of a pet trust, a resulting trust is ordinarily created in the settlor unless the terms of the trust provide for a different disposition. See Restatement (Third) of Trusts Section 48 (Prel. Draft No. 3. 1997). Subsections (b) and (c) address administrative issues commonly encountered in connection with honorary trusts. No portion of the trust property of such a trust may be applied other than for its intended use. But if the trust property exceeds the amount needed, provision is made for partial termination. This section is based on Section 2-907 of the Uniform Probate Code but is much less elaborate. The UPC provision also addresses a number of trust issues that are covered elsewhere in this Act. **UPC II Statute** (This is the version of UPC II that Colorado's CPC II Committee used in drafting the current CPC II). (a) Honorary Trust. A trust (i) for a noncharitable corporation or unincorporated society or (ii) for a lawful noncharitable purpose may be performed by the trustee for (21) years but no longer, whether or not there is a beneficiary who can seek the trust's enforcement or a

termination and whether or not the terms of the trust contemplate longer duration.

(b) Trust for Pets. Subject to the provisions of this subsection, a trust for the care of a designated domestic or pet animal and the animal's offspring is valid. Except as expressly provided otherwise in the trust instrument:

(1) No portion of the principal or income may be converted to the use of the trustee or to any use other than for the benefit of the covered animal or animals.

(2) The trust terminates at the earlier of (21) years after the trust was created or when no living animal is covered by the trust. Upon termination, the trustee shall transfer the unexpended trust property in the following order:

(i) as directed in the trust instrument.

(ii) if the trust was created in a nonresiduary clause in the transferor's will or in a codicil to the transferor's will, under the residuary clause in the transferor's will; for purposes of Section 2-707, the residuary clause is treated as creating a future interest under the terms of a trust.

(iii) if no taker is produced by the application of subparagraphs (i) or (ii), to the transferor's heirs under Section 2-711.

(3) The intended use of the principal and income can be enforced by an individual designated for that purpose in the trust instrument or, if none, by an individual appointed by a court upon application to it by an individual.

(4) Except as ordered by the court or required by the trust instrument, no filing, report, registration, periodic accounting, separate maintenance of funds, appointment or fee is required by reason of the existence of the fiduciary relationship of the trustee.

(5) A governing instrument must be liberally construed to bring the transfer within this section, to presume against the merely precatory or honorary nature of the disposition, and to carry out the general intent of the transferor. Extrinsic evidence is admissible in

	determining the transferor's intent.
	(6) A court may reduce the amount of the property transferred, if it determines that that amount substantially exceeds the amount required for the intended use. The amount of the reduction, if any, passes as unexpended trust property under subsection (b)(2). (7) If no trustee is designated or if no designated trustee agrees to serve or is able to serve, a court shall name a trustee. A court may order the transfer of the property to another trustee, if required to assure that the intended use is carried out and if no successor trustee is designated in the trust instrument or if no designated successor trustee agrees to serve or is able to serve. A court may also make such other orders and determinations as shall be advisable to carry out the intent of the transferor and the purpose of this section. When Colorado adopted UPC II, the legislature adopted a pets trust. Colorado made changes to the act at that time. The committee is unaware of any problems that have arisen with the statute as adopted in 1994. The committee decided at the May 1998 meeting to keep Colorado's existing pets trust. Although the Comment to UTC states that the statute is based on UPC Section 2-907, it differs substantially from the actual language of UPC II. The (CBA) CPC Sub-Committee of the Statutory Revisions Committee of the Probate Section of the CBA studied this statute in detail and had numerous discussions on the issues involved. The Sub-Committee decided on the language which is now Colorado law. It seems unnecessary to revisit these issues or to change the current Colorado law. As for the UTC comment that they did not fully follow the UPC provision because it "also addresses a number of trust issues that are covered elsewhere in this Act": As stated above, we feel that Pets trusts are different from other trusts, and therefore, we recommend that these terms be stated here, even though they may also be covered in other sections of the UTC. Following are some of the rationales of the Sub-Committee in coming to its conclusions:

	The CPC II committee recognized that persons wishing to create a Pets Trust do so for emotional reasons: to assure that their Pet(s), whom they consider as a family member, should be well cared for throughout its life(s).
	Because our Committee has also taken the position that Pets trusts are special and different from other trusts, we felt that the statute regarding such trusts should reflect this view. Before the enactment of this statute, one could not be sure that a pets trust would would be upheld by the Courts as valid under the Rule Against Perpetuities, because the case law seemed to be split as to whether or not the Rule Against Perpetuities requires that the trust's measuring life be human or animal. In order to avoid any confusion, UPC II has made Pets Trusts a Statutory exception to the Rule Against Perpetuities. In addition, our Committee recognized that a limit on duration of 21 years would not necessarily accomplish the transferor's goal, since some animals, such as horses, can live for more than 21 years; and took note of the California Statute passed in response to this UPC II provision, which allows Pets trusts to continue for the lifetime(s) of the designated Pet(s). Further, we recognized that the transferor may wish to provide for the offspring of such pets, as provided in the UPC II language. However, we felt that there should be some limit to the duration of such trusts. Therefore, we changed the language to state that a Pets trust can be set up for the care of a designated pet(s) and its offspring, and can continue for the entire lifetime(s) of the designated pet(s) but only for the lifetime(s) of its offspring which are in gestation at the time that the trust begins its care of such pets. UPC Sub-paragraph (b)(2). CPC Paragraph (2). Our Committee wanted to be sure that a trustee would not be prevented from expending trust funds for normal administration costs and fees, thus the added language. UPC Sub-paragraph (b)(1). CPC Sub-paragraph 3(a). Our Committee added two additional persons who would be able to enforce the trust without the necessity of petitioning the Court for permission to do so: The caretaker of the animal(s) for whose care the trust was created, as he or she would be an advocate for such animal(s); and The remainder beneficiary, who should have a method of protecting their interests. UPC Sub-paragraph (b)(3). CPC Sub-paragraph 3(d). OurCommittee wanted to make it clear that such trusts

	should be subject to the same rights and restrictions regarding administration that all other trusts are subject to. Therefore, we have deleted entirely UPC Sub-paragraph (b)(4), which exempted such trusts from reporting, registration, etc.; and we have added CPC Sub-paragraph (3)(e): Registration, Fiduciary Duties.
	Our Committee felt that a person should be able to do what they want to do with their funds, and that a Court should not therefore have the authority to override the transferor's decision or wishes by reducing the amount of principal to be placed in such a trust. Thus, we deleted UPC Sub-paragraph (b)(6). Finally, our Committee totally agreed with the concepts and language proposed by UPC II regarding: - Designation of how the remainder of the trust assets will pass after the death of the specified animal(s), if not otherwise provided for in the trust instrument. UPC Sub-paragraphs (b)(2)(i), (ii), and (iii). CPC Sub-paragraphs (3)(b)(I), (II), and (III). -The direction that such an instrument be liberally construed to carry out the general intent of the transferor, and allowing extrinsic evidence in determining such intent. UPC Sub-paragraph (b)(5). CPC Paragraph (2).
6. COLORADO LAW	**15-11-901. Honorary Trusts; trusts for pets.** (1) Honorary Trust. Subject to subsection (3) of this section, and except as provided under sections 38-30-110, 38-30-111 and 38-30-112, C.R.S., if (i) a trust is for a specific, lawful, noncharitable purpose or for lawful, noncharitable purposes to be selected by the trustee, and (ii) there is no definite or definitively ascertainable beneficiary designated, the trust may be performed by the trustee for (21) years but no longer, whether or not the terms of the trust contemplate a longer duration. (2) Trust for pets. Subject to this subsection (2) and subsection (3) of this section, a trust for the care of designated domestic or pet animals and the animals' offspring in gestation is valid. For purposes of this subsection (2), the determination of the "animals' offspring in gestation" is made at the time the designated domestic or pet animals become present beneficiaries of the trust. Unless the trust instrument provides for an earlier termination, the trust terminates when no living animal is covered by the trust. A governing instrument shall be liberally construed to bring the transfer within this subsection (2), to presume against the merely precatory or honorary nature of the

	disposition, and to carry out the general intent of the transferor. Extrinsic evidence is admissible in determining the transferor's intent. Any trust under this subsection (2) shall be an exception to any statutory or common law rule against perpetuities.
	(3) Additional provisions applicable to honorary trusts and trusts for pets. In addition to the provisions of subsection (1) or (2) of this section, a trust covered by either of those subsections is subject to the following provisions: (a) Except as expressly provided otherwise in the trust instrument, no portion of the principal or income may be converted to the use of the trustee, other than reasonable trustee fees and expenses of administration, or to any use other than for the trust's purpose or for the benefit of the covered animal or animals. (b) upon termination, the trustee shall transfer the unexpended trust property in the following order: (I) As directed in the trust instrument; (II) If the trust was created in a nonresiduary clause in the transferor's will or in a codicil to the transferor's will, under the residuary clause in the transferor's will; and (III) If no taker is produced by the application of subparagraph (I) or (II) of this paragraph (b), to the transferor's heirs under Part 5 of this article. (c) (Reserved) (d) The intended use of the principal or income can be enforced by an individual designated for that purpose in the trust instrument, by the person having custody of an animal for which care is provided by the trust instrument, by a remainder beneficiary, or, if none, by an individual appointed by a court upon application to it by an individual. (e) All trusts created under this section shall be registered and all trustees shall be subject to the laws of this state applying to trusts and trustees.

	(f) (Reserved) (g) If no trustee is designated or if no designated trustee is willing or able to serve, a court shall name a trustee. A court may order the transfer of the property to another trustee, if required to assure that the intended use is carried out and if no successor trustee is
	designated in the trust instrument or if no designated successor trustee agrees to serve or is able to serve. A court may also make such other orders and determinations as shall be advisable to carry out the intent of the transferor and the purpose of this section.
7. RECOMMENDATIONS	The committee recommends reserving this section, and relying on Colorado's existing statute.

UNIFORM TRUST CODE
ARTICLE 4
CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUST

1. UTC SECTION	**409**
2. SUBJECT	**NONCHARITABLE TRUST WITHOUT ASCERTAINABLE BENEFICIARY**
3. UTC STATUTE	[RESERVED] ~~Except as otherwise provided in section 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 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 the court.~~ ~~(3) Property of a trust authorized by this section may be applied only to its intended use, except to the extent the 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.~~
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section authorizes two types of trusts without ascertainable beneficiaries; trusts for general but noncharitable purposes, and trusts for a specific noncharitable purpose other than the care of an animal, on which see Section 408. Examples of trusts for general noncharitable purposes include a bequest of money to be distributed to such objects of benevolence as the trustee might select. Unless such attempted disposition was interpreted as charitable, at common law the disposition was honorary only and did not create a trust. Under this section, however, the disposition is enforceable as a trust for a period of up to 21 years, although that number is placed in brackets to indicate that States may wish to select a different time limit. The most common example of a trust for a specific noncharitable purpose is a trust for the care of a cemetery plot. The lead-in language to the section recognizes that some special purpose trusts, particularly those for care of cemetery plots, are subject to other statutes. Such legislation will typically

	endeavor to facilitate perpetual care as opposed to care limited to 21 years as under this section. For the requirement that a trust, particularly the type of trust authorized by this section, must have a purpose that is not capricious, see Section 404 Comment. For examples of the types of trusts authorized by this section, see Restatement (Third) of Trusts § 47 (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts § 62 cmt. w and § 124 (1959). The case law on capricious purposes is collected in 2 Austin W. Scott & William F. Fratcher, The Law of Trusts § 124.7 (4th ed. 1987). This section is similar to Section 408, although less detailed. Much of the Comment to Section 408 also applies to this section.
5. COLORADO COMMITTEE COMMENTS	This section was, in earlier drafts and in UPC II, part of the Pets trust section. See the discussion for section 408, above. This section places a twenty-one year limit on the duration of honorary trusts other than pets trusts, such as a trust for the care of a cemetery plot. Trusts and other funding devices for the perpetual care of cemetery plots is a topic frequently addressed by separate legislation. As for the UTC comment that "Trusts and other funding devices for the perpetual care of cemetery plots is a topic frequently addressed by separate legislation," please note that Colorado does have such statutes found at C.R.S. §38-30-110, -111 and -112, as referenced in the Colorado pets trust statute. These types of trusts were usually statutory exceptions to the Rule Against Perpetuities.
6. COLORADO LAW	See the above discussion for pets trusts. The honorary trust section is C.R.S. §15-11-901(1).
7. RECOMMENDATIONS	When Colorado adopted UPC II, the legislature adopted this statute as part of that act. The committee decided at the May 1998 meeting to stay with existing Colorado law.

UNIFORM TRUST CODE
ARTICLE 4
CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUST

1. UTC SECTION	**410**
2. SUBJECT	**MODIFICATION OR TERMINATION OF TRUST; PROCEEDINGS FOR APPROVAL OR DISAPPROVAL**
3. UTC STATUTE (AMENDED)	(a) In addition to the methods of termination prescribed by Sections 411 through 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 Sections 411 through 416, or trust combination or division under Section 417, may be commenced by a trustee or beneficiary. ~~, and a proceeding to approve or disapprove a proposed modification or termination under Section 411 may be commenced by the settlor. The settlor of a charitable trust may maintain a proceeding to modify the trust under Section 413.~~
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	Subsection (a) lists the grounds on which trusts typically terminate. For a similar formulation, see Restatement (Third) of Trusts Section 61 (Tentative Draft No. 3, approved 2001). Terminations under subsection (a) may be in either in whole or in part. Other types of terminations, all of which require action by a court, trustee, or beneficiaries, are covered in Sections 411-414, which also address trust modification. Of these sections, all but Section 411 apply to charitable trusts and all but Section 413 apply to noncharitable trusts. Withdrawal of the trust property is not an event terminating a trust. The trust remains in existence although the trustee has no duties to perform unless and until property is later contributed to the trust. Subsection (b) specifies the persons who have standing to seek court approval or disapproval of proposed trust modifications, terminations, combinations, or divisions. An approval or disapproval may be sought for an action that does not require court permission, including a petition questioning the trustee's distribution upon termination of a trust under $50,000 (Section 414), and a petition to approve or disapprove a proposed trust division or consolidation (Section 417). Subsection (b) makes the settlor an interested person with respect to a judicial proceeding brought by the beneficiaries under Section 411

	to terminate or modify a trust. Contrary to Restatement (Second) of Trusts Section 391 (1959), subsection (b) grants a settlor standing to petition
	the court under Section 413 to apply cy pres to modify the settlor's charitable trust. **2004 Amendment.** For an explanation of why a portion of subsection (b) has been placed in brackets, see the comment to the 2004 Amendment to Section 411.
5. COLORADO COMMITTEE COMMENTS	As discussed in connection with the 2004 amendments to UTC § 411, a state may enact one of two alternative provisions of § 411(a), or may enact neither. If a state enacts neither alternative, it should delete the bracketed cross reference to § 411 from § 410.
6. COLORADO LAW	None.
7. RECOMMENDATIONS	If Colorado enacts either alternative version of § 411(a), it should retain the bracketed language in § 410. If Colorado enacts neither version of § 411(a), the bracketed language in § 410 should be deleted. See discussion of 2004 amendments to § 411.

UNIFORM TRUST CODE
ARTICLE 4
CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUST

1. UTC SECTION	**411**
2. SUBJECT	**MODIFICATION OR TERMINATION OF NONCHARITABLE IRREVOCABLE TRUST BY CONSENT**
3. UTC STATUTE (AMENDED)	~~(a) 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. If upon petition the court finds that the settlor and all beneficiaries consent to the modification or termination of an irrevocable trust, the court shall enter an order approving the modification or termination even if the modification or termination is inconsistent with a material purpose of the trust. A settlor's power to consent to a trust modification or termination may be exercised by an agent under a power or attorney only to the extent expressly authorized by the power of attorney or the terms of the trust, by the settlor's [conservator] with the approval of the court supervising the [conservatorship] if an agent is not so authorized, or by 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.~~ **(a)** ~~(b)~~ Other than a trust established by court order under Title XIX of the federal "Social Security Act," 42 U.S.C. Section 1396 p(d)(4), ~~A~~ a noncharitable irrevocable trust may be terminated upon consent of all of the benficiaries if ~~the court concludes~~: *(i)* the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust; or *(ii)* the settlor waives all material purposes. A noncharitable irrevocable trust may be modified upon consent of all of the beneficiaries if ~~the court concludes~~: *(i)* court concludes that modification is not inconsistent with a material purpose of the trust; or *(ii)* the settlor waives all material purposes. A settlor's power to waive material purposes may be exercised by an agent under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust; by the settlor's [conservator] with the approval of the court supervising the [conservatorship] if an agent is not so authorized; or by 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)** ~~[(c)~~ A spendthrift provision in the terms of the trust is not presumed to constitute a material purpose of the trust.~~]~~ **(c)** ~~(d)~~ Upon termination of a trust under subsection (a) ~~or (b)~~, the trustee shall

	distribute the trust property as agreed by the beneficiaries.
	(d) ~~(c)~~ If not all of the beneficiaries consent to a proposed modification or termination of the trust under subsection (a) ~~or (b)~~, the modification or termination may be approved by the 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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section describes the circumstances in which termination or modification of a noncharitable irrevocable trust may be compelled by the beneficiaries, with or without the concurrence of the settlor. For provisions governing modification or termination of trusts without the need to seek beneficiary consent, see Sections 412 (modification or termination due to unanticipated circumstances or inability to administer trust effectively), 414 (termination or modification of uneconomic noncharitable trust), and 416 (modification to achieve settlor's tax objectives). If the trust is revocable by the settlor, the method of revocation specified in Section 602 applies. Subsection (a), which was placed in brackets pursuant to a 2004 amendment, states the test for termination or modification by the beneficiaries with the concurrence of the settlor. For an explanation of why subsection (a) has been placed in brackets, see the 2004 comment at the end of this section. Subsection (b) states the test for termination or modification by unanimous consent of the beneficiaries without the concurrence of the settlor. The rules on trust termination in Subsections (a)-(b) carries forward the *Claflin* rule, first stated in the famous case of *Claflin v. Claflin*, 20 N.E. 454 (Mass. 1889). Subsection (c) addresses the effect of a spendthrift provision. Subsection (d) directs how the trust property is to be distributed following a termination under either subsection (a) or (b). Subsection (e) creates a procedure for judicial approval of a proposed termination or modification when the consent of less than all of the beneficiaries is available. Under this section, a trust may be modified or terminated over a trustee's objection. However, pursuant to Section 410, the trustee has standing to object to a proposed termination or modification. The settlor's right to join the beneficiaries in terminating or modifying a trust under this section does not rise to the level of a taxable power. *See* Treas. Reg.

	Section 20.2038-1(a)(2). No gift tax consequences result from a termination as
	long as the beneficiaries agree to distribute the trust property in accordance with the value of their proportionate interests. The provisions of Article 3 on representation, virtual representation and the appointment and approval of representatives appointed by the court apply to the determination of whether all beneficiaries have signified consent under this section. The authority to consent on behalf of another person, however, does not include authority to consent over the other person's objection. *See* Section 301(b). Regarding the persons who may consent on behalf of a beneficiary, see Sections 302 through 305. A consent given by a representative is invalid to the extent there is a conflict of interest between the representative and the person represented. Given this limitation, virtual representation of a beneficiary's interest by another beneficiary pursuant to Section 304 will rarely be available in a trust termination case, although it should be routinely available in cases involving trust modification, such as a grant to the trustee of additional powers. If virtual or other form of representation is unavailable, Section 305 of the Code permits the court to appoint a representative who may give the necessary consent to the proposed modification or termination on behalf of the minor, incapacitated, unborn, or unascertained beneficiary. The ability to use virtual and other forms of representation to consent on a beneficiary's behalf to a trust termination or modification has not traditionally been part of the law, although there are some notable exceptions. *Compare* Restatement (Second) Section 337(1) (1959) (beneficiary must not be under incapacity), *with Hatch v. Riggs National Bank,* 361 F.2d 559 (D.C. Cir. 1966) (guardian ad litem authorized to consent on beneficiary's behalf). Subsection (a) also addresses the authority of an agent, conservator, or guardian to act on a settlor's behalf. Consistent with Section 602 on revocation or modification of a revocable trust, the section assumes that a settlor, in granting an agent general authority, did not intend for the agent to have authority to consent to the termination or modification of a trust, authority that could be exercised to radically alter the settlor's estate plan. In order for an agent to validly consent to a termination or modification of the settlor's revocable trust, such authority must be expressly conveyed either in the power or in the terms of the trust. Subsection (a), however, does not impose restrictions on consent by a conservator or guardian, other than prohibiting such action if the settlor is represented by an agent. The section instead leaves the issue of a conservator's or guardian's authority to local law. Many conservatorship statutes recognize

	that termination or modification of the settlor's trust is a sufficiently important transaction that a conservator should first obtain the approval of the court supervising the conservatorship. *See, e.g.*, Unif. Probate Code Section 5 411(a)(4). Because the Uniform Trust Code uses the term "conservator" to refer to the person appointed by the court to manage an individual's property
	Subsection (a) is similar to Restatement (Third) of Trusts Section 65(2) (Tentative Draft No. 3, approved 2001), and Restatement (Second) of Trusts Section 338(2) (1959), both of which permit termination upon joint action of the settlor and beneficiaries. Unlike termination by the beneficiaries alone under subsection (b), termination with the concurrence of the settlor does not require a finding that the trust no longer serves a material purpose. No finding of failure of material purpose is required because all parties with a possible interest in the trust's continuation, both the settlor and beneficiaries, agree there is no further need for the trust. Restatement Third goes further than subsection (b) of this section and Restatement Second, however, in also allowing the beneficiaries to compel termination of a trust that still serves a material purpose if the reasons for termination outweigh the continuing material purpose. Subsection (b), similar to Restatement Third but not Restatement Second, allows modification by beneficiary action. The beneficiaries may modify any term of the trust if the modification is not inconsistent with a material purpose of the trust. Restatement Third, though, goes further than this Code in also allowing the beneficiaries to use trust modification as a basis for removing the trustee if removal would not be inconsistent with a material purpose of the trust. Under the Code, however, Section 706 is the exclusive provision on removal of trustees. Section 706(b)(4) recognizes that a request for removal upon unanimous agreement of the qualified beneficiaries is a factor for the court to consider, but before removing the trustee the court must also find that such action best serves the interests of all the beneficiaries, that removal is not inconsistent with a material purpose of the trust, and that a suitable cotrustee or successor trustee is available. *Compare* Section 706(b)(4), *with* Restatement (Third) Section 65 cmt. f (Tentative Draft No. 3, approved 2001). The requirement that the trust no longer serve a material purpose before it can be terminated by the beneficiaries does not mean that the trust has no remaining function. In order to be material, the purpose remaining to be performed must be of some significance: Material purposes are not readily to be inferred. A finding of such a

	purpose generally requires some showing of a particular concern or objective on the part of the settlor, such as concern with regard to the beneficiary's management skills, judgment, or level of maturity. Thus, a court may look for some circumstantial or other evidence indicating that the trust arrangement represented to the settlor more than a method of allocating the benefits of property among multiple beneficiaries, or a means of offering to the beneficiaries (but not imposing on them) a
	particular advantage. Sometimes, of course, the very nature or design of a trust suggests its protective nature or some other material purpose. Restatement (Third) of Trusts Section 65 cmt. d (Tentative Draft No. 3, approved 2001). Subsection (c) of this section deals with the effect of a spendthrift provision on the right of a beneficiary to concur in a trust termination or modification. By a 2004 amendment, subsection (c) has been placed in brackets and thereby made optional. Spendthrift terms have sometimes been construed to constitute a material purpose without inquiry into the intention of the particular settlor. For examples, see Restatement (Second) of Trusts Section 337 (1959); George G. Bogert & George T. Bogert, The Law of Trusts and Trustees Section 1008 (Rev. 2d ed. 1983); and 4 Austin W. Scott & William F. Fratcher, The Law of Trusts Section 337 (4th ed. 1989). This result is troublesome because spendthrift provisions are often added to instruments with little thought. Subsection (c), similar to Restatement (Third) of Trusts Section 65 cmt. e (Tentative Draft No. 3, approved 2001), does not negate the possibility that continuation of a trust to assure spendthrift protection might have been a material purpose of the particular settlor. The question of whether that was the intent of a particular settlor is instead a matter of fact to be determined on the totality of the circumstances. Subsection (d) recognizes that the beneficiaries' power to compel termination of the trust includes the right to direct how the trust property is to be distributed. While subsection (a) requires the settlor's consent to terminate an irrevocable trust, the settlor does not control the subsequent distribution of the trust property. Once termination has been approved, how the trust property is to be distributed is solely for the beneficiaries to decide. Subsection (e), similar to Restatement (Third) of Trusts Section 65 cmt. c (Tentative Draft No. 3, approved 2001), and Restatement (Second) of Trusts Sections 338(2) & 340(2) (1959), addresses situations in which a termination or modification is requested by less than all the beneficiaries, either because a

	beneficiary objects, the consent of a beneficiary cannot be obtained, or representation is either unavailable or its application uncertain. Subsection (e) allows the court to fashion an appropriate order protecting the interests of the nonconsenting beneficiaries while at the same time permitting the remainder of the trust property to be distributed without restriction. The order of protection for the nonconsenting beneficiaries might include partial continuation of the trust, the purchase of an annuity, or the valuation and protection for the nonconsenting beneficiaries might include partial
	continuation of the trust, the purchase of an annuity, or the valuation and cashout of the interest. **2003 Amendment.** The amendment, which adds the language "modification or" to subsection (a), fixes an inadvertent omission. It was the intent of the drafting committee that an agent with authority or a conservator or guardian with the approval of the court be able to participate not only in a decision to terminate a trust but also in a decision to modify it. **2004 Amendments.** **Section 411(a), Section 301(d), and Conforming Changes to Sections 301(c) and 410(b).** Section 411(a) was amended in 2004 on the recommendation of the Estate and Gift Taxation Committee of the American College of Trust and Estate Counsel (ACTEC). Enacting jurisdictions now have several options all of which are indicated by brackets: • delete subsection (a), meaning that the state's prior law would control on this issue. • require court approval of the modification or termination. • make the provision prospective and applicable only to irrevocable trusts created on or after the effective date or to revocable trusts that become irrevocable on or after the effective date of the provision. • enact subsection (a) in its original form. "Section 411(a), as originally drafted did not require that a court approve a joint decision of the settlor and beneficiaries to terminate or modify an irrevocable trust. The ACTEC Committee was concerned that: • Section 411(a), without amendment, could potentially result in the taxation for federal estate tax purposes of irrevocable trusts created in states which previously required that a court approve a settlor/beneficiary termination or modification; and

	• Because of the ability of a settlor under Section 301 to represent and bind a beneficiary with respect to a termination or modification of an irrevocable trust, Section 411(a) might result in inclusion of the trust in the settlor's gross estate. New Section 301(d) eliminates the possibility of such representation. The Drafting Committee recommends that all jurisdictions enact the amendment to Section 301(d). The Drafting Committee recommends that
	jurisdictions conform Section 411(a) to conform to prior law on whether or not court approval is necessary for the settlor and beneficiaries to jointly terminate or modify an irrevocable trust. If prior law is in doubt, the enacting jurisdiction may wish to make Section 411(a) prospective only. The enacting jurisdiction may also elect to delete Section 411(a). States electing to delete Section 411(a) should also delete the cross-references to Section 411 found in Sections 301(c) and 410(b). These cross-references have therefore been placed in brackets. States electing to delete Section 411(a) should also not enact Section 301(d), which similarly has been placed in brackets. **Section 411(c)** Section 411(c), which by the 2004 amendment was placed in brackets and therefore made optional, provides that a spendthrift provision is not presumed to constitute a material purpose of the trust. Several states that have enacted the Code have not agreed with the provision and have either deleted it or have reversed the presumption. Given these developments, the drafting committee concluded that uniformity could not be achieved. The Joint Editorial Board for Uniform Trusts and Estates Acts, however, is of the view that the better approach is to enact subsection (c) in its original form for the reasons stated in the comment to this Section.
5. COLORADO COMMITTEE COMMENTS	Colorado follows the common law rule that a trust may be modified or terminated by agreement of the settlor and all beneficiaries, apparently without court approval. The estate tax issue referred to in the preliminary draft of the official comment is highlighted by the Tax Court opinion concerning the family limited partnership that was involved in *Estate of Strangi v. Commissioner*, T.C. Memo 2003-145. In *Strangi*, Judge Cohen used very broad language to the effect that the decedent's power, acting together with the other partners, to revoke the partnership agreement was a retainedpower under Internal Revenue Code § 2036(a)(2). Under the broad language of *Strangi*, the power of the settlor and all beneficiaries to modify or

	terminate a trust under UTC § 411(a) might cause the trust to be included in the settlor's gross estate. UTC § 411(b) provides that a noncharitable irrevocable trust may be terminated upon consent of all of the beneficiaries, without the consent of the settlor or if the settlor is deceased, if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. In addition, a noncharitable irrevocable trust may be modified upon consent of all of the beneficiaries if the court concludes that the modification is not
	inconsistent with a material purpose of the trust. This is not new law. Rather, it follows the so-called "Claflin" rule of *Claflin v. Claflin*, 20 N.E. 454 (Mass. 1889). However, the presence of a spendthrift provision in the trust has sometimes been held to constitute a material purpose of the trust, without inquiry into the settor's actual purpose in creating the trust, even though the spendthrift provision may have been inserted by the drafting lawyer as a routine matter without any discussion with the settlor. **2005 Amendment:** The first clause in the first sentence in subsection (a) has been added to make it clear that a trust created by court order pursuant to Title XIX of the federal "Social Security Act," 42 U.S.C. Section 1396 p(d)(4) (e.g. disability trusts authorized in 15-14-412.8 C.R.S.) must not be amended or terminated during the life of the beneficiary.
6. COLORADO LAW	As to the § 411(a) issue, *In re Green Valley Financial Holdings*, 32 P.3d 643 (Col. App. 2001) held that "if the settlor and all of the beneficiaries consent to termination of a trust and none of them is incapacitated, they can compel termination even though the purposes of the trust have not been accomplished. Restatement (Second) of Trusts § 338(1) (1959). This rule is applicable even though, as here, the trust agreement specifically provides that the trust shall be irrevocable. Restatement, supra, § 338 cmt. a."32 P.3d at 646.
7. RECOMMENDATIONS	The committee recommends re-writing sections 411(a) and 411(b) as indicated, to highlight that the termination or modification is done by the beneficiaries, and either the settlor is waiving any material purpose or the court is determining that the termination or modification will not frustrate any material purpose. This change is also consistent with existing Colorado law. Colorado should enact subsection § 411(c) (now renumbered as § 411(b)), which provides that a spendthrift provision is not presumed to constitute a material purpose of the settlor.

UNIFORM TRUST CODE
ARTICLE 4
CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUST

1. UTC SECTION	**412**
2. SUBJECT	**MODIFICATION OR TERMINATION BECAUSE OF UNANTICIPATED CIRCUMSTANCES OR INABILITY TO ADMINISTER TRUST EFFECTIVELY**
3. UTC STATUTE	(a) The 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) The 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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section broadens the court's ability to apply equitable deviation to terminate or modify a trust. Subsection (a) allows a court to modify the dispositive provisions of the trust as well as its administrative terms. For example, modification of the dispositive provisions to increase support of a beneficiary might be appropriate if the beneficiary has become unable to provide for support due to poor health or serious injury. Subsection (a) is similar to Restatement (Third) of Trusts § 66(1) (Tentative Draft No. 3, 2001), except that this section, unlike the Restatement, does not impose a duty on the trustee to petition the court if the trustee is aware of circumstances justifying judicial modification. The purpose of the "equitable deviation" authorized by subsection (a) is not to disregard the settlor's intent but to modify inopportune details to effectuate better the settlor's broader purposes. Among other things, equitable deviation may be used to modify administrative or dispositive terms due to the failure to anticipate economic change or the incapacity of a beneficiary. For numerous illustrations, see Restatement (Third) of Trusts § 66 cmt. b (Tentative Draft No. 3, 2001). While it is necessary that there be circumstances not anticipated by the settlor before the court may grant relief under subsection (a), the circumstances may have been in existence when the trust was created. This section thus complements Section 415, which allows for reformation of a trust based on mistake of fact or law at the creation of the trust.

	Subsection (b) broadens the court's ability to modify the administrative terms of a trust. The standard under subsection (b) is similar to the standard for applying cy pres to a charitable trust. *See* Section 413(a). Just as a charitable trust may be modified if its particular charitable purpose becomes impracticable or wasteful, so can the administrative terms of any trust, charitable or noncharitable. Subsections (a) and (b) are not mutually exclusive. Many situations justifying modification of administrative terms under subsection (a) will also justify modification under subsection (b). Subsection (b) is also an application of the requirement in Section 404 that a trust and its terms must be for the benefit of its beneficiaries. *See also* Restatement (Third) of Trusts § 27(2) and cmt. b (Tentative Draft No. 2, approved 1999). Although the settlor is granted considerable latitude in defining the purposes of the trust, the principle that a trust have a purpose which is for the benefit of its beneficiaries precludes unreasonable restrictions on the use of trust property. An owner's freedom to be capricious about the use of the owner's own property ends when the property is impressed with a trust for the benefit of others. *See* Restatement (Second) of Trusts § 124 cmt. g (1959). Thus, attempts to impose unreasonable restrictions on the use of trust property will fail. *See* Restatement (Third) of Trusts § 27 Reporter's Notes to cmt. b (Tentative Draft No. 2, approved 1999). Subsection (b), unlike subsection (a), does not have a direct precedent in the common law, but various States have insisted on such a measure by statute. *See, e.g.*, Mo. Rev. Stat. §456.590.1. Upon termination of a trust under this section, subsection (c) requires that the trust be distributed in a manner consistent with the purposes of the trust. As under the doctrine of cy pres, effectuating a distribution consistent with the purposes of the trust requires an examination of what the settlor would have intended had the settlor been aware of the unanticipated circumstances. Typically, such terminating distributions will be made to the qualified beneficiaries, often in proportion to the actuarial value of their interests, although the section does not so prescribe. For the definition of qualified beneficiary, see Section 103(12). Modification under this section, because it does not require beneficiary action, is not precluded by a spendthrift provision.
5. COLORADO COMMITTEE COMMENTS	Section 412 establishes the "deviation" doctrine. Section 412 permits modification or termination of a trust when there are circumstances not anticipated by the settlor. A modification or termination under this "deviation" rule may include circumstances in existence at the time of the trust's creation which were known to the settlor but not considered by the settlor.

	Section 412 would codify the so-called "deviation" doctrine. Unlike Colorado
	case law and *Restatement (Second) of Trusts* §§ 167 and 336 (1959), upon which Section 412 is partially based, Section 412 allows a court to modify or terminate a trust with respect to its beneficial or dispositive provisions, not merely its administrative terms. For example, modification of the beneficial provisions to increase support of a beneficiary might be appropriate if the beneficiary has become unable to provide for support due to poor health or serious injury. While it is necessary there be "circumstances not anticipated" by the settlor before the court may grant relief under this section, the new approach makes it clear that it is not essential that circumstances have changed. The circumstances not anticipated by the settlor may have been in existence when the trust was created. This section thus complements Section 411, which allows for reformation of a trust based on mistake of fact or law at the creation of the trust. The UTC drafting committee intends that relief under Section 412 should not be lightly granted since reasonable minds often disagree on the purpose of a trust and on whether the settlor chose the appropriate means of implementation. For this reason, the UTC drafting committee intends that the petitioner must demonstrate that the proposed termination or modification will "substantially further" the settlor's purpose in creating the trust. Upon termination under this section, Section 412(b) requires that the trust be distributed in accordance with the settlor's probable intent. This requirement, which is similar to the doctrine of cy pres, will require an examination of what the settlor probably would have done had the settlor been aware of the unanticipated circumstances. Typically, such terminating distributions will be made to the qualified beneficiaries, perhaps in proportion to the actuarial value of their interests, Section 412, however, does not prescribe such distributions. Some expressed concern that "benefit to the beneficiaries" should factor in the decision to allow a deviation. *Killin* cuts against such an accommodation.
6. COLORADO LAW	In his March 1986 article, Jim Wade summarized Colorado law regarding modification and termination arising from unanticipated circumstances. See Wade, *Trust Termination and Modification*, 15 The Colorado Lawyer 389 (March 1986). Jim Wade's article describes that "deviation" is appropriate for administrative provisions but is not appropriate for disposition provisions. Colorado law seems to support a distinction between "administrative" trust terms and "dispositive" trust terms.

	"Administrative" trust terms involve requirements such as asset retention or limitations on permitted investment. For example, in *Matter of Will of Killin*, 703 P.2d 1323 (Colo. App. 1985), a testamentary trust prohibited the sale of a 2,332 acre ranch located in Douglas and El Paso Counties. Income beneficiaries filed suit requesting removal of the offensive trust term. The Colorado Court of Appeals classified the case as a "deviation" from administrative terms and held that "a court may not order a trustee to deviate from the terms of a trust unless, because of a change in circumstances, compliance with its terms would defeat or substantially impair the accomplishment of its underlying purposes." 703 P.2d at 1326. Relying on the *Restatement,* 2d. § 167, the court also held that "deviation from expressed intent of a testator that trust property be retained during trust administration is not warranted solely because of a potential increased income to the income beneficiaries."
7. RECOMMENDATIONS	The committee recommends adoption of this provision without change.

UNIFORM TRUST CODE
ARTICLE 4
CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUST

1. UTC SECTION	**413**
2. SUBJECT	**CY PRES**
3. UTC STATUTE	(a) Except as otherwise provided in subsection (b), 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 (3) the 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 the court under subsection (a) 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) fewer than 21 years have elapsed since the date of the trust's creation.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	Subsection (a) codifies the court's inherent authority to apply cy pres. The power may be applied to modify an administrative or dispositive term. The court may order the trust terminated and distributed to other charitable entities. Partial termination may also be ordered if the trust property is more than sufficient to satisfy the trust's current purposes. Subsection (a), which is similar to Restatement (Third) of Trusts § 67 (Tentative Draft No. 3, 2001), modifies the doctrine of cy pres by presuming that the settlor had a general charitable intent when a particular charitable purpose becomes impossible or impracticable to achieve. Traditional doctrine did not supply that presumption, leaving it to the courts to determine whether the settlor had a general charitable intent. If such an intent is found, the trust property is applied to other charitable purposes. If not, the charitable trust fails. *See* Restatement (Second) of Trusts § 399 (1959). In the great majority of cases the settlor would prefer that the property be used for other charitable purposes. Courts are usually able to find a general charitable purpose to which to apply the property, no matter how vaguely such purpose may have been expressed by the settlor. Under subsection (a), if the particular purpose for which the trust was created becomes impracticable, unlawful, impossible to achieve, or wasteful, the trust does not fail. The court instead must either modify the terms of the trust or

	distribute the property of the trust in a manner consistent with the settlor's charitable purposes. The settlor, with one exception, may mandate that the trust property pass to a noncharitable beneficiary upon failure of a particular charitable purpose. Responding to concerns about the clogging of title and other administrative problems caused by remote default provisions upon failure of a charitable purpose, subsection (b) invalidates a gift over to a noncharitable beneficiary upon failure of a particular charitable purpose unless the trust property is to revert to a living settlor or fewer than 21 years have elapsed since the trust's creation. Subsection (b) will not apply to a charitable lead trust, under which a charity receives payments for a term certain with a remainder to a noncharity. In the case of a charitable lead trust, the settlor's particular charitable purpose does not fail upon completion of the specified trust term and distribution of the remainder to the noncharity. Upon completion of the specified trust term, the settlor's particular charitable purpose has instead been fulfilled. For a discussion of the reasons for a provision such as subsection(b), see Ronald R. Chester, *Cy Pres of Gift Over: The Search for Coherence in Judicial Reform of Failed Charitable Trusts*, 23 Suffolk U. L. Rev. 41 (1989). The doctrine of cy pres is applied not only to trusts, but also to other types of charitable dispositions, including those to charitable corporations. This section does not control dispositions made in nontrust form. However, in formulating rules for such dispositions, the courts often refer to the principles governing charitable trusts, which would include this Code. For the definition of charitable purpose, see Section 405(a). Pursuant to Sections 405(c) and 410(b), a petition requesting a court to enforce a charitable trust or to apply cy pres may be maintained by a settlor. Such actions can also be maintained by a cotrustee, the state attorney general, or by a person having a special interest in the charitable disposition. *See* Restatement (Second) of Trusts § 391 (1959).
5. COLORADO COMMITTEE COMMENTS	Subsection (b) is somewhat akin to Section 411(d) of the Uniform Trust Code in the sense that court modification of a charitable trust using cy pres doctrine is limited under the circumstances specified.
6. COLORADO LAW	Colorado law on trust terminations is sparse. See Colorado Committee Comments to Section 411(d).
7. RECOMMENDATIONS	The committee recommends adopting Section 413 without change.

UNIFORM TRUST CODE
ARTICLE 4
CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUST

1. UTC SECTION	**414**
2. SUBJECT	**MODIFICATION OR TERMINATION OF UNECONOMIC TRUST**
3. UTC STATUTE	(a) After notice to the qualified beneficiaries, the trustee of a trust consisting of trust property having a total value less than ~~[$50,000]~~ $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) The 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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	Subsection (a) assumes that a trust with a value of $50,000 or less is sufficiently likely to be inefficient to administer that a trustee should be able to terminate it without the expense of a judicial termination proceeding. The amount has been placed in brackets to signal to enacting jurisdictions that they may wish to designate a higher or lower figure. Because subsection (a) is a default rule, a settlor is free to set a higher or lower figure or to specify different procedures or to prohibit termination without a court order. *See* Section 105 and Article 4 General Comment. Subsection (b) allows the court to modify or terminate a trust if the costs of administration would otherwise be excessive in relation to the size of the trust. The court may terminate a trust under this section even if the settlor has forbidden it. *See* Section 105(b)(4). Judicial termination under this subsection may be used whether or not the trust is larger or smaller than $50,000. When considering whether to terminate a trust under either subsection (a) or (b), the trustee or court should consider the purposes of the trust. Termination under this section is not always wise. Even if administrative costs may seem excessive in relation to the size of the trust, protection of the assets from beneficiary mismanagement may indicate that the trust be continued. The court may be able to reduce the costs of administering the trust by appointing a new trustee.

	Upon termination of a trust under this section, subsection (c) requires that the trust property be distributed in a manner consistent with the purposes of the trust. In addition to outright distribution to the beneficiaries, Section 816(21) authorizes payment to be made by a variety of alternate payees. Distribution under this section will typically be made to the qualified beneficiaries in proportion to the actuarial value of their interests. Even though not accompanied by the usual trappings of a trust, the creation and transfer of an easement for conservation or preservation will frequently create a charitable trust. The organization to whom the easement was conveyed will be deemed to be acting as trustee of what will ostensibly appear to be a contractual or property arrangement. Because of the fiduciary obligation imposed, the termination or substantial modification of the easement by the "trustee" could constitute a breach of trust. The drafters of the Uniform Trust Code concluded that easements for conservation or preservation are sufficiently different from the typical cash and securities found in small trusts that they should be excluded from this section, and subsection (d) so provides. Most creators of such easements, it was surmised, would prefer that the easement be continued unchanged even if the easement, and hence the trust, has a relatively low market value. For the law of conservation easements, see Restatement (Third) of Property: Servitudes §1.6 (2000). While this section is not directed principally at honorary trusts, it may be so applied. *See* Sections 408, 409. Because termination of a trust under this section is initiated by the trustee or ordered by the court, termination is not precluded by a spendthrift provision.
5. COLORADO COMMITTEE COMMENTS	Section 414 develops a relief device for trust assets that may not require trust administration. Subsection (a) assumes that a trust with a value of $50,000 [recommended threshold is $100,000] or less is inherently uneconomical and may be terminated without the expense of a judicial termination proceeding. Subsection (b) allows a trust to be modified or terminated if the costs of administration would otherwise be excessive. Our subcommittee viewed this Section as a less important rule creating a relief valve for small trusts. Since we anticipate this provision would be a default rule a settlor is free to set a higher or lower figure or to specify different procedures or to prohibit termination without a court order. Under Section 414(b) however, a court may terminate a trust under this section even if a

	settlor has forbid such action. A court termination procedure may be utilized
	for a trust of any size but most cases will involve smaller trusts although greater than $50,000 [recommended threshold is $100,000] in value. Compliance with this section is within the discretion of the trustee or, if court approval is required, within the discretion of the court. When considering whether to terminate a noncharitable trust under this section, the UTC drafting committee comments state that a trustee or court should consider the protective function the trust is designed to serve. Termination under this section is not always wise. Even if administrative costs may seem expensive in relation to the size of the trust, protection of the asset base may indicate that the trust be continued. In order to reduce administrative costs in relation to the size of the trust, the court, instead of terminating the trust, may appoint a new trustee under Section 414(b). Upon termination of the trust, the trust property is to be distributed, in the case of a noncharitable trust, in accordance with the settlor's probable intention, or in the case of a charitable trust, pursuant to the *cy pres* principles articulated in Section 413. Section 414(c) could be clarified regarding whether a trustee in a termination could "spend" trust assets on trust purposes. This may avoid what appears to be a mandatory distribution rule.
6. COLORADO LAW	As with other issues regarding trust terminations, Colorado law has not addressed the issues presented by Section 414.
7. RECOMMENDATIONS	The committee recommends adoption of this provision, with the change that the threshold dollar amount be increased from $50,000 to $100,000.

UNIFORM TRUST CODE
ARTICLE 4
CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUST

1. UTC SECTION	**415**
2. SUBJECT	**REFORMATION TO CORRECT MISTAKES**
3. UTC STATUTE	The 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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	Reformation of inter vivos instruments to correct a mistake of law or fact is a long-established remedy. Restatement (Third) of Property: Donative Transfers § 12.1 (Tentative Draft No. 1, approved 1995), which this section copies, clarifies that this doctrine also applies to wills. This section applies whether the mistake is one of expression or one of inducement. 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 excluded [sic included]. A mistake in the inducement occurs when the terms of the trust accurately reflect what the settlor intended to be included or excluded but this intention was based on a mistake of fact or law. *See* Restatement (Third) of Property: Donative Transfers § 12.1 cmt. i (Tentative Draft No. 1, approved 1995). Mistakes of expression are frequently caused by scriveners' errors while mistakes of inducement often trace to errors of the settlor. Reformation is different from resolving an ambiguity. Resolving an ambiguity involves the interpretation of language already in the instrument. Reformation, on the other hand, may involve the addition of language not originally in the instrument, or the deletion of language originally included by mistake, if necessary to conform the instrument to the settlor's intent. Because reformation may involve the addition of language to the instrument, or the deletion of language that may appear clear on its face, reliance on extrinsic evidence is essential. To guard against the possibility of unreliable or contrived evidence in such circumstance, the higher standard of clear and convincing proof is required. *See* Restatement (Third) of Property: Donative Transfers § 12.1 cmt. e (Tentative Draft No. 1, approved 1995). In determining the settlor's original intent, the court may consider evidence relevant to the settlor's intention even though it contradicts an apparent plain meaning of the text. The objective of the plain meaning rule, to protect against

	fraudulent testimony, is satisfied by the requirement of clear and convincing proof. *See* Restatement (Third) of Property: Donative Transfers § 12.1 cmt. d and Reporter's Notes (Tentative Draft No. 1, approved 1995). *See also* John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. Pa. L. Rev. 521 (1982). For further discussion of the rule of this section and its application to illustrative cases, see Restatement (Third) of Property: Donative Transfers § 12.1 cmts. and Reporter's Notes (Tentative Draft No. 1, approved 1995).
5. COLORADO COMMITTEE COMMENTS	The UTC drafting committee views "reformation" as a "long-established remedy" to correct for a mistake of law or fact. The UTC comments also state that "reformation" is a remedy different than clarification of an ambiguity. Clarification of an ambiguity involves the interpretation of a term already in the trust. Reformation, on the other hand, involves *"the addition of a term not originally in the trust, or the deletion of a term originally included by mistake."* Because reformation involves the addition of a term to the instrument, or deletion of a term in an instrument that may appear clear on its face, Section 415 reflects that reliance on extrinsic evidence is essential. To guard against the possibility of unreliable or contrived evidence in such circumstance, the UTC higher standard of *"clear and convincing proof"* is required. Our subcommittee viewed Section 415 as an important provision that follows the "liberal" trend towards allowing reformation. See Langbein and Waggoner, *Reformation of the Wills on the Ground of Mistake: Change of Direction in American Law?* 130 Univ. of Pa. L. Rev. 521 (1982). This section applies whether the mistake is one of expression or one of inducement. A "mistake of expression" occurs when the terms of the trust misstate the settlor's intention, fails to include a term that was intended to be included, or includes a term that was not intended to be included. A "mistake in the inducement" occurs when the terms of the trust accurately reflect what the settlor intended to be included or excluded but his intention was based on a mistake of fact or law. *Restatement (Third) of Property: Donative Transfers* § 12.1 cmt. i (Tentative Draft No. 1, 1995). This section disapproves of the "plain meaning" rule. For this reason, evidence contradicting the so-called plain meaning of the text is admissible. The objective of the plain meaning rule, to protect against fraudulent

	testimony, apparently is satisfied by requiring the presentation of clear and convincing evidence before a requested reformation may be granted. New York and Florida courts have also begun to reform trusts to save estate and generation-skipping transfer taxes. See Carlyn S. McCaffrey & Alan H. Hirschfeld, *Restructuring Wills and Trusts to Reduce Generation-Skipping Taxes*, 131 Tr. & Est., March. 1992, at 8. The Internal Revenue Service appears to take the position that reformation of trusts will not be retroactively effective for federal tax purposes. Apparently, the Service attempts to draw a line between *construction* of a trust or will, in which the IRS will be bound by a state court, and *reformation*, which will not be given effect for purposes of the estate tax, which applies to instruments and interests as they exist on the date of the decedent's death. See Rev. Rul. 93-79, 1993-36 IRB 5, refusing to give retroactive effect to a state court order reforming a trust. But cf. *Flitcroft v. Commissioner*, 328 F.2d 449 (9th Cir. 1964), holding that reformation of trusts was retroactively effective for federal tax purposes.
6. COLORADO LAW	The Colorado statutes expressly authorize reformation in Colo. Rev. Stat. § 15-1-1001 et. seq. In his leading treatise, Jim Wade states that the "traditional basis for reformation" should apply to trust instruments." Jim Wade also observes that "[r]eformation is particularly attractive in cases where the inadvertent or mistaken inclusion of provisions in charitable trusts would destroy or impair intended tax benefits." Wade and Parks, *Colorado Law of Wills, Trust & Fiduciary Administration*, (1996) at p. 46-11.
7. RECOMMENDATIONS	The committee recommends adoption of this provision without change.

UNIFORM TRUST CODE
ARTICLE 4
CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUST

1. UTC SECTION	**416**
2. SUBJECT	**MODIFICATION TO ACHIEVE SETTLOR'S TAX OBJECTIVES**
3. UTC STATUTE	To achieve the settlor's tax objectives, the 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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section is copied from Restatement (Third) of Property: Donative Transfers § 12.2 (Tentative Draft No. 1, approved 1995). "Modification" under this section is to be distinguished from the "reformation" authorized by Section 415. Reformation under Section 415 is available when the terms of a trust fail to reflect the donor's original, particularized intention. The mistaken terms are then reformed to conform to this specific intent. The modification authorized here allows the terms of the trust to be changed to meet the settlor's tax-saving objective as long as the resulting terms, particularly the dispositive provisions, are not inconsistent with the settlor's probable intent. The modification allowed by this subsection is similar in concept to the cy pres doctrine for charitable trusts (*see* Section 413), and the deviation doctrine for unanticipated circumstances (*see* Section 412). Whether a modification made by the court under this section will be recognized under federal tax law is a matter of federal law. Absent specific statutory or regulatory authority, binding recognition is normally given only to modifications made prior to the taxing event, for example, the death of the testator or settlor in the case of the federal estate tax. *See* Rev. Rul. 73-142, 1973-1 C.B. 405. Among the specific modifications authorized by the Internal Revenue Code or Service include the revision of split-interest trusts to qualify for the charitable deduction, modification of a trust for a noncitizen spouse to become eligible as a qualified domestic trust, and the splitting of a trust to utilize better the exemption from generation-skipping tax. For further discussion of the rule of this section and the relevant case law, see Restatement (Third) of Property: Donative Transfers § 12.2 cmts. and Reporter's Notes (Tentative Draft No. 1, approved 1995).

	The provision is based on *Restatement (Third) of Property: Donative Transfers* § 12.2 (Tentative Draft No. 1, 1995). "Modification" under this section is to be distinguished from the "reformation" authorized by Section 415. "Reformation" under Section 415 is available when the terms of a trust fail to reflect the donor's original, particularized intention. The mistaken terms are then reformed to match this specific intent. Section 416(a)'s "modification," however, is more general, allowing documents to be changed to meet the settlor's tax-saving objective as long as the resulting terms, particularly the beneficial provisions, are not inconsistent with the settlor's probable intent. While subsection (a) is intended to function similar to a tax savings clause, it is better practice to expressly include such a tax savings provision in the terms of the trust. That way, there will be no doubt as to the settlor's intent. The UTC comments state that whether a modification made by the court under subsection (b) will be recognized for purposes of federal tax law is a matter of federal law. Among the modifications recognized under federal law have been the revision of split-interest trusts to qualify for the charitable deduction, modification of a trust for a noncitizen spouse to become eligible as a qualified domestic trust, and the splitting of a trust to better utilize the exemption from generation-skipping tax. We also wondered about the "mandate" of Section 416(a). Perhaps this could be softened, e.g., "taken into serious account."
6. COLORADO LAW	As described above under the Comments to Section 415, it appears that Colorado courts possibly would view the changes under this Section 416 as "reformations." As stated by Jim Wade, "[r]eformation is particularly attractive in cases where the inadvertent or mistaken inclusion of provisions in charitable trusts would destroy or impair the intended tax benefits." Wade and Parks, *Colorado Law of Wills, Trust and Fiduciary Administration* (1996) p. 46-11.
7. RECOMMENDATIONS	The committee recommends adoption of this provision without change.

UNIFORM TRUST CODE
ARTICLE 4
CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUST

1. UTC SECTION	**417**
2. SUBJECT	**COMBINATION AND DIVISION OF TRUSTS**
3. UTC STATUTE	After notice to the qualified beneficiaries, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts, if the result does not impair the rights of any beneficiary or adversely affect achievement of the purposes of the trust.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section, which authorizes the combination or division of trusts, is subject to contrary provision in the terms of the trust. *See* Section 105 and Article 4 General Comment. Many trust instruments and standardized estate planning forms include comprehensive provisions governing combination and division of trusts. Except for the requirement that the qualified beneficiaries receive advance notice of a proposed combination or division, this section is similar to Restatement (Third) of Trusts § 68 (Tentative Draft No. 3, 2001). This section allows a trustee to combine two or more trusts even though their terms are not identical. Typically the trusts to be combined will have been created by different members of the same family and will vary on only insignificant details, such as the presence of different perpetuities savings periods. The more the dispositive provisions of the trusts to be combined differ from each other the more likely it is that a combination would impair some beneficiary's interest, hence the less likely that the combination can be approved. Combining trusts may prompt more efficient trust administration and is sometimes an alternative to terminating an uneconomic trust as authorized by Section 414. Administrative economies promoted by combining trusts include a potential reduction in trustees' fees, particularly if the trustee charges a minimum fee per trust, the ability to file one trust income tax return instead of multiple returns, and the ability to invest a larger pool of capital more effectively. Particularly if the terms of the trust are identical, available administrative economies may suggest that the trustee has a responsibility to pursue a combination. *See* Section 805 (duty to incur only reasonable costs). Division of trusts is often beneficial and, in certain circumstances, almost routine. Division of trusts is frequently undertaken due to a desire to obtain maximum advantage of exemptions available under the federal generation-skipping tax. While the terms of the trusts which result from such a division are identical, the division will permit differing investment objectives to be

	pursued and allow for discretionary distributions to be made from one trust and not the other. Given the substantial tax benefits often involved, a failure by the trustee to pursue a division might in certain cases be a breach of fiduciary duty. The opposite could also be true if the division is undertaken to increase fees or to fit within the small trust termination provision. *See* Section 414. This section authorizes a trustee to divide a trust even if the trusts that result are dissimilar. Conflicts among beneficiaries, including differing investment objectives, often invite such a division, although as in the case with a proposed combination of trusts, the more the terms of the divided trusts diverge from the original plan, the less likely it is that the settlor's purposes would be achieved and that the division could be approved. This section does not require that a combination or division be approved either by the court or by the beneficiaries. Prudence may dictate, however, that court approval under Section 410 be sought and beneficiary consent obtained whenever the terms of the trusts to be combined or the trusts that will result from a division differ substantially one from the other. For the provisions relating to beneficiary consent or ratification of a transaction, or release of trustee from liability, see Section 1009. While the consent of the beneficiaries is not necessary before a trustee may combine or divide trusts under this section, advance notice to the qualified beneficiaries of the proposed combination or division is required. This is consistent with Section 813, which requires that the trustee keep the beneficiaries reasonably informed of trust administration, including the giving of advance notice to the qualified beneficiaries of several specified actions that may have a major impact on their interests. Numerous States have enacted statutes authorizing division of trusts, either by trustee action or upon court order. For a list of these statutes, see Restatement (Third) Property: Donative Transfers § 12.2 Statutory Note (Tentative Draft No. 1, approved 1995). Combination or division has also been authorized by the courts in the absence of authorizing statute. *See, e.g., In re Will of Marcus*, 552 N.Y.S. 2d 546 (Surr. Ct.1990) (combination); *In re Heller Inter Vivos Trust*, 613 N.Y.S. 2d 809 (Surr. Ct. 1994) (division); and *BankBoston v. Marlow*, 701 N.E. 2d 304 (Mass. 1998) (division). For a provision authorizing a trustee, in distributing the assets of the divided trust, to make non-pro-rata distributions, see Section 816(22).

5. COLORADO COMMITTEE COMMENTS	The UTC drafting committee has created this relief as a default rule authorizing the combination or division of trusts, in the absence of an express provision in the terms of the trust. This section allows a trustee to combine two or more trusts even though their terms are not identical, although typically the trusts to be combined will have been created by different members of the same family and vary on only insignificant details, such as the presence of different perpetuities savings periods. The more the beneficial provisions of the trusts to be combined differ from each other the more likely it is that a combination will result in the reduction of some beneficiary's interest and the less likely it is that the settlor's purpose will be accomplished and the combination can be approved. This section authorizes a trustee to divide a trust even if the trusts that result are dissimilar. Conflicts among beneficiaries, including differing investment objectives, often invite such a division, although as in the case with a proposed combination of trusts, the farther away the terms of the divided trusts are from the original plan the less likely it is that the settlor's purpose will be achieved and the division can be approved. Our subcommittee viewed this as a subsidiary (default?) rule. Many trust instruments and standardized estate planning forms include comprehensive provisions permitting these steps. Combining trusts may prompt more efficient trust administration and is sometimes an alternative to simply terminating the trusts as permitted by Section 414. Administrative economies promoted by combining trusts include a potential reduction in trustee's fees, particularly if the trustee charges a minimum fee per trust, the ability to file one trust income tax return instead of multiple returns, and the ability to invest more efficiently because of a larger pool of available capital. Division of trusts is often beneficial and, in certain circumstances, almost routine. The UTC comments state that the division of trusts is frequently undertaken due to a desire to obtain maximum advantage of exemptions available under the federal generation-skipping tax. While the terms of the trusts which result from such a division are identical, the division will permit differing investment objectives to be pursued and allow for discretionary distributions to be made from one trust and not the other.

	While the consent of the beneficiaries is not necessary before a trustee may combine or divide trusts under this section, advance notice to the qualified beneficiaries of the proposed combination or division is required. The UTC comments state that this is consistent with Section 814, which requires that the trustee keep the beneficiaries reasonably informed of trust administration, including the giving of advance notice to the qualified beneficiaries of several specified actions that may have a major impact on their interests. The committee noted that this Section 417 is similar to C.R.S. §15-16-401, but is less specific. For example, court approval is required for division or combination pursuant to C.R.S. §15-16-401, whereas Section 417 does not require court approval. The flexibility and more general terms of Section 417 are favored. To avoid inconsistencies, the committee notes that the adoption of Section 417 would necessitate the repeal of C.R.S. §15-16-401.
6. COLORADO LAW	C.R.S. §15-16-401, provides that upon the petition of a trustee, beneficiary or other interested party and after notice and hearing, the court may direct the division of a trust or the consolidation of separate trusts after making certain findings described in the statute. C.R.S. §15-16-401 is more specific than Section 417. Many Colorado practitioners include comprehensive provisions addressing these issues in trust instruments.
7. RECOMMENDATIONS	The committee recommends adoption of this provision without change and recommends repeal of C.R.S. §15-16-401 and appropriate revisions to UTC Section 1105 to accomplish this.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 5
CREDITOR CLAIMS; SPENDTHRIFT; AND DISCRETIONARY TRUSTS

1. UTC SECTION	501
2. SUBJECT	RIGHTS OF BENEFICIARY'S CREDITOR OR ASSIGNEE
3. UTC STATUTE	To the extent a beneficiary's interest is not subject to a spendthrift provision, the 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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section applies only if the trust does not contain a spendthrift provision or the spendthrift provision does not apply to a particular beneficiary's interest. A settlor may subject to spendthrift protection the interests of certain beneficiaries but not others. A settlor may also subject only a portion of the trust to spendthrift protection such as an interest in the income but not principal. For the effect of a spendthrift provision on creditor claims, see Section 503. Absent a valid spendthrift provision, a creditor may ordinarily reach the interest of a beneficiary the same as any other of the beneficiary's assets. This does not necessarily mean that the creditor can collect all distributions made to the beneficiary. The interest may be too indefinite or contingent for the creditor to reach or the interest may qualify for an exemption under the state's general creditor exemption statutes. *See* [Restatement] (Third) of Trusts Section 56 (2003); Restatement (Second) of Trusts Sections 147-149, 162 (1959). Other creditor law of the State may limit the creditor to a specified percentage of a distribution. *See, e.g.*, Cal. Prob. Code § 15306.5. This section does not prescribe the procedures ("other means") for reaching a beneficiary's interest or of priority among claimants, leaving those issues to the enacting State's laws on creditor rights. The section does clarify, however, that an order obtained against the trustee, whatever state procedure may have been used, may extend to future distributions whether made directly to the beneficiary or to others for the beneficiary's benefit. By allowing an order to extend to future payments, the need for the creditor periodically to return to court will be reduced. Because proceedings to satisfy a claim are equitable in nature, the second sentence of this section ratifies the court's discretion to limit the award as appropriate under the circumstances. In exercising its discretion to limit relief, the court may appropriately consider the circumstances of a beneficiary and the beneficiary's family. See Restatement (Third) of Trusts § 56 cmt. e (Tentative Draft No. 2, approved 1999).

	2005 Amendment. A 2005 amendment changes "protected by" to "subject to" in the first sentence of the section. No substantive change is intended. The amendment was made to negate an implication that this section allowed an exception creditor to reach a beneficiary's interest even though the trust contained a spendthrift provision. The list of exception creditors and their remedies are contained in Section 503. Clarifying changes are also made in the comments and unnecessary language on creditor remedies omitted.
5. COLORADO COMMITTEE COMMENTS	Absent an applicable, valid spendthrift provision, the interest of a beneficiary in a trust may be attached. This section does not prescribe the procedures that a creditor must follow to attach the interest. Such procedures are left to other state law. The creditor must go to court first and cannot proceed directly against the trust. Typical judicial proceedings result in an attachment, garnishment or similar remedy. Use of the words "attachment of present or future distributions to or for the beneficiary" make it clear that the attachment or garnishment may reach current and future distributions that the trustee is required to make or that the trustee decides to make. Thus, the creditor intercepts such distributions. Use of the words "beneficiary's interest" suggest that the creditor's remedy is limited to reaching the interest the beneficiary has in the trust. Thus, if the beneficiary has only an income interest, the creditor cannot reach or attach the principal that generates the income. 2005 Amendment. The intent of the drafters is that 501 apply only when the trust does not contain a spendthrift provision or when a spendthrift provision does not apply to a particular beneficial interest. As originally written, 501 was susceptible of another meaning, to wit: 501 might apply when there is no spendthrift protection (e.g. in the case of an exception creditor under 503.) This change and a corresponding clarification in the 2005 official comments are intended to make the drafters' intent regarding 501 clear.
6. COLORADO LAW	No Colorado law directly on point.
7. RECOMMENDATIONS	This section should be enacted.

1. UTC SECTION	502
2. SUBJECT	SPENDTHRIFT PROVISION
3. UTC STATUTE	(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 [article], a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.
4. NATIONAL CONFERENCE OF COMMISSIONER ON UNIFORM STATE LAWS COMMENTS	Under this section, a settlor has the power to restrain the transfer of a beneficiary's interest, regardless of whether the beneficiary has an interest in income, in principal, or in both. Unless one of the exceptions under this article applies, a creditor of the beneficiary is prohibited from attaching a protected interest and may only attempt to collect directly from the beneficiary after payment is made. This section is similar to Restatement (Third) of Trusts § 58 (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts §§ 152-153 (1959). For the definition of spendthrift provision, see Section 103(15). For a spendthrift provision to be effective under this Code, it must prohibit both the voluntary and involuntary transfer of the beneficiary's interest, that is, a settlor may not allow a beneficiary to assign while prohibiting a beneficiary's creditor from collecting, and vice versa. *See* Restatement (Third) of Trusts § 58 cmt. b (Tentative Draft No. 2, approved 1999). *See also* Restatement (Second) of Trusts § 152(2) (1959). A spendthrift provision valid under this Subsection (b), which is derived from Texas Property Code will also be recognized as valid in a federal bankruptcy proceeding. *See* 11 U.S.C. § 541(c)(2). § 112.035(b), allows a settlor to provide maximum spendthrift protection simply by stating in the instrument that all interests are held subject to a "spendthrift trust" or words of similar effect. A disclaimer, because it is a refusal to accept ownership of an interest and not a transfer of an interest already owned, is not affected by the presence or absence of a spendthrift provision. Most disclaimer statutes expressly provide that the validity of a disclaimer is not affected by a spendthrift protection. *See, e.g.*, Uniform Probate Code § 2-801(a). Releases and

	exercises of powers of appointment are also not affected because they are not transfers of property. *See* Restatement (Third) of Trusts § 58 cmt. c (Tentative Draft No. 2, approved 1999). A spendthrift provision is ineffective against a beneficial interest retained by the settlor. *See* Restatement (Third) of Trusts §58(2), approved 1999. This is a necessary corollary to Section 505(a)(2), which allows a creditor or assignee of the settlor to reach the maximum amount that can be distributed to or for the settlor's benefit. This right to reach the trust applies whether or not the trust contains a spendthrift provision. A valid spendthrift provision makes it impossible for a beneficiary to make a legally binding transfer, but the trustee may choose to honor the beneficiary's purported assignment. The trustee may recommence distributions to the beneficiary at anytime. The beneficiary, not having made a binding transfer, can withdraw the beneficiary's direction but only as to future payments. *See* Restatement (Third) of Trusts § 58 cmt. d (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 152 cmt. i (1959).
5. COLORADO COMMITTEE COMMENTS	UTC §103 (15) defines a spendthrift provision as "....a term of a trust which restrains the voluntary and involuntary transfer of a beneficiary's interest." This is a fairly traditional definition of a spendthrift provision. A restriction on a voluntary transfer means that the beneficiary cannot sell, pledge, assign, transfer or otherwise deal with the beneficiary's interest during the term of the trust. A restriction on an involuntary transfer means that a creditor of a beneficiary cannot attach the beneficiary's interest during the term of the trust. For a spendthrift provision to be effective under the UTC, it must prohibit <u>both</u> a voluntary and involuntary transfer. The UTC recognizes the validity of spendthrift provisions in this section. Thus, a beneficiary's interest in a "spendthrift trust" is protected until a distribution has been <u>made and received</u> by the beneficiary. There are some exceptions to spendthrift as shall be seen in subsequent UTC sections. UTC §502 follows *Restatement (Second) of Trusts*, §§ 152 and 153 (1959) and *Restatement (Third) of Trusts*, §58 (preliminary draft no. 4, 1998). For comparison, the *<u>Restatement (Second)</u>* sections read verbatim as follows: *§152. Restraint on Alienation of Income* *(1) Except as stated in §§ 156 and 157, if by the terms of a trust the*

	beneficiary is entitled to the income from the trust property for life or for a term of years and it is provided that his interest shall not be transferable by him and shall not be subject to the claims of his creditors, the restraint on the voluntary and involuntary transfer of his right to the income accruing during his life is valid. *(2) A trust in which by the terms of the trust or by statute a valid restraint on the voluntary and involuntary transfer of the interest of the beneficiary is imposed is a spendthrift trust.* *§153. Restraint on Alienation of Principal* *(1) Except as stated in §§ 156 and 157, if by the terms of a trust the beneficiary is entitled to have the principal conveyed to him at a future time, a restraint on the voluntary or involuntary transfer of his interest in the principal is valid.* *(2) If the beneficiary is entitled to have the principal conveyed to him immediately, a restraint on the voluntary or involuntary transfer of his interest in the principal is invalid.* *(3) If the principal is not to be conveyed to the beneficiary during his lifetime, a restraint on the voluntary or involuntary transfer of his interest in the principal is invalid.*
6. COLORADO LAW	Spendthrift provisions in trusts are valid in Colorado. See Snyder vs. O'Conner, 81 P.2d 773(1938); Newell vs. Tubbs, 84 P.2d 820 (1938) (spendthirft provisions are enforecable generally, but language used in this case not sufficient to create spendthrift protection); In re Nicholson's Estate. People, et al. vs. City and County of Denver, et al., 93 P.2d 880, 883-884 (Colo. 1939). See also, Wade/Parks *Colorado Law of Wills, Trusts & Fiduciary Administration,* section 32-39, 1998 edition. Many statutory benefit programs have similar spendthrift protection. See for example the spendthrift protection afforded PERA retirement plan benefits under §24-54.5-107 C.R.S. The spendthrift protection is absolute for PERA benefits except in the case of child support obligations. Colorado has embraced a public policy exception to PERA spendthrift provisions when it comes to child support.
7. RECOMMENDATIONS	Settlors have for years included spendthrift provisions in the terms of their trusts. The validity of spendthrift provisions has been recognized in the *Restatement (Second)* position which Colorado apparently follows. UTC §502 codifies the *Restatement (Second)* position. This section should be enacted.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 5
CREDITOR CLAIMS; SPENDTHRIFT; AND DISCRETIONARY TRUSTS

1. UTC SECTION	**503**
2. SUBJECT	**EXCEPTIONS TO SPENDTHRIFT PROVISION**
3. UTC STATUTE	(a) In this section, "child" includes any person for whom an order or judgment for child support has been entered in this or another State. (b) To the extent provided in subsection (c), a ~~A~~ spendthrift provision is unenforceable against: (1) a beneficiary's child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance; (2) a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust; and (3) a claim of this State or the United States to the extent a statute of this State or federal law so provides. (c) The only remedy of a ~~A~~ claimant against whom a spendthrift provision cannot be enforced ~~may~~ is to obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary. The court may limit the award to such relief asis appropriate under the circumstances.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section exempts the claims of certain categories of creditors from the effects of a spendthrift restriction and specifies the remedies such exemption creditors may take to satisfy their claims. The exception in subsection (b)(1) for judgments or orders to support a beneficiary's child or current or former spouse is in accord with Restatement (Third) of Trusts § 59(a) (Tentative Draft No. 2, approved 1999), Restatement (Second) of Trusts § 157(a) (1959), and numerous state statutes. It is also consistent with federal bankruptcy law, which exempts such support orders from discharge. The effect of this exception is to permit the claimant for unpaid support to attach present or future distributions that would otherwise be made to the beneficiary. Distributions subject to attachment include distributions required by the express terms of the trust, such as mandatory payments of income, and distributions the trustee has otherwise decided to make, such as through the exercise of discretion. Subsection (b)(1), unlike Section 504, does not authorize the spousal or child claimant to compel a distribution from the trust. Section 504 authorizes a spouse or child claimant to compel a distribution to the extent the trustee has abused a discretion or failed to comply with a standard for distribution. Subsection (b)(1) refers both to "support" and "maintenance" in order to accommodate differences among the States in terminology employed. No difference in meaning between the two terms is intended.

The definition of "child" in subsection (a) accommodates the differing approaches States take to defining the class of individuals eligible for child support, including such issues as whether support can be awarded to stepchildren. However the State making the award chooses to define "child" will be recognized under this Code, whether the order sought to be enforced was entered in the same or different State. For the definition of "state," which includes Puerto Rico and other American possessions, see Section 103(17).

The definition of "child" in subsection (a) is not exclusive. The definition clarifies that a "child" includes an individual awarded child support in any state. The definition does not expressly include but neither does it exclude persons awarded child support in some other country or political subdivision, such as a Canadian province.

The exception in subsection (b)(2) for a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust is in accord with Restatement (Third) of Trusts § 59(b) (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts § 157(c) (1959). This exception allows a beneficiary of modest means to overcome an obstacle preventing the beneficiary's obtaining services essential to the protection or enforcement of the beneficiary's rights under the trust. *See* Restatement (Third) of Trusts § 59 cmt. d (Tentative Draft No. 2, approved 1999).

Subsection (b)(3), which is similar to Restatement (Third) of Trusts § 59 cmt. a (Tentative Draft No. 2, approved 1999), exempts certain governmental claims from a spendthrift restriction. Federal preemption guarantees that certain federal claims, such as claims by the Internal Revenue Service, may bypass a spendthrift provision no matter what this Code might say. The case law and relevant Internal Revenue Code provisions on the exception for federal tax claims are collected in George G. Bogert & George T. Bogert, The Law of Trusts and Trustees § 224 (Rev. 2d ed. 1992); and 2A Austin W. Scott & William F. Fratcher, The Law of Trusts § 157.4 (4th ed. 1987). Regarding claims by state governments, this subsection recognizes that States take a variety of approaches with respect to collection, depending on whether the claim is for unpaid taxes, for care provided at an institution, or for other charges. Acknowledging this diversity, subsection (c) does not prescribe a rule, but refers to other statutes of the State on whether particular claims are subject to or exempted from spendthrift provisions.

Unlike Restatement (Third) of Trusts § 59(2) (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts § 157(b) (1959), this Code does not create an exception to the spendthrift restriction for creditors who have furnished necessary services or supplies to the beneficiary. Most of these cases involve claims by governmental entities, which the drafters concluded are better handled by the enactment of special legislation as authorized by subsection (b)(3). The drafters also declined to create an exception for tort claimants. For a discussion of the exception for tort claims, which has not generally been recognized, see Restatement (Third) of Trusts § 59 Reporter's Notes to cmt. a (Tentative Draft No. 2, approved 1999). For a discussion of other exceptions to a spendthrift restriction, recognized in some States, see George G. Bogert & George T. Bogert, The Law of Trusts and

Trustees § 224 (Rev. 2d ed. 1992); and 2A Austin W. Scott & William F. Fratcher, The Law of Trusts §§ 157-157.5 (4th ed. 1987).

Subsection (c) provides that the only remedy available to an exception creditor is attachment of present or future distributions. Depending on other creditor law of the state, additional remedies may be available should a beneficiary's interest not be subject to a spendthrift provision. Section 501, which applies in such situations, provides that the creditor may reach the beneficiary's interest under that section by attachment or "other means." Subsection (c) similar to Section 501, clarifies that the court has the authority to limit the creditor's relief as appropriate under the circumstances.

2005 Amendment. The amendment rewrote this section. The section previously provided:

SECTION 503. EXCEPTIONS TO SPENDTHRIFT PROVISION.

(a) In this section, "child" includes any person for whom an order or judgment for child support has been entered in this or another State.
(b) Even if a trust contains a spendthrift provision, a beneficiary's child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance, or a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust, may obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary.
(c) A spendthrift provision is unenforceable against a claim of this State or the United States to the extent a statute of this State or federal law so provides.

5. COLORADO COMMITTEE COMMENTS

Restatement (Second) of Trusts §157 (1959) recognizes preferred status for some creditors of a beneficiary of a trust. The *Restatement* position is expressed as follows:

§157. Particular Classes of Claimants

Although a trust is a spendthrift trust or a trust for support, the interest of the beneficiary can be reached in satisfaction of an enforceable claim against the beneficiary,

(a) by the wife or child of the beneficiary for support, or by the wife for alimony;

(b) for necessary services rendered to the beneficiary or necessary supplies furnished to him;

(c) for services rendered and materials furnished which preserve or benefit the interest of the beneficiary;

(d) by the United States or a State to satisfy a claim against the

beneficiary.

Thus, per *Restatement (Second)*, these preferred creditors may attach a beneficiary's interest in a trust even though the trust contains a valid spendthrift provision. The *Restatements (Second)* and *(Third)* recognize that an owner of property does not have an unqualified power of disposition. There are common law and statutory restrictions based on public policy. Thus, spendthrift restraint is not unqualified. For public policy reasons, some creditors are not bared by spendthrift provisions.

The UTC codifies some, but not all, of the common law preferred creditor classes. Under the UTC, there are only three preferred creditor classes, to wit: (i) a beneficiary's child, spouse or former spouse who has a judgment or court order against the beneficiary for support or maintenance; (ii) a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust; and (iii) a claim of a state or the United States to the extent a statute of this state or federal law so provides.

Restatement (Third) of Trusts section 59 provides:

Section 59. Spendthrift Trusts: Exceptions for Particular Types of Claims:

The interest of a beneficiary in a spendthrift trust can be reached in satisfaction of an enforceable claim against the beneficiary for:

a) Support of a child, spouse or former spouse; or

b) Services or supplies provided for necessities or for protection of the beneficiary's interest in the trust.

Restatement (Third) of Trusts section 59 cmt. a(1) provides that "It is implicit in the rule of this section, as a statement of the common law, that governmental claimants, and other claimants as well, may reach the interest of a beneficiary of a spendthrift trust to the extent provided by federal law or an applicable state statute."

Restatement (Third) of Trusts section 59 cmt. a(2) provides that "The exceptions to spendthrift immunity stated in this section are not exclusive. Special circumstances, or evolving policy may justify recognition of other exceptions, ..."

While the *Restatment (Third) of Trusts* section 59 leaves open the possibility that courts may recognize other exceptions to spendthrift protection, such as for a tort creditor, enactment of the UTC will prevent courts from doing so. The UTC provides that creditors may not reach a beneficial interest in a spendthrift trust "except as otherwise provided" in the Code. See UTC section 502(c) supra. Thus, enactment of the UTC will limit the classes of exception creditors to only those recognized by the legislature.

2005 Amendment 503 has been restructured for three reasons.

	(i) In connection with the amendment of 501, remedies for government exception creditors are being addresed in 503. As originally drafted, 503(c) did not address government exception creditor remedies on the assumption that state and federal laws piercing spendthrift would provided the remedies (e.g. tax liens.) Some have argued that because 503(c) did not contain remedies, the drafters intended that 501 (as originally drafted) did; and that as a consequence, a government creditor could force a spendthrift interest to "judicial sale." The drafters did not intend this result. Remedies for such exception creditors are now to be addressed in 503(c). ii) Under 503(b) as originally drafted, child, spouse, former spouse and "protection provider" exception creditors were limited to attaching only present or future distributions. There is a belief that this same restriction should apply to government exception creditors unless state or federal law applies otherwise. Accordingly, the remedy restriction has been moved to new subsection 503(c); and 503(b) has been rewritten to simply identify the three classes of exception creditors (although section 503(b)(3) continues to recognize state and federal law remedies engrafted into spendthrift piercing statutes/laws.) iii) There is an interest in bringing the benefit of the last sentence of 501 to bear on relief granted to all exception creditors under 503. Accordingly, new subsection (c) duplicates the last sentence in 501. A court should consider exercising its equitable powers under the last sentence of section 503(c) where it seems appropriate in light of a beneficiary's particular circumstances. Consider for example the case of a beneficiary who is disabled for medical reasons with a reduction in employment and wages. Although the beneficiary had been ordered to pay maintenance to a former spouse, maintenance has fallen into arrears because of disability. The former spouse obtains a judgment for the maintenance arrearage. In these circumstances, the court should limit the former spouse's award.
6. COLORADO LAW	There is no comparable Colorado law on point. However, Colorado has already embraced the public policy position placing the interest of a beneficiary's child for support ahead of the beneficiary's interest in such statutory benefits as PERA retirement, etc. See discussion re: section 502, supra.
7. RECOMMENDATIONS	This section should be enacted. There is no Colorado law on the matter and there is benefit to be derived from a clear statutory rule that will add certainty to the classes of exception creditors recognized in Colorado.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 5
CREDITOR CLAIMS; SPENDTHRIFT; AND DISCRETIONARY TRUSTS

1. UTC SECTION	**504**
2. SUBJECT	**DISCRETIONARY TRUSTS; EFFECT OF STANDARD**
3. UTC STATUTE	(a) In this section, "child" includes any person for whom an order or judgment for child support has been entered in this or another State. (b) Except as otherwise provided in subsection (c), 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. (c) To the extent a trustee has not complied with a standard of distribution or has abused a discretion: (1) a distribution may be ordered by the court to satisfy a judgment or court order against the beneficiary for support or maintenace of the beneficiary's child, spouse, or former spouse; and (2) the court shall direct the trustee to pay to the child, spouse, or former spouse such amount as is equitable under the circumstances but not more than the amount the trustee would would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion. (d) 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~~ <u>of</u> distribution. (e) If the trustee's or cotrustee's discretion to make distributions for the trustee's or cotrustee's own benefit is limited by an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor's claim were the beneficiary not acting as trustee or cotrustee.
4. NATIONAL CONFRENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section addresses the ability of a beneficiary's creditor to reach the beneficiary's discretionary trust interest, whether or not the exercise of the trustee's discretion is subject to a standard. This section, similar to the Restatement, eliminates the distinction between discretionary and support trusts, unifying the rules for all trusts fitting within either of the former categories. *See* Restatement (Third) of Trusts § 60 Reporter's Notes to cmt. a (Tentative Draft No. 2, approved 1999). By eliminating this distinction, the rights of a creditor are the same whether the distribution standard is discretionary, subject to a standard, or both. Other than for a claim by a

child, spouse or former spouse, a beneficiary's creditor may not reach the beneficiary's interest. Eliminating this distinction affects only the rights of creditors. The affect of this change is limited to the rights of creditors. It does not affect the rights of a beneficiary to compel a distribution. Whether the trustee has a duty in a given situation to make a distribution depends on factors such as the breadth of the discretion granted and whether the terms of the trust include a support or other standard. *See* Section 814 comment.

For a discussion of the definition of "child" in subsection (a), see Section 503 Comment.

Subsection (b), which establishes the general rule, forbids a creditor from compelling a distribution from the trust, even if the trustee has failed to comply with the standard of distribution or has abused a discretion. Under subsection (d), the power to force a distribution due to an abuse of discretion or failure to comply with a standard belongs solely to the beneficiary. Under Section 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.

Subsection (c) creates an exception for support claims of a child, spouse, or former spouse who has a judgment or order against a beneficiary for support or maintenance. While a creditor of a beneficiary generally may not assert that a trustee has abused a discretion or failed to comply with a standard of distribution, such a claim may be asserted by the beneficiary's child, spouse, or former spouse enforcing a judgment or court order against the beneficiary for unpaid support or maintenance. The court must direct the trustee to pay the child, spouse or former spouse such amount as is equitable under the circumstances but not in excess of the amount the trustee was otherwise required to distribute to or for the benefit of the beneficiary. Before fixing this amount, the court having jurisdiction over the trust should consider that in setting the respective support award, the family court has already considered the respective needs and assets of the family. The Uniform Trust Code does not prescribe a particular procedural method for enforcing a judgment or order against the trust, leaving that matter to local collection law.

Subsection (e), which was added by a 2004 amendment, is discussed below.

2004 Amendment

Section 504(e), 103(11)

Trusts are frequently drafted in which a trustee is also a beneficiary. A common example is what is often referred to as a bypass trust, under which the settlor's spouse will frequently be named as both trustee and beneficiary. An amount equal to the exemption from federal estate tax will be placed in the bypass trust, and the trustee, who will often be the settlor's spouse, will be given discretion to make distributions to the beneficiaries, a class which will usually include the spouse/trustee. To prevent the inclusion of the trust in the spouse-trustee's gross estate, the spouse's discretion to make distributions for

	the spouse's own benefit will be limited by an ascertainable standard relating to health, education, maintenance, or support. The UTC, as previously drafted, did not specifically address the issue of whether a creditor of a beneficiary may reach the beneficial interest of a beneficiary who is also a trustee. However, *Restatement (Third) of Trusts* §60, comment g, which was approved by the American law Institute in 1999, provides that the beneficial interest of a beneficiary/trustee may be reached by the beneficiary/trustee's creditors. Because the UTC is supplemented by the common law (see UTC Section 106), this *Restatement* rule might also apply in states enacting the UTC. The drafting committee has concluded that adoption of the *Restatement* rule would unduly disrupt standard estate planning and should be limited. Consequently, Section 504 is amended to provide that the provisions of this section, which generally prohibit a creditor of a beneficiary from reaching a beneficiary's discretionary interest, apply even if the beneficiary is also a trustee or cotrustee. The beneficiary-trustee is protected from creditor claims to the extent the beneficiary-trustee's discretion is protected by an ascertainable standard as defined in the relevant Internal Revenue Code sections. The result is that the beneficiary's trustee's interest is protected to the extent it is also exempt from federal estate tax. The amendment thereby achieves its main purpose, which is to protect the trustee-beneficiary of a bypass trust from creditor claims. The protection conferred by this subsection, however, is no greater than if the beneficiary had not been named trustee. If an exception creditor can reach the beneficiary's interest under some other provision, the interest is not insulated from creditor claims by the fact the beneficiary is or becomes a trustee. In addition, the definition of "power of withdrawal" in Section 103 is amended to clarify that a power of withdrawal does not include a power exercisable by the trustee that is limited by an ascertainable standard. The purpose of this amendment is to preclude a claim that the power of a trustee-beneficiary to make discretionary distributions for the trustee-beneficiary's own benefit results in an enforceable claim of the trustee-beneficiary's creditors to reach the trustee-beneficiary's interest as provided in Section 505(b). Similar to the amendment to Section 504, the amendment to "power of withdrawal" is being made because of concerns that Restatement (Third) of Trusts Section 60 comment g, otherwise might allow a beneficiary-trustee's creditors to reach the trustee's beneficial interest. The Code does not specifically address the extent to which a creditor of a trustee/beneficiary may reach a beneficial interest of a beneficiary/trustee that is not limited by an ascertainable standard. For the definition of "ascertainable standard," see Section 103(2).
5. COLORADO COMMITTEE COMMENTS	While trusts with valid spendthrift provisions directly prevent beneficiaries from assigning their interests and creditors of such beneficiaries from attaching their interests (with certain exceptions as we have seen), the very

nature of beneficial interests in discretionary trusts and trusts subject to a standard indirectly bar the reach of creditors of a beneficiary.

A creditor who has attached a discretionary interest (because of the absence of a spendthrift provision or because a spendthrift exception applies) can't, as a general rule, force exercise of discretion. Thus, the indirect protection against creditor claims.

Restatement (Second) of Trusts, sections 154 and 155 provide:

§154. Trusts for Support

Except as stated in §§ 156 and 157, if by the terms of a trust it is provided that the trustee shall pay or apply only so much of the income and principal or either as is necessary for the education or support of the beneficiary, the beneficiary cannot transfer his interest and his creditors cannot reach it.

§155. Discretionary Trusts

(1) Except as stated in § 156, if by the terms of a trust it is provided that the trustee shall pay to or apply for a beneficiary only so much of the income and principal or either as the trustee in his uncontrolled discretion shall see fit to pay or apply, a transferee or creditor of the beneficiary cannot compel the trustee to pay any part of the income or principal.

(2) Unless a valid restraint on alienation has been imposed in accordance with the rules stated in §§ 152 and 153, if the trustee pays to or applies for the beneficiary any part of the income or principal with knowledge of the transfer or after he has been served with process in a proceeding by a creditor to reach it, he is liable to such transferee or creditor.

Restatement (Third) of Trusts section 60 provides:

Transfer or Attachment of Discretionary Interests

Subject to the rules stated in sections 58 and 59 (on spendthrift trusts), if the terms of a trust provide for a beneficiary to receive distributions in the trustee's discretion, a transferee or creditor of the beneficiary is entitled to receive or attach any distributions the trustee makes or is required to make in the exercise of that discretion after the trustee has knowledge of the transfer or attachment. The amounts a creditor can reach may be limited to provide for the beneficiary's needs (Comment c), or the amounts may be increased where the beneficiary is either the settlor (Comment f) or holds the discretionary power to determine his or her own distributions (Comment g).

Restatement (Third) of Trusts recognizes the common law right of a beneficiary's creditor to attach his or her discretionary interest unless a valid spendthrift provision applies to the interest. *Restatement (Third) of Trusts* section 60 cmt. a.

In a departure from the *Restatement (Second) of Trusts*, with respect to creditor rights, *Restatement (Third)* applies to discretionary interests whether expressed in the form of a standard or not. *Restatement (Third) of Trusts* section 60 cmt. a and Rptr's Notes on cmt. a.

Under *Restatement (Third)*, self-settled discretionary interests are not protected against creditor claims whether or not there is a spendthrift provision. *Restatement (Third) of Trusts* section 60 cmt. f.

Under the *Third Restatement* where a discretionary beneficiary is also trustee, his or her creditors are able to reach the maximum amount that the trustee/beneficiary can properly take. *Restatement (Third) of Trusts* section 60 cmt. g.

As a general rule, a creditor of a beneficiary cannot compel the trustee to make discretionary distributions if the beneficiary cannot do so. However, the *Restatement (Third) of Trusts* points out that it is rare that a beneficiary is so powerless taking into account the beneficiary's circumstances, the terms of the discretionary power and the purposes of the trust. Thus, the exercise or non-exercise of discretion is always subject to judicial review to prevent abuse. *Restatement (Third) of Trusts* section 60 cmt. e.

Compared with the *Restatement* position, the rule codified in the Uniform Trust Code is much more protective of discretionary interests with respect to creditor claims. The UTC makes it clear that, whether or not there is a spendthrift provision in the terms of the trust, no creditor of a beneficiary can compel a distribution that is subject to the trustee's discretion whether such discretion is expressed in the form of a standard or not, even if the trustee has abused discretion or failed to comply with the standard. Thus, under the UTC, even a creditor who has provided support to the beneficiary of a support trust is unable to force exercise of discretion.

Section 504(c) of the Uniform Trust Code makes a public policy exception with respect to a discretionary beneficiary's child, spouse or former spouse who has a judgment for support. Such a creditor can force exercise of discretion but only if the trustee has abused discretion or failed to comply with the standard. However, this UTC provision only authorizes the court to force exercise of discretion in satisfaction of the judgment. It does not require it. If a court does act, the UTC requires the court to direct the trustee to distribute to the creditor only an amount that is equitable taking into account the discretionary beneficiary's circumstances.

2005 Amendment.

Restatement (Third) of Trusts section 60, cmt. g. provides that the beneficial interest of a beneficiary/trustee may be reached by his or her creditors. This *Restatement* position would apply in the case of the surviving spouse serving as trustee and beneficiary of a family (exemption) trust. This 2004 NCCUSL amendment is intended to eliminate such a result and thereby protect estate plans employing a traditional family trust arrangement, provided the trustee's power to make discretionary distributions to self is

	limited by an ascertainable standard.
6. COLORADO LAW	Colorado courts have recognized the *Restatement (Second)* position with respect to discretionary trusts in the context of determining whether a discretionary interest is "property" for purposes of division of property in divorce. Absent an abuse of discretion a beneficiary cannot compel exercise of discretion and therefore, the discretionary interest is not "property" for this purpose. See for example In Re Marriage of Rosenblum; 602 P.2d 892 (Colo. App. 1979); In Re Marriage of Jones, 812 P.2d 1152 (Colo. 1991); and in Re McCart, 847 P2d 184 (Colo. App. 1992.) These Colorado decisions do not address whether and under what circumstances a beneficiary's creditor can force exercise of discretion. The *Restatement (Third)* position recognizes the common law right of a creditor to force exercise of discretion. If the trustee has abused discretion it is possible, but not likely, that the beneficiary's creditor could obtain a court order forcing exercise of discretion. *Restatement (Third) of Trusts, Section 60 cmt. e.* UTC section 504 is more protective than the *Restatement* position. Under this section, no creditor is permitted to force a trustee's exercise of discretion, even if the trustee has abused discretion (e.g. acted dishonestly with an improper motive or failed to exercise judgment or act at all). However, a beneficiary's child, spouse or former spouse, who has a judgment against the beneficiary for support or maintenance, may obtain a court ordered distribution from the trust if the child, spouse or former spouse can demonstrate that the trustee has abused discretion. Any such court ordered distribution must be equitable taking into account the beneficiary's interest. Moreover, such court ordered distribution cannot exceed the amount that the trustee would have distributed if the trustee had not abused discretion.
7. RECOMMENDATIONS	This section should be enacted.

1. UTC SECTION	505
2. SUBJECT	CREDITOR'S CLAIM AGAINST SETTLOR
3. UTC STATUTE	(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 the claims of the settlor's creditors. 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. (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. (3) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, and, except as otherwise provided by §13-54-102 C.R.S. or other applicable statutes, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and ~~[statutory allowances]~~ statutory allowances to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, ~~expenses, and [allowances]~~.expenses and allowances. (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~~ either case as in effect on ~~[~~the effective date of this ~~[~~Code~~]~~~~]~~, or as later amended~~]~~.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE	Subsection (a)(1) states what is now a well accepted conclusion, that a revocable trust is subject to the claims of the settlor's creditors while the settlor is living. *See* Restatement (Third) of Trusts § 25 cmt. e (Tentative Draft No. 1, approved 1996). Such claims were not allowed at common law,

LAWS COMMENTS	however. *See* Restatement (Second) of Trusts § 330 cmt. o (1959). Because a settlor usually also retains a beneficial interest that a creditor may reach under subsection (a)(2), the common law rule, were it retained in this Code, would be of little significance. *See* Restatement (Second) of Trusts § 156(2) (1959). Subsection (a)(2), which is based on Restatement (Third) of Trusts § 58(2) and cmt. e (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts § 156 (1959), follows traditional doctrine in providing that a settlor who is also a beneficiary may not use the trust as a shield against the settlor's creditors. The drafters of the Uniform Trust Code concluded that traditional doctrine reflects sound policy. Consequently, the drafters rejected the approach taken in States like Alaska and Delaware, both of which allow a settlor to retain a beneficial interest immune from creditor claims. *See* Henry J. Lischer, Jr., *Domestic Asset Protection Trusts: Pallbearers to Liability*, 35 Real Prop. Prob. & Tr. J. 479 (2000); John E. Sullivan, III, *Gutting the Rule Against Self-Settled Trusts: How the Delaware Trust Law Competes with Offshore Trusts*, 23 Del. J. Corp. L. 423 (1998). Under the Code, whether the trust contains a spendthrift provision or not, a creditor of the settlor may reach the maximum amount that the trustee could have paid to the settlor-beneficiary. If the trustee has discretion to distribute the entire income and principal to the settlor, the effect of this subsection is to place the settlor's creditors in the same position as if the trust had not been created. For the definition of "settlor," see Section 103(15). This section does not address possible rights against a settlor who was insolvent at the time of the trust's creation or was rendered insolvent by the transfer of property to the trust. This subject is instead left to the State's law on fraudulent transfers. A transfer to the trust by an insolvent settlor might also constitute a voidable preference under federal bankruptcy law. Subsection (a)(3) recognizes that a revocable trust is usually employed as a will substitute. As such, the trust assets, following the death of the settlor, should be subject to the settlor's debts and other charges. However, in accordance with traditional doctrine, the assets of the settlor's probate estate must normally first be exhausted before the assets of the revocable trust can be reached. This section does not attempt to address the procedural issues raised by the need first to exhaust the decedent's probate estate before reaching the assets of the revocable trust. Nor does this section address the priority of creditor claims or liability of the decedent's other nonprobate assets for the decedent's debts and other charges. Subsection (a)(3), however, does ratify the typical pourover will, revocable trust plan. As long as the rights of the creditor or family member claiming a statutory allowance are not impaired, the settlor is free to shift liability from the probate estate to the revocable trust. Regarding other issues associated with potential liability of nonprobate assets for unpaid claims, see Section 6-102 of the Uniform Probate Code, which was added to that Code in 1998. Subsection (b)(1) treats a power of withdrawal as the equivalent of a power of revocation because the two powers are functionally identical. This is also the approach taken in Restatement (Third) of Trusts § 56 cmt. b (Tentative

	Draft No. 2, approved 1999). If the power is unlimited, the property subject to the power will be fully subject to the claims of the power holder's creditors, the same as the power holder's other assets. If the power holder retains the power until death, the property subject to the power may be liable for claims and statutory allowances to the extent the power holder's probate estate is insufficient to satisfy those claims and allowances. For powers limited either in time or amount, such as a right to withdraw a $10,000 annual exclusion contribution within 30 days, this subsection would limit the creditor to the $10,000 contribution and require the creditor to take action prior to the expiration of the 30-day period. Upon the lapse, release, or waiver of a power of withdrawal, the property formerly subject to the power will normally be subject to the claims of the power holder's creditors and assignees the same as if the power holder were the settlor of a now irrevocable trust. Pursuant to subsection (a)(2), a creditor or assignee of the power holder generally may reach the power holder's entire beneficial interest in the trust, whether or not distribution is subject to the trustee's discretion. However, following the lead of Arizona Revised Statutes § 14-7705(g) and Texas Property Code § 112.035(e), subsection (b)(2) creates an exception for trust property which was subject to a Crummey or five and five power. Upon the lapse, release, or waiver of a power of withdrawal, the holder is treated as the settlor of the trust only to the extent the value of the property subject to the power at the time of the lapse, release, or waiver exceeded the greater of the amounts specified in IRC §§ 2041(b)(2) or 2514(e) [greater of 5% or $5,000], or IRC § 2503(b) [$10,000 in 2001]. The Uniform Trust Code does not address creditor issues with respect to property subject to a special power of appointment or a testamentary general power of appointment. For creditor rights against such interests, see Restatement (Property) Second: Donative Transfers §§ 13.1-13.7 (1986).
5. COLORADO COMMITTEE COMMENTS	This UTC section follows *Restatement (Second) of Trusts* §156 (1959) which provides: *§156. WHERE THE SETTLOR IS A BENEFICIARY* *(1) Where a person creates for his own benefit a trust with a provision restraining the voluntary or involuntary transfer of his interest, his transferee or creditors can reach his interest.* *(2) Where a person creates for his own benefit a trust for support or a discretionary trust, his transferee or creditors can reach the maximum amount which the trustee under the terms of the trust could pay to him or apply for his benefit.* *UTC Subsection (a) (1)* This subsection recognizes the modern view holding that a settlor's revocable trust is subject to the claims of such settlor's creditors while the settlor is living. See *Restatement (Second) of Trusts* §156 (2) (1959). At

common law this was not so if the settlor reserved only a "naked" power to revoke. See *Restatement (Second) of Trusts* §330, comment o (1959). The Uniform Trust Code overrules this narrow common law position. The Official Comments to the UTC suggests that the common law rule has little significance today since settlors of revocable trusts typically retain a beneficial interest as well as a power to revoke.

UTC Subsection (a)(2)

A. Whether or not there is a spendthrift provision, in the case of a beneficiary who is also a settlor of an irrevocable trust, the creditor of such beneficiary can reach the maximum amount that the trustee can distribute for the beneficiary. The creditor "stands in the beneficiary's shoes" with respect to the beneficial interest in such a trust. If there are more than one settlor/beneficiary, the creditor of one of them can reach only the interest attributable to that settlor/beneficiary.

This codification is in accord with *Restatement (Third) of Trusts* section 58(2) which provides that: "A restraint on the voluntary and involuntary alienation of a beneficial interest retained by the settlor of a trust is invalid."

There does not have to be a fraudulent conveyance for this subsection to apply.

UTC Subsection (a) (3)

B. Following one of the principal policies underpinning *Restatement (Third) of Trusts* this subsection recognizes that revocable trusts are truly will substitutes, and that disposition of property under revocable trusts should be treated the same as disposition under wills. Therefore, this subsection provides that creditors of decedents who die with property devolving under revocable trusts should be treated the same as creditors of decedents who die with property devolving under wills. See *Restatement (Third) of Trusts* §25, comments d and e (tentative draft no. 1)

Thus, this subsection codifies the well established modern trend in case law holding that: (i) assets of a deceased settlor's revocable trust do not escape liability for the claims of such settlor's creditors to the extent (ii) the settlor's probate estate is insufficient to satisfy such claims.[1]

State Street Bank and Trust Co. v. Raiser, 389 N.E.2d 768 (1979) where citing the rule in *Restatement (Second) of Trusts* §156 the court said that "it is excessive obeisance to the form in which property is held to prevent creditors from reaching property placed in trust [following the creditor's death.];" and Johnson v. Commercial Bank, 588 P.2d 1096 (1978). See also *Restatement of Property* §328 comment a (1940).

This section is an "enabling" section making clear that revocable trust assets do not escape liability for creditor claims. The UTC drafters have left to other state law the procedure to follow in reaching such assets postmortem.

	Colorado is now considering new UPC §6- 102 which, if enacted, will establish such procedures in Colorado. If Colorado enacts UPC §6-102 it is important that UTC §505(a)(3) coordinate with such enactment. Subsection (a)(3) has been drafted accordingly. *UTC Subsection (b)(1)* According to the official comments, this subsection "...treats a presently exercisable general power of appointment as the functional equivalent of a power of revocation." Thus, the policy of UTC §505 and *Restatement (Third) of Trusts* is brought to bear on the property subject to such a power. The power holder is treated as the settlor of a revocable trust to the extent of property subject to the power. *UTC Subsection (b)(2)* This subsection provides that the holder of a power of withdrawal continues to be treated as a settlor of a trust with respect to property that had been subject to the withdrawal power even after lapse, release or waiver of the power, but only to the extent that the value of the property subject to the withdrawal power exceeds the 5 x 5 limit or the annual gift tax exclusion amount. Thus, for example, after lapse of a Crummey withdrawal power, property which had been subject to the power will no longer be subject to the power holder's creditors' claims to the extent the value of the property subject to the lapsed power is less than the 5 x 5 limit or the annual gift tax exclusion amount.
6. COLORADO LAW	Self Settled Trusts. Some have suggested that section 38-10-111 C.R.S. applies only to creditors existing at the time a self settled trust is created and, therefore, that creditors arising after creation of such a trust can't reach the settlor/beneficiary's interest. This position has been refuted by the Colorado Supreme Court in dicta in In re: Cohen, 8 P. 3d 429, 432 (Colo. 1999) citing *Restatement (Second) of Trusts* section 156 (1959). Powers of Appointment/Withdrawal. The Court of Appeals has taken a position with respect to creditors' rights in property subject to a currently exercisable general power of appointment. In University National Bank v. Rhoadarmer, 827 P.2d 561 (Colo. App. 1991), a trust beneficiary held a currently exercisable power to withdraw trust principal up to $5,000.00 or 5% of the current market value of the trust principal. The beneficiary's creditor attempted garnishment of this interest. The Court of Appeals held: (i) that a currently exercisable power of appointment is not "property" of the power holder and is therefore not subject to garnishment; (ii) that absent exercise of the power, the

	beneficiary has no "property" held by the trust susceptible to garnishment; and (iii) the existence of a spendthrift provision in the trust terms prevents invasion of trust property for benefit of the power holder's creditors. Enactment of UTC §505 (b) (1) and (2) will overrule the holding in Rhoadarmer.
7. RECOMMENDATIONS	Under existing Colorado law, death benefits payable to designated beneficiaries under life insurance policies and benefits payable to designated beneficiaries pursuant to pension and retirement plans are exempt from the claims of the insureds'/participants' creditors after death. Section 13-54-102 C.R.S. Reference to §13-54-102 C.R.S. in the UTC section should be added to apply this policy in the case of such benefits payable to an insured's revocable trust after the insured's death. The overruling of the holding in Rhoadarmer, supra, by subsections (b)(1) and (2) is a policy matter that should be brought to the attention of the legislature. Otherwise, UTC Section 505, as modified by specific reference to §13-54-102 C.R.S., should be approved.

1. UTC SECTION	506
2. SUBJECT	OVERDUE DISTRIBUTION
3. UTC STATUTE	(a) In this section, "mandatory distribution" means a distribution of income or principal which the trustee is required to make to a beneficiary under the terms of the trust, including a distribution upon termination of the trust. The term does not include a distribution subject to the exercise of the trustee's discretion even if (1) the discretion is expressed in the form of a standard of distribution, or (2) the terms of the trust authorizing a distribution couple language of discretion with language of direction. (b) 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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	The effect of a spendthrift provision is generally to insulate totally a beneficiary's interest until a distribution is made and received by the beneficiary. *See* Section 502. But this section, along with several other sections in this article, recognizes exceptions to this general rule. Whether a trust contains a spendthrift provision or not, a trustee should not be able to avoid creditor claims against a beneficiary by refusing to make a distribution required to be made by the express terms of the trust. On the other hand, a spendthrift provision would become largely a nullity were a beneficiary's creditors able to attach all required payments as soon as they became due. This section reflects a compromise between these two competing principles. A creditor can reach a mandatory distribution, including a distribution upon termination, if the trustee has failed to make the payment within a reasonable time after the designated distribution date. Following this reasonable period, payments mandated by the express terms of the trust are in effect being held by the trustee as agent for the beneficiary and should be treated as part of the beneficiary's personal assets. This section is similar to Restatement (Third) of Trusts § 58 cmt. d (Tentative Draft No. 2, approved 1999). **2001 Amendment.** By amendment in 2001, "designated distribution date" was substituted for "required distribution date" in subsection (b). The amendment conforms the language of this section to terminology used elsewhere in the Code.

	2005 Amendment. The amendment adds a clarifying definition of "mandatory distribution" in subsection (a), which is based on an Ohio proposal. The amendment: • tracks the traditional understanding that a mandatory distribution includes a provision requiring that a beneficiary be paid the income of a trust or receive principal upon termination; • correlates the definition of "mandatory distribution" in this section to the broad definition of discretionary trust used in Section 504. Under both Sections 504 and 506, a trust is discretionary even if the discretion is expressed in the form of a standard, such as a provision directing a trustee to pay for a beneficiary's support; • addresses the situation where the terms of the trust couple language of discretion with language of direction. An example of such a provision is "my trustees shall, in their absolute discretion, distribute such amounts as are necessary for the beneficiary's support." Despite the presence of the imperative "shall," the provision is discretionary, not mandatory. For a more elaborate example of such a discretionary "shall" provision, see Marsman. Nasca, 573 N.E. 2d 1025 (Mass. Ct. App. 1991). • is clarifying. No change of substance is intended by this amendment. This amendment merely clarifies that a mandatory distribution is to be understood in its traditional sense such as a provision requiring that the beneficiary receive an income or receive principal upon termination of the trust.
5. COLORADO COMMITTEE COMMENTS	If a trustee fails to make a distribution to a beneficiary within a "reasonable time" after the express terms of the trust require the distribution to be made, the trustee has become an agent for the beneficiary and the creditors of such beneficiary may attach the distribution held back by the trustee. Such a distribution has already become an asset of the beneficiary. It had been argued that some discretionary trust terms might be construed as creating "mandatory" interests (e.g. "trustee shall distribute principal and income for the beneficiary's support") and that 506 "creates" a right in the beneficiary to compel them. Therefore, it had been argued, a creditor could "stand in the shoes" of the beneficiary and compel the distribution. The drafters did not intend this result. A mandatory distribution is one that the trustee does not have discretion to withhold. Moreover, the intent of article 5 is to treat all discretionary trusts, whether expressed in the form of a standard or not, as discretionary for purposes of defining creditor's rights. New subsection (a) is being added to make the intent of 506 clear. In some contexts, the word "shall" has been construed to mean "may" and vice versa. For discussion of the misuse of the word "shall" in legal documents see Brian A. Garner, *A Dictionary of Modern Legal Usage*, p. 939-942 (2nd. ed., Oxford University Press).

6. COLORADO LAW	There is none.
7. RECOMMENDATIONS	This section should be enacted.

1. UTC SECTION	507
2. SUBJECT	PERSONAL OBLIGATIONS OF TRUSTEE
3. UTC STATUTE	Trust property is not subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	Because the beneficiaries of the trust hold the beneficial interest in the trust property and the trustee holds only legal title without the benefits of ownership, the creditors of the trustee have only a personal claim against the trustee. *See* Restatement (Third) § 5 cmt. k (Tentative Draft No.1, approved 1996); Restatement (Second) of Trusts § 12 cmt. a (1959). Similarly, a personal creditor of the trustee who attaches trust property to satisfy the debt does not acquire title as a bona fide purchaser even if the creditor is unaware of the trust. *See* Restatement (Second) of Trusts § 308 (1959). The protection afforded by this section is consistent with that provided by the Bankruptcy Code. Property in which the trustee holds legal title as trustee is not part of the trustee's bankruptcy estate. 11 U.S.C. § 541(d). The exemption of the trust property from the personal obligations of the trustee is the most significant feature of Anglo-American trust law by comparison with the devices available in civil law countries. A principal objective of the Hague Convention on the Law Applicable to Trusts and on their Recognition is to protect the Anglo-American trust with respect to transactions in civil law countries. *See* Hague Convention art. 11. *See also* Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. Rev. 434 (1998); John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 Yale L.J. 165, 179-80 (1997).
5. COLORADO COMMITTEE COMMENTS	The intent of this section is to make clear that the personal creditors of a trustee may not attach property interests titled to the trustee for benefit of third party beneficiaries. This position follows *Restatement (Second) of Trusts,* section 12, cmt. (a) and *Restatement (Third) of Trusts*, section 5, cmt. (k) (tentative draft no. 1, 1996). *Restatement (Third) of Trusts*, section 5, cmt. (k) explains that when a trust is created there is a fiduciary relationship between the trustee and the beneficiaries. The beneficiaries have equitable interests in trust property. On the other hand, a debtor does not stand in a fiduciary relationship to his creditors.

	When one person transfers funds to another, it depends on the manifest intention of the parties whether the relationship created is that of trust or debt. If the intention is that the money shall be kept or used as a separate fund for the benefit of the payor or one or more third persons, a trust is created. If it is intended, however, that the person receiving the money shall have the unrestricted use of it, being liable to pay a similar amount to the payor or a third person, whether with or without interest, a debt is created. *Restatement (Third) of Trusts*, section 5, cmt. (k). Thus, if a trustee becomes insolvent, beneficiaries retain their equitable interests in trust property. On the other hand, if a loan has been made and the borrower becomes insolvent, the lender has a personal claim against the borrower and may reach the borrower's property but not property held by the borrower as trustee for others.
6. COLORADO LAW	This section is a codification of part of the policy underpinning the holding in Lagae v. Lackner, 996 P.2d 1281 (Colo. 2000).
7. RECOMMENDATIONS	This section should be enacted.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 6
REVOCABLE TRUSTS

1. UTC SECTION	**601**
2. SUBJECT	**CAPACITY OF SETTLOR OF REVOCABLE TRUST**
3. UTC STATUTE	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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section is patterned after Restatement (Third) of Trusts § 11(1) (Tentative Draft No. 1, approved 1996). The revocable trust is used primarily as a will substitute, with its key provision being the determination of the persons to receive the trust property upon the settlor's death. To solidify the use of the revocable trust as a device for transferring property at death, the settlor usually also executes a pourover will. The use of a pourover will assures that property not transferred to the trust during life will be combined with the property the settlor did manage to convey. Given this primary use of the revocable trust as a device for disposing of property at death, the capacity standard for wills rather than that for lifetime gifts should apply. The application of the capacity standard for wills does not mean that the revocable trust must be executed with the formalities of a will. There are no execution requirements under this Code for a trust not created by will, and a trust not containing real property may be created by an oral statement. *See* Section 407 and Comment. The Uniform Trust Code does not explicitly spell out the standard of capacity necessary to create other types of trusts, although Section 402 does require that the settlor have capacity. This section includes a capacity standard for creation of a revocable trust because of the uncertainty in the case law and the importance of the issue in modern estate planning. No such uncertainty exists with respect to the capacity standard for other types of trusts. To create a testamentary trust, the settlor must have the capacity to make a will. To create an irrevocable trust, the settlor must have the capacity that would be needed to transfer the property free of trust. *See generally* Restatement (Third) of Trusts § 11 (Tentative Draft No. 1, approved 1996); Restatement (Third) of Property: Wills and Other Donative Transfers § 8.1 (Tentative Draft No. 3, 2001).
5. COLORADO COMMITTEE COMMENTS	This section, like all of Article 6, treats a revocable trust as the functional equivalent of a will. Section 601 is patterned after *Restatement (Third) of Trusts* § 11 (Tentative Draft No. 1, approved 1996). In light of the widespread use of the revocable trust as a device for disposing of property at death, the UTC and the drafters of the *Third Restatement* take the position that the capacity standard for

	wills, and not for lifetime gifts, should apply to a revocable trust.
6. COLORADO LAW	Because section 601 simply incorporates the capacity standard for making a will, rather than defining capacity for purposes of creating a revocable trust, this section must be read in conjunction with C.R.S. § 15-11-501, which provides that: "An individual eighteen or more years of age who is of sound mind may make a will." Being "of sound mind," or having testamentary capacity, requires that the testator "understand . . . in a general way: (1) The nature and extent of his property, (2) The persons who are the natural objects of his bounty, and (3) The disposition which he is making of his property. He must also be capable of: (4) Appreciating these elements in relation to each other, and (5) Forming an orderly desire as to the disposition of his property." Atkinson, *Law of Wills* (1953) § 51. Similar formulations are found in the Colorado case law. *Lehman v. Lindenmeyer*, 48 Colo. 305, 109 P. 956 (1910); *Cunningham v. Stender*, 127 Colo. 293, 255 P.2d 977 (1953) (testamentary capacity requires that "(1) [testatrix] understood the nature of her act; (2) that she knew the extent of her property; (3) that she understood the proposed testamentary disposition; (4) that she knew the natural objects of her bounty; and (5) that the will represented her wishes."); *Estate of Spicer H. Breeden*, 992 P.2d 1167 at 1170. "In Colorado, a sound mind includes the presence of the Cunningham factors and the absence of insane delusions that materially affect the will." *Id.* at 1172. See Instruction 34:9 of the Colorado Jury Instructions, quoted with approval in *Breeden*. Case law in Colorado states that "capacity to create a trust" is an essential element of an express private trust, *In re Baum*, 22 F.3d 1014 (10th Cir. 1994); *Estate of Brenner*, 547 P.2d 938 (Colo. App. 1976), but the only definition of capacity is that "a person has a capacity to create a trust by declaring himself trustee of property to the extent that he has capacity to transfer the property inter vivos." *In re Estate of Granberry*, 498 P.2d 960 at 963 (Colo. App. 1972), citing the *Restatement (Second) of Trusts* § 18. Arguably, the capacity required to make an inter vivos transfer of property refers to capacity to contract (as opposed to capacity to make an inter vivos gift) and, again arguably, that is a higher level of capacity than testamentary capacity. *See* Susan Fox Buchanan and James W. Buchanan III, *Mental Competence and Legal Capacity Under Colorado Law: A Question of Consistency*, 90 Colorado Lawyer 1813 at 1813-1814 (September 1990). However, the Colorado case law on this issue is confusing at best. One Colorado case states that the standard of capacity to make an inter vivos *gift* is the same as the standard of testamentary capacity. *Columbia Sav. & Loan Ass'n v. Carpenter*,

	33 Colo. App. 360, 521 P.2d 1299 (1974) ("Although we find no Colorado cases dealing with the issue of mental capacity to make an inter vivos gift, we believe
	that those cases defining testamentary capacity are applicable"), *rev'd on other grounds sub nom. Judkins v. Carpenter*, 189 Colo. 95, 537 P.2d 737 (1975). Another case, dealing with capacity to contract, states that "Contractual capacity and testamentary capacity are the same." *Hanks v. McNeil Coal Corp.*, 168 P.2d 256 (Colo. 1946). However the test enunciated by the court in *Hanks* for lack of contractual capacity was quite different from the normal formulation of the test for testamentary capacity: "The legal test . . . is whether 'he was incapable of understanding and appreciating the extent and effect of business transactions in which he engaged.'" *Id.*, citing *Ellis v. Colorado Nat. Bank*, 10 P.2d 336 (Colo. 1932). The Colorado Supreme Court recently quoted *Hanks* with approval: "In Hanks, we noted that contractual capacity and testamentary capacity are the same." *Estate of Spicer Breeden*, 992 P.2d 1167 at 1170.
7. RECOMMENDATIONS	Testamentary capacity has been characterized as "the least amount of cognitive capability [necessary] to do a legal act." Gibbs and Hanson, *Degree of Capacity Required to Create an Inter Vivos Trust*, Trusts & Estates 14 (December 1993). The *Restatement (Second) of Trusts* §§ 18 and 19 provide that the capacity necessary to create an inter vivos trust is that necessary to transfer property inter vivos, but the *Restatement* does not define the standard of capacity. Some courts have held that the degree of capacity required to create a revocable living trust is greater than testamentary capacity. The rationale is that creating a living trust is akin to transacting business, and that it takes greater acumen to deal with other self-interested persons than it does to make gifts to loved ones. Rein-Francovich, *An Ounce of Prevention: Grounds for Upsetting Wills and Will Substitutes*, 20 Gonzaga Law Review 1 at 20-21 (1984/85). On the other hand, some commentators argue that this reasoning is flawed and, if anything, the standard for testamentary capacity should be higher than the standard for contractual capacity, because a testamentary disposition is more likely to be ill-considered and does not involve a present parting with ownership or possession. See *Id.* at 21, quoting John H. Langbein, *Living Probate: The Conservatorship Model*, 77 Mich. L. Rev. 63, 82 (1978); Susan Fox Buchanan and James W. Buchanan III, *Mental Competence and Legal Capacity Under Colorado Law: A Question of Consistency*, 90 Colorado Lawyer 1813, 1814 (September 1990). Note that the UTC does not deal with the standard of capacity necessary to create an *irrevocable* living trust. The comments state that section 601 sets out a capacity standard for the creation of a revocable trust because of the uncertainty on that issue in the case law and the importance of the issue in modern estate planning.

	Although it does not define the applicable standard of capacity, Section 601 would clarify that the same standard of capacity that applies to the making of a
	will also applies to creating, amending, or revoking a revocable living trust. This approach has the advantages of (1) clarifying a potentially uncertain area of the law, and (2) consistency, in that the same test of capacity would apply both to wills and to a common will substitute in the form of the revocable living trust. The subcommittee recommends adoption of this provision without change.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 6
REVOCABLE TRUSTS

1. UTC SECTION	**602**
2. SUBJECT	**REVOCATION OR AMENDMENT OF REVOCABLE TRUST**
3. UTC STATUTE	(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 [the effective date of this [Code]]. (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. (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:~~ by any other method manifesting clear and convincing evidence of the settlor's intent, which may include 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. ~~(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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	Subsection (a), which provides that a settlor may revoke or modify a trust unless the terms of the trust expressly state that the trust is irrevocable, changes the common law. Most States follow the rule that a trust is presumed irrevocable absent evidence of contrary intent. *See* Restatement (Second) of Trusts § 330 (1959). California, Iowa, Montana, Oklahoma, and Texas presume that a trust is revocable. The Uniform Trust Code endorses this minority approach, but only for trusts created after its effective date. This Code presumes revocability when the instrument is silent because the instrument was likely drafted by a nonprofessional, who intended the trust as a will substitute. The most recent revision of the Restatement of Trusts similarly reverses the former approach. A trust is presumed revocable if the settlor has retained a beneficial interest. *See* Restatement (Third) of Trusts § 63 cmt. c (Tentative Draft No. 3, 2001). Because professional drafters habitually spell out whether or not a trust is revocable, subsection (a) will have limited application. A power of revocation includes the power to amend. An unrestricted power to amend may also include the power to revoke a trust. *See* Restatement (Third) of Trusts § 63 cmt. g (Tentative Draft No. 3, 2001); Restatement (Second) of Trusts § 331 cmt. g and h (1959). Subsection (b), which is similar to Restatement (Third) of Trusts § 63 cmt. k (Tentative Draft No. 3, 2001), provides default rules for revocation or amendment of a trust having several settlors. The settlor's authority to revoke or modify the trust depends on whether the trust contains community property. To the extent the trust contains community property, the trust may be revoked by either spouse acting alone but may be amended only by joint action of both spouses. The purpose of this provision, and the reason for the use of joint trusts in community property States, is to preserve the community character of property transferred to

the trust. While community property does not prevail in a majority of States, contributions of community property to trusts created in noncommunity property States does occur. This is due to the mobility of settlors, and the fact that community property retains its community character when a couple move from a community to a noncommunity State. For this reason, subsection (b), and its provision on contributions of community property, should be enacted in all States, whether community or noncommunity.

With respect to separate property contributed to the trust, or all property of the trust if none of the trust property consists of community property, subsection (b) provides that each settlor may revoke or amend the trust as to the portion of the trust contributed by that settlor. The inclusion of a rule for contributions of separate property does not mean that the drafters of this Code concluded that the use of joint trusts should be encouraged. The rule is included because of the widespread use of joint trusts in noncommunity property States in recent years. Due to the desire to preserve the community character of trust property, joint trusts are a necessity in community property States. Unless community property will be contributed to the trust, no similarly important reason exists for the creation of a joint trust in a noncommunity property State. Joint trusts are often poorly drafted, confusing the dispositive provisions of the respective settlors. Their use can also lead to unintended tax consequences. *See* Melinda S. Merk, *Joint Revocable Trusts for Married Couples Domiciled in Common-Law Property States*, 32 Real Prop. Prob. & Tr. J. 345 (1997).

Subsection (b) does not address the many technical issues that can arise in determining the settlors' proportionate contribution to a joint trust. Most problematic are contributions of jointly-owned property. In the case of jointtenancies in real estate, each spouse would presumably be treated as having made an equal contribution because of the right to sever the interest and convert it into a tenancy in common. This is in contrast to joint accounts in financial institutions, ownership of which in most States is based not on fractional interest but on actual dollar contribution. *See, e.g.*, Uniform Probate Code § 6-211. Most difficult may be determining a contribution rule for entireties property. In *Holdener v. Fieser*, 971 S.W. 2d 946 (Mo. Ct. App. 1998), the court held that a surviving spouse could revoke the trust with respect to the entire interest but did not express a view as to revocation rights while both spouses were living.

This section does not explicitly require that the other settlor or settlors be notified if a joint trust is revoked by less than all of the settlors, but such notice would be required pursuant to Section 603. While a trust is revocable and the settlor has capacity, Section 603(a) provides that the duties of the trustee, including the duty to keep the beneficiaries informed of administrative developments, are owed

	exclusively to the settlor. With respect to trusts having several settlors, Section
	603(c) clarifies that the trustee's duties, including the duty to keep the beneficiaries informed of developments, are owed to *all* settlors having capacity. Notifying the other settlor or settlors of the revocation or amendment will place them in a better position to protect their interests. If the revocation or amendment by less than all of the settlors breaches an implied agreement not to revoke or amend the trust, those harmed by the action can sue for breach of contract. If the trustee fails to notify the other settlor or settlors of the revocation or amendment, the parties aggrieved by the trustee's failure can sue the trustee for breach of trust. Subsection (c), which is similar to Restatement (Third) of Trusts § 63 cmt. h and i (Tentative Draft No. 3, 2001), specifies the method of revocation and amendment. Revocation of a trust differs fundamentally from revocation of a will. Revocation of a will, because a will is not effective until death, cannot affect an existing fiduciary relationship. With a trust, however, because a revocation will terminate an already existing fiduciary relationship, there is a need to protect a trustee who might act without knowledge that the trust has been revoked. There is also a need to protect trustees against the risk that they will misperceive the settlor's intent and mistakenly assume that an informal document or communication constitutes a revocation when that was not in fact the settlor's intent. To protect trustees against these risks, drafters habitually insert provisions providing that a revocable trust may be revoked only by delivery to the trustee of a formal revoking document. Some courts require strict compliance with the stated formalities. Other courts, recognizing that the formalities were inserted primarily for the trustee's and not the settlor's benefit, will accept other methods of revocation as long as the settlor's intent is clear. *See* Restatement (Third) of Trusts § 63 Reporter's Notes to cmt. h-j (Tentative Draft No. 3, 2001). This Code tries to effectuate the settlor's intent to the maximum extent possible while at the same time protecting a trustee against inadvertent liability. While notice to the trustee of a revocation is good practice, this section does not make the giving of such notice a prerequisite to a trust's revocation. To protect a trustee who has not been notified of a revocation or amendment, subsection (g) provides that 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, as unamended, was still in effect. However, to honor the settlor's intent, subsection (c) generally honors a settlor's clear expression of intent even if inconsistent with stated formalities in the terms of the trust. Under subsection (c), the settlor may revoke or amend a revocable trust by

	substantially complying with the method specified in the terms of the trust or by a later executed will or codicil or any other method manifesting clear and
	convincing evidence of the settlor's intent. Only if the method specified in the terms of the trust is made exclusive is use of the other methods prohibited. Even then, a failure to comply with a technical requirement, such as required notarization, may be excused as long as compliance with the method specified in the terms of the trust is otherwise substantial. Subsection (c)(2) revised to avoid an implication that a revocatory provision in a will or codicil is effective immediately upon execution of the testamentary document. While revocation of a trust will ordinarily continue to be accomplished by signing and delivering a written document to the trustee, other methods, such as a physical act or an oral statement coupled with a withdrawal of the property, might also demonstrate the necessary intent. These less formal methods, because they provide less reliable indicia of intent, will often be insufficient, however. The method specified in the terms of the trust is a reliable safe harbor and should be followed whenever possible. Revocation or amendment by will is mentioned in subsection (c) not to encourage the practice but to make clear that it is not precluded by omission. *See* Restatement (Third) of Property: Will and Other Donative Transfers § 7.2 cmt. e (Tentative Draft No. 3, 2001), which validates revocation or amendment of will substitutes by later will. Situations do arise, particularly in death-bed cases, where revocation by will may be the only practicable method. In such cases, a will, a solemn document executed with a high level of formality, may be the most reliable method for expressing intent. A revocation in a will ordinarily becomes effective only upon probate of the will following the testator's death. For the cases, see Restatement (Third) of Trusts § 63 Reporter's Notes to cmt. h-i (Tentative Draft No. 3, 2001). A residuary clause in a will disposing of the estate differently than the trust is alone insufficient to revoke or amend a trust. The provision in the will must either be express or the will must dispose of specific assets contrary to the terms of the trust. The substantial body of law on revocation of Totten trusts by will offers helpful guidance. The authority is collected in William H. Danne, Jr., *Revocation of Tentative ("Totten") Trust of Savings Bank Account by Inter Vivos Declaration or Will*, 46 A.L.R. 3d 487 (1972). Subsection (c) does not require that a trustee concur in the revocation or

	amendment of a trust. Such a concurrence would be necessary only if required by the terms of the trust. If the trustee concludes that an amendment unacceptably changes the trustee's duties, the trustee may resign as provided in Section 705.
	Subsection (d), providing that upon revocation the trust property is to be distributed as the settlor directs, codifies a provision commonly included in revocable trust instruments. Subsection (e), which is similar to Restatement (Third) of Trusts § 63 cmt. l (Tentative Draft No. 3, 2001), authorizes an agent under a power of attorney to revoke or modify a revocable trust only to the extent the terms of the trust or power of attorney expressly so permit. An express provision is required because most settlors usually intend that the revocable trust, and not the power of attorney, to function as the settlor's principal property management device. The power of attorney is usually intended as a backup for assets not transferred to the revocable trust or to address specific topics, such as the power to sign tax returns or apply for government benefits, which may be beyond the authority of a trustee or are not customarily granted to a trustee. Subsection (f) addresses the authority of a conservator or guardian to revoke or amend a revocable trust. Under the Uniform Trust Code, a "conservator" is appointed by the court to manage the ward's party, a "guardian" to make decisions with respect to the ward's personal affairs. *See* Section 103. Consequently, subsection (f) authorizes a guardian to exercise a settlor's power to revoke or amend a trust only if a conservator has not been appointed. Many state conservatorship statutes authorize a conservator to exercise the settlor's power of revocation with the prior approval of the court supervising the conservatorship. *See, e.g.*, Uniform Probate Code § 411(a)(4). Subsection (f) ratifies this practice. Under the Code, a conservator may exercise a settlor's power of revocation, amendment, or right to withdraw trust property upon approval of the court supervising the conservatorship. Because a settlor often creates a revocable trust for the very purpose of avoiding conservatorship, this power should be exercised by the court reluctantly. Settlors concerned about revocation by a conservator may wish to deny a conservator a power to revoke. However, while such a provision in the terms of the trust is entitled to considerable weight, the court may override the restriction if it concludes that the action is necessary in the interests of justice. *See* Section 105(b)(13). Steps a conservator can take to stem possible abuse is not limited to petitioning to revoke the trust. The conservator could petition for removal of the trustee under Section 706. The conservator, acting on the settlor-beneficiary's behalf,

	could also bring an action to enforce the trust according to its terms. Pursuant to Section 303, a conservator may act on behalf of the beneficiary whose estate the conservator controls whenever a consent or other action by the beneficiary is required or may be given under the Code.
	If a conservator has not been appointed, subsection (f) authorizes a guardian to exercise a settlor's power to revoke or amend the trust upon approval of the court supervising the guardianship. The court supervising the guardianship will need to determine whether it can grant a guardian authority to revoke a revocable trust under local law or whether it will be necessary to appoint a conservator for that purpose.
5. **COLORADO COMMITTEE COMMENTS**	**Subsection (a),** providing that a trust is revocable unless the trust expressly states that it is irrevocable, is contrary to the common law. *See Restatement (Second) of Trusts* § 330 (1959). **Subsection (b)** provides default rules for the revocation of a trust with more than one settlor. The language dealing with community property is relevant in Colorado because former community property residents may contribute community property to a trust created in Colorado, or the situs of a trust holding community property may be moved to Colorado. The rules concerning contributions of noncommunity property by multiple settlors are helpful because of the prevalence in recent years of joint revocable trusts. **Subsection (c)** relaxes the rules relating to the methods by which a revocable trust may be revoked, by requiring only substantial, rather than strict, compliance with a revocation method specified in the trust terms, and by allowing revocation by a will or codicil or by any other method manifesting clear and convincing evidence of the settlor's intent. The comments say that revocation by will is "mentioned . . . not to encourage the practice but to make clear that it is not precluded by omission." The comments also state that a revocation by will ordinarily would become effective only upon probate of the will following the testator/settlor's death. This section is intended to effectuate the settlor's intent to the maximum extent possible, while at the same time protecting the trustee against liability (see subsection 602(g)). The comments also point out that less formal methods of revocation should not be encouraged, because they provide less reliable indicia of the settlor's intent. **Subsection (d)** codifies a common revocable trust provision. **Subsection (e)** provides that an agent under a power of attorney may exercise the settlor's power to revoke only if expressly authorized by the terms of the trust or

	the terms of the power of attorney. According to the comments, this is because the settlor usually intends that the trust, rather than the power of attorney, will be the primary property management device.
	Subsection (f) allows a conservator of, if there is no conservator, a guardian, to exercise the settlor's power to amend or modify with the approval of the court supervising the conservatorship or guardianship. The Comments make the point that, because this is not a mandatory rule under Section 105, the settlor may provide in the trust instrument that a conservator or guardian will not have this power even with court approval. **Subsection (g)** addresses the possibility that a trust could be amended or revoked without the trustee's knowledge, by providing that the trustee is not liable for distributions made or other actions taken on the assumption that the trust has not been amended or revoked.
6. COLORADO LAW	**Subsection (a).** There are no Colorado cases directly addressing whether a trust is revocable or irrevocable in the absence of an express provision as to revocation. Presumably, Colorado would follow the majority rule set forth in the *Restatement (Second) of Trusts* § 330, under which the trust is irrevocable unless a power to revoke is expressly reserved. *See Brown v. International Trust Company*, 278 P.2d 581 at 583 (Colo. 1954) ("A settlor may revoke a valid trust *where a power of revocation is validly reserved . . . .*" Emphasis added.) **Subsection (b).** The manner in which a power to revoke may be exercised as to a trust with multiple settlors is currently a matter of interpretation of the trust instrument. **Subsection (c).** Under current Colorado law, if the trust instrument specifies a method of revocation, the trust may be revoked only by strict compliance with the specified method. *Brown v. International Trust Company*, 278 P.2d 581 at 583 (Colo. 1954) ("if a particular method of revocation is specified, that procedure must be strictly followed in order to make the revocation effective"); *Denver National Bank v. Von Brecht*, 322 P.2d 667 at 670 (Colo. 1958) ("revocation of a trust agreement must be in accordance with the terms of the instrument and not otherwise"). *See also Restatement (Second) of Trusts* § 330, comment f. **Subsection (d).** No current Colorado law. **Subsection (e).** As to the exercise of a power to revoke by the settlor's agent under a power of attorney, C.R.S. § 15-14-608(2) provides: "An agent may not

	revoke or amend a trust that is revocable or amendable by the principal without specific authority and specific reference to the trust *in the agency instrument*. In addition, an agent may not require the trustee of any trust for the benefit of the principal to pay income or principal to the agent without specific authority and specific reference to the trust *in the agency instrument*." Emphasis added.
	Subsection (f). This subsection is consistent with Colorado's new guardianship and conservatorship law. Unless limited by the court, a conservator has certain powers that may be exercised without seeking prior court approval, C.R.S. § 15-14-425, but these do not include the power to amend or revoke a trust. The court has "all the powers over the estate and business affairs of the protected person that the person could exercise if the person were an adult, present, and not under conservatorship or other protective order," C.R.S. § 15-14-410(1)(b), which clearly would include the power to amend or revoke a trust. The court may confer on the conservator any power that the court itself could exercise. C.R.S. § 15-14-425(4). **Subsection (g)**. No current Colorado law.
7. RECOMMENDATIONS	**Subsection (a)**. The presumption of revocability in the absence of an express provision may cause a trust to be revocable which the settlor intended to be irrevocable. Although there are no Colorado cases on this is issue, Colorado would probably follow the majority rule that a trust is irrevocable unless a power to revoke is expressly reserved. Therefore, this provision may represent a change in Colorado law. However, the provision expressly does not apply to trusts excuted prior to the effective date of the Act. The advisable practice, of course, is to specify in the trust instrument whether the trust is revocable or irrevocable. **Subsection (b)**. The default rules for how a power of revocation may be exercised if there are multiple settlors will be useful in light of the increasing number of joint revocable trusts appearing in Colorado. Again, it is, of course, advisable to address this issue in the trust instrument, and the default rules will be applicable where the instrument is silent. **Subsection (c)**. This subsection relaxes current law by requiring only substantial, rather than strict, compliance with trust provisions specifying the manner in which the trust may be revoked. In addition, this subsection would allow revocation by will or by any other method "manifesting clear and convincing evidence" of the settlor's intent, unless the trust instrument expressly provides that the method of revocation set forth in the trust instrument is exclusive. This subsection would overrule *Brown v. International Trust Company*, 278 P.2d 581 (Colo. 1954), where the decedent had established a trust to which certain life insurance policies were made payable. The settlor reserved the right to revoke the

	trust by an instrument in writing signed by the settlor and delivered to the trustee. The settlor subsequently executed a will that purported to make a different disposition of the life insurance proceeds payable to the trust. The court held that the will did not revoke the trust, because it did not comply with the method of revocation provided for in the trust agreement. This subsection is consistent with
	the theory underlying the "harmless error" rule as to execution or revocation of a will under C.R.S. § 15-12-503. However, the committee was concerned with the language of UTC § 602(c)(2)(A). Written as a separate subsection, the official language does not appear to apply the clear and convincing evidence standard to revocation or amendment of a trust by a will or codicil. In addition, the reference to revocation by "executing" a later will or codicil suggests that the revocation or amendment would be effective at the time of execution of the will or codicil, rather than at the death of the settlor/testator. Consequently, the committee recommends adoption of section 602(c) with the modifications indicated above. **Subsection (d).** This provision clarifies that the settlor may direct to whom or the manner in which the property of a revoked trust is to be distributed. **Subsection (e).** UTC § 602(e) is not entirely consistent with C.R.S. § 15-14-608(2). The UTC provision allows an agent to exercise a power to revoke a trust if authorized in *either* the power of attorney or the trust instrument. C.R.S. § 14-14-608(2) requires that the authority to revoke be expressed in the power of attorney, and also requires that authority to exercise a power of withdrawal be expressed in the power of attorney. The UTC provision could be adopted with a revision deleting the reference to authorization in the trust instrument. Alternatively, the UTC provision could be adopted without change, in which event the first two sentences of C.R.S. § 15-14-608(2) should be amended. The committee recommends the latter approach. Thus, the first two sentences of C.R.S. § 15-14-608(2) would be revised to read as follows: "AN AGENT MAY EXERCISE THE PRINCIPAL'S POWER TO AMEND OR REVOKE A TRUST, AND MAY REQUIRE THE TRUSTEE OF ANY TRUST FOR THE BENEFIT OF THE PRINCIPAL TO PAY INCOME OR PRINCIPAL TO THE AGENT, ONLY TO THE EXTENT THE TERMS OF THE TRUST OR THE AGENCY INSTRUMENT EXPRESSLY SO AUTHORIZE." **Subsection (f).** This subsection is consistent with the current Colorado law of conservatorships. **Subsection (g).** This subsection provides reasonable protection from liability to

	a trustee who is unaware of an amendment or revocation of a trust. The committee recommends adaption of section 602 with the change to subsection 602(c)(2) described above. As noted above, C.R.S. section 14-14-608(2) should be amended to make it consistent with UTC section 602(e).

UNIFORM TRUST CODE COMMITTEE
ARTICLE 6
REVOCABLE TRUST

1. UTC SECTION	**603**
2. SUBJECT	**SETTLOR'S POWERS; POWERS OF WITHDRAWAL**
3. UTC STATUTE	(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) If a revocable trust has more than one settlor, the duties of the trustee are owed to all of the settlors having capacity to revoke the trust. (c) 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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section recognizes that the settlor of a revocable trust is in control of the trust and should have the right to enforce the trust. Pursuant to this section, the duty under Section 813 to inform and report to beneficiaries is owed to the settlor of a revocable trust as long as the settlor has capacity. If the settlor loses capacity, subsection (a) no longer applies, with the consequence that the rights of the beneficiaries are no longer subject to the settlor's control. The beneficiaries are then entitled to request information concerning the trust and the trustee must provide the beneficiaries with annual trustee reports and whatever other information may be required under Section 813. However, because this section may be freely overridden in the terms of the trust, a settlor is free to deny the beneficiaries these rights, even to the point of directing the trustee not to inform them of the existence of the trust. Also, should an incapacitated settlor later regain capacity, the beneficiaries rights will again be subject to the settlor's control. Typically, the settlor of a revocable trust will also be the sole or primary beneficiary of the trust, and the settlor has control over whether to take action against a trustee for breach of trust. Upon the settlor's incapacity, any right of action the settlor-trustee may have against the trustee for breach of trust occurring while the settlor had capacity will pass to the settlor's agent or conservator, who would succeed to the settlor's right to have property restored to the trust. Following the death or incapacity of the settlor, the beneficiaries would have a right to maintain an action against a trustee for breach of trust. However, with respect to actions occurring prior to the settlor's death or incapacity, an action by

the beneficiaries could be barred by the settlor's consent or by other events such as approval of the action by a successor trustee. For the requirements of a consent, see Section 1009.

Subsection (c) makes clear that a holder of a power of withdrawal has the same powers over the trust as the settlor of a revocable trust. Equal treatment is warranted due to the holder's equivalent power to control the trust. For the definition of power of withdrawal, see Section 103(11).

2001 Amendment. By a 2001 amendment, former subsection (b) was deleted. Former subsection (b) provided: While a trust is revocable and the settlor does not have capacity to revoke the trust, rights of the beneficiaries are held by the beneficiaries. No substantive change was intended by this amendment. Former subsection (b) was superfluous. Rights of the beneficiaries are always held by the beneficiaries unless taken away by some other provision. Subsection (a) grants these rights to the settlor of a revocable trust while the settlor has capacity. Upon a settlor's loss of capacity, these rights are held by the beneficiaries with or without former subsection (b).

2003 Amendment. The purpose of former subsection (b), which was deleted in 2003, was to make certain that upon revocation of amendment of a joint trust by fewer than all of its settlors, that the trustee would notify the nonparticipating settlor or settlors. The subsection, which provided that "If a revocable trust has more than one settlor, the duties of the trustee are owed to all of the settlors having capacity to revoke the trust," imposed additional duties upon a trustee and unnecessarily raised interpretative questions as to its scope. The drafters original intent is restored, and in a much clearer form, by repealing former subsection (b), and by amending Section 602 to add a subsection (b)(3) that states explicitly what former subsection (b) was trying to achieve.

2004 Amendment. The amendment places in brackets and makes optional the language in subsection (a) dealing with the settlor's capacity.

Section 603 generally provides that while a trust is revocable, all rights that the trust beneficiaries would otherwise possess are subject to the control of the settlor. This section, however, negates the settlor's control if the settlor is incapacitated. In such case, the beneficiaries are entitled to assert all rights provided to them under the Code, including the right to information concerning the trust.

Two issues have arisen concerning this incapacity limitation. First, because determining when a settlor is incapacitated is not always clear, concern has been

	the settlor has become incapacitated and the settlor's control of the beneficiary's rights have ceased. Second, concern has been expressed that this section prescribes a different rule for revocable trusts than for wills and that the rules for both should instead be the same. In the case of a will, the devisees have no right to know of the dispositions made in their favor until the testator's death, whether or not the testator is incapacitated. Under Section 603, however, the remainder beneficiary's right to know commences on the settlor's incapacity. The drafting committee has decided to place the reference to the settlor's incapacity in Section 603(a) in brackets. Enacting jurisdictions are free to strike the incapacity limitation or to provide a more precise definition of when a settlor is incapacitated, as has been done in the Missouri enactment (Mo. Stat. Ann. Â§ 456.6-603). Concluding that uniformity among the states on this issue is not essential, the drafting committee has decided to place the reference to the settlor's incapacity in Section 603(a) in brackets. Enacting jurisdictions are free to strike the incapacity limitation or to provide a more precise definition of when a settlor is incapacitated, as has been done in the Missouri enactment (Mo. Stat. Ann. Section 456.6-603).
5. COLORADO COMMITTEE COMMENTS	**Subsection (a)** recognizes that the settlor of a revocable trust effectively has complete control over the trust, and therefore should have the right to enforce the trust to the exclusion of beneficiaries. (Of course, in the case of a typical revocable living trust, the settlor will also be the primary beneficiary during his or her lifetime.) As a result, the rights of other beneficiaries are postponed until the settlor dies or loses the capacity to revoke the trust, and the trustee's duties do not extend to the other beneficiaries until that time. **Subsection (b)** clarifies that if the settlor becomes incapacitated, the rights of the beneficiaries will be held by the beneficiaries. At that point, the beneficiaries are entitled to request information about the trust and the trustee must provide annual reports to them. However, the comments point out that because this is not a mandatory rule under section 105, the settlor may override section 603(b) in the trust agreement, even to the point of directing the trustee not to inform the beneficiaries of the existence of the trust. Of course, in the typical revocable trust, the settlor will be the primary beneficiary during his or her lifetime, and the issue will be whether, upon the settlor's incapacity, the remainder beneficiaries should be entitled to information about the trust. It is noted that subsection (b) has been deleted by the National Conference of Commissioners on Uniform State Laws as unnecessary surplusage and the balance of the paragraphs have been re-lettered.

	Subsection (c) [re-lettered b] clarifies that if there is more than one settlor, the trustee's duties are owed to all settlors having capacity to revoke the trust. This subsection should be read in conjunction with section 602(b), dealing with who has the power to revoke when there is more than one settlor. **Subsection (d)** [re-lettered c] recognizes that a power of withdrawal is functionally equivalent to a power of revocation, and should be treated in the same manner. **2005 Amendment** The Missouri statute referred to at the end of the preliminary draft of the official comment says that a settlor "is presumed to have capacity . . . until either the settlor is adjudicated totally incapacitated or disabled or the trustee has received an affidavit of incapacity." Affidavit of incapacity is defined as "a written certificate furnished by at least one licensed medical doctor that states that the settlor lacks capacity to revoke the trust." A doctor will not provide an affidavit in the absence of a HIPPA waiver or other authorization. Moreover, doctors may be unwilling to opine that a settlor "lacks capacity to revoke the trust," because that is a question of law as much as it is a medical question. Therefore, the Missouri solution seems awkward at best.
6. COLORADO LAW	This provision is consistent with C.R.S. § 15-10-108 (which is identical to UPC § 1-108): For the purpose of granting consent or approval with regard to the acts or accounts of a personal representative or trustee, including relief from liability or penalty for failure to post bond, to register a trust, or to perform other duties, and for purposes of consenting to modification or termination of a trust or to deviation from its terms, the sole holder or all coholders of a presently exercisable general power of appointment, including one in the form of a power of amendment or revocation, are deemed to act for beneficiaries to the extent that their interests (as objects, takers in default, or otherwise) are subject to the power.
7. RECOMMENDATIONS	The provision is a logical recognition of the extent of control retained by the settlor over a revocable living trust, and of the equivalent control exercised by the holder of a presently exercisable power of withdrawal. The subcommittee recommends adoption of this provision but the committee does recommend deleting the bracketed language in section 603.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 6
REVOCABLE TRUSTS

1. UTC SECTION	**604**
2. SUBJECT	**LIMITATION ON ACTION CONTESTING VALIDITY OF REVOCABLE TRUST; DISTRIBUTION OF TRUST PROPERTY**
3. UTC STATUTE	(a) A person ~~may~~ must 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] years after the settlor's death; or (2) [120] days after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding. The time limit in this subsection [604(a)] is an absolute bar that may not be waived or tolled. (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 doing so 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 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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section provides finality to the question of when a contest of a revocable trust may be brought. The section is designed to allow an adequate time in which to bring a contest while at the same time permitting the expeditious distribution of the trust property following the settlor's death. A trust can be contested on a variety of grounds. For example, the contestant may allege that no trust was created due to lack of intent to create a trust or lack of capacity (*see* Section 402), that undue influence, duress, or fraud was involved in the trust's creation (*see* Section 406), or that the trust had been revoked or modified (*see* Section 602). A "contest" is an action to invalidate all or part of the terms of the trust or of property transfers to the trustee. An action against a beneficiary or other person for intentional interference with an inheritance or gift,

	not being a contest, is not subject to this section. For the law on intentional
	interference, see Restatement (Second) of Torts § 774B (1979). Nor does this section preclude an action to determine the validity of a trust that is brought during the settlor's lifetime, such as a petition for a declaratory judgment, if such action is authorized by other law. *See* Section 106 (Uniform Trust Code supplemented by common law of trusts and principles of equity). This section applies only to a revocable trust that becomes irrevocable by reason of the settlor's death. A trust that became irrevocable by reason of the settlor's lifetime release of the power to revoke is outside its scope. A revocable trust does not become irrevocable upon a settlor's loss of capacity. Pursuant to Section 602, the power to revoke may be exercised by the settlor's agent, conservator, or guardian, or personally by the settlor if the settlor regains capacity. Subsection (a) specifies a time limit on when a contest can be brought. A contest is barred upon the first to occur of two possible events. The maximum possible time for bringing a contest is three years from the settlor's death. This should provide potential contestants with ample time in which to determine whether they have an interest that will be affected by the trust, even if formal notice of the trust is lacking. The three-year period is derived from Section 3-108 of the Uniform Probate Code. Three years is the maximum limit under the UPC for contesting a nonprobated will. Enacting jurisdictions prescribing shorter or longer time limits for contest of a nonprobated will should substitute their own time limit. To facilitate this process, the "three-year" period has been placed in brackets. A trustee who wishes to shorten the contest period may do so by giving notice. Drawing from California Probate Code § 16061.7, subsection (a)(2) bars a contest by a potential contestant 120 days after the date the trustee sent that person a copy of the trust instrument and informed the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a contest. The reference to "120" days is placed in brackets to suggest to the enacting jurisdiction that it substitute its statutory time period for contesting a will following notice of probate. The 120 day period in subsection (a)(2) is subordinate to the three-year bar in subsection (a)(1). A contest is automatically barred three years after the settlor's death even if notice is sent by the trustee less than 120 days prior to the end of that period. Because only a small minority of trusts are actually contested, trustees should not be restrained from making distributions because of concern about possible liability should a contest later be filed. Absent a protective statute, a trustee is ordinarily absolutely liable for misdelivery of the trust assets, even if the trustee

	reasonably believed that the distribution was proper. *See* Restatement (Second) of Trusts § 226 (1959). Subsection (b) addresses liability concerns by allowing
	the trustee, upon the settlor's death, to proceed expeditiously to distribute the trust property. The trustee may distribute the trust property in accordance with the terms of the trust until and unless the trustee receives notice of a pending judicial proceeding contesting the validity of the trust, or until notified by a potential contestant of a possible contest, followed by its filing within 60 days. Even though a distribution in compliance with subsection (b) discharges the trustee from potential liability, subsection (c) makes the beneficiaries of what later turns out to have been an invalid trust liable to return any distribution received. Issues as to whether the distribution must be returned with interest, or with income earned or profit made are not addressed in this section but are left to the law of restitution. For purposes of notices under this section, the substitute representation principles of Article 3 are applicable. The notice by the trustee under subsection (a)(2) or by a potential contestant under subsection (b)(2) must be given in a manner reasonably suitable under the circumstances and likely to result in its receipt. *See* Section 109(a). This section does not address possible liability for the debts of the deceased settlor or a trustee's possible liability to creditors for distributing trust assets. For possible liability of the trust, see Section 505(a)(3) and Comment. Whether a trustee can be held personally liable for creditor claims following distribution of trust assets is addressed in Uniform Probate Code § 6-102, which was added to that Code in 1998.
5. COLORADO COMMITTEE COMMENTS	The purpose of this section is to provide finality as to when a contest of a revocable trust may be brought, and to protect the trustee in making distributions in the absence of actual knowledge of a contest or notice that a contest will be brought.
7. RECOMMENDATIONS	The comments point out that UTC § 604(b), protecting the trustee for making distributions in the absence of knowledge or notice of a contest, does not protect the distributees from potential liability for return of distributed property if a successful contest is later brought (see subsection 604(c)), nor does it prevent the successful contestant from reaching property remaining in the trustee's hands. The comments also point out that this section does not deal with the potential liability of the trust for debts of the deceased settlor. That subject is addressed by UTC § 505(a)(3) and new UPC § 6-102. UPC § 6-102 has not yet been adopted

	in Colorado, but it is anticipated that it will be introduced in the 2002 session.
	The committee recommends that section 604(a) be adopted with the modifications that "may" should be changed to "must," and that a sentence be added making it clear that the time limit to contest a revocable trust will not be subject to equitable tolling. The committee recommends that UTC § 604(b)(2) be revised as indicated above to specify the manner in which the trustee is to be notified of a potential contest, with the notice procedure to be consistent with the notice procedures in C.R.S. §§ 15-11-208 and 15-11-804.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 7
OFFICE OF TRUSTEE

1. UTC SECTION	**701**
2. SUBJECT	**ACCEPTING OR DECLINING TRUSTEESHIP**
3. UTC STATUTE	(a) Except as otherwise provided in subsection (c), 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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section, which specifies the requirements for a valid acceptance of the trusteeship, implicates many of the same issues that arise in determining whether a trust has been revoked. Consequently, the two provisions track each other closely. *Compare* Section 701(a), *with* Section 602(c) (procedure for revoking or modifying trust). Procedures specified in the terms of the trust are recognized, but only substantial, not literal compliance is required. A failure to meet technical requirements, such as notarization of the trustee's signature, does not result in a failure to accept. Ordinarily, the trustee will indicate acceptance by signing the trust instrument or signing a separate written instrument. However, this section validates any other method demonstrating the necessary intent, such as by knowingly exercising trustee powers, unless the terms of the trust make the specified method exclusive. This section also does not preclude an acceptance by estoppel. For general

	background on issues relating to trustee acceptance and rejection, see Restatement
	(Third) of Trusts § 35 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 102 (1959). Consistent with Section 201(b), which emphasizes that continuing judicial supervision of a trust is the rare exception, not the rule, the Uniform Trust Code does not require that a trustee qualify in court. To avoid the inaction that can result if the person designated as trustee fails to communicate a decision either to accept or to reject the trusteeship, subsection (b) provides that a failure to accept within a reasonable time constitutes a rejection of the trusteeship. What will constitute a reasonable time depends on the facts and circumstances of the particular case. A major consideration is possible harm that might occur if a vacancy in a trusteeship is not filled in a timely manner. A trustee's rejection normally precludes a later acceptance but does not cause the trust to fail. *See* Restatement (Third) of Trusts § 35 cmt. c (Tentative Draft No. 2, approved 1999). Regarding the filling of a vacancy in the event of a rejection, see Section 704. A person designated as trustee who decides not to accept the trusteeship need not provide a formal rejection, but a clear and early communication is recommended. The appropriate recipient of the rejection depends upon the circumstances. Ordinarily, it would be appropriate to communicate the rejection to the person who informed the designee of the proposed trusteeship. If judicial proceedings involving the trust are pending, the rejection could be filed with the court. In the case of a person named as trustee of a revocable trust, it would be appropriate to communicate the rejection to the settlor. In any event, it would be best to inform a beneficiary with a significant interest in the trust because that beneficiary might be more motivated than others to seek appointment of a new trustee. Subsection (c)(1) makes clear that a nominated trustee may act expeditiously to protect the trust property without being considered to have accepted the trusteeship. However, upon conclusion of the intervention, the nominated trustee must send a rejection of office to the settlor, if living and competent, otherwise to a qualified beneficiary. Because of the potential liability that can inhere in trusteeship, subsection (c)(2) allows a person designated as trustee to inspect the trust property without accepting the trusteeship. The condition of real property is a particular concern, including possible tort liability for the condition of the premises or liability for violation of state or federal environmental laws such as CERCLA, 42 U.S.C. § 9607. For a provision limiting a trustee's personal liability for obligations

	arising from ownership or control of trust property, see Section 1010(b).
5. COLORADO COMMITTEE COMMENTS	Section 101 contains a confirmation of common law principles (with new material as noted below) on acceptance of trusteeship and relates to the provisions regarding resignation (Section 702). The Official Comments indicate a desire to track with the revocation procedure in Section 602. The drafters make it clear that technical errors (e.g. no notary on trustee's signature) will not result in non-acceptance. They also allow for "equitable" acceptance under the principles of estoppel or even damages for an unreasonable delay. Subparagraph (c) provides needed relief in permitting the trustee the opportunity to inspect the property, including an assessment of potential environmental issues, without being deemed an acceptance. However that might not control any liability issues that could arise under applicable federal laws. Also the Official Comments state that the trustee must, upon "conclusion" of the emergency clearly indicate a rejection (if it is so rejected). It might be better to give such notice at the inception of such action attendant to an emergency, i.e. "We are acting to avoid loss etc. but have not yet reached a decision about acceptance."
6. COLORADO LAW	Colorado law provides for registration of trusts (under CRS 15-16-101) within 30 days of "acceptance" and thus has a statutory scheme that confirms but does not define acceptance. However there is nothing in that statutory scheme that would preclude a separate definition of what constitutes acceptance of a trust. See Wade, Colorado Law of Wills, Trust and Fiduciary Administration Section 46.2. Restatement on Trusts, Second, states that no writing was required under common law. Section 39. The UTA continues this tradition by not requiring a signing. The manifestation of intent to accept is based upon the facts of each case and merely protecting the property is not an acceptance. Once an acceptance has been made, a trustee cannot disclaim but must resign, unless otherwise provided by law. Restatement of Trusts Second, Section 102. Bogert, Law of Trusts and Trustees, Revised Second Edition, Section 150. The presence or absence of an acceptance does not prevent the creation of a trust however. Ibid, Section 35. The conduct for an acceptance or a disclaimer can be done in any manner that sufficiently indicates intention, written or oral. Inaction is normally treated as a disclaimer. Scott on Trusts, Fourth Edition, Section 102.
	An acceptance requires a meeting of the minds between grantor and grantee but the acceptance may be shown in a great variety of ways. The directions of the Settlor do not preclude other means of acceptance. It is unsettled however whether an acceptance is necessary to have a deed operate to pass title to

	property. Bogert, Law of Trusts and Trustees, Revised Second Edition, Section 150.
7. RECOMMENDATIONS	The committee recommends adoption of this section without change.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 7
OFFICE OF TRUSTEE

1. UTC SECTION	**702**
2. SUBJECT	**TRUSTEE'S BOND**
3. UTC STATUTE	(a) A trustee shall give bond to secure performance of the trustee's duties only if the 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) The court may specify the amount of a bond, its liabilities, and whether sureties are necessary. The court may modify or terminate a bond at any time. (c) Unless otherwise directed by the court, the cost of a bond is charged to the trust. ~~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.~~
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This provision is consistent with the Restatement Third and with the bonding provisions of the Uniform Probate Code. *See* Restatement (Third) of Trusts § 34(3) and cmt. a (Tentative Draft No. 2, approved 1999); Uniform Probate Code §§ 3-604 (personal representatives), 5-415 (conservators), and 7-304 (trustees). Because a bond is required only if the terms of the trust require bond or a bond is found by the court to be necessary to protect the interests of beneficiaries, bond should rarely be required under this Code. Despite the ability of the court pursuant to Section 105(b)(6) to override a term of the trust waiving bond, the court should order bond in such cases only for good reasons. Similarly, the court should rarely dispense with bond if the settlor directed that the trustee give bond. This section does not attempt to detail all of the technical bonding requirements that the court may impose. Typical requirements are listed in the Uniform Probate Code sections cited above. The amount of a bond otherwise required may be reduced by the value of trust property deposited in a manner that prevents its unauthorized disposition, and by the value of real property which the trustee, by express limitation of power, lacks power to convey without court authorization. Also, the court may excuse or otherwise modify a requirement of a bond, reduce or increase the amount of a bond, release a surety, or permit the substitution of another bond with the same or different sureties.

	Subsection (c) clarifies that a regulated financial-service institution need not provide bond for individual trusts. Such institutions must meet detailed financial responsibility requirements in order to do trust business in the State, thereby obviating the need to post bonds in individual trusts. Subsection (c) is placed in brackets because the enacting jurisdiction may have already dealt with the subject in separate legislation, such as in its statutes on regulation of financial institutions. Instead of the phrase "regulated financial-service institution," enacting jurisdictions may wish to substitute their own term for institutions qualified to engage in trust business in the State.
5. COLORADO COMMITTEE COMMENTS	This provision was proposed to clarify when a bond might be required. There was comparatively little discussion of this principle *vis a vis* trusts at common law. However, this law provides less detail than our statute (see below). If a Settlor makes no provision for bond, applicable statutes should govern. Bogert, Section 151. The California law on trusts, enacted in 1987, sets forth (in varying sections) the criteria for determining the need for a bond including: required by document, by the court and by an individual named by the court as a trustee who/that was not named in the document. If we do not amend this provision it may present a conflict with the Colorado statute listed above, i.e. the UTA does not go as far as the Colorado statute in permitting the beneficiaries to request a bond. While these provisions are liberal in the sense of rarely requiring a bond, the Official Comments do not specifically excuse a bond for financial institutions. The drafters leave that to "separate legislation". An argument could be made that the imposition of a bond, if at all, is more often needed when an individual serves as trustee. The amount of a bond, if needed, can be reduced by the value of trust property held in a manner that prevents unauthorized disposition.
6. COLORADO LAW	The applicable Colorado statutes are 15-16-304 and 15-12-913. CRS 15-16-304 states that a trustee need not provide bond to secure performance unless required by terms of the trust, *reasonably requested by beneficiaries* or found by the court to be necessary. (Under informal probate an interested person may also request a bond, CRS 15-12-605). CRS 15-12-913 allows a personal representative to petition the court for a bond before distributing to a trustee (unless excused by the document) if apprehension about protecting the interests of the beneficiaries exists. The UTA omits the "reasonable request of the beneficiaries" and apparently leaves it to the court to determine such matters on its own initiative.

	It is presumed that a bond charged to the trust would be against principal, if the imposition of the bond was not due to breach of duties.
7. RECOMMENDATIONS	The committee recommends adoption of this section with subsection (c) modified as described above.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 7
OFFICE OF TRUSTEE

1. UTC SECTION	**703**
2. SUBJECT	**COTRUSTEES**
3. UTC STATUTE	(a) Cotrustees who are unable to reach a unanimous decision may act by majority decision. (b) If a vacancy occurs in a cotrusteeship, the remaining cotrustees may act for the trust. (c) A cotrustee must participate in the performance of a trustee's function unless the cotrustee is unavailable to perform the function because of absence, illness, disqualification ~~under other law~~ or other temporary incapacity or the cotrustee has properly delegated the performance of the function to another trustee. (d) If a cotrustee 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 cotrustee or a majority of the remaining cotrustees may act for the trust. (e) A trustee may not delegate to a cotrustee 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), 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 cotrustee from committing a serious breach of trust; and (2) compel a cotrustee 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 cotrustee 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.

4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section contains most but not all of the Code's provisions on cotrustees. Other provisions relevant to cotrustees include Sections 704 (vacancy in trusteeship need not be filled if cotrustee remains in office), 705 (notice of resignation must be given to cotrustee), 706 (lack of cooperation among cotrustees as ground for removal), 707 (obligations of resigning or removed trustee), 813 (reporting requirements upon vacancy in trusteeship), and 1013 (authority of cotrustees to authenticate documents. Cotrustees are appointed for a variety of reasons. Having multiple decision-makers serves as a safeguard against eccentricity or misconduct. Cotrustees are often appointed to gain the advantage of differing skills, perhaps a financial institution for its permanence and professional skills, and a family member to maintain a personal connection with the beneficiaries. On other occasions, cotrustees are appointed to make certain that all family lines are represented in the trust's management. Cotrusteeship should not be called for without careful reflection. Division of responsibility among cotrustees is often confused, the accountability of any individual trustee is uncertain, obtaining consent of all trustees can be burdensome, and unless an odd number of trustees is named deadlocks requiring court resolution can occur. Potential problems can be reduced by addressing division of responsibilities in the terms of the trust. Like the other sections of this article, this section is freely subject to modification in the terms of the trust. *See* Section 105. Much of this section is based on comparable provisions of the Restatement of Trusts, although with extensive modifications. Reference should also be made to ERISA § 405 (29 U.S.C. § 1105), which in recent years has been the statutory base for the most significant case law on the powers and duties of cotrustees. Subsection (a) is in accord with Restatement (Third) of Trusts § 39 (Tentative Draft No. 2, approved 1999), which rejects the common law rule, followed in earlier Restatements, requiring unanimity among the trustees of a private trust. *See* Restatement (Second) of Trusts § 194 (1959). This section is consistent with the prior Restatement rule applicable to charitable trusts, which allowed for action by a majority of trustees. *See* Restatement (Second) of Trusts § 383 (1959). Under subsection (b), a majority of the remaining trustees may act for the trust when a vacancy occurs in a cotrusteeship. Section 704 provides that a vacancy in a cotrusteeship need be filled only if there is no trustee remaining in office. Pursuant to subsection (c), a cotrustee must participate in the performance of a trustee function unless the cotrustee has properly delegated performance to another cotrustee, or the cotrustee is unable to participate due to temporary

	might be disqualified include federal securities law and the ERISA prohibited transactions rules. Subsection (d) authorizes a cotrustee to assume some or all of the functions of another trustee who is unavailable to perform duties as provided in subsection (c). Subsection (e) addresses the extent to which a trustee may delegate the performance of functions to a cotrustee. The standard differs from the standard for delegation to an agent as provided in Section 807 because the two situations are different. Section 807, which is identical to Section 9 of the Uniform Prudent Investor Act, recognizes that many trustees are not professionals. Consequently, trustees should be encouraged to delegate functions they are not competent to perform. Subsection (e) is premised on the assumption that the settlor selected cotrustees for a specific reason and that this reason ought to control the scope of a permitted delegation to a cotrustee. Subsection (e) prohibits a trustee from delegating to another trustee functions the settlor reasonably expected the trustees to perform jointly. The exact extent to which a trustee may delegate functions to another trustee in a particular case will vary depending on the reasons the settlor decided to appoint cotrustees. The better practice is to address the division of functions in the terms of the trust, as allowed by Section 105. Subsection (e) is based on language derived from Restatement (Second) of Trusts § 171 (1959). This section of the Restatement Second, which applied to delegations to both agents and cotrustees, was superseded, as to delegation to agents, by Restatement (Third) of Trusts: Prudent Investor Rule Section 171 (1992). By permitting the trustees to act by a majority, this section contemplates that there may be a trustee or trustees who might dissent. Trustees who dissent from the acts of a cotrustee are in general protected from liability. Subsection (f) protects trustees who refused to join in the action. Subsection (h) protects a dissenting trustee who joined the action at the direction of the majority, such as to satisfy a demand of the other side to a transaction, if the trustee expressed the dissent to a cotrustee at or before the time of the action in question. However, the protections provided by subsections (f) and (h) no longer apply if the action constitutes a serious breach of trust. In that event, subsection (g) may impose liability against a dissenting trustee for failing to take reasonable steps to rectify the improper conduct. The responsibility to take action against a breaching cotrustee codifies the substance of Sections 184 and 224 of the Restatement (Second) of Trusts (1959).
5. COLORADO COMMITTEE COMMENTS	The imposition of a majority vote is a break with common law which required unanimity, except for certain charitable trusts Scott on Trusts, 4th Edition, Section 194. Bogert, Section 554. ACTEC Notes, Fall 1999. It is consistent with the draft of the Restatement on Trusts, Third, and the sections in the UTA on delegation.

	The better practice is to allow division of the functions of the trust. But a duty does exist not to delegate where expectations are the opposite. Scott, Section 224.2. Common law states that failure to supervise the conduct of a co-trustee can result in liability. Section 224.3 and where there are several trustees the liability can be joint and several. Section 224.6. This UTA section also fits with the philosophy set forth in Section 704, Vacancy in Trustee. Subsection (c) states that the remaining trustee(s) "may" act to prevent injury, damage. While this is apparently intended as relief from the majority rule, it could be interpreted in conflict with the duty that exists to prevent damage. The terms of delegation, in (d) (1), are consistent with Section 909, Delegation of Investment and Management Functions. The drafters state that subsection (b) is disregarded as long as there is at least one trustee acting. They would permit a sole trustee (when vacancy occurs) to act. The Act Comments (referencing Section 1108 on personal liability) say that a trustee who dissents is not liable to third parties; however the statute contains no such restriction. Also, the imposition of a majority test does not address the problem that exists when an even number of trustees exists, most commonly two.
6. COLORADO LAW	By analogy, CRS 15-12-717 does normally require unanimity among co-personal representatives. Subsection (b) is consistent with CRS 15-12-718 which allows a remaining co-personal representative to act alone and (c) follows principles in 15-12-717 which allows solo action in emergencies. CRS 15-1-804, Fiduciaries Powers Act, paragraph 1(y) allows the survivor of the holders of powers imposed upon two or more fiduciaries to act alone. CRS 15-1-804 (x) (II) allows a trustee to delegate (consistent with the Prudent Investor Act) investment and management functions that a prudent trustee could properly delegate. It has been accepted under common law that co-trustees were effectively joint tenants and the survivors acted accordingly. Historically this presented some problems where one trustee was an individual and one a corporation, since such a joint tenancy could not exist. That has been eroded by case law and by statute. Bogert, Section 530, Restatement of Trusts Second. A co-trustee has a duty to be active, notwithstanding a lack of unanimity. Bogert Section 584; allowing a co-trustee exclusive control and entrusting that by a positive act, such as a power of

	attorney, could be negligent. Bogert, Section 585, as would a failure to supervise (587). A co-trustee has to duty to warn the non-acting co-trustee and the failure to act upon such warning may be a breach of trust. Bogert, Section 588.
7. RECOMMENDATIONS	The committee recommends adoption of this section with minor modifications to subsections (c) and (d) indicated above to remove any ambiguity as to the meaning of the phrase "under other law".

UNIFORM TRUST CODE COMMITTEE
ARTICLE 7
OFFICE OF TRUSTEE

1. UTC SECTION	**704**
2. SUBJECT	**VACANCY IN TRUSTEESHIP; APPOINTMENT OF SUCCESSOR**
3. UTC STATUTE	(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] or [conservator] is appointed for an individual serving as trustee. (b) If one or more cotrustees 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 noncharitable 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 the 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 the court. (e) Whether or not a vacancy in a trusteeship exists or is required to be filled, the court may appoint an additional trustee of special fiduciary whenever the court considers the appointment necessary for the administration of the trust.

4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section lists the ways in which a trusteeship becomes vacant and the rules on filling the vacancy. *See also* Sections 701 (accepting or declining trusteeship), 705 (resignation), and 706 (removal). Good drafting practice suggests that the terms of the trust deal expressly with the problem of vacancies, naming successors and specifying the procedure for filling vacancies. This section applies only if the terms of the trust fail to specify a procedure. The disqualification of a trustee referred to in subsection (a)(4) would include a financial institution whose right to engage in trust business has been revoked or removed. Such disqualification might also occur if the trust's principal place of administration is transferred to a jurisdiction in which the trustee, whether an individual or institution, is not qualified to act. Subsection (b) provides that a vacancy in the cotrusteeship must be filled only if the trust has no remaining trustee. If a vacancy in the cotrusteeship is not filled, Section 703 authorizes the remaining cotrustees to continue to administer the trust. However, as provided in subsection (d) [sic (e)], the court, exercising its inherent equity authority, may always appoint additional trustees if the appointment would promote better administration of the trust. *See* Restatement (Third) of Trusts § 34 cmt. e (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 108 cmt. e (1959). Absent an effective provision in the terms of the trust, subsection (c)(2) permits a vacancy in the trusteeship to be filled, without the need for court approval, by a person selected by unanimous agreement of the qualified beneficiaries. Pursuant to Section 705(a)(1), the qualified beneficiaries may also receive the trustee's resignation. If a trustee resigns following notice to the qualified beneficiaries as provided in Section 705, the trust may be transferred to a successor appointed pursuant to subsection (c)(2) of this section, all without court involvement. A nonqualified beneficiary who is displeased with the choice of the qualified beneficiaries may petition the court for removal of the trustee under Section 706. If the qualified beneficiaries fail to make an appointment, subsection (c)(3) authorizes the court to fill the vacancy. In making the appointment, the court should consider the objectives and probable intention of the settlor, the promotion of the proper administration of the trust, and the interests and wishes of the beneficiaries. *See* Restatement (Third) of Trusts § 34 cmt. f (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 108 cmt. d (1959). In the case of a revocable trust, the appointment of a successor will normally be made directly by the settlor. As to the duties of a successor trustee with respect to the actions of a predecessor, see Section 812.

	Subsection (d) added to clarify procedure for appointing successor trustee of a charitable trust. **2001 Amendment.** Subsection (d), which creates a procedure for the filling of a vacancy in the trusteeship of a charitable trust, was added by a 2001 amendment. **2004 Amendment.** The amendment to Section 704(d)(2) is a conforming amendment to the amendment to Section 110(d). Section 110(d) provides that the attorney general has the rights o a qualified beneficiary with respect to charitable trusts having a principal place of administration in the state. If the enacting jurisdiction elects to delete or modify Section 110(d), then the enacting jurisdiction may wish to also modify subsection Section 704(d)(2) of this Section, which requires that the attorney general concur in the selection of a successor trustee nominated by a designated charitable organization.
5. COLORADO COMMITTEE COMMENTS	This law seeks to clarify the succession of trustees, perhaps one of the most common occurrences in the administration of a trust. Scott on Trusts, Fourth Edition, lists three principles governing the succession of trustees. It can be done by appointment of court (108.2), by person(s) authorized to appointment by the terms of the trust (108.3) and by the beneficiaries (108.3). The overriding concept is that if one trustee ceases to act for any reason, the result depends upon the circumstances (108.4). The drafters say that this section is only applicable when the vacancy *must* be filled. When read with the provisions of Section 703 (which would permit a sole trustee to act), an anomaly may result. This Act consists of default provisions. If the default would permit a sole trustee to act, then the vacancy terms could only apply when there is no trustee. The drafters would rely upon the "inherent equity authority" of the court for such other vacancies that may occur. The definition of Qualified Beneficiaries is very sweeping; compare the language used under CRS 15-16-303, which requires trustee to inform "current beneficiaries" and other provisions under that statute.
6. COLORADO LAW	In the Colorado law the need to address a vacancy is addressed by implication under CRS 15-16-201 (a) which gives the court the authority to appoint a trustee. See Wade, Section 46.8. See also notes on Section 703, above.
7. RECOMMENDATIONS	The committee recommends adoption of this section without change.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 7
OFFICE OF TRUSTEE

1. UTC SECTION	**705**
2. SUBJECT	**RESIGNATION OF TRUSTEE**
3. UTC STATUTE	(a) A trustee may resign: (1) upon at least 30 days' notice to the qualified beneficiaries, the settlor, if living, and all cotrustees; or (2) with the approval of the court. (b) In approving a resignation, the 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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section rejects the common law rule that a trustee may resign only with permission of the court, and goes further than the Restatements, which allow a trustee to resign with the consent of the beneficiaries. *See* Restatement (Third) of Trusts § 36 (Tentative Draft No.2, approved 1999); Restatement (Second) of Trusts § 106 (1959). Concluding that the default rule ought to approximate standard drafting practice, the Drafting Committee provided in subsection (a) that a trustee may resign by giving notice to the qualified beneficiaries and any cotrustee. A resigning trustee may also follow the traditional method and resign with approval of the court. Subsection (a) (1) revised to clarify that a living settlor must receive notice of a trustee's resignation. Restatement (Third) of Trusts § 36 cmt. d (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts § 106 cmt. b (1959), provide, similar to subsection (c), that a resignation does not release the resigning trustee from potential liabilities for acts or omissions while in office. The act of resignation can give rise to liability if the trustee resigns for the purpose of facilitating a breach of trust by a cotrustee. *See Ream v. Frey*,107 F.3d 147 (3rd Cir. 1997). Regarding the residual responsibilities of a resigning trustee until the trust property is delivered to a successor trustee, see Section 707.

	In the case of a revocable trust, because the rights of the qualified beneficiaries are subject to the settlor's control (*see* Section 603), resignation of the trustee is accomplished by giving notice to the settlor instead of the beneficiaries.
5. COLORADO COMMITTEE COMMENTS	It is unusual for a trustee to resign without a mutual decision having been made among the relevant parties, settlor, beneficiaries and the simultaneous acceptance by the new trustee etc. Nevertheless, a statutory scheme would avoid any confusion over this procedure. Scott states that it is not sufficient to simply convey the property (106). Resignation procedures under the Restatement Second/Scott envision resignation by: court permission, the terms of the trust and by the consent of the beneficiaries (106.1-106.3). Sometimes a settlor/trustee of a revocable trust deposits the assets with an institution which will become trustee only upon death or incapacity of the settlor. Other provisions of the UTC address acceptance of trusteeship. See subsection (a)(1)(A). Frequently, in practice, the trustee of a revocable trust may never have assented to that role. A disclaimer would seem to be the better choice than written rejection or resignation. Under the Act's comments, court approval of a resignation is needed only if no other alternatives are available. This might produce confusion when the successor language is ambiguous or inconclusive. Subsection (a) (2) requires a writing when notifying qualified beneficiaries of an irrevocable trust of a resignation.
6. COLORADO LAW	No Colorado law was found directly concerning resignation. The common law states that resignation is not a unilateral act. It needs to be accomplished through court approval, consent of all of the beneficiaries or such other method permitted by the document. Bogert Section 511. Generally the trustee must allege and prove some reason for resignation. Section 515. The charge for the costs of the application to resign is in the discretion of the court. Section 518.
7. RECOMMENDATIONS	The committee recommends adoption of this section without change.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 7
OFFICE OF TRUSTEE

1. UTC SECTION	**706**
2. SUBJECT	**REMOVAL OF TRUSTEE**
3. UTC STATUTE	(a) The settlor, a cotrustee, 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) The court may remove a trustee if: (1) the trustee has committed a serious breach of trust; (2) lack of cooperation among cotrustees 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 cotrustee 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 Section 1001(b) as may be necessary to protect the trust property or the interests of the beneficiaries.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	Subsection (a), contrary to the common law, grants the settlor of an irrevocable trust the right to petition for removal of a trustee. The right to petition for removal does not give the settlor of an irrevocable trust any other rights, such as the right to an annual report or to receive other information concerning administration of the trust. The right of a beneficiary to petition for removal does not apply to a revocable trust while the settlor has capacity. Pursuant to Section 603(a), while a trust is revocable and the settlor has capacity, the rights of the beneficiaries are subject to the settlor's exclusive control. Trustee removal may be regulated by the terms of the trust. *See* Section 105. In fashioning a removal provision for an irrevocable trust, the drafter should be cognizant of the danger that the trust may be included in the settlor's federal gross estate if the settlor retains the power to be appointed as trustee or to appoint someone who is not independent. *See* Rev. Rul. 95-58, 1995-2 C.B. 191.

Subsection (b) lists the grounds for removal of the trustee. The grounds for removal are similar to those found in Restatement (Third) of Trusts § 37 cmt. e (Tentative Draft No. 2, approved 1999). A trustee may be removed for untoward action, such as for a serious breach of trust, but the section is not so limited. A trustee may also be removed under a variety of circumstances in which the court concludes that the trustee is not best serving the interests of the beneficiaries. The term "interests of the beneficiaries" means the beneficial interests as provided in the terms of the trust, not as defined by the beneficiaries. *See* Section 103(7). Removal for conduct detrimental to the interests of the beneficiaries is a well-established standard for removal of a trustee. *See* Restatement (Third) of Trusts § 37 cmt. d (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 107 cmt. a (1959).

Subsection (b)(1), consistent with Restatement (Third) of Trusts § 37 cmt. e and g (Tentative Draft No, 2, approved 1999), makes clear that not every breach of trust justifies removal of the trustee. The breach must be "serious." A serious breach of trust may consist of a single act that causes significant harm or involves flagrant misconduct. A serious breach of trust may also consist of a series of smaller breaches, none of which individually justify removal when considered alone, but which do so when considered together. A particularly appropriate circumstance justifying removal of the trustee is a serious breach of the trustee's duty to keep the beneficiaries reasonably informed of the administration of the trust or to comply with a beneficiary's request for information as required by Section 813. Failure to comply with this duty may make it impossible for the beneficiaries to protect their interests. It may also mask more serious violations by the trustee.

The lack of cooperation among trustees justifying removal under subsection (b)(2) need not involve a breach of trust. The key factor is whether the administration of the trust is significantly impaired by the trustees' failure to agree. Removal is particularly appropriate if the naming of an even number of trustees, combined with their failure to agree, has resulted in deadlock requiring court resolution. The court may remove one or more or all of the trustees. If a cotrustee remains in office following the removal, under Section 704 appointment of a successor trustee is not required.

Subsection (b)(2) deals only with lack of cooperation among cotrustees, not with friction between the trustee and beneficiaries. Friction between the trustee and beneficiaries is ordinarily not a basis for removal. However, removal might be justified if a communications breakdown is caused by the trustee or appears to be incurable. *See* Restatement (Third) of Trusts § 37 cmt. e (Tentative Draft No. 2, approved 1999).

	Subsection (b)(3) authorizes removal for a variety of grounds, including unfitness, unwillingness, or persistent failure to administer the trust effectively. Removal in any of these cases is allowed only if it best serves the interests of the beneficiaries. For the definition of "interests of the beneficiaries," see Section 103(7). "Unfitness" may include not only mental incapacity but also lack of basic ability to administer the trust. Before removing a trustee for unfitness the court should consider the extent to which the problem might be cured by a delegation of functions the trustee is personally incapable of performing. "Unwillingness" includes not only cases where the trustee refuses to act but also a pattern of indifference to some or all of the beneficiaries. *See* Restatement (Third) of Trusts § 37 cmt. e (Tentative Draft No. 2, approved 1999). A "persistent failure to administer the trust effectively" might include a long-term pattern of mediocre performance, such as consistently poor investment results when compared to comparable trusts. It has traditionally been more difficult to remove a trustee named by the settlor than a trustee named by the court, particularly if the settlor at the time of the appointment was aaware of the trustee's failings. *See* Restatement (Third) of Trusts Section 37 cmt. f (Tentative Draft No.2, approved 1999); Restatement (Second of Trusts Section 107 cmt. f-g (1959)Because of the discretion normally granted to a trustee, the settlor's confidence in thejudgment of the particular person whom the settlor selected to act as trustee is entitled to considerable weight. This deference to the settlor's choice can weaken or dissolve if a substantial change in the trustee's circumstances occurs. To honor a settlor's reasonable expectations, subsection (b)(4) lists a substantial change of circumstances as a possible basis for removal of the trustee. Changed circumstances justifying removal of a trustee might include a substantial change in the character of the service or location of the trustee. A corporate reorganization of an institutional trustee is not itself a change of circumstances if it does not affect the service provided the individual trust account. Before removing a trustee on account of changed circumstances, the court must also conclude that removal is not inconsistent with a material purpose of the trust, that it will best serve the interests of the beneficiaries, and that a suitable cotrustee or successor trustee is available. Subsection (b)(4) also contains a specific but more limited application of Section 411. Section 411 allows the beneficiaries by unanimous agreement to compel modification of a trust if the court concludes that the particular modification is not inconsistent with a material purpose of the trust. Subsection (b)(4) of this section similarly allows the qualified beneficiaries to request removal of the trustee if the designation of the trustee was not a material purpose of the trust. Before removing the trustee the court must also find that removal will best serve

	the interests of the beneficiaries and that a suitable cotrustee or successor trustee is available. Subsection (c) authorizes the court to intervene pending a final decision on a request to remove a trustee. Among the relief that the court may order under Section 1001(b) is an injunction prohibiting the trustee from performing certain acts and the appointment of a special fiduciary to perform some or all of the trustee's functions. Pursuant to Section 1004, the court may also award attorney's fees as justice and equity may require.
5. COLORADO COMMITTEE COMMENTS	Restatement Second states that in considering the removal of a trustee the court should have paramount regard for the interest of the trust and the rights of the beneficiaries. This section follows that doctrine. Under the Restatement, removal can be by court (107.1), by terms of the trust (107.2) and by the beneficiaries (107.3). The grounds for removal must be something more than an exercise of discretion. Bogert, Section 527. The courts are more averse to removing a trustee chosen by the settlor. (527) California law, Section 15642 provides criteria for removal: breach of duty, insolvency, hostility and lack of cooperation, and failure to act. The Act's Comments grant the settlor of an irrevocable trust the right to petition for removal, unlike Restatement Second. They state that the right to so petition does not grant other rights, "such as the right to an annual report". Under (b)(4) the drafters would permit removal for "changed circumstances". If this included a change in corporate identity, that might be inconsistent with the drafting language used by many attorneys who include "successors in interest" as standard language. Another removal standard is failure to "reasonably" inform beneficiaries. This seems consistent with Colorado law, if it does lend itself to litigation. Subparagraph (3) lends itself to different interpretations as to "comparable" trusts and what is "persistent and substantial". Still it is probably the best guideline unless the new Uniform Principal and Income Act should (unlikely at the moment) adopt a unitrust concept.
6. COLORADO LAW	Case law indicates that the court where the trust is registered has authority to remove the trustee even where the assets have situs elsewhere. Johnson v. El Paso Cattle Company, 725 P.2d 1180 (Colo App 1986), 725 P.2d 1180. The right to remove is in the "sound discretion" of the probate court. Matter of

	Malone's Estate, 597 P.2d 1049. See also 15-16-305 and Wade, Section 46.2 which references removal of the trustee, at least in the context of registration irregularities.
7. RECOMMENDATIONS	The committee recommends adoption of this section without change.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 7
OFFICE OF TRUSTEE

1. UTC SECTION	**707**
2. SUBJECT	**DELIVERY OF PROPERTY BY FORMER TRUSTEE**
3. UTC STATUTE	(a) Unless a cotrustee remains in office or the court otherwise orders, and until the trust property is delivered to a successor trustee or other person entitled to it, a trustee who has resigned or been removed has the duties of a trustee and the powers necessary to protect the trust property. (b) A trustee who has resigned or been removed shall proceed expeditiously to deliver the trust property within the trustee's possession to the cotrustee, successor trustee, or other person entitled to it.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section addresses the continuing authority and duty of a resigning or removed trustee. Subject to the power of the court to make other arrangements or unless a cotrustee remains in office, a resigning or removed trustee has continuing authority until the trust property is delivered to a successor. If a cotrustee remains in office, there is no reason to grant a resigning or removed trustee any continuing authority, and none is granted under this section. In addition, if a cotrustee remains in office, the former trustee need not submit a final trustee's report. *See* Section 813(c). There is ample authority in the Uniform Trust Code for the appointment of a special fiduciary, an appointment which can avoid the need for a resigning or removed trustee to exercise residual powers until a successor can take office. *See* Sections 704(d) (court may appoint additional trustee or special fiduciary whenever court considers appointment necessary for administration of trust), 705(b) (in approving resignation, court may impose conditions necessary for protection of trust property), 706(c) (pending decision on petition for removal, court may order appropriate relief), and 1001(b)(5) (to remedy breach of trust, court may appoint special fiduciary as necessary to protect trust property or interests of beneficiary). If the former trustee has died, the Uniform Trust Code does not require that the trustee's personal representative windup the deceased trustee's administration. Nor is a trustee's conservator or guardian required to complete the former trustee's administration if the trustee's authority terminated due to an adjudication of incapacity. However, to limit the former trustee's liability, the personal representative, conservator or guardian may submit a trustee's report on the former trustee's behalf as authorized by Section 813(c). Otherwise, the

	former trustee remains liable for actions taken during the trustee's term of office until liability is otherwise barred.
5. COLORADO COMMITTEE COMMENTS	This section ensures that there is at least someone at the controls of the trust when a trustee resigns, is removed, dies or is otherwise eliminated. This may be a former trustee or a representative of the former trustee. Of course the court may otherwise order a different arrangement. This section should be enacted. It empowers a responsible party to protect the trust and its assets.
6. COLORADO LAW	Section 15-16-201 and 15-16-305 provides for the possibility that the office of trustee will be vacant for some reason and for a means of filling the vacancy, but does not speak to the continuation issue before the new trustee is in place. Scott on Trusts Section 105 on the death of a sole trustee notes that the personal representative of the deceased trustee will be responsible for the trust and trust assets until a successor shall be appointed. Scott on Trusts does not address incapacity of a sole trustee.
7. RECOMMENDATIONS	The committee recommends adoption of Section 707 without change.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 7
OFFICE OF TRUSTEE

1. UTC SECTION	**708**
2. SUBJECT	**COMPENSATION OF TRUSTEE**
3. UTC STATUTE	(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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	Subsection (a) establishes a standard of reasonable compensation. Relevant factors in determining this compensation, as specified in the Restatement, include the custom of the community; the trustee's skill, experience, and facilities; the time devoted to trust duties; the amount and character of the trust property; the degree of difficulty, responsibility and risk assumed in administering the trust, including in making discretionary distributions; the nature and costs of services rendered by others; and the quality of the trustee's performance. *See* Restatement (Third) of Trusts § 38 cmt. c (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 242 cmt. b (1959). In setting compensation, the services actually performed and responsibilities assumed by the trustee should be closely examined. A downward adjustment of fees may be appropriate if a trustee has delegated significant duties to agents, such as the delegation of investment authority to outside managers. *See* Section 807 (delegation by trustee). On the other hand, a trustee with special skills, such as those of a real estate agent, may be entitled to extra compensation for performing services that would ordinarily be delegated. *See* Restatement (Third) of Trusts § 38 cmt. d (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 242 cmt. d (1959). Because "trustee" as defined in Section 103(19) includes not only an individual trustee but also cotrustees, each trustee, including a cotrustee, is entitled to reasonable compensation under the circumstances. The fact that a trust has more than one trustee does not mean that the trustees together are entitled to more compensation than had either acted alone. Nor does the appointment of more

than one trustee mean that the trustees are eligible to receive the compensation in equal shares. The total amount of the compensation to be paid and how it will be divided depend on the totality of the circumstances. Factors to be considered include the settlor's reasons for naming more than one trustee and the level of responsibility assumed and exact services performed by each trustee. Often the fees of cotrustees will be in the aggregate higher than the fees for a single trustee because of the duty of each trustee to participate in administration and not delegate to a cotrustee duties the settlor expected the trustees to perform jointly. *See* Restatement (Third) of Trusts § 38 cmt. i (Tentative Draft No. 2, approved 1999). The trust may benefit in such cases from the enhanced quality of decision-making resulting from the collective deliberations of the trustees.

Financial institution trustees normally base their fees on published fee schedules. Published fee schedules are subject to the same standard of reasonableness under the Uniform Trust Code as are other methods for computing fees. The courts have generally upheld published fee schedules but this is not automatic. Among the more litigated topics is the issue of termination fees. Termination fees are charged upon termination of the trust and sometimes upon transfer of the trust to a successor trustee. Factors relevant to whether the fee is appropriate include the actual work performed; whether a termination fee was authorized in the terms of the trust; whether the fee schedule specified the circumstances in which a termination fee would be charged; whether the trustee's overall fees for administering the trust from the date of the trust's creation, including the termination fee, were reasonable; and the general practice in the community regarding termination fees. Because significantly less work is normally involved, termination fees are less appropriate upon transfer to a successor trustee than upon termination of the trust. For representative cases, see *Cleveland Trust Co. v. Wilmington Trust Co.*, 258 A.2d 58 (Del. 1969); *In re Trusts Under Will of Dwan*, 371 N.W. 2d 641 (Minn. Ct. App. 1985); *Mercer v. Merchants National Bank*, 298 A.2d 736 (N.H. 1972); *In re Estate of Payson*, 562 N.Y.S. 2d 329 (Surr. Ct. 1990); *In re Indenture Agreement of Lawson*, 607 A. 2d 803 (Pa. Super. Ct. 1992); *In re Estate of Ischy*, 415 A.2d 37 (Pa. 1980); *Memphis Memorial Park v. Planters National Bank*, 1986 Tenn. App. LEXIS 2978 (May 7, 1986); *In re Trust of Sensenbrenner*, 252 N.W. 2d 47 (Wis. 1977).

This Code does not take a specific position on whether dual fees may be charged when a trustee hires its own law firm to represent the trust. The trend is to authorize dual compensation as long as the overall fees are reasonable. For a discussion, see Ronald C. Link, *Developments Regarding the Professional Responsibility of the Estate Administration Lawyer: The Effect of the Model Rules of Professional Conduct*, 26 Real Prop. Prob. & Tr. J. 1, 22-38 (1991).

Subsection (b) permits the terms of the trust to override the reasonable compensation standard, subject to the court's inherent equity power to make adjustments downward or upward in appropriate circumstances. Compensation provisions should be drafted with care. Common questions include whether a provision in the terms of the trust setting the amount of the trustee's compensation is binding on a successor trustee, whether a dispositive provision for the trustee in the terms of the trust is in addition to or in lieu of the trustee's regular compensation, and whether a dispositive provision for the trustee is conditional on the person performing services as trustee. *See* Restatement (Third) of Trusts § 38 cmt. e (Tentative Draft No.2, approved 1999); Restatement (Second) of Trusts § 242 cmt. f (1959).

Compensation may be set by agreement. A trustee may enter into an agreement with the beneficiaries for lesser or increased compensation, although an agreement increasing compensation is not binding on a nonconsenting beneficiary. *See* Section 111(d) (matters that may be resolved by nonjudicial settlement). *See also* Restatement (Third) of Trusts § 38 cmt. f (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 242 cmt. i (1959). A trustee may also agree to waive compensation and should do so prior to rendering significant services if concerned about possible gift and income taxation of the compensation accrued prior to the waiver. *See* Rev. Rul. 66-167, 1966-1 C.B. 20. *See also* Restatement (Third) of Trusts § 38 cmt. g (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 242 cmt. j (1959).

Section 816(15) grants the trustee authority to fix and pay its compensation without the necessity of prior court review, subject to the right of a beneficiary to object to the compensation in a later judicial proceeding. Allowing the trustee to pay its compensation without prior court approval promotes efficient trust administration but does place a significant burden on a beneficiary who believes the compensation is unreasonable. To provide a beneficiary with time to take action, and because of the importance of trustee's fees to the beneficiaries' interests, Section 813(b)(4) requires a trustee to provide the qualified beneficiaries with advance notice of any change in the method or rate of the trustee's compensation. Failure to provide such advance notice constitutes a breach of trust, which, if sufficiently serious, would justify the trustee's removal under Section 706.

Under Sections 501-502 of the Uniform Principal and Income Act (1997), one-half of a trustee's regular compensation is charged to income and the other half to principal. Chargeable to principal are fees for acceptance, distribution, or termination of the trust, and fees charged on disbursements made to prepare

	property for sale.
5. COLORADO COMMITTEE COMMENTS	This section establishes a standard of reasonableness for the trustee under the circumstances. Although it recognizes that compensation can be subject to a contractual agreement, it allows the court in all cases to impose a reasonableness standard if the duties of the trustee change or the compensation is unreasonably low or high. This section should be enacted. It is consistent with current law for estates and recognizes the problem in change of circumstances.
6. COLORADO LAW	The Colorado Fiduciary Powers Act does not deal with fiduciary's compensation. Trustee fees are subject to court review if challenged by beneficiaries of the trust. Section 15-16-201 (1) and –205. Section 15-16-205 gives the court the power to review the reasonableness of fees which implies a reasonableness standard but does not expressly state that that is the standard. Compensation for a personal representative is to be "reasonable," Section 15-12-719, and court review is provided in Section 15-12-721. Scott on Trusts, Section 242 notes that a trustee is entitled to compensation even if not specified in the governing document. The general principal applied is one of reasonableness.
7. RECOMMENDATIONS	The committee recommends adoption of Section 708 without change.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 7
OFFICE OF TRUSTEE

1. UTC SECTION	**709**
2. SUBJECT	**REIMBURSEMENT OF EXPENSES**
3. UTC STATUTE	(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 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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	A trustee has the authority to expend trust funds as necessary in the administration of the trust, including expenses incurred in the hiring of agents. *See* Sections 807 (delegation by trustee) and 816(15) (trustee to pay expenses of administration from trust). Subsection (a)(1) clarifies that a trustee is entitled to reimbursement from the trust for incurring expenses within the trustee's authority. The trustee may also withhold appropriate reimbursement for expenses before making distributions to the beneficiaries. *See* Restatement (Third) of Trusts § 38 cmt. b (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 244 cmt. b (1959). A trustee is ordinarily not entitled to reimbursement for incurring unauthorized expenses. Such expenses are normally the personal responsibility of the trustee. As provided in subsection (a)(2), a trustee is entitled to reimbursement for unauthorized expenses only if the unauthorized expenditures benefitted the trust The purpose of this provision, which is derived from Restatement (Second) of Trusts § 245 (1959), is not to ratify the unauthorized conduct of the trustee, but to prevent unjust enrichment of the trust. Given this purpose, a court, on appropriate grounds, may delay or even deny reimbursement for expenses which benefitted the trust. Appropriate grounds include: (1) whether the trustee acted in bad faith in incurring the expense; (2) whether the trustee knew that the expense was inappropriate; (3) whether the trustee reasonably believed the expense was necessary for the preservation of the trust estate; (4) whether the

	expense has resulted in a benefit; and (5) whether indemnity can be allowed
	without defeating or impairing the purposes of the trust. *See* Restatement (Second) of Trusts § 245 cmt. g (1959). Subsection (b) implements Section 802(h)(5), which creates an exception to the duty of loyalty for advances by the trustee for the protection of the trust if the transaction is fair to the beneficiaries. Reimbursement under this section may include attorney's fees and expenses incurred by the trustee in defending an action. However, a trustee is not ordinarily entitled to attorney's fees and expenses if it is determined that the trustee breached the trust. *See* 3A Austin W. Scott & William F. Fratcher, The Law of Trusts § 245 (4th ed. 1988).
5. COLORADO COMMITTEE COMMENTS	Trustees have the authority to expend trust funds as necessary in administration of the trust, including expenses incurred in the hiring of agents. Trustees are entitled to reimbursement from the trust for incurring expenses within the trustees' authority. Ordinarily a trustee is not entitled to reimbursement for incurring unauthorized expenses. Such expenses are normally the personal responsibility of the trustee. To prevent unjust enrichment to the trust or beneficiaries the court may order the reimbursement for unauthorized expenses. This is not meant to ratify the unauthorized conduct of the trustee. Given this purpose, a court, on appropriate grounds, may delay or even deny reimbursement for expenses which benefited the trust. Reimbursement under this section may include attorney's fees and expenses incurred by the trustee in defending an action. However, a trustee is not ordinarily entitled to attorney's fees and expenses if it is determined that the trustee breached the trust. This section should be enacted. It clarifies current law and adds the circumstances of the equity argument under the unjust enrichment section.
6. COLORADO LAW	The Colorado Fiduciary Powers Act, Section 15-1-804 (q) speaks to the advance of money for protection of a trust and liabilities incurred in or by the collection, care, administration of the trust. The act allows the fiduciary to reimbursement with interest and a lien on the trust assets. Scott on Trust in Section 188 notes that when expenses are properly incurred by a trustee for the benefit of the trust the trustee is entitled to reimbursement from the trust estate or a credit for such payments to his account. Section 188.6 notes that when the expense is not properly incurred a trustee is not entitled to

	reimbursement. The unjust enrichment issue is not discussed.
7. RECOMMENDATIONS	The committee recommends adoption of Section 709 without change.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 8
DUTIES AND POWERS OF TRUSTEE

1. UTC SECTION	**801**
2. SUBJECT	**DUTY TO ADMINISTER TRUST**
3. UTC STATUTE	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 [Code].
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section confirms that a primary duty of a trustee is to follow the terms and purposes of the trust and to do so in good faith. Only if the terms of a trust are silent or for some reason invalid on a particular issue does this Code govern the trustee's duties. This section also confirms that a trustee does not have a duty to act until the trustee has accepted the trusteeship. For the procedure for accepting a trusteeship, see Section 701. In administering the trust, the trustee must not only comply with this section but also with the other duties specified in this article, particularly the obligation not to place the interests of others above those of the beneficiaries (Section 802), the duty to act with prudence (Section 804), and the duty to keep the qualified beneficiaries reasonably informed about the administration of the trust (Section 813). While a trustee generally must administer a trust in accordance with its terms and purposes, the purposes and particular terms of the trust can on occasion conflict. If such a conflict occurs because of circumstances not anticipated by the settlor, it may be appropriate for the trustee to petition under Section 412 to modify or terminate the trust. Pursuant to Section 404, the trustee is not required to perform a duty prescribed by the terms of the trust if performance would be impossible, illegal or contrary to public policy. For background on the trustee's duty to administer the trust, see Restatement (Second) of Trusts §§ 164-169 (1959).
5. COLORADO COMMITTEE COMMENTS	See Scott on Trusts section 200.4. Generally any duty the trustee has under Law is to an individual or entity that can enforce the duty. In English Law the courts are primarily concerned with the interests of the beneficiaries. There is growing case law in the ~~good old~~ US ~~of~~ A in which the court exercises administrative power to insure the intent and purpose of the trust is given due consideration. This has been done in cases where no party is presenting this side

	to the court. The Uniform Act encourages this approach. Although I could not find specific case law in Colorado on this issue, it is apparent that the Denver Probate Court at times favors the Act's approach.
6. COLORADO LAW	"...The general duty of the trustee to administer a trust expeditiously for the benefit of the beneficiaries is not altered by this code." CRS 15-16-301
7. RECOMMENDATIONS	The committee recommends adopting Section 801 without change.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 8
DUTIES AND POWERS OF TRUSTEE

1. UTC SECTION	**802**
2. SUBJECT	**DUTY OF LOYALTY**
3. UTC STATUTE	(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 Section 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 the court; (3) the beneficiary did not commence a judicial proceeding within the time allowed by Section 1005; (4) the beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with Section 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 ow 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) 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 interest if the investment complies with the Colorado Uniform Prudent Investor Act ~~prudent investor rule of [Article] 9.~~ The trustee may be compensated by the investment company or investment trust for providing those services out of fees charged to the trust if the trustee at least annually notifies the persons entitled under Section 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 interest 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 interest 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] [guardianship] 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) The 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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section addresses the duty of loyalty, perhaps the most fundamental duty of the trustee. Subsection (a) states the general principle, which is copied from Restatement (Second) of Trusts § 170(1) (1959). A trustee owes a duty of loyalty to the beneficiaries, a principle which is sometimes expressed as the obligation of the trustee not to place the trustee's own interests over those of the beneficiaries. Most but not all violations of the duty of loyalty concern transactions involving the trust property, but breaches of the duty can take other

	forms. For a discussion of the different types of violations, see George G. Bogert & George T. Bogert, The Law of Trusts and Trustees § 543 (Rev. 2d ed. 1993); and 2A Austin W. Scott & William F. Fratcher, The Law of Trusts §§ 170-170.24
	(4th ed. 1987). The "interests of the beneficiaries" to which the trustee must be loyal are the beneficial interests as provided in the terms of the trust. *See* Section 103(7). The duty of loyalty applies to both charitable and noncharitable trusts, even though the beneficiaries of charitable trusts are indefinite. In the case of a charitable trust, the trustee must administer the trust solely in the interests of effectuating the trust's charitable purposes. *See* Restatement (Second) of Trusts § 379 cmt. a (1959). Duty of loyalty issues often arise in connection with the settlor's designation of the trustee. For example, it is not uncommon that the trustee will also be a beneficiary. Or the settlor will name a friend or family member who is an officer of a company in which the settlor owns stock. In such cases, settlors should be advised to consider addressing in the terms of the trust how such conflicts are to be handled. Section 105 authorizes a settlor to override an otherwise applicable duty of loyalty in the terms of the trust. Sometimes the override is implied. The grant to a trustee of authority to make a discretionary distribution to a class of beneficiaries that includes the trustee implicitly authorizes the trustee to make distributions for the trustee's own benefit. Subsection (b) states the general rule with respect to transactions involving trust property that are affected by a conflict of interest. A transaction affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary who is affected by the transaction. Subsection (b) carries out the "no further inquiry" rule by making transactions involving trust property entered into by a trustee for the trustee's own personal account voidable without further proof. Such transactions are irrebuttably presumed to be affected by a conflict between personal and fiduciary interests. It is immaterial whether the trustee acts in good faith or pays a fair consideration. *See* Restatement (Second) of Trusts § 170 cmt. b (1959). The rule is less severe with respect to transactions involving trust property entered into with persons who have close business or personal ties with the trustee. Under subsection (c), a transaction between a trustee and certain relatives and business associates is presumptively voidable, not void. Also presumptively voidable are transactions with corporations or other enterprises in which the trustee, or a person who owns a significant interest in the trustee, has an interest that might

	affect the trustee's best judgment. The presumption is rebutted if the trustee establishes that the transaction was not affected by a conflict between personal and fiduciary interests. Among the factors tending to rebut the presumption are whether the consideration was fair and whether the other terms of the transaction are similar to those that would be transacted with an independent party.
	Even where the presumption under subsection (c) does not apply, a transaction may still be voided by a beneficiary if the beneficiary proves that a conflict between personal and fiduciary interests existed and that the transaction was affected by the conflict. The right of a beneficiary to void a transaction affected by a conflict of interest is optional. If the transaction proves profitable to the trust and unprofitable to the trustee, the beneficiary will likely allow the transaction to stand. For a comparable provision regulating fiduciary investments by national banks, see 12 C.F.R. §9.12(a). As provided in subsection (b), no breach of the duty of loyalty occurs if the transaction was authorized by the terms of the trust or approved by the court, or if the beneficiary failed to commence a judicial proceeding within the time allowed or chose to ratify the transaction, either prior to or subsequent to its occurrence. In determining whether a beneficiary has consented to a transaction, the principles of representation from Article 3 may be applied. Subsection (b)(5), which is derived from Section 3-713(1) of the Uniform Probate Code, allows a trustee to implement a contract or pursue a claim that the trustee entered into or acquired before the person became or contemplated becoming trustee. While this subsection allows the transaction to proceed without automatically being voidable by a beneficiary, the transaction is not necessarily free from scrutiny. In implementing the contract or pursuing the claim, the trustee must still complete the transaction in a way that avoids a conflict between the trustee's fiduciary and personal interests. Because avoiding such a conflict will frequently be difficult, the trustee should consider petitioning the court to appoint a special fiduciary, as authorized by subsection (i), to work out the details and complete the transaction. Subsection (d) creates a presumption that a transaction between a trustee and a beneficiary not involving trust property is an abuse by the trustee of a confidential relationship with the beneficiary. This subsection has limited scope. If the trust has terminated, there must be proof that the trustee's influence with the beneficiary remained. Furthermore, whether or not the trust has terminated, there must be proof that the trustee obtained an advantage from the relationship. The fact the trustee profited is insufficient to show an abuse if a third party would have similarly profited in an arm's length transaction. Subsection (d) is based on

	Cal. Prob. Code §16004(c). *See also* 2A Austin W. Scott & William F. Fratcher § 170.25 (4th ed. 1987), which states the same principle in a slightly different form: "Where he deals directly with the beneficiaries, the transaction may stand, but only if the trustee makes full disclosure and takes no advantage of his position and the transaction is in all respects fair and reasonable."
	Subsection (e), which allows a beneficiary to void a transaction entered into by the trustee that involved an opportunity belonging to the trust, is based on Restatement (Second) of Trusts § 170 cmt. k (1959). While normally associated with corporations and with their directors and officers, what is usually referred to as the corporate opportunity doctrine also applies to other types of fiduciary. The doctrine prohibits the trustee's pursuit of certain business activities, such as entering into a business in direct competition with a business owned by the trust, or the purchasing of an investment that the facts suggest the trustee was expected to purchase for the trust. For discussion of the corporate opportunity doctrine, see Kenneth B. Davis, Jr., *Corporate Opportunity and Comparative Advantage*, 84 Iowa L. Rev. 211 (1999); and Richard A. Epstein, *Contract and Trust in Corporate Law: The Case of Corporate Opportunity*, 21 Del. J. Corp. L. 5 (1996). *See also* Principles of Corporate Governance: Analysis and Recommendations § 5.05 (American Law Inst. 1994). Subsection (f) creates an exception to the no further inquiry rule for trustee investment in mutual funds. This exception applies even though the mutual fund company pays the financial-service institution trustee a fee for providing investment advice and other services, such as custody, transfer agent, and distribution, that would otherwise be provided by agents of the fund. Mutual funds offer several advantages for fiduciary investing. By comparison with common trust funds, mutual fund shares may be distributed in-kind when trust interests terminate, avoiding liquidation and the associated recognition of gain for tax purposes. Mutual funds commonly offer daily pricing, which gives trustees and beneficiaries better information about performance. Because mutual funds can combine fiduciary and nonfiduciary accounts, they can achieve larger size, which can enhance diversification and produce economies of scale that can lower investment costs. Mutual fund investment also has a number of potential disadvantages. It adds another layer of expense to the trust, and it causes the trustee to lose control over the nature and timing of transactions in the fund. Trustee investment in mutual funds sponsored by the trustee, its affiliate, or from which the trustee receives extra fees has given rise to litigation implicating the trustee's duty of loyalty, the duty to invest with prudence, and the right to receive only reasonable compensation. Because financial institution trustees ordinarily provide advisory

	services to and receive compensation from the very funds in which they invest trust assets, the contention is made that investing the assets of individual trusts in these funds is imprudent and motivated by the effort to generate additional fee income. Because the financial institution trustee often will also charge its regular fee for administering the trust, the contention is made that the financial institution trustee's total compensation, both direct and indirect, is excessive.
	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. Nearly all of the States have enacted statutes authorizing trustees to invest in funds from which the trustee might derive additional compensation. Portions of subsection (f) are based on these statutes. Subsection (f) makes clear that such dual investment-fee arrangements are not automatically presumed to involve a conflict between the trustee's personal and fiduciary interests, but subsection (f) does not otherwise waive or lessen a trustee's fiduciary obligations. The trustee, in deciding whether to invest in a mutual fund, must not place its own interests ahead of those of the beneficiaries. The investment decision must also comply with the enacting jurisdiction's prudent investor rule. To obtain the protection afforded by subsection (f), the trustee must disclose at least annually to the beneficiaries entitled to receive a copy of the trustee's annual report the rate and method by which the additional compensation was determined. Furthermore, the selection of a mutual fund, and the resulting delegation of certain of the trustee's functions, may be taken into account under Section 708 in setting the trustee's regular compensation. *See also* Uniform Prudent Investor Act §§ 7 and 9 and Comments; Restatement (Third) of Trusts: Prudent Investor Rule § 227 cmt. m (1992). Subsection (f) applies whether the services to the fund are provided directly by the trustee or by an affiliate. While the term "affiliate" is not used in subsection (c), the individuals and entities listed there are examples of affiliates. The term is also used in the regulations under ERISA. An "affiliate" of a fiduciary includes (1) any person who directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with the fiduciary; (2) any officer, director, partner, employee, or relative of the fiduciary, and any corporation or partnership of which the fiduciary is an officer, director or partner. *See* 29 C.F.R. § 2510.3-21(e). Subsection (g) addresses an overlap between trust and corporate law. It is based on Restatement of Trusts (Second) § 193 cmt. a (1959), which provides that "[i]t is the duty of the trustee in voting shares of stock to use proper care to promote the interest of the beneficiary," and that the fiduciary responsibility of a trustee in voting a control block "is heavier than where he holds only a small fraction of

	the shares." Similarly, the Department of Labor construes ERISA's duty of loyalty to make share voting a fiduciary function. *See* 29 C.F.R. §2509.94-2. When the trust owns the entirety of the shares of a corporation, the corporate assets are in effect trust assets that the trustee determines to hold in corporate form. The trustee may not use the corporate form to escape the fiduciary duties of trust law. Thus, for example, a trustee whose duty of impartiality would require the trustee to make current distributions for the support of current beneficiaries may not evade that duty by holding assets in corporate form and pleading the discretion
	of corporate directors to determine dividend policy. Rather, the trustee must vote for corporate directors who will follow a dividend policy consistent with the trustee's trust-law duty of impartiality. Subsection (h) contains several exceptions to the general duty of loyalty, which apply if the transaction was fair to the beneficiaries. Subsection (h)(1)-(2) clarify that a trustee is free to contract about the terms of appointment and rate of compensation. Consistent with Restatement (Second) of Trusts § 170 cmt. r (1959), subsection (h)(3) authorizes a trustee to engage in a transaction involving another trust of which the trustee is also trustee, a transaction with a decedent's estate or a conservatorship estate of which the trustee is personal representative or conservator, or a transaction with another trust or other fiduciary relationship in which a beneficiary of the trust has an interest. The authority of a trustee to deposit funds in a financial institution operated by the trustee, as provided in subsection (h)(4), is recognized in Restatement (Second) of Trusts § 170 cmt. m (1959). The power to deposit funds in its own institution does not negate the trustee's responsibility to invest prudently, including the obligation to earn a reasonable rate of interest on deposits. Subsection (h)(5) authorizes a trustee to advance money for the protection of the trust. Such advances usually are of small amounts and are made in emergencies or as a matter of convenience. Pursuant to Section 709(b), the trustee has a lien against the trust property for any advances made. **2003 Amendment.** The amendment revises subsection (f) to clarify that compensation received from a mutual fund for providing services to the fund is an addition to the trustee's regular compensation. It also clarifies that the trustee obligation to notify certain of the beneficiaries of compensation received from the fund applies only to compensation received for providing investment management or advisory services. The amendment conforms subsection (f) to the drafters' original intent. Subsection (f) formerly provided:

	(f) 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 complies with the prudent investor rule of [Article] 9. The trustee may be compensated by the investment company or investment trust for providing those services out of fees charged to the trust if the trustee at least annually notifies the persons entitled under Section 813 to receive a copy of the trustee's annual report of the rate and method by which the compensation was determined.
	2004 Amendment. Section 802(f) creates an exception to the prohibition on self-dealing for certain investments in mutual funds in which the trustee, or its affiliate, provides services in a capacity other than that as trustee. As originally drafted, Section 802(f) provided that the exception applied only if the investment complied with the Uniform Prudent Investor Act and the trustee notified the qualified beneficiaries of the additional compensation received for providing the services. However, the Uniform Prudent Investor Act itself contains its own duty of loyalty provision (Section 5), thereby arguably limiting or undoing this exception to the UTC's loyalty provision. The amendment, by providing that the investment does not violate the duty of loyalty under the UTC if it "otherwise" complies with the Uniform Prudent Investor Act, is intended to negate the implication that the investment must also comply with the Uniform Prudent Investor Act's own duty of loyalty provision.
5. COLORADO COMMITTEE COMMENTS	This section of the act is an attempt to clarify and codify the holdings in this area. Recommend enactment. Since a guardian has authority over the finances of its ward if no conservator is appointed for the ward, the committee adds the word "[guardianship]" to subsection (h)(3).
6. COLORADO LAW	Colorado Case Law substantiates the duty of loyalty as primary. See Scott On Trusts section 170 through 170.25, section 205 and 206.
7. RECOMMENDATIONS	The committee recommends adopting Section 802 without change other than to specifically reference the Colorado Uniform Prudent Investor Act and add the word "guardianship" to subsection (h)(3).

UNIFORM TRUST CODE COMMITTEE
ARTICLE 8
DUTIES AND POWERS OF TRUSTEE

1. UTC SECTION	**803**
2. SUBJECT	**IMPARTIALITY**
3. UTC STATUTE	If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	The duty of impartiality is an important aspect of the duty of loyalty. This section is identical to Section 6 of the Uniform Prudent Investor Act, except that this section also applies to all aspects of trust administration and to decisions by a trustee with respect to distributions. The Prudent Investor Act is limited to duties with respect to the investment and management of trust property. The differing beneficial interests for which the trustee must act impartially include those of the current beneficiaries versus those of beneficiaries holding interests in the remainder; and among those currently eligible to receive distributions. In fulfilling the duty to act impartially, the trustee should be particularly sensitive to allocation of receipts and disbursements between income and principal and should consider, in an appropriate case, a reallocation of income to the principal account and vice versa, if allowable under local law. For an example of such authority, see Uniform Principal and Income Act § 104 (1997). The duty to act impartially does not mean that the trustee must treat the beneficiaries equally. Rather, the trustee must treat the beneficiaries equitably in light of the purposes and terms of the trust. A settlor who prefers that the trustee, when making decisions, generally favor the interests of one beneficiary over those of others should provide appropriate guidance in the terms of the trust. *See* Restatement (Second) of § 183 cmt. a (1959).
5. COLORADO COMMITTEE COMMENTS	See the Colorado Estate Planning Handbook section 13.17 for a summary of fiduciary duties. See Scott on Trusts section 183 and 232. The Trustee is under a duty to be impartial to preserve a fair balance between preserving the value of trust property for the remainder as well as making it productive for beneficiaries receiving current benefit.
6. COLORADO LAW	Basically tracks with current Colorado Law.
7. RECOMMENDATIONS	The committee recommends adopting Section 803 without change.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 8
DUTIES AND POWERS OF TRUSTEE

1. UTC SECTION	804
2. SUBJECT	PRUDENT ADMINISTRATION
3. UTC STATUTE	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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	The duty to administer a trust with prudence is a fundamental duty of the trustee. This duty does not depend on whether the trustee receives compensation. The duty may be altered by the terms of the trust. *See* Section 105. This section is similar to Section 2(a) of the Uniform Prudent Investor Act and Restatement (Third) of Trusts: Prudent Investor Rule § 227 (1992). The language of this section diverges from the language of the previous Restatement. The prior Restatement can be read as applying the same standard - "man of ordinary prudence would exercise in dealing with his own property" - regardless of the type or purposes of the trust. *See* Restatement (Second) of Trusts § 174 cmt. a (1959). This section appropriately bases the standard on the purposes and other circumstances of the particular trust. A settlor who wishes to modify the standard of care specified in this section is free to do so, but there is a limit. Section 1008 prohibits a settlor from exculpating a trustee from liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or to the interests of the beneficiaries.
5. COLORADO COMMITTEE COMMENTS	The trustee must use prudence not only in the application of investment activities but in the overall administration of day to day activities of the trust. This standard is based on reasonableness in accordance with the total circumstances. A settlor who wishes to modify the standard of care specified in this section is free to do so, but there is a limit. Section 1008 prohibits a settlor from exculpating a trustee from liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or to the interests of the beneficiaries. The new act is a more modernized and politically correct restatement of current Colorado Law. It really does not set a new standard of care. Recommend adoption.

6. COLORADO LAW	"Except as otherwise provided by the terms of the trust, the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another, and if the trustee has special skills or is named trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills."
7. RECOMMENDATIONS	The committee recommends adopting Section 804 without change.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 8
DUTIES AND POWERS OF TRUSTEE

1. UTC SECTION	**805**
2. SUBJECT	**COSTS OF ADMINISTRATION**
3. UTC STATUTE	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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section is similar to Section 7 of the Uniform Prudent Investor Act and is consistent with the rules concerning costs in Restatement (Third) of Trusts: Prudent Investor Rule § 227(c)(3) (1992). For related rules concerning compensation and reimbursement of trustees, see Sections 708 and 709. The duty not to incur unreasonable costs applies when a trustee decides whether and how to delegate to agents, as well as to other aspects of trust administration. In deciding whether and how to delegate, the trustee must be alert to balancing projected benefits against the likely costs. To protect the beneficiary against excessive costs, the trustee should also be alert to adjusting compensation for functions which the trustee has delegated to others. The obligation to incur only necessary or appropriate costs of administration has long been part of the law of trusts. *See* Restatement (Second) of Trusts § 188 (1959).
5. COLORADO COMMITTEE COMMENTS	This rule, which borrows significantly from Section 227(c)(3) of the RESTATEMENT (THIRD) of TRUSTS: Prudent Investor Rule (1992), RESTATEMENT (SECOND) of TRUSTS §188 (1959), and common law, provides that a trustee may only incur reasonable expenses in managing a trust. This duty applies when a trustee delegates to agents as well. The trustee is obligated to balance projected benefits against likely costs. It also requires that the trustee consider adjusting its compensation when delegating trust functions.
6. COLORADO LAW	Almost identical to §907, Uniform Prudent Investor Act, CRS §15-1.1-107. Section 805 tracks CRS §15-1.1-107 very closely. The existing statute reads: "In investing or 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". CRS §15-1.1-107 (1997). Other sections of Colorado Law reflect this general policy. CRS §15-16-205 (1997) provides for court review of trust employee compensation. It allows a court, upon petition, to inquire into the "propriety of

	employment of any person", and "the reasonableness" of the compensation provided for trust employees and for the trustees himself. CRS §15-16-301 (1997) reads that except as specifically provided, "the general duty of the trustee to administer a trust expeditiously and for the benefit of the beneficiaries is not altered by this code". See also *Mountain States Beet Growers Marketing Association v. Monroe,* 804 Colo. 300 (1928), and *Rippey v. Denver U.S. National Bank,* 273 F. Supp. 718 (1967), where the courts enunciated that a trustee is obligated to act using "utmost good faith", and must at all times, strive to protect the interests of his beneficiaries.
7. RECOMMENDATIONS	Colorado case law and statutes do not conflict with Section 805 and the Restatement sections it is based on. In fact, the statutes and case law support it. CRS §15-1.1-107 is almost identical. Case law also recognizes a trustee's duty to act prudently, in good faith and for the benefit of the trust, which is consistent with 805's requirement that a trustee incur only reasonable expenses. The Subcommittee recommends adoption without modification.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 8
DUTIES AND POWERS OF TRUSTEE

1. UTC SECTION	806
2. SUBJECT	TRUSTEE'S SKILLS
3. UTC STATUTE	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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section is similar to Section 7-302 of the Uniform Probate Code, Restatement (Second) of Trusts § 174 (1959), and Section 2(f) of the Uniform Prudent Investor Act.
5. COLORADO COMMITTEE COMMENTS	Second 806 would require trustees to use the full extent of their skills whether the trustee actually possesses those skills or incorrectly represents such competence. The comment to 806 suggests that a skilled trustee who makes representations of little competency is subject to the same standard as a trustee of modest abilities who makes representation of great competence. UTC Section 806 (cmt.), 72. 806 is similar to Section 7-302 of the Uniform Probate Code and RESTATEMENT (SECOND) of TRUSTS §174 (1959). This section continues the existing distinction in the law between amateur and professional trustees. Because the standard of prudence is relational, it follows that the standard for professional trustees is the standard of prudent professionals; for amateurs, it is the standard of prudent amateurs. Official comments to 15-1.1-102. Case law strongly supports the concept of a higher standard of care for the trustee representing itself to be an expert or professional, See Annot. @ 91 A.L.R. 3d. 904 (1979).
6. COLORADO LAW	Colorado has adopted UPC §7-302 as CRS §§15-16-302 and 15-1.1-102. The statute is almost identical to §902(f), Uniform Prudent Investor Act, CRS §15-1.1-102(f)]. Following the requirement that a trustee should act as a "prudent man dealing with the property of another", it also requires that if a trustee "has special skills, or is named trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills." The comments to §7-302 state that the section clearly conveys the idea that a trustee must comply with an "external" rather than an "internal" standard of care. This probably relates to the prudent man standard. *Rippey v. Denver U.S. National Bank,* 273 F. Supp. 718 (D. Colo. 1967) held that

	a Trustee owes a duty to his beneficiaries to exercise such care and skills as a man
	of ordinary prudence would exercise in safeguarding and preserving his own property. In *Murphy v. Central Bank & Trust Co.*, 699 P.2d 13 (Colo. App. 1985), the court ruled that damages awarded beneficiaries were justified because the trustee did not seek the best price obtainable for trust property it was selling. The court found that because the trustee did not obtain independent appraisals, or secure competitive bidding, and because it failed to place the property on the open market before sale, it violated its fiduciary duty of loyalty and reasonable care. *Murphy*, P.2d at 14. In this case, the trustee bank certainly had the skills available to determine a fair asking price for the property. Its failure to do so was deemed unreasonable by the court. This suggests that in Colorado, if a trustee fails to use all available skills, this failure will be deemed unreasonable, and a violation of his fiduciary duties. Colorado case law decided prior to the UPIA regarding application of a trustee's skills is represented by the following: "The law is clear that to surcharge an executor [trustee] there must be a finding that he failed to exercise common prudence, common skill and common caution in his management of the estate, and that these failures resulted in loss to the estate and prejudice to the persons in interest." Estate of McKeen, 541 P.2d 101, 103 (Colo. App. 1975); In re Estate of Blanpied, 155 Colo. 133, 393 P.2d 355.
7. RECOMMENDATIONS	§806 reflects existing Colorado statutory law (15-16-302 and 15-1.1-102(f)) and the UPC. The Subcommittee recommends adoption without modification.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 8
DUTIES AND POWERS OF TRUSTEE

1. UTC SECTION	**807**
2. SUBJECT	**DELEGATION BY TRUSTEE**
3. UTC STATUTE	(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) 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 the courts of this State.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section permits trustees to delegate various aspects of trust administration to agents, subject to the standards of the section. The language is derived from Section 9 of the Uniform Prudent Investor Act. *See also* John H. Langbein, *Reversing the Nondelegation Rule of Trust-Investment Law*, 59 Mo. L. Rev. 105 (1994) (discussing prior law). This section encourages and protects the trustee in making delegations appropriate to the facts and circumstances of the particular trust. Whether a particular function is delegable is based on whether it is a function that a prudent trustee might delegate under similar circumstances. For example, delegating some administrative and reporting duties might be prudent for a family trustee but unnecessary for a corporate trustee. This section applies only to delegation to agents, not to delegation to a cotrustee. For the provision regulating delegation to a cotrustee, see Section 703(e).

5. COLORADO COMMITTEE COMMENTS	Section 807 provides trustees with the ability to delegate certain trust duties and powers to agents. §807 is derived from Section 9 of the RESTATEMENT (THIRD) of TRUSTS: Prudent Investor Rule §171 (1992). Section 807 is intended to encourage and protect trustees when they reasonably delegate authority. Whether particular functions are delegable is based on whether it is a function that a "prudent" trustee would have delegated under similar circumstances. This Section only addresses delegation to agents, not delegation to co-trustees.
6. COLORADO LAW	CRS §15-1.1-109 (1997) is almost identical to the language of Section 807. However, §15-1.1-109 is limited to delegation of investment and management functions, while §807 allows delegation of duties and powers. Colorado law, therefore, embraces the more modern approach to delegation spelled out in the Prudent Investor Rule, and rejects the rule found in the RESTATEMENT (SECOND) of TRUSTS §171 (1959) which discouraged delegation to agents. The official comment that follows CRS §15-1.1-109 suggests that the statute was intended to balance the hazards and advantages of delegation. CRS §15-1.1-109 (cmt.) (1997). It notes that the trustee's duties of care, skill, and caution in delegation "should protect the beneficiary against overboard delegation". CRS §15-1.1-109 (cmt) (1997). For example, a trustee's delegation would be deemed unreasonable where he agreed to an exculpation clause in an investment management agreement that left his beneficiaries without recourse. CRS §15-1.1-109 (cmt.) (1997). The section addresses concerns of trustee immunity, found under subsection (c), as well. Although subsection (c) exonerates the trustee from personal responsibility for the agent's conduct when the delegation satisfies the standards of subsection (a), subsection (b) makes the agent responsible to the trust. The beneficiaries of the trust can, therefore, rely upon the trustee to enforce the terms of the delegation. CRS §15-1.1-109 (cmt.)(1997).
7. RECOMMENDATIONS	Section 807 has already been adopted (at least as it relates to management and investment functions) in Colorado under CRS 15-1.1-109. The Subcommittee recommends adoption without modification.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 8
DUTIES AND POWERS OF TRUSTEE

1. UTC SECTION	**808**
2. SUBJECT	**POWERS TO DIRECT**
3. UTC STATUTE	(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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	Subsection (a) is an application of Section 603(a), which provides that a revocable trust is subject to the settlor's exclusive control as long as the settlor has capacity. Because of the settlor's degree of control, subsection (a) of this section authorizes a trustee to rely on a written direction from the settlor even if it is contrary to the terms of the trust. The written direction of the settlor might be regarded as an amendment of the trust. Subsection (a) has limited application upon a settlor's incapacity. An agent, conservator, or guardian has authority to give the trustee instructions contrary to the terms of the trust only if the agent, conservator, or guardian succeeds to the settlor's powers with respect to revocation, amendment, or distribution as provided in Section 602(e). Subsections (b)-(d) ratify the use of trust protectors and advisers. Subsections (b) and (d) are based in part on Restatement (Second) of Trusts § 185 (1959). Subsection (c) is similar to Restatement (Third) of Trusts § 64(2) (Tentative Draft No. 3, 2001). "Advisers" have long been used for certain trustee functions, such as the power to direct investments

or manage a closely-held business. "Trust protector," a term largely associated with offshore trust practice, is more recent and usually connotes the grant of greater powers, sometimes including the power to amend or terminate the trust. Subsection (c) ratifies the recent trend to grant third persons such broader powers.

A power to direct must be distinguished from a veto power. A power to direct involves action initiated and within the control of a third party. The trustee usually has no responsibility other than to carry out the direction when made. But if a third party holds a veto power, the trustee is responsible for initiating the decision, subject to the third party's approval. A trustee who administers a trust subject to a veto power occupies a position akin to that of a cotrustee and is responsible for taking appropriate action if the third party's refusal to consent would result in a serious breach of trust. *See* Restatement (Second) of Trusts § 185 cmt. g (1959); Section 703(g)(duties of cotrustees).

Frequently, the person holding the power is directing the investment of the holder's own beneficial interest. Such self-directed accounts are particularly prevalent among trusts holding interests in employee benefit plans or individual retirement accounts. *See* ERISA § 404(c) (29 U.S.C. § 1104(c)). But for the type of donative trust which is the primary focus of this Code, the holder of the power to direct is frequently acting on behalf of others. In that event and as provided in subsection (d), the holder is presumptively acting in a fiduciary capacity with respect to the powers granted and can be held liable if the holder's conduct constitutes a breach of trust, whether through action or inaction. Like a trustee, liability cannot be imposed if the holder has not accepted the grant of the power either expressly or informally through exercise of the power. *See* Section 701.

Powers to direct are most effective when the trustee is not deterred from exercising the power by fear of possible liability. On the other hand, the trustee does have overall responsibility for seeing that the terms of the trust are honored. For this reason, subsection (b) imposes only minimal oversight responsibility on the trustee. A trustee must generally act in accordance with the direction. A trustee may refuse the direction only if the attempted exercise would be manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty owed by the holder of the power to the beneficiaries of the trust.

	The provisions of this section may be altered in the terms of the trust. *See* Section 105. A settlor can provide that the trustee must accept the decision of the power holder without question. Or a settlor could provide that the holder of the power is not to be held to the standards of a fiduciary. A common technique for assuring that a settlor continues to be taxed on all of the income of an irrevocable trust is for the settlor to retain a nonfiduciary power of administration. *See* I.R.C. § 675(4).
5. COLORADO COMMITTEE COMMENTS	Subsection (a) is an application of UTC §603, that a revocable trust is within the settlor's control for as long as the settlor has capacity. Subsection (b) and (d) of Section 808 are derived from RESTATEMENT (SECOND) of TRUSTS §185 (1959). Powers to direct usually involve choice of investment management, or management of closely held business interests. A power to direct, as distinguished from a veto power, usually involves action "initiated and within the control of a third party". The trustee, then, has no duty other than to carry out the other party's direction. If the other party holds a veto power however, the trustee must initiate the action, subject to the third party's power to direct. A trustee who is subject to a veto power can be compared to a co-trustee in that they both have the duty to take appropriate action if the third party's veto would damage the trust. See RESTATEMENT (SECOND) of TRUSTS §185 cmt. g (1959); UTC Section 703(d)(2)(duties of co-trustees). There are varying forms of the powers to direct. Often, the person holding the power is directing the trust towards the holder's own benefit. (i.e. a "self directed" account such as an IRA). However, with donative trusts, the power holder is often acting on behalf of others. In that situation, subsection (d) provides that that person (other than a beneficiary) is presumptively acting in a fiduciary capacity and can be held liable if the power holder's conduct constitutes a breach. Powers to direct will be more effective when trustees are not concerned with following the commands of the holder because of fears of liability. However, because the trustee retains ultimate responsibility for the trust, subsection (b) provides that a trustee need not honor an exercise of the power to direct if the attempted exercise is manifestly contrary to the terms of the trust or the trustee "knows" that the attempted exercise violates a fiduciary duty that the power holder owes to the beneficiary. Subsection (c) was a new section in the October 2000 draft.

6. COLORADO LAW	Current CRS §15-1-307 provides as follows: "Whenever an instrument under which a fiduciary is acting reserves to the settlor or vests in an advisory or investment committee or in any other person or persons including one or more other fiduciaries, to the exclusion of the fiduciary or to the exclusion of one or more of several fiduciaries, authority to direct the making or retention of any investment, the excluded fiduciary or fiduciaries shall not be liable, either individually or as a fiduciary, for any loss resulting from the making or retention of any investment pursuant to such direction." Under this section the trust instrument may reserve or direct the authority to make or retain any investment to the exclusion of a fiduciary. The excluded fiduciary will not be liable for any loss pursuant to such direction.
7. RECOMMENDATIONS	1. The trustee will not be exonerated from all liability, as under current law. The trustee retains ultimate liability for the trust. 2. (b) puts the trustee in the position of determining the power holders' duties to the beneficiaries (last sentence). 3. Under (b) the trustee must examine the trust to determine whether the direction is contrary to the terms of the trust. 4. 808(b) allows direction of "certain actions" of a trustee. That is broader than the investment direction in §15-1-307. The Subcommittee recommends adoption without modification.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 8
DUTIES AND POWERS OF TRUSTEE

1. UTC SECTION	**809**
2. SUBJECT	**CONTROL AND PROTECTION OF TRUST PROPERTY**
3. UTC STATUTE	A trustee shall take reasonable steps to take control of and protect the trust property.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section codifies the substance of Sections 175 and 176 of the Restatement (Second) of Trusts (1959). The duty to take control of and safeguard trust property is an aspect of the trustee's duty of prudent administration as provided in Section 804. *See also* Sections 816(1) (power to collect trust property), 816(11) (power to insure trust property), and 816(12) (power to abandon trust property). The duty to take control normally means that the trustee must take physical possession of tangible personal property and securities belonging to the trust, and must secure payment of any choses in action. *See* Restatement (Second) of Trusts § 175 cmt. a, c and d (1959). This section, like the other sections in this part, is subject to alteration by the terms of the trust. *See* Section 105. For example, the settlor may provide that the spouse may occupy the settlor's former residence rent free, in which event the spouse's occupancy would prevent the trustee from taking possession.
5. COLORADO COMMITTEE COMMENTS	This section ensures that the Trustee take control of the trust property and has a duty to control it with prudence (subject to limitations in the terms of the trust). Related UTA Section: 804 (duty to act with prudence); 816(1) (power to collect trust property); 816(12) (powers to insure trust property); 816(13) (power to abandon trust property).
6. COLORADO LAW	Dealing in part with C.R.S. §§ 15-16-302, 15-16-303 and 15-16-305. **Scott on Trusts** discusses not only a duty to take physical possession of trust property but in appropriate cases to see that it is designated as trust property. For example, properly recording an interest in land (*Lackner*?), mortgage or deed of trust or with shares of stock and registered bonds, he should see that they are registered in his name as trustee. Scott also discusses trustee's duty not only to take control of the trust property but to keep control. Ordinarily, keeping possession of the property and not entrusting possession to others. There are situations in

	which it is proper for the trustee to put a beneficiary of the trust in possession of the trust property (home in possession of the surviving spouse).
7. RECOMMENDATIONS	This section should be enacted.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 8
DUTIES AND POWERS OF TRUSTEE

1. UTC SECTION	**810**
2. SUBJECT	**RECORD KEEPING AND IDENTIFICATION OF TRUST PROPERTY**
3. UTC STATUTE	(a) A trustee shall keep adequate records of the administration of the trust. (b) A trustee shall keep trust property separate from the trustee's own property. (c) Except as otherwise provided in subsection (d), a trustee shall cause the trust property to be designated so that the interest of the trust, to the extent feasible, appears in records maintained by a party other than a trustee or beneficiary. (d) If the trustee maintains records clearly indicating the respective interests, a trustee may invest as a whole the property of two or more separate trusts.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	The duty to keep adequate records stated in subsection (a) is implicit in the duty to act with prudence (Section 804) and the duty to report to beneficiaries (Section 813). For an application, see *Green v. Lombard*, 343 A. 2d 905, 911 (Md. Ct. Spec. App. 1975). *See also* Restatement (Second) of Trusts §§ 172, 174 (1959). The duty to earmark trust assets and the duty of a trustee not to mingle the assets of the trust with the trustee's own are closely related. Subsection (b), which addresses the duty not to mingle, is derived from Section 179 of the Restatement (Second) of Trusts (1959). Subsection (c) makes the requirement that assets be earmarked more precise than that articulated in Restatement (Second) § 179 by requiring that the interest of the trust must appear in the records of a third party, such as a bank, brokerage firm, or transfer agent. Because of the serious risk of mistake or misappropriation even if disclosure is made to the beneficiaries, showing the interest of the trust solely in the trustee's own internal records is insufficient. Section 816(7)(B), which allows a trustee to hold securities in nominee form, is not inconsistent with this requirement. While securities held in nominee form are not specifically registered in the name of the trustee, they are properly earmarked because the trustee's holdings are indicated in the records maintained by an independent party, such as in an account at a brokerage firm. Earmarking is not practical for all types of assets. With respect to assets not subject to registration, such as tangible personal property and bearer bonds, arranging for the trust's ownership interest to be reflected on the records

	of a third-party custodian would not be feasible. For this reason, subsection (c)
	waives separate record keeping for these types of assets. Under subsection (b), however, the duty of the trustee not to mingle these or any other trust assets with the trustee's own remains absolute. Subsection (d), following the lead of a number of state statutes, allows a trustee to use the property of two or more trusts to make joint investments, even though under traditional principles a joint investment would violate the duty to earmark. A joint investment frequently is more economical than attempting to invest the funds of each trust separately. Also, the risk of misappropriation or mistake is less when the trust property is invested jointly with the property of another trust than when pooled with the property of the trustee or other person.
5. COLORADO COMMITTEE COMMENTS	No comment is given for the inclusion of subsection (a). The remainder of the section ensures that the Trustee earmark all assets and not mingle those assets of the trust with his own and requires the interest of the trust appear in records held by a third-party, such as a bank or brokerage company and (d) allows the trustee to place several assets of the trust into one account if that causes the investment to be most practical and economical. Subsection (c) introduces a new duty on trustees to designate interest in trust property appearing in records of a 3rd party other than a trustee or beneficiary. The comments recognize that earmarking is not practical for all types of assets. It would be "impractical" to have tangible personal property assets subject to registration with a 3rd party.
6. COLORADO LAW	Relating to C.R.S. § 15-16-301, 15-16-302, 15-16-303 and 15-16-401. May be in conflict with 15-1-804(2)(dd) that allows trustee to "hold assets of two or more trusts" ... as an undivided whole, without separation (provided such trusts are essentially the same). With regard to (b), Scott on Trusts states that a trustee commits a breach of trust when he takes title to trust property in his individual name, even though he does not mingle the property with property of his own. Scott does not discuss the concept presented in (c) other than related sections of taking control of the property and that it may be appropriate to designate trust property as such. Regarding (d) Scott asserts a trustee holding property under distinct trusts is not authorized to mingle the property of separate trusts and divide the income among the beneficiaries in proportion to the contributions made by the separate trusts.

7. RECOMMENDATIONS	This section should be enacted.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 8
DUTIES AND POWERS OF TRUSTEE

1. UTC SECTION	811
2. SUBJECT	ENFORCEMENT AND DEFENSE OF CLAIMS
3. UTC STATUTE	A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section codifies the substance of Sections 177 and 178 of the Restatement (Second) of Trusts (1959). It may not be reasonable to enforce a claim depending upon the likelihood of recovery and the cost of suit and enforcement. It might also be reasonable to settle an action or suffer a default rather than to defend an action. *See also* Section 816(14) (power to pay, contest, settle, or release claims).
5. COLORADO COMMITTEE COMMENTS	Section 811 is based on RESTATEMENT (SECOND) of TRUSTS §177, and §178 (1959). While 811 requires that trustees take steps to enforce or defend against claims, the comment explains that it may not be reasonable to do so in every case, basically applying a cost benefit analysis. For instance, it would be unreasonable to pursue a suit if the likelihood of recovery is too low, or the cost of litigation too high. It would also be considered unreasonable to defend an action, instead of settling or losing by default, in situations where costs or risks are too high.
6. COLORADO LAW	Colorado law, through CRS §15-1-804(2)(r) (part of the Colorado Fiduciaries' Powers Act), authorizes (but does not require) trustees "to pay, contest, or otherwise settle claims by or against the estate or trust". CRS § 15-10-201(8) defines "claims" as "liabilities of the decedent or protected person whether arising in contract, in tort, or otherwise". 15-1-804(1) applies a reasonableness standard to the exercise of any of the powers set forth in that section, including the "claims" power in (2)(r). "In the exercise of any of his powers, whether derived from this part 8 or from any other source, a fiduciary has a duty to act reasonably and equitably with due regard for his obligations and responsibilities toward the interests of beneficiaries and creditors, the estate or trust involved, and the purposes thereof and with due regard for the manner in which men of prudence, discretion, and intelligence would act in the management of the property of another." C.R.S. §15-1-804(1). Colorado case law specifically endorses §811's duty to enforce/defend claims and has adopted §177 of the Restatement of Trusts, Vol.1. In *Brisnehan v.*

	Central Bank and Trust Company, 134 Colo. 47 (1956), the court considered an
	action by a former city employee regarding his eligibility to participate in the distribution of a trust fund. Regarding the issue of whether the trustee bank had the authority to question the eligibility of the former employee, the court ruled that it was within the power of the trustee to "institute action and proceedings for the protection of the trust estate and the enforcement of claims and rights belonging thereto". *Brisnehan,* 134 Colo. at 51. The court further held that a trustee has a duty to "take all legal steps which may be reasonably necessary with relation to those objectives". *Brisnehan,* 134 Colo. at 51. (Citing §177 Restatement of Trusts, Vol. 1) It went on to hold that not only does a trustee have the power to enforce/defend trust claims, but if he fails to do so and his inaction results in damage to the trust, he could be held personally liable. *Brisnehan,* 134 Colo. at 52. This case compliments §811 because it not only empowers a trustee to enforce/defend trust claims, and limits it by a standard of reasonableness. *Brisnehan* suggests that a trustee who fails to take action may be held personally liable. Is this implicit in §811?
7. RECOMMENDATIONS	Although Colorado law has not specifically adopted Section 811's wording, statutes and case law support the concept. The Subcommittee Recommends adoption without modification.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 8
DUTIES AND POWERS OF TRUSTEE

1. UTC SECTION	812
2. SUBJECT	COLLECTING TRUST PROPERTY
3. UTC STATUTE	A trustee shall take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee, and to redress a breach of trust known to the trustee to have been committed by a former trustee.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section is a specific application of Section 811 on the duty to enforce claims, which includes a claim for trust property held by a former trustee or others, and a claim against a predecessor trustee for breach of trust. The duty imposed by this section is not absolute. Pursuit of a claim is not required if the amount of the claim, costs of suit and enforcement, and likelihood of recovery, make such action uneconomic. Unlike Restatement (Second) of Trusts § 223 (1959), this section only requires a successor trustee to redress breaches of trust "known" to have been committed by the predecessor. For the definition of "know," see Section 104. Limiting the successor's obligation to known breaches is a common feature of state trust statutes. *See, e.g.*, Mo. Rev. Stat. § 456.187.2. As authorized by Section 1009, the beneficiaries may relieve the trustee from potential liability for failing to pursue a claim against a predecessor trustee or other person holding trust property. The obligation to pursue a successor trustee can also be addressed in the terms of the trust. *See* Section 105.
5. COLORADO COMMITTEE COMMENTS	There is an express duty to enforce reasonable claims and it extends not only to former trustees but also to PR's and conservators. Reinforcement of breach by current trustee if he had "knowledge" of breach by predecessor. "Knowledge" is to have knowledge of the fact or have reason to know that the fact exists based upon all of the facts and circumstances known to the person at the time. See 102(7)
6. COLORADO LAW	Related to § 15-16-301 and possibly § 15-16-306 duties of current trustee are further clarified when applied.
7. RECOMMENDATIONS	This section should be enacted.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 8
DUTIES AND POWERS OF TRUSTEE

1. UTC SECTION	**813**
2. SUBJECT	**DUTY TO INFORM AND REPORT**
3. UTC STATUTE	(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) upon request of a beneficiary, shall promptly furnish to the beneficiary a copy of the portions of the trust instrument, which describe or affect the beneficiary's interest; (2) within 60 days after accepting a trusteeship, shall notify the qualified beneficiaries of the acceptance and of the trustee's name, address, and telephone number; (3) within 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, all notify the qualified beneficiaries of the trust's existence, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument, and of the right to a trustee's report as provided in subsection (c); and (4) shall notify the qualified beneficiaries in advance of any change in the method or rate of the trustee's compensation. (c) 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. Upon a vacancy in a trusteeship, unless a cotrustee remains in office, a report must be sent to the qualified beneficiaries by the former trustee. 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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	The duty to keep the beneficiaries reasonably informed of the administration of the trust is a fundamental duty of a trustee. For the common law duty to keep the beneficiaries informed, see Restatement (Second) of Trusts § 173 (1959). This section makes the duty to keep the beneficiaries informed more precise by limiting it to the qualified beneficiaries. For the definition of qualified beneficiary, see Section 103(12). The result of this limitation is that the information need not be furnished to beneficiaries with remote remainder interests unless they have filed a specific request with the trustee. *See* Section 110(a) (request for notice). For the extent to which a settlor may waive the requirements of this section in the terms of the trust, see Section 105(b)(8)-(9). The trustee is under a duty to communicate to a qualified beneficiary information about the administration of the trust that is reasonably necessary to enable the beneficiary to enforce the beneficiary's rights and to prevent or redress a breach of trust. *See* Restatement (Second) of Trusts § 173 cmt. c (1959). Ordinarily, the trustee is not under a duty to furnish information to a beneficiary in the absence of a specific request for the information. *See* Restatement (Second) of Trusts § 173 cmt. d (1959). Thus, the duty articulated in subsection (a) is ordinarily satisfied by providing the beneficiary with a copy of the annual report mandated by subsection (c). However, special circumstances may require that the trustee provide additional information. For example, if the trustee is dealing with the beneficiary on the trustee's own account, the trustee must communicate material facts relating to the transaction that the trustee knows or should know. *See* Restatement (Second) of Trusts § 173 cmt. d (1959). Furthermore, to enable the beneficiaries to take action to protect their interests, the trustee may be required to provide advance notice of transactions involving real estate, closely-held business interests, and other assets that are difficult to value or to replace. *See* In re Green Charitable Trust, 431 N.W. 2d 492 (Mich. Ct. App. 1988); Allard v. Pacific National Bank, 663 P.2d 104 (Wash. 1983). The trustee is justified in not providing such advance disclosure if disclosure is forbidden by other law, as under federal securities laws, or if disclosure would be seriously detrimental to the interests of the beneficiaries, for example, when disclosure would cause the loss of the only serious buyer. Subsection (a) provides a different standard if a beneficiary, whether qualified or not, makes a request for information. In that event, the trustee must promptly

	comply with the beneficiary's request unless unreasonable under the circumstances. Further supporting the principle that a beneficiary should be
	allowed to make an independent assessment of what information is relevant to protecting the beneficiary's interest, subsection (b)(1) requires the trustee on request to furnish a beneficiary with a complete copy of the trust instrument and not merely with those portions the trustee deems relevant to the beneficiary's interest. For a case reaching the same result, see Fletcher v. Fletcher, 480 S.E. 2d 488 (Va. Ct. App. 1997). Subsection (b)(1) is contrary to Section 7-303(b) of the Uniform Probate Code, which provides that "[u]pon reasonable request, the trustee shall provide the beneficiary with a copy of the terms of the trust which describe or affect his interest. . . ." The drafters of this Code decided to leave open for further consideration by the courts the extent to which a trustee may claim attorney-client privilege against a beneficiary seeking discovery of attorney-client communications between the trustee and the trustee's attorney. The courts are split because of the important values that are in tension on this question. "The [attorney-client] privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." Upjohn Co. v. United States, 449 U.S. 383 (1981). On the other hand, subsection (a) of this section requires that a trustee keep the qualified beneficiaries reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests, which could include facts that the trustee has revealed only to the trustee's attorney. There is authority for the view that the trustee is estopped from pleading attorney-client privilege in such circumstances. In the leading case, Riggs Nation Bank v. Zimmer, 355 A.2d 709, 713 (Del. Ch. 1976, the court reasoned that the beneficiary, not the trustee is the attorney's client: "As the trustee is not the real client . . . ." This beneficiary-as-client theory has been criticized on the ground that it conflicts with the trustee's fiduciary duty to implement the intentions of the settlor, which are sometimes in tension with the wishes of one or more beneficiaries. See Louis H. Hamel, Jr., Trustee's Privileged Counsel: A Rebuttal, 21 ACTEC Notes 156 (1995); Charles F. Gibbs & Cindy D. Hanson, The Fiduciary Exception to a Trustee's Attorney/Client Privilege, 21 ACTEC Notes 236 (1995). Prominent decisions in California and Texas have refused to follow Delaware in recognizing an exception for the beneficiary against the trustee's attorney-client privilege. Wells Fargo Bank v. Superior Court (Boltwood), 990 P.2d 591 (Cal. 2000); Huie v. De Shazo, 922 S.W. 2d 920 (Tex. 1996). The beneficiary-as-client theory continues to be applied to ERISA trusts. See, e.g., United States v. Mett, 178 F.3d 1058, 1062-64 (9th Cir. 1999). However, in a

	pension trust the beneficiaries are the settlors of their own trust because the trust is funded with their own earnings. Accordingly, in ERISA attorney-client cases "[t]here are no competing interests such as other stockholders or the intentions of the Settlor." Gibbs & Hanson, 21 ACTEC Notes at 238. For further discussion
	of the attorney-client privilege and whether there is a duty to disclose to the beneficiaries, see ACTEC Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.2 (3d ed. 1999); Rust E. Reid et al., Privilege and Confidentiality Issues When a Lawyer Represents a Fiduciary, 30 Real Prop. Prob. & Tr. J. 541 (1996). To enable beneficiaries to protect their interests effectively, it is essential that they know the identity of the trustee. Subsection (b)(2) requires that a trustee inform the qualified beneficiaries within 60 days of the trustee's acceptance of office and of the trustee's name, address and telephone number. Similar to the obligation imposed on a personal representative following admission of the will to probate, subsection (b)(3) requires the trustee of a revocable trust to inform the qualified beneficiaries of the trust's existence within 60 days after the settlor's death. These two duties can overlap. If the death of the settlor happens also to be the occasion for the appointment of a successor trustee, the new trustee of the formerly revocable trust would need to inform the qualified beneficiaries both of the trustee's acceptance and of the trust's existence. Subsection (b)(4) deals with the sensitive issue of changes, usually increases, in trustee compensation. Changes can include changes in a periodic base fee, rate of percentage compensation, hourly rate, termination fee, or transaction charge. Regarding the standard for setting trustee compensation, see Section 708 and Comment. Subsection (c) requires the trustee to furnish the current beneficiaries and other beneficiaries who request it with a copy of a trustee's report at least annually and upon termination of the trust. Unless a cotrustee remains in office, the former trustee also must provide a report to all of the qualified beneficiaries upon the trustee's resignation or removal. If the vacancy occurred because of the former trustee's death or adjudication of incapacity, a report may, but need not be provided by the former trustee's personal representative, conservator, or guardian. The Uniform Trust Code employs the term "report" instead of "accounting" in order to negate any inference that the report must be prepared in any particular format or with a high degree of formality. The reporting requirement might even be satisfied by providing the beneficiaries with copies of the trust's income tax returns and monthly brokerage account statements if the information on those

	returns and statements is complete and sufficiently clear. The key factor is not the format chosen but whether the report provides the beneficiaries with the information necessary to protect their interests. For model account forms, together with practical advice on how to prepare reports, see Robert Whitman, Fiduciary Accounting Guide (2d ed. 1998).
	Subsection (d) allows trustee reports and other required information to be waived by a beneficiary. A beneficiary may also withdraw a consent. However, a waiver of a trustee's report or other information does not relieve the trustee from accountability and potential liability for matters that the report or other information would have disclosed. Subsection (e), which was added to the Code in 2004, is discussed in 2004 Amendment below. **2004 Amendment.** Subsection (b)(2) and (b)(3) require that certain notices be sent by the trustee to the qualified beneficiaries within 60 days of the trustee's acceptance of office, or within 60 days after the creation of an irrevocable trust or the date a revocable trust becomes irrevocable. Subsection (e) is added to make clear the drafting committee's intent that these requirements are not to be retroactively applied to trustee acceptances of office occurring prior to the effective date of the Code and to trusts which have become irrevocable prior to the effective date.
5. COLORADO COMMITTEE COMMENTS	This section further clarifies the duty of disclosure of information of administration to qualified beneficiaries first (and in certain circumstances by advance notice) and to remote beneficiaries promptly upon written notice by that beneficiary. The standard is different if a beneficiary, whether qualified or not, makes a specific request for information. A "qualified" beneficiary is who is entitled to income distributions OR would be entitled to distribution if the trust were to terminate. *See* 102(12). A beneficiary is essentially any other interested person in the trust including one who holds a power of appointment over trust property. The committee recommends that subsection (b)(1) be modified to comport with the current Colorado policy (set forth in Colorado Probate Code Section 15-16-303(3) that only portions of the trust instrument that affect a beneficiary's interest be furnished. Subsection (b)(2) requires trustee to inform qualified beneficiaries of a revocable trust of the trustee's acceptance of office and contact information within 60 days

	of acceptance. Subsection (b)(4) deals with changes, usually trustee compensation and when prior notice is required and to whom. Subsection (c) requires that financial reports to beneficiaries provide certain,
	detailed information necessary to protect their interest. Further, the provision makes it discretionary for a personal representative, conservator or guardian to send such information in the event of a deceased trustee. Subsection (d) makes it clear that waivers of such information are not irrevocable.
6. COLORADO LAW	§15-16-303(1) provides "... a trustee shall keep the beneficiaries of the trust reasonable informed of the trust and its administration." and §15-16-303(4) provides "Upon reasonable request, a beneficiary is entitled to a statement of the accounts of the trust annually and on termination of the trust or change of the trustee."
7. RECOMMENDATIONS	This section should be enacted with the modification to subsection(b) indicated above.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 8
DUTIES AND POWERS OF TRUSTEE

1. UTC SECTION	**814**
2. SUBJECT	**DISCRETIONARY POWERS; TAX SAVINGS**
3. UTC STATUTE	(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), 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 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 of 1986, as in effect on [the effective date of this [Code]] [, or as later amended]; 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) 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, the court may appoint a special fiduciary with authority to exercise the power. (d) Subsection (b) 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 2523 (e) of the Internal Revenue Code of 1986, as in effect on [the effective date of this [Code]] [, or as later amended], 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 [the effective date of this [Code]] [, or as later amended].
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	Despite the breadth of discretion purportedly granted by the wording of a trust, no grant of discretion to a trustee, whether with respect to management or distribution, is ever absolute. A grant of discretion establishes a range within which the trustee may act. The greater the grant of discretion, the broader the range. Pursuant to subsection (a), a trustee's action must always be in good faith, with regard to the purposes of the trust, and in accordance with the trustee's other duties, including the obligation to exercise reasonable skill, care and caution. *See* Sections 801 (duty to administer trust) and 804 (duty to act with prudence). The standard stated in subsection (a) applies only to powers which are to be exercised in a fiduciary as opposed to a nonfiduciary capacity. Regarding the standards for exercising discretion and construing particular language of discretion, see Restatement (Third) of Trusts § 50 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 187 (1959). *See also* Edward C. Halbach, Jr., Problems *of Discretion in Discretionary Trusts,* 61 Colum. L. Rev. 1425 (1961). An abuse by the trustee of the discretion granted in the terms of the trust is a breach of trust that can result in surcharge. See Section 1001(b) (remedies for breach of trust). Subsections (b) through (d) rewrite the terms of a trust that might otherwise result in adverse estate and gift tax consequences to a beneficiary-trustee. This Code does not generally address the subject of tax curative provisions. These are provisions that automatically rewrite the terms of trusts that might otherwise fail to qualify for probable intended tax benefits. Such provisions, because they apply to all trusts using or failing to use specified language, are often overbroad, applying not only to trusts intended to qualify for tax benefits but also to smaller trust situations where taxes are not a concern. Enacting tax-curative provisions also requires special diligence by state legislatures to make certain that these provisions are periodically amended to account for the frequent changes in federal tax law. Furthermore, many failures to draft with sufficient care may be correctable by including a tax savings clause in the terms of the trust or by seeking modification of the trust using one or more of the methods authorized by Sections 411-417. Notwithstanding these reasons, the unintended inclusion of the trust in the beneficiary-trustee's gross estate is a frequent enough occurrence that the drafters concluded that it is a topic that this Code should address. It is also a topic on which numerous States have enacted corrective statutes. A tax curative provision differs from a statute such as Section 416 of this Code, which allows a court to modify a trust to achieve an intended tax benefit. Absent Congressional or regulatory authority authorizing the specific modification, a lower court decree in state court modifying a trust is controlling for federal estate

	tax purposes only if the decree was issued before the taxing event, which in the case of the estate tax would be the decedent's death. *See* Rev. Rul. 73-142, 1973-1 C.B. 405. There is specific federal authority authorizing modification of trusts
	for a number of reasons (*see* Comment to Section 416) but not on the specific issues addressed in this section. Subsections (b) through (d), by interpreting the original language of the trust instrument in a way that qualifies for intended tax benefits, obviates the need to seek a later modification of the trust. Subsection (b)(1) states the main rule. Unless the terms of the trust expressly indicate that the rule in this subsection is not to apply, the power to make discretionary distributions to a beneficiary-trustee is automatically limited by the requisite ascertainable standard necessary to avoid inclusion of the trust in the trustee's gross estate or result in a taxable gift upon the trustee's release or exercise of the power. Trusts of which the trustee-beneficiary is also a settlor are not subject to this subsection. In such a case, limiting the discretion of a settlor-trustee to an ascertainable standard would not be sufficient to avoid inclusion of the trust in the settlor's gross estate. *See generally* John J. Regan, Rebecca C. Morgan & David M. English, Tax, Estate and Financial Planning for the Elderly § 17.07[2][h]. Furthermore, the inadvertent inclusion of a trust in a settlor-trustee's gross estate is a far less frequent and better understood occurrence than is the in advertent inclusion of the trust in the estate of a nonsettlor trustee-beneficiary. Subsection (b)(2) addresses a common trap, the trustee who is not a beneficiary but who has power to make discretionary distributions to those to whom the trustee owes a legal obligation of support. Discretion to make distributions to those to whom the trustee owes a legal obligation of support, such as to the trustee's minor children, results in inclusion of the trust in the trustee's gross estate even if the power is limited by an ascertainable standard. The applicable regulation provides that the ascertainable standard exception applies only to distributions for the benefit of the decedent, not to distributions to those to whom the decedent owes a legal obligation of support. *See* Treas. Reg. § 20.2041-1(c)(2). Subsection (c) deals with cotrustees and adopts the common planning technique of granting the broader discretion only to the independent trustee. Cotrustees who are beneficiaries of the trust or who have a legal obligation to support a beneficiary may exercise the power only as limited by subsection (b). If all trustees are so limited, the court may appoint a special fiduciary to make a decision as to whether a broader exercise is appropriate.

	Subsection (d) excludes certain trusts from the operation of this section. Trusts qualifying for the marital deduction will be includable in the surviving spouse's gross estate regardless of whether this section applies. Consequently, if the
	spouse is acting as trustee, there is no need to limit the power of the spouse-trustee to make discretionary distributions for the spouse's benefit. Similar reasoning applies to the revocable trust, which, because of the settlor's power to revoke, is automatically includable in the settlor's gross estate even if the settlor is not named as a beneficiary. QTIP marital trusts are subject to this section, however. QTIP trusts qualify for the marital deduction only if so elected on the federal estate tax return. Excluding a QTIP for which an election has been made from the operation of this section would allow the terms of the trust to be modified after the settlor's death. By not making the QTIP election, an otherwise unascertainable standard would be limited. By making the QTIP election, the trustee's discretion would not be curtailed. This ability to modify a trust depending on elections made on the federal estate tax return could itself constitute a taxable power of appointment resulting in inclusion of the trust in the surviving spouse's gross estate. The exclusion of the Section 2503(c) minors trust is necessary to avoid loss of gift tax benefits. While preventing a trustee from distributing trust funds in discharge of a legal obligation of support would keep the trust out of the trustee's gross estate, such a restriction might result in loss of the gift tax annual exclusion for contributions to the trust, even if the trustee were otherwise granted unlimited discretion. *See* Rev. Rul. 69-345, 1969-1 C.B. 226. **2004 Amendment.** The amendment substitutes "ascertainable standard" which is now a defined term in Section 103(2), for the former and identical definition in this section. No substantive change is intended.
5. COLORADO COMMITTEE COMMENTS	Subsection (a) applies to exercising of fiduciary powers, that discretionary powers given to a trustee are never absolute, but a range within which the trustee may act. The greater the grant of discretion, the broader the range. A trustee's action must always be in good faith, with regard to the purposes of the trust and interest of the beneficiaries. No comment is given for the inclusion of subsections (b)-(d).

6. COLORADO LAW	Subsection (a) relates to the trustee in §15-16-301 and the prudent man standard of §15-16-302. No Colorado law was found relating to the ascertainable standards as referred to by subsections (b)-(d).
7. RECOMMENDATIONS	This section should be enacted.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 8
DUTIES AND POWERS OF TRUSTEE

1. UTC SECTION	**815**
2. SUBJECT	**GENERAL POWERS OF TRUSTEE**
3. UTC STATUTE	(a) A trustee, without authorization by the court, may exercise: (1) powers conferred by the terms of the trust; or (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 [Code]. (b) The exercise of a power is subject to the fiduciary duties prescribed by this [article].
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section is intended to grant trustees the broadest possible powers, but to be exercised always in accordance with the duties of the trustee and any limitations stated in the terms of the trust. This broad authority is denoted by granting the trustee the powers of an unmarried competent owner of individually owned property, unlimited by restrictions that might be placed on it by marriage, disability, or cotenancy. The powers conferred elsewhere in this Code that are subsumed under this section include all of the specific powers listed in Section 816 as well as other powers described elsewhere in this Code. *See* Sections 108(c) (transfer of principal place of administration), 414(a) (termination of uneconomic trust with value less than $50,000), 417 (combination and division of trusts), 703(e) (delegation to cotrustee), 802(h) (exception to duty of loyalty), 807 (delegation to agent of powers and duties), 810(d) (joint investments), and Article 9 (Uniform Prudent Investor Act). The powers conferred by this Code may be exercised without court approval. If court approval of the exercise of a power is desired, a petition for court approval should be filed. A power differs from a duty. A duty imposes an obligation or a mandatory prohibition. A power, on the other hand, is a discretion, the exercise of which is not obligatory. The existence of a power, however created or granted, does not speak to the question of whether it is prudent under the circumstances to exercise the power.

5. COLORADO COMMITTEE COMMENTS	This section grants broadest of powers, of course exercised in accordance within parameters of the trust. These powers may be exercised without court approval, with court approval upon notice. Also included in this section is the definition of power versus duty.
6. COLORADO LAW	§§ 15-16-301, 15-16-302, 15-16-306 and 15-17-101.
7. RECOMMENDATIONS	This section should be enacted.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 8
DUTIES AND POWERS OF TRUSTEE

1. UTC SECTION	**816**
2. SUBJECT	**SPECIFIC POWERS OF TRUSTEE**
3. UTC STATUTE	Without limiting the authority conferred by Section 815 and in addition to the powers conferred under the Colorado Fiduciary Powers Act, a trustee may: (1) collect trust property and accept or reject additions to the trust property from a settlor or any other person; (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 and take any action that may be taken by shareholders, members, or property owners, including merging, dissolving, or otherwise changing the form of business organization or contributing additional capital; (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, with or without power of substitution, or enter into or continue a voting trust agreement; (B) hold a security in the name of a nominee or in other form without disclosure of the trust so that title may pass by delivery; (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 depositary 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, demolish improvements, raze existing or erect new party walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements, and make or vacate

	plats and adjust boundaries;
	(9) enter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for exploration and removal of natural resources, with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust; (10) grant an option involving a sale, lease, or other disposition of trust property or acquire an option for the acquisition of property, including an option exercisable beyond the duration of the trust, and exercise an option so acquired; (11) insure the property of the trust against damage or loss and insure the trustee, the trustee's agents, and beneficiaries against liability arising from the administration of the trust; (12) abandon or decline to administer property of no value or of insufficient value to justify its collection or continued administration; (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, or property owned or operated by an organization in which the trustee holds or has been asked to hold an interest, for the purpose of determining the application of environmental law with respect to the property; (B) take action to prevent, abate, or otherwise remedy any actual or potential violation of any environmental law affecting property held property held directly or indirectly by the trustee, whether taken before or after the assertion of a claim or the initiation of governmental enforcement; (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, exercise rights thereunder, including exercise of the right to indemnification for

	expenses and against liabilities, and take appropriate action to collect the proceeds;
	(18) make loans out of trust property, including loans to a beneficiary on terms and conditions the trustee considers to be fair and reasonable under the circumstances, and the trustee has a lien on future distributions for repayment of those loans; (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, confer upon the appointed trustee all of the powers and duties of the appointing trustee, require that the appointed trustee furnish security, and remove any trustee so appointed; (21) pay an amount distributable to a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated, by paying it directly to the beneficiary or applying it for the beneficiary's benefit, 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 under [the Uniform Transfers to Minors Act] or custodial trustee under [the Uniform Custodial Trust Act], and, for that purpose, creating a custodianship or custodial trust; (C) if the trustee does not know of a [conservator], [guardian], custodian, or custodial trustee, paying it to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf; or (D) managing it as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution; (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 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 that are useful to

	achieve or facilitate the exercise of the trustee's powers; 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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section enumerates specific powers commonly included in trust instruments and in trustee powers legislation. All the powers listed are subject to alteration in the terms of the trust. *See* Section 105. The powers listed are also subsumed under the general authority granted in Section 815(a)(2) to exercise all powers over the trust property which an unmarried competent owner has over individually owned property, and any other powers appropriate to achieve the proper management, investment, and distribution of the trust property. The powers listed add little of substance not already granted by Section 815 and powers conferred elsewhere in the Code, which are listed in the Comment to Section 815. While the Committee drafting this Code discussed dropping the list of specific powers, it concluded that the demand of third parties to see language expressly authorizing specific transactions justified retention of a detailed list. As provided in Section 815(b), the exercise of a power is subject to fiduciary duties except as modified in the terms of the trust. The fact that the trustee has a power does not imply a duty that the power must be exercised. Many of the powers listed in this section are similar to the powers listed in Section 3 of the Uniform Trustees' Powers Act (1964). Several are new, however, and other powers drawn from that Act have been updated. The powers enumerated in this section may be divided into categories. Certain powers, such as the powers to acquire or sell property, borrow money, and deal with real estate, securities, and business interests, are powers that any individual can exercise. Other powers, such as the power to collect trust property, are by their very nature only applicable to trustees. Other specific powers, particularly those listed in other sections of the Uniform Trust Code, modify a trustee duty that would otherwise apply. *See, e.g.*, Sections 802(h) (exceptions to duty of loyalty) and 810(d) (joint investments as exception to earmarking requirement). Paragraph (1) authorizes a trustee to collect trust property and collect or decline additions to the trust property. The power to collect trust property is an incident of the trustee's duty to administer the trust as provided in Section 801. The trustee has a duty to enforce claims as provided in Section 811, the successful prosecution of which can result in collection of trust property. Pursuant to Section 812, the trustee also has a duty to collect trust property from a former trustee or other person holding trust property. For an application of the power to reject additions to the trust property, see Section 816(13) (power to decline

	property with possible environmental liability). Paragraph (2) authorizes a trustee to sell trust property, for cash or on credit, at public or private sale. Under the Restatement, a power of sale is implied unless limited in the terms of the trust. Restatement (Third) of Trusts: Prudent Investor
	Rule § 190 (1992). In arranging a sale, a trustee must comply with the duty to act prudently as provided in Section 804. This duty may dictate that the sale be made with security. Paragraph (4) authorizes a trustee to deposit funds in an account in a regulated financial-service institution. This includes the right of a financial institution trustee to deposit funds in its own banking department as authorized by Section 802(h)(4). Paragraph (5) authorizes a trustee to borrow money. Under the Restatement, the sole limitation on such borrowing is the general obligation to invest prudently. *See* Restatement (Third) of Trusts: Prudent Investor Rule § 191 (1992). Language clarifying that the loan may extend beyond the duration of the trust was added to negate an older view that the trustee only had power to encumber the trust property for the period that the trust was in existence. Paragraph (6) authorizes the trustee to continue, contribute additional capital to, or change the form of a business. Any such decision by the trustee must be made in light of the standards of prudent investment stated in Article 9. Paragraph (7), regarding powers with respect to securities, codifies and amplifies the principles of Restatement (Second) of Trusts § 193 (1959). Paragraph (9), authorizing the leasing of property, negates the older view, reflected in Restatement (Second) of Trusts § 189 cmt. c (1959), that a trustee could not lease property beyond the duration of the trust. Whether a longer term lease is appropriate is judged by the standards of prudence applicable to all investments. Paragraph (10), authorizing a trustee to grant options with respect to sales, leases or other dispositions of property, negates the older view, reflected in Restatement (Second) of Trusts § 190 cmt. k (1959), that a trustee could not grant another person an option to purchase trust property. Like any other investment decision, whether the granting of an option is appropriate is a question of prudence under the standards of Article 9.

	Paragraph (11), authorizing a trustee to purchase insurance, empowers a trustee to implement the duty to protect trust property. *See* Section 809. The trustee may also insure beneficiaries, agents, and the trustee against liability, including liability for breach of trust.
	Paragraph (13) is one of several provisions in the Uniform Trust Code designed to address trustee concerns about possible liability for violations of environmental law. This paragraph collects all the powers relating to environmental concerns in one place even though some of the powers, such as the powers to pay expenses, compromise claims, and decline property, overlap with other paragraphs of this section (decline property, paragraph (1); compromise claims, paragraph (14); pay expenses, paragraph (15)). Numerous States have legislated on the subject of environmental liability of fiduciaries. For a representative state statute, see Tex. Prop. Code Ann. § 113.025. *See also* Sections 701(c)(2) (designated trustee may inspect property to determine potential violation of environmental or other law or for any purpose) and 1010(b) (trustee not personally liable for violation of environmental law arising from ownership or control of trust property). Paragraph (14) authorizes a trustee to pay, contest, settle, or release claims. Section 811 requires that a trustee need take only "reasonable" steps to enforce claims, meaning that a trustee may release a claim not only when it is uncollectible, but also when collection would be uneconomic. *See* Restatement (Second) of Trusts § 192 (1959) (power to compromise, arbitrate and abandon claims). Paragraph (15), among other things, authorizes a trustee to pay compensation to the trustee and agents without prior approval of court. Regarding the standard for setting trustee compensation, see Section 708. *See also* Section 709 (repayment of trustee expenditures). While prior court approval is not required, Section 813(b)(4) requires the trustee to inform the qualified beneficiaries in advance of a change in the method or rate of compensation. Paragraph (16) authorizes a trustee to make elections with respect to taxes. The Uniform Trust Code leaves to other law the issue of whether the trustee, in making such elections, must make compensating adjustments in the beneficiaries' interests. Paragraph (17) authorizes a trustee to take action with respect to employee benefit or retirement plans, or annuities or life insurance payable to the trustee. Typically, these will be beneficiary designations which the settlor has made payable to the trustee, but this Code also allows the trustee to acquire ownership

	of annuities or life insurance. Paragraphs (18) and (19) allow a trustee to make loans to a beneficiary or to guarantee loans of a beneficiary upon such terms and conditions as the trustee considers fair and reasonable. The determination of what is fair and reasonable must be made in light of the fiduciary duties of the trustee and the purposes of
	the trust. Frequently, a trustee will make loans to a beneficiary which might be considered less than prudent in an ordinary commercial sense although of great benefit to the beneficiary and which help carry out the trust purposes. If the trustee requires security for the loan to the beneficiary, adequate security under this paragraph may consist of a charge on the beneficiary's interest in the trust. *See* Restatement (Second) of Trusts § 255 (1959). However, the interest of a beneficiary subject to a spendthrift restraint may not be pledged as security for a loan. *See* Section 502. Paragraph (20) authorizes the appointment of ancillary trustees in jurisdictions in which the regularly appointed trustee is unable or unwilling to act. Normally, an ancillary trustee will be appointed only when there is a need to manage real estate located in another jurisdiction. This paragraph allows the regularly appointed trustee to select the ancillary trustee and to confer on the ancillary trustee such powers and duties as may be necessary. The appointment of ancillary trustees is a topic which a settlor may wish to address in the terms of the trust. Paragraph (21) authorizes a trustee to make payments to another person for the use or benefit of a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated. Although an adult relative or other person receiving funds is required to spend it on the beneficiary's behalf, it is preferable that the trustee make the distribution to a person having more formal fiduciary responsibilities. For this reason, payment may be made to an adult relative only if the trustee does not know of a conservator, guardian, custodian, or custodial trustee capable of acting for the beneficiary. Paragraph (22) authorizes a trustee to make non-pro-rata distributions and allocate particular assets in proportionate or disproportionate shares. This power provides needed flexibility and lessens the risk that a non-pro-rata distribution will be treated as a taxable sale. Paragraph (23) authorizes a trustee to resolve disputes through mediation or arbitration. The drafters of this Code encourage the use of such alternate methods for resolving disputes. Arbitration is a form of nonjudicial settlement agreement authorized by Section 111. In representing beneficiaries and others in connection

	with arbitration or mediation, the representation principles of Article 3 may be applied. Settlors wishing to encourage use of alternate dispute resolution may draft to provide it. For sample language, see American Arbitration Association, Arbitration Rules for Wills and Trusts (1995). Paragraph (24) authorizes a trustee to prosecute or defend an action. As to the propriety of reimbursement for attorney's fees and other expenses of an action or
	judicial proceeding, see Section 709 and Comment. *See also* Section 811 (duty to defend actions). Paragraph (26), which is similar to Section 344 of the Restatement (Second) of Trusts (1959), clarifies that even though the trust has terminated, the trustee retains the powers needed to wind up the administration of the trust and distribute the remaining trust property.
5. COLORADO COMMITTEE COMMENTS	This section lists types of specific powers typically included in trust instruments. The powers listed here add little substance not already granted by Section 815 but his section concludes that the demand of third parties to see language expressly authorizing specific transactions required a detailed list of powers available to a Trustee. ¶ 1 authorizes trustee to collect trust property and collect or decline additions to the trust property. ¶ 2 authorizes trustee to sell trust property for cash or on credit at public or private sale but must determine if sale requires advance notice to the qualified beneficiaries. ¶ 4 authorizes trustee to deposit funds into financial-service institution, including an institution operated by trustee)an exception to self-dealing) as long as trustee invests funds prudently ¶ 5 authorizes trustee to borrow money when prudent. Language clarifies that the loan may extend beyond duration of the trust which negates old view that trustee only had power while trust was in existence. ¶ 6 authorizes trustee to continue, incorporate or otherwise change the form of a business. Authority under this section is broader than UTPA. ¶ 7 adds further details and codifies language regarding "powers" relating to securities.

	¶ 9 authorizes trustee to lease property, which negates old view. Reasonable and prudent judgement must apply. ¶ 10 authorizes trustee to grant options with respect to sales, leases or other dispositions or property, which negates old view. Reasonable and prudent judgement must apply.
	¶ 11 authorizes trustee to purchase insurance and empowers trustee to implement the duty to protect trust property. Trustee may also insure beneficiaries, agents and trustee against liability including liability for breach of trust. ¶ 13 one of several provisions designed to address trustee concerns about possible liability for environmental hazards. This paragraph collects all the powers relating to environmental concerns in to one place even though some of the specific powers such as paying expenses, compromise claims, etc, may also be addressed elsewhere. ¶14 authorizes trustee to release claims, meaning trustee may release a claim not only when uncollectible but when collection would be uneconomical. ¶ 15 authorizes a trustee to pay compensation to trustee and agents without prior court approval. Although court approval is not necessary, this section requires trustee to inform qualified beneficiaries in advance of a change in the method or rate of compensation. ¶ 16 authorizes trustee to make elections with respect to taxes. ¶ 17 authorizes a trustee to take action with respect to employee benefit or retirement plans or annuities or life insurance payable to the trustee. Typically these will be beneficiary designations but now trustee can also acquire ownership of annuities and life insurance. ¶ 18 and ¶ 19 allow trustee to make loans to a beneficiary or guarantee loans of a beneficiary upon such terms and conditions the trustee considers fair and reasonable. If trustee requires security for the loan to the beneficiary, adequate security may consist of a charge on the beneficiary's interest in the trust. Interest of a beneficiary subject to a spendthrift restraint may not be used for security for a loan under this paragraph. ¶ 20 allows for appointment of ancillary trustees in jurisdictions (generally for real estate matters) when the regularly appointed trustee is unable or unwilling

	to act. This paragraph allows the regularly appointed trustee to select the ancillary trustee and to confer with the ancillary trustee as necessary. ¶ 21 allows a trustee to make payments to another person for the use or benefit of a beneficiary whom the trustee reasonably believes is incapacitated. Priority list is 1: conservator; 2 : guardian, custodian under UT to Minors Act and 3: an adult relative or other person having beneficiary's legal or physical car or custody. Trustee is also authorized to create a custodianship or custodial trust for distribution of funds.
	¶ 22 provides that a trustee may allocate receipts and disbursements in accordance with the state's applicable principal and income law. ¶ 23 authorizes a trustee to resolve disputes through medication or arbitration. This section strongly recommends such alternate methods over litigation. ¶ 24 authorizes a trustee to prosecute or defend an action. For specifics see Section 709. ¶ 26 clarifies that even though the trust has terminated, the trustee retains the powers needed to wind up the administration of the trust and distribute the remaining trust property.
6. COLORADO LAW	See comparison of this section with Colorado's Fiduciaries' Powers Act, previously submitted to the committee.
7. RECOMMENDATIONS	The committee recommends adoption of this section with the modification described in subsection (a) to harmonize Section 816 with the Colorado Fiduciaries' Powers Act.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 8
DUTIES AND POWERS OF TRUSTEE

1. UTC SECTION	**817**
2. SUBJECT	**DISTRIBUTION UPON TERMINATION**
3. UTC STATUTE	(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 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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section contains several provisions governing distribution upon termination. Other provisions of the Uniform Trust Code relevant to distribution upon termination include Section 816(26) (powers upon termination to windup administration and distribution), and 1005 (limitation of action against trustee). Subsection (a) is based on Section 3-906(b) of the Uniform Probate Code. It addresses the dilemma that sometimes arises when the trustee is reluctant to make distribution until the beneficiary approves but the beneficiary is reluctant to approve until the assets are in hand. The procedure made available under subsection (a) facilitates the making of non-pro-rata distributions. However, whenever practicable it is normally better practice to obtain the advance written consent of the beneficiaries to a proposed plan of distribution. Subsection (b) recognizes that upon an event terminating or partially terminating a trust, expeditious distribution should be encouraged to the extent reasonable under the circumstances. However, a trustee is entitled to retain a reasonable reserve for payment of debts, expenses, and taxes. Sometimes these reserves must be quite large, for example, upon the death of the beneficiary of a QTIP

	trust that is subject to federal estate tax in the beneficiary's estate. Not infrequently, a substantial reserve must be retained until the estate tax audit is concluded several years after the beneficiary's death. Subsection (c) is an application of Section 1009. Section 1009 addresses the validity of any type of release that a beneficiary might give. Subsection (c) is more limited, dealing only with releases given upon termination of the trust. Factors affecting the validity of a release include adequacy of disclosure, whether the beneficiary had a legal incapacity, and whether the trustee engaged in any improper conduct. *See* Restatement (Second) of Trusts § 216 (1959).
5. COLORADO COMMITTEE COMMENTS	This cuts off the time by which a beneficiary can object to the distribution of the trust.
6. COLORADO LAW	None.
7. RECOMMENDATIONS	This section should be enacted.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 10
LIABILITY OF TRUSTEES AND
RIGHTS OF PERSONS DEALING WITH TRUSTEE

1. UTC SECTION	**1001**
2. SUBJECT	**REMEDIES FOR BREACH OF TRUST**
3. UTC STATUTE	(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 Section 706; (8) reduce or deny compensation to the trustee; (9) subject to Section 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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section codifies the remedies available to rectify or to prevent a breach of trust for violation of a duty owed to a beneficiary. The duties that a trust might breach include those contained in Article 8 in addition to those specified elsewhere in the Code. This section identifies the available remedies but does not attempt to cover the refinements and exceptions developed in case law. The availability of a remedy in a particular circumstance will be determined not only by this Code but also by the common law of trusts and principles of equity. *See* Section 106. Beneficiaries and cotrustees have standing to bring a petition to remedy a breach of trust. Following a successor trustee's acceptance of office, a successor trustee has standing to sue a predecessor for breach of trust. *See* Restatement (Second) of Trusts § 200 (1959). A person who may represent a beneficiary's interest under Article 3 would have standing to bring a petition on behalf of the person represented. In the case of a charitable trust, those with standing include the

state attorney general, a charitable organization expressly entitled to receive benefits under the terms of the trust, and other persons with a special interest. *See* Section 110 & Restatement (Second) of Trusts § 391 (1959). A person appointed to enforce a trust for an animal or a trust for a noncharitable purpose would have standing to sue for a breach of trust. *See* Sections 110(b), 408, 409.

Traditionally, remedies for breach of trust at law were limited to suits to enforce unconditional obligations to pay money or deliver chattels. *See* Restatement (Second) of Trusts § 198 (1959). Otherwise, remedies for breach of trust were exclusively equitable, and as such, punitive damages were not available and findings of fact were made by the judge and not a jury. *See* Restatement (Second) of Trusts § 197 (1959). The Uniform Trust Code does not preclude the possibility that a particular enacting jurisdiction might not follow these norms.

The remedies identified in this section are derived from Restatement (Second) of Trusts § 199 (1959). The reference to payment of money in subsection (b)(3) includes liability that might be characterized as damages, restitution, or surcharge. For the measure of liability, see Section 1002. Subsection (b)(5) makes explicit the court's authority to appoint a special fiduciary, also sometimes referred to as a receiver. *See* Restatement (Second) of Trusts § 199(d) (1959). The authority of the court to appoint a special fiduciary is not limited to actions alleging breach of trust but is available whenever the court, exercising its equitable jurisdiction, concludes that an appointment would promote administration of the trust. *See* Section 704(d) (special fiduciary may be appointed whenever court considers such appointment necessary for administration).

Subsection (b)(8), which allows the court to reduce or deny compensation, is in accord with Restatement (Second) of Trusts § 243 (1959). For the factors to consider in setting a trustee's compensation absent breach of trust, see Section 708 and Comment. In deciding whether to reduce or deny a trustee compensation, the court may wish to consider (1) whether the trustee acted in good faith; (2) whether the breach of trust was intentional; (3) the nature of the breach and the extent of the loss; (4) whether the trustee has restored the loss; and (5) the value of the trustee's services to the trust. *See* Restatement (Second) of Trusts § 243 cmt. c (1959).

The authority under subsection (b)(9) to set aside wrongful acts of the trustee is a corollary of the power to enjoin a threatened breach as provided in subsection (b)(2). However, in setting aside the wrongful acts of the trustee the court may not impair the rights of bona fide purchasers protected under Section 1012. *See* Restatement (Second) of Trusts § 284 (1959).

	to reasonable compensation for administering the trust unless the court reduces or denies the trustee compensation pursuant to Section 1001(b)(8). Subsection (b) is based on Restatement (Second) of Trusts § 258 (1959). Cotrustees are jointly and severally liable for a breach of trust if there was joint participation in the breach. Joint and several liability also is imposed on a nonparticipating cotrustee who, as provided in Section 703(g), failed to exercise reasonable care (1) to prevent a cotrustee from committing a serious breach of trust, or (2) to compel a cotrustee to redress a serious breach of trust. Joint and several liability normally carries with it a right in any trustee to seek contribution from a cotrustee to the extent the trustee has paid more than the trustee's proportionate share of the liability. Subsection (b), consistent with Restatement (Second) of Trusts § 258 (1959), creates an exception. A trustee who was substantially more at fault or committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries is not entitled to contribution from the other trustees. Determining degrees of comparative fault is a question of fact. The fact that one trustee was more culpable or more active than another does not necessarily establish that this trustee was substantially more at fault. Nor is a trustee substantially less at fault because the trustee did not actively participate in the breach. *See* Restatement (Second) of Trusts § 258 cmt. e (195). Among the factors to consider: (1) Did the trustee fraudulently induce the other trustee to join in the breach? (2) Did the trustee commit the breach intentionally while the other trustee was at most negligent? (3) Did the trustee, because of greater experience or expertise, control the actions of the other trustee? (4) Did the trustee alone commit the breach with liability imposed on the other trustee only because of an improper delegation or failure to properly monitor the actions of the cotrustee? *See* Restatement (Second) of Trusts § 258 cmt. d (1959).
5. COLORADO COMMITTEE COMMENTS	This section is based on Restatement (Third) of Trust: Prudent Investor Rule, §§ 205-213 (1992). If trustee commits a breach of trust, the beneficiaries may either affirm the transaction or, if a loss has occurred, hold the trustee liable for the amount necessary to fully compensate the consequences of the breach. This section is consistent with Restatement (Third), §205, which provides that a trustee who commits a breach of trust is: (a) accountable for any lost profit occurring to the trust through breach of trust; or (b) chargeable for the amount required to restore the values of the estate or trust distribution to what they would have been had it been properly administered; and (c) the trustee is subject to such liability as necessary to prevent the trustee from benefitting personally from breach of trust. (For a thorough discussion of calculations of damages, see Restatement (Third), §208, "liability for breach of trust by *selling* trust property;

	Restatement (Third), §209," liability for breach of trust by failing to sell trust
	property; Restatement (Third), §210, "liability for improperly invested funds"; Restatement (Third), §211, liability of breach for failing to make proper investment).
6. COLORADO LAW	The Colorado Court of Appeals in *Heller v. First National Bank of Denver, N.A.*, 657 P.2d 992 (1982) addresses the recovery of damages, including the recovery of damages for lost income, accountant fees and attorney fees. See, also, *Estate of Demmel*, 129 Colo. 107, 267 P.2d 647 (1954); *Estate of Curtis*, 103 Colo. 361, 86 P.2d 260 (1938); *Estate of Hill*, 484 P.2d 121 (Colo. App. 1971); *Beyer v. First National Bank*, 843 P.2d 53 (Colo. App. 1992).
7. RECOMMENDATIONS	To the extent that Section 1002 is consistent with Common law, the general committee recommends adopting it as is.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 10
LIABILITY OF TRUSTEES AND
RIGHTS OF PERSONS DEALING WITH TRUSTEE

1. UTC SECTION	1003
2. SUBJECT	DAMAGES IN ABSENCE OF BREACH
3. UTC STATUTE	(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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	The principle on which a trustee's duty of loyalty is premised is that a trustee should not be allowed to use the trust as a means for personal profit other than for routine compensation earned. While most instances of personal profit involve situations where the trustee has breached the duty of loyalty, not all cases of personal profit involve a breach of trust. Subsection (a), which holds a trustee accountable for any profit made, even absent a breach of trust, is based on Restatement (Second) of Trusts § 203 (1959). A typical example of a profit is receipt by the trustee of a commission or bonus from a third party for actions relating to the trust's administration. *See* Restatement (Second) of Trusts § 203 cmt. a (1959). A trustee is not an insurer. Similar to Restatement (Second) of Trusts § 204 (1959), subsection (b) provides that absent a breach of trust a trustee is not liable for a loss or depreciation in the value of the trust property or for failure to make a profit.
5. COLORADO COMMITTEE COMMENTS	This section is consistent with Restatement (Third) §203 (1959), which provides that the trustee is not liable to the beneficiary for a loss or depreciation of value of trust property or for the failure to make a profit, not resulting from a breach of trust. This section incorporates the principal duty, the loyalty, which is premised that a trustee shall not be allowed to use the trust as a means for personal profit, other than for compensation earned.
6. COLORADO LAW	This section incorporates Restatement (Second) of Trust, §203 1959. See, also, Restatement (Third) of Trust, §204 (1992) which recognizes that a trustee is accountable for any profit made by the trustee arising from the administration of the trust, even absent of breach. In *Heller v. First National Bank of Denver, N.A.*, 657 P.2d 992 (Colo. App. 1982), the Colorado Court of Appeals held that when reviewing investments made by a trustee, a court may not use the advantage of

	hindsight.
7. RECOMMENDATIONS	To the extent that Section 1003 is consistent with Colorado Law, the general committee recommends its adoption as is.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 10
LIABILITY OF TRUSTEES AND
RIGHTS OF PERSONS DEALING WITH TRUSTEE

1. UTC SECTION	**1004**
2. SUBJECT	**ATTORNEY'S FEES AND COSTS**
3. UTC STATUTE	(a) In a judicial proceeding involving the administration of a trust, the 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. (1) Except as provided in paragraph (3) of this section, if any trustee, person nominated as trustee, or court appointed fiduciary, defends or prosecutes any proceeding in good faith, whether successful or not, he or she is entitled to receive from the trust his or her necessary expenses and disbursements including reasonable attorney fees and costs incurred. Except as limited by court order or by the terms of the trust, compensation may be paid and expenses reimbursed without court order. (2) If not otherwise compensated for services rendered, any lawyer for a trustee, any lawyer whose services resulted in an order beneficial to the trust, and any person appointed by the court as fiduciary, is entitled to reimbursement for costs and reasonable compensation from the trust. (3) Any trustee, person nominated as trustee, or court appointed trustee who is unsuccessful in defending the propriety of his or her actions for breach of fiduciary duty action, shall not be entitled to recover their expenses, including attorney fees and costs, under this section to the extent of any matter in which breaches of fiduciary duty is found. (4) If any trustee, person nominated as fiduciary, or court appointed trustee trustee, any lawyer for the above, or any lawyer whose services resulted in an order beneficial to the trust, is required to defend his or her fees or costs, the court shall conduct a fee review at the end of such proceeding and shall consider and may award the fees and expenses incurred by such parties in the review of their fees and costs, including but not limited to their attorney fees and costs, as the court deems equitable. An award of fees and costs to the fiduciary, lawyer or beneficiary may be ordered paid from, and may be allocated from the trust, or from the person, party or organization that required the trustee to defend his or her fees or costs, as the court deems just. (5) If the Court determines that any pleadings under this section were not substantially warranted or were brought in bad faith, the court may

	award fees and costs incurred by the trustee, or affected parties, in responding to the pleadings. Nothing in this section is intended to limit any other remedy as provided by law. (b) Factors to be considered as guides in determining the reasonableness of any fee referred to in this section, include the following: (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the services properly; (2) The likelihood, if apparent, that the acceptance of the particular employment will preclude the person employed from other employment; (3) The fee customarily charged in the locality for similar services; (4) The amount involved and the results obtained; (5) The time limitations imposed by the circumstances; (6) The experience, reputation, and ability of the person performing the services.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section, which is based on Massachusetts General Laws chapter 215, § 45, codifies the court's historic authority to award costs and fees, including reasonable attorney's fees, in judicial proceedings grounded in equity. The court may award a party its own fees and costs from the trust. The court may also charge a party's costs and fees against another party to the litigation. Generally, litigation expenses were at common law chargeable against another party only in the case of egregious conduct such as bad faith or fraud. With respect to a party's own fees, Section 709 authorizes a trustee to recover expenditures properly incurred in the administration of the trust. The court may award a beneficiary litigation costs if the litigation is deemed beneficial to the trust. Sometimes, litigation brought by a beneficiary involves an allegation that the trustee has committed a breach of trust. On other occasions, the suit by the beneficiary is brought because of the trustee's failure to take action against a third party, such as to recover property properly belonging to the trust. For the authority of a beneficiary to bring an action when the trustee fails to take action against a third party, see Restatement (Second) of Trusts §§ 281-282 (1959). For the case law on the award of attorney's fees and other litigation costs, see 3 Austin W. Scott & William F. Fratcher, The Law of Trusts §§ 188.4 (4th ed. 1988).
5. COLORADO COMMITTEE COMMENTS	This section permits an award of attorney fees and costs against any party for breach of trust. The award of attorney fees in a breach of trust action is an exception to the general rule prohibiting awards of attorney fees absent statutory or contractual provisions. The decision to award attorney fees are within the discretion of the trial court.

6. COLORADO LAW	See, *G. Bogert, Trust and Trustees*, §§701 and 871. In *Heller v. First National Bank of Denver, N.A.*, 657 P.2d 992 (1982), the Colorado Court of Appeals held that the beneficiaries' request for recovery of contingent fees was recoverable; however, it upheld the trial court's reduction of the fees based upon the beneficiaries' failure to prove damages. Probate Code §15-12-720, C.R.S., permits personal representatives to recover fees and costs, so long as the action is prosecuted or defended in good faith. The UTC would grant the court discretion to award costs and expenses, including reasonable attorney fees as a sanction against another party. This section gives the courts greater discretion with regard to sanctions beyond Colorado Probate Code and §13-17-101, C.R.S., et. seq., (frivolous and groundless). Colorado courts have awarded attorney fees and reimbursed costs where a party defends or prosecutes any proceeding in good faith and results in an order which benefits the Estate rather than the party individually. *In Re Chaney's Estate,* 103 Colo. 319, 85 P.2d 729 (1938); *Estate of Coors*, 344 P.2d 184 (Colo. 1959); *Estate of Enz*, 515 P.2d 113 (Colo. App. 1973); *Estate of Phipps*, 713 P.2d 412 (1985); *Estate of Fryer*, 874 P.2d 490 (Colo. App. 1994); See also, *G. Bogert, Trust and Trustees*, Sections 701 and 871. Colorado Probate Code §15-12-720, C.R.S., permits only the personal representatives to recover fees and costs, so long as the action is prosecuted or defended in good faith. The UGPPA §15-14-417, C.R.S., has codified the "benefit rule" expanding those permitted to recover attorney fees and costs to all parties. A similar amendment to §§15-12-719 and 15-12-720, C.R.S., has been approved by the CBA Board of Governors in decedent's estates. This section of the UTC would track this current and proposed legislation granting the court discretion to award and apportion costs and expenses, including reasonable attorney fees and costs as a sanction against another party.
7. RECOMMENDATIONS	The general committee recommended Section 1004 be modified in accord with the Colorado UGPPA §417 and the Colorado Probate Code §§15-12-719, 720 and 721, C.R.S. This Section of the UTC was revised following Mr. Robert Steenrod's draft of revised §15-12-719, 720 and 721 which, in turn, are based on Mr. Steenrod's work on UGPPA §417 to create uniform standards governing fiduciary compensation fees and expenses throughout the Colorado Probate Code and the proposed Colorado Trust Code.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 10
LIABILITY OF TRUSTEES AND
RIGHTS OF PERSONS DEALING WITH TRUSTEE

1. UTC SECTION	**1005**
2. SUBJECT	**LIMITATION OF ACTIONS AGAINST TRUSTEE**
3. UTC STATUTE	(a) A beneficiary may not commence a proceeding against a trustee for breach of trust more than ~~one year~~ six months after the date that the beneficiary or a ~~representative of~~ person who may represent and bind the beneficiary, as provided in Article 3, 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) does not apply, a judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within three years ~~five 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. (d) For purposes of subsection (a), a beneficiary is deemed to have been sent a report if: (1) in the case of a beneficiary having capacity, it is sent to the beneficiary; or (2) in the case of a beneficiary who under Article 3 may be represented and bound by another person, it is sent to the other person. (e) This section does not preclude an action to recover for fraud or misrepresentation related to the report.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	The one-year and five-year limitations periods under this section are not the only means for barring an action by a beneficiary. A beneficiary may be foreclosed by consent, release, or ratification as provided in Section 1009. Claims may also be barred by principles such as estoppel and laches arising in equity under the common law of trusts. *See* Section 106.

	The representative referred to in subsection (a) is the person who may represent and bind a beneficiary as provided in Article 3. During the time that a trust is revocable and the settlor has capacity, the person holding the power to revoke is the one who must receive the report. *See* Section 603(a) (rights of settlor of revocable trust). This section addresses only the issue of when the clock will start to run for purposes of the statute of limitations. If the trustee wishes to foreclose possible claims immediately, a consent to the report or other information may be obtained pursuant to Section 1009. For the provisions relating to the duty to report to beneficiaries, see Section 813. Subsection (a) applies only if the trustee has furnished a report. The one-year statute of limitations does not begin to run against a beneficiary who has waived the furnishing of a report as provided in Section 813(d). Subsection (c) is intended to provide some ultimate repose for actions against a trustee. It applies to cases in which the trustee has failed to report to the beneficiaries or the report did not meet the disclosure requirements of subsection (b). It also applies to beneficiaries who did not receive notice of the report, whether personally or through representation. While the five-year limitations period will normally begin to run on termination of the trust, it can also begin earlier. If a trustee leaves office prior to the termination of the trust, the limitations period for actions against that particular trustee begins to run on the date the trustee leaves office. If a beneficiary receives a final distribution prior to the date the trust terminates, the limitations period for actions by that particular beneficiary begins to run on the date of final distribution. If a trusteeship terminates by reason of death, a claim against the trustee's estate for breach of fiduciary duty would, like other claims against the trustee's estate, be barred by a probate creditor's claim statute even though the statutory period prescribed by this section has not yet expired. This section does not specifically provide that the statutes of limitations under this section are tolled for fraud or other misdeeds, the drafters preferring to leave the resolution of this question to other law of the State.

5. COLORADO COMMITTEE COMMENTS	This section is based in fact on Uniform Probate Code §7-307. This section governs time limits to beneficiaries bringing claims against the trustee (see, §1010). This section codifies the principles of estoppel and laches under common law of trusts. Those who receive reports must initiate a proceeding against the trustee within one year of the date of the report, so long as the report discloses facts related to the claim and notice of the one year to challenge the
	action. The UTC final draft imposes a five year statute of limitation for breach of fiduciary duty claims. This section also imputes a notice of a claim if the beneficiary knew of facts surrounding a claim or reasonably should have inquired into the existence of a claim but failed to do so, and would stop him from asserting that claim. During the October 2000 meeting, the Committee recommended that the one year limitation period be reduced to six months (consistent with 15-16-307, C.R.S., accountings), and that the five year limitation period be reduced to three years, consistent with §13-80-101, C.R.S. (breach of fiduciary duty). ~~At the December 2000 meeting the Committee again reviewed this Section and agreed that the self-executing limitations specified in Section (c) should be deleted. The result of the deletion is Colorado's general limitations statute applies in the event a situation falls outside of UTC §1005(a).~~ The Committee discussed whether a three year limitation period would be appropriate if no report contained adequate facts regarding the breach of trust as provided to the beneficiary. Specifically, the Committee questioned whether the current law contained such limitation and, in reviewing §13-80-101, C.R.S., it concluded that no such limitation period existed. Rather, pursuant to §13-80-101, C.R.S., no limitation period commences until such time as "the cause of action accrues." ~~The Committee concluded that recommending adoption of the UTC §1005(c) would be inconsistent with §13-80-101, C.R.S., and also inconsistent with §15-16-307, C.R.S., (which requires a final accounting before a statute of limitations commences).~~ It was further noted that if the beneficiary is a minor, no statute of limitation commences until the minor has obtained the age of majority. After the foregoing discussion, the Committee recommended the adoption of Section 1005 with the following modifications: ~~(1) Section 1005(a) shall include the word "not" after the phrase, "a beneficiary may";~~ (1) the one year limitation period in Section 1005(a) is reduced to six months, where a beneficiary or representative of the beneficiary was sent a report

	adequately setting for the facts constituting the breach of trust claim and informing the beneficiary of the limitation period; (2) no revision to Section 1005(b) was made; and (3) Section 1005(c) containing a self-executing five year limitation be amended to three years ~~is deleted. The result of the deletion is that~~ consistent with the provisions of §§13-80-101 and 15-16-307, C.R.S., ~~control all circumstances and~~
	~~proceedings~~ regarding the breach of trust claims when Section 1005(a) is not applicable. The general committee believed it important to add a new section (d ~~c~~) taken from the October 1999 draft regarding the sending of reports to beneficiaries or their representative. In recognition of the "fraud exception," the general committee also believed subsection (e ~~d~~) was appropriate.
6. COLORADO LAW	The Colorado Court of Appeals has consistently held that where the beneficiaries of a trust, after full disclosure, consented to the actions of the trustee, they cannot later bring a claim for surcharge. *Beyer v. First National Bank*, 843 P.2d 53 (Colo. Appellate 1992). Section 13-80-101, C.R.S., provides: (1) The following civil actions, regardless of the theory upon which suit is brought or against whom suit is brought shall be commenced within three years after the cause of action accrues, and not thereafter: (f) all actions for breach of trust or breach of fiduciary duty. Section 15-10-106, C.R.S., provides that any action for fraud must be commenced within 5 years from the date after the discovery of the fraud.
7. RECOMMENDATIONS	The committee recommends adoption of Section 1005 with the modifications indicated.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 10
LIABILITY OF TRUSTEES AND
RIGHTS OF PERSONS DEALING WITH TRUSTEE

1. UTC SECTION	1006
2. SUBJECT	RELIANCE ON TRUST INSTRUMENT
3. UTC STATUTE	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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	It sometimes happens that the intended terms of the trust differ from the apparent meaning of the trust instrument. This can occur because the court, in determining the terms of the trust, is allowed to consider evidence extrinsic to the trust instrument. *See* Section 103(17) (definition of "terms of a trust"). Furthermore, if a trust is reformed on account of mistake of fact or law, as authorized by Section 415, provisions of a trust instrument can be deleted or contradicted and provisions not in the trust instrument may be added. The concept of the "terms of a trust," both as defined in this Code and as used in the doctrine of reformation, is intended to effectuate the principle that a trust should be administered and distributed in accordance with the settlor's intent. However, a trustee should also be able to administer a trust with some dispatch and without concern that a reasonable reliance on the terms of the trust instrument is misplaced. This section protects a trustee who so relies on a trust instrument but only to the extent the breach of trust resulted from such reliance. This section is similar to Section 1(b) of the Uniform Prudent Investor Act, which protects a trustee from liability to the extent that the trustee acted in reasonable reliance on the provisions of the trust. This section protects a trustee only if the trustee's reliance is reasonable. For example, a trustee's reliance on the trust instrument would not be justified if the trustee is aware of a prior court decree or binding nonjudicial settlement agreement clarifying or changing the terms of the trust.
5. COLORADO COMMITTEE COMMENTS	This section provides that the trustee may rely on the apparent plain meaning of the written trust instrument to govern his fiduciary responsibilities concerning the administration of the trust. Section 103 (17) (Definition of "Terms of a Trust") means "the manifestation of the settlor's intent regarding a trust provision as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding". The terms of the trust as defined under the Code as well as under the Doctrine of Reformation reflect the principle that a trust should be administered and distributed according

	to the settlor's intent. Further, the trustee should be permitted to reasonably
	rely on the terms of the trust with respect to the administration of the trust. This section protects the trustee who relies on a written trust instrument, but only to the extent that breach of trust resulted from such reliance. This section is similar to Section 2 (b) of the Uniform Prudent Investor Act which protects a trustee from liability to the extent that the trustee acted in reasonable reliance on the provisions of the trust.
6. COLORADO LAW	Comment B, Restatement (Third) Section 50 (Tentative Draft No. 2 , March 1999) provides that the courts do not generally intervene where a trust sets forth reasonably definite or objective standards. When trusts are silent or there are no express standards or guidelines concerning the proposed purpose of discretionary power or relative priority among beneficiaries, courts will impose a general standard of reasonableness or at least good faith judgment. Extrinsic evidence is admissible to explain the ambiguities in wills and trusts. Generally, the courts permit extrinsic evidence to explain the ambiguities in wills and trusts. *Christopher v. Cole*, 118 Colo. 471, 196 P.2d 988 (1984); *In Re Estate of Gross*, 646 P.2d 396 (Colo. App. 1981); *Estate of Holmes*, 821 P.2d 300 (Colo. App. 1991). *Colorado Prudent Investor Rule*, §15-1.1-101(b), C.R.S., provides the trustee is not liable to a beneficiary to the extent that a trustee acted reasonably and with reasonable reliance under the provisions of the trust.
7. RECOMMENDATIONS	To the extent that Section 1006 is consistent with Colorado Law, the general committee adopted this section as is.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 10
LIABILITY OF TRUSTEES AND
RIGHTS OF PERSONS DEALING WITH TRUSTEE

1. UTC SECTION	1007
2. SUBJECT	EVENT AFFECTING ADMINISTRATION OR DISTRIBUTION
3. UTC STATUTE	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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section, which is based on Washington Revised Code § 11.98.100, is designed to encourage trustees to administer trusts expeditiously and without undue concern about liability for failure to ascertain external facts, often of a personal nature, that might affect administration or distribution of the trust. The common law, contrary to this section, imposed absolute liability against a trustee for misdelivery regardless of the trustee's level of care. *See* Restatement (Second) of Trusts § 226 (1959). The events listed in this section are not exclusive. A trustee who has exercised reasonable care to ascertain the occurrence of other events, such as the attainment by a beneficiary of a certain age, is also protected from liability.
5. COLORADO COMMITTEE COMMENTS	This section imposes a duty on the trustee to exercise reasonable care to ascertain significant events which may affect the administration of the trust. The trustee must make a reasonable effort to ascertain the facts which may significantly impact their administration of the trust, and if so, the trustee is absolved of liability. (See Restatement (Second) of Trusts Section 226 [1959]).
6. COLORADO LAW	Colorado Prudent Investment Rule §15-1.1-101, C.R.S., generally provides that a trustee is not liable to a beneficiary to the extent that the trustee acted reasonably and with reasonable reliance under the provisions of the trust. In *Estate of McCart*, 847 P.2d 184 (Colo. App. 1992), the Court of Appeals held that the trustee abused his discretion in denying discretionary distributions to spouse/beneficiary that had remarried. The Court also held that, as a general rule, a trustee is entitled to defend litigation as an expense of the trust if the litigation is not the fault of the trustee.
7. RECOMMENDATIONS	To the extent that Section 1007 is consistent with Colorado Law, the general committee adopted this section as is.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 10
LIABILITY OF TRUSTEES AND
RIGHTS OF PERSONS DEALING WITH TRUSTEE

1. UTC SECTION	**1008**
2. SUBJECT	**EXCULPATION OF TRUSTEE**
3. UTC STATUTE	(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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	Even if the terms of the trust attempt to completely exculpate a trustee for the trustee's acts, the trustee must always comply with a certain minimum standard. As provided in subsection (a), a trustee must always act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. Subsection (a) is consistent with the standards expressed in Sections 105 and 814(a), which, similar to this section, place limits on the power of a settlor to negate trustee duties. This section is also similar to Section 222 of the Restatement (Second) of Trusts (1959), except that this Code, unlike the Restatement, allows a settlor to exculpate a trustee for a profit that the trustee made from the trust. Subsection (b) disapproves of cases such as *Marsman v. Nasca*, 573 N.E.2d 1025 (Mass. App. Ct. 1991), which held that an exculpatory clause in a trust instrument drafted by the trustee was valid because the beneficiary could not prove that the clause was inserted as a result of an abuse of a fiduciary relationship. For a later case where sufficient proof of abuse was present, see *Rutanan v. Ballard*, 678 N.E.2d 133 (Mass. 1997). Subsection (b) responds to the danger that the insertion of such a clause by the fiduciary or its agent may have been undisclosed or inadequately understood by the settlor. To overcome the presumption of abuse in subsection (b), the trustee must establish that the clause was fair and that its existence and contents were adequately communicated to the settlor. In determining whether the clause was fair, the

	court may wish to examine: (1) the extent of the prior relationship between the
	settlor and trustee; (2) whether the settlor received independent advice; (3) the sophistication of the settlor with respect to business and fiduciary matters; (4) the trustee's reasons for inserting the clause; and (5) the scope of the particular provision inserted. *See* Restatement (Second) of Trusts § 222 cmt. d (1959). The requirements of subsection (b) are satisfied if the settlor was represented by independent counsel. If the settlor was represented by independent counsel, the settlor's attorney is considered the drafter of the instrument even if the attorney used the trustee's form. Because the settlor's attorney is an agent of the settlor, disclosure of an exculpatory term to the settlor's attorney is disclosure to the settlor.
5. COLORADO COMMITTEE COMMENTS	Subsection (a) tracts Section 222 of the Restatement (Second) of Trust (1959) setting forth the extent to which a settlor may negate a duty under the terms of the trust. There is a minimum standard of conduct to which the trustee must adhere, whether stated as a negation of a duty or in the form of an exculpatory provision. The trustee must always act in good faith and is liable for any breach of the trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. An exculpatory provision is also unenforceable to the extent that it was inserted as a result of an abuse by the trustee of a fiduciary or confidential relationship with the settlor. Next, subsection (b) creates a presumption of abuse of fiduciary or confidential relationship unless the trustee proves that the exculpatory provision is fair under the circumstances and that its existence and contents were adequately disclosed to the settlor.
6. COLORADO LAW	There is no Colorado case law or Colorado Probate Code provisions which govern exculpation of a trustee. Colorado Probate Code §15-1-509, C.R.S., provides that a fiduciary has a duty to act reasonably and equitably with due regard for his obligations and responsibilities toward the interests of beneficiaries and creditors and the estate or trust involved and the purposes thereof with due regard for the manner in which men of prudence, discretion, intelligence would act in the management of the property of another. Section 15-1.1-101, et. seq., C.R.S., of the Prudent Investor Rule provides that a trustee is not liable to a beneficiary to the extent that the trustee has acted reasonably and with reasonable reliance under the provisions of the trust.
7. RECOMMENDATIONS	To the extent that Section 1008 is consistent with Colorado Law, the general committee adopted this section as is.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 10
LIABILITY OF TRUSTEES AND
RIGHTS OF PERSONS DEALING WITH TRUSTEE

1. UTC SECTION	**1009**
2. SUBJECT	**BENEFICIARY'S CONSENT, RELEASE, OR RATIFICATION**
3. UTC STATUTE	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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section is based on Sections 216 through 218 of the Restatement (Second) of Trusts (1959). A consent, release, or affirmance under this section may occur either before or after the approved conduct. This section requires an affirmative act by the beneficiary. A failure to object is not sufficient. *See* Restatement (Second) of Trusts § 216 cmt. a (1959). A consent is binding on a consenting beneficiary although other beneficiaries have not consented. *See* Restatement (Second) of Trusts § 216 cmt. g (1959). To constitute a valid consent, the beneficiary must know of the beneficiary's rights and of the material facts relating to the breach. *See* Restatement (Second) of Trusts § 216 cmt. k (1959). If the beneficiary's approval involves a self-dealing transaction, the approval is binding only if the transaction was fair and reasonable. *See* Restatement (Second) of Trusts §§ 170(2), 216(3) and cmt. n (1959). An approval by the settlor of a revocable trust or by the holder of a presently exercisable power of withdrawal binds all the beneficiaries. *See* Section 603. A beneficiary is also bound to the extent an approval is given by a person authorized to represent the beneficiary as provided in Article 3.
5. COLORADO COMMITTEE COMMENTS	This section is based on Sections 216 through 218 of the Restatement (Second) of Trust (1959). When one beneficiary has consented but other beneficiaries have not, courts give a remedy to the non-consenting beneficiaries. However, consent by the settlor of a revocable trust or by the holder of a presently-exercisable power of withdrawal binds all of the beneficiaries. The beneficiary is also bound to the extent that a consent is given by a person authorized to

	represent a beneficiary, such as a fiduciary, guardian, conservator or agent.
	Pursuant to the Restatement (Second) of Trust Section 216 (3) and comment (n), a consent of a beneficiary to a self-dealing transaction by a trustee is binding only if the transaction was fair and reasonable.
6. COLORADO LAW	The Colorado Court of Appeals has consistently held that where beneficiaries of a trust, after full disclosure, consented to actions of the trustee, they cannot later bring a claim for surcharge. The Colorado Court of Appeals held *In Trust for Julius F. Seeman*, 841 P.2d 403 (Colo. App. 1992), that the silence of co-trustees constituted consent to the actions of the sole trustee and that the co-trustees could not later complain concerning the actions of the sole trustee which benefitted the trust. In the case of *Beyer v. First National Bank*, 843 P.2d 53 (Colo. App. 1992), adult beneficiaries, after full disclosure of investments of the bank, consented to those investments. The Colorado Court of Appeals, in affirming the trial, held that the ratification of the investments of the bank by the beneficiaries precluded recovery of damages for loss resulting in poor investments.
7. RECOMMENDATIONS	To the extent that Section 1009 is consistent with Colorado Law, the general committee adopted this section as is.

	their fiduciary responsibilities to a single trustee, they were estopped from bringing claims for breach of fiduciary duty. In *Vento v. Colorado National Bank of Pueblo*, 907 P.2d 642 (Colo. App. 1995), reh'g denied (1995), cert. denied (1995) the Colorado Court of Appeals held that the trustee breached his fiduciary duty in failing to seek advice of an independent mining expert during renegotiations of a lease.
7. RECOMMENDATIONS	To the extent that Section 1010 is consistent with Colorado Law, the general committee adopted this section as is.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 10
LIABILITY OF TRUSTEES AND
RIGHTS OF PERSONS DEALING WITH TRUSTEE

1. UTC SECTION	**1011**
2. SUBJECT	**INTEREST AS A GENERAL PARTNER**
3. UTC STATUTE	(a) Except as otherwise provided in subsection (c) or unless personal liability is imposed in the contract, a trustee who holds an interest as a 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 the †Colorado Uniform Partnership Act (1997) or Colorado Uniform Limited Partnership Act of 1981†. (b) Except as otherwise provided in subsection (c), 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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	Section 1010 protects a trustee from personal liability on contracts that the trustee enters into on behalf of the trust. Section 1010 also absolves a trustee from liability for torts committed in administering the trust unless the trustee was personally at fault. It does not protect a trustee from personal liability for contracts entered into or torts committed by a general or limited partnership of which the trustee was a general partner. That is the purpose of this section, which is modeled after Ohio Revised Code § 1339.65. Subsection (a) protects the trustee from personal liability for such partnership obligations whether the trustee signed the contract or it was signed by another general partner. Subsection (b) protects a trustee from personal liability for torts committed by the partnership unless the trustee was personally at fault. Protection from the partnership's contractual obligations is available under subsection (a) only if the other party is on notice of the fiduciary relationship, either in the contract itself

	counterparts, unless the trustee was personally at fault. *See also* Sections 701(c)(2) (nominated trustee may investigate trust property to determine potential violation of environmental law without having accepted trusteeship) and 816(13) (trustee powers with respect to possible liability for violation of environmental law). Subsection (c) alters the common law rule that a trustee could not be sued in a representative capacity if the trust estate was not liable.
5. COLORADO COMMITTEE COMMENTS	This section is based on Section 7-306 of the Uniform Probate Code. Unlike this section of the UPC, which requires that the contract disclose both the representative capacity and identify the trust, subsection (a) of this section protects the trustee who reveals his fiduciary relationship by indicating the signature as trustee or by simply referring to the trust. Under this section, it is assumed that all that should be required is that the other contracting party is put on notice that a trust is involved. This section affords protection to the trustee only to contracts that are properly entered into in the trustee's fiduciary capacity, meaning that the trustee is exercising an available power that is not violating his duty. This section does not excuse any liability the trustee may have for breach of trust. Subsection (b) protects a trustee from personal liability for violations of environmental liability. (See CERCLA April 1996 Colo. Lawyer) unless the trustee was personally at fault. (See UTC §§701(c)and 816(14)). Subsection (c) addresses trustee liability arising from ownership or control of trust property and for torts occurring incident to the administration of the trust. Liability in such situations is imposed on a trustee personally only if the trustee was personally at fault either intentionally or negligently. This section of the UTC deviates from the Restatement (Second) of Trust Section 264 (1959) which imposes liability on a trustee regardless of fault, including liability for acts of agents under respond at superior.
6. COLORADO LAW	Colorado Prudent Investor Rule §15-1.1-109 provides that a trustee may delegate investment in management functions; however, the trustee shall exercise reasonable care, skill and caution in selecting the agent. 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. The trustee who exercises reasonable care, skill and caution in selecting an agent shall not be liable to beneficiaries for decisions or acts of the agent to whom the function was delegated. The Colorado Court of Appeals held *In the Trust Agreement of Julius F. Seaman*, 841 P.2d 403 (Colo. App. 1992), that where co-trustees delegated

UNIFORM TRUST CODE COMMITTEE
ARTICLE 10
LIABILITY OF TRUSTEES AND
RIGHTS OF PERSONS DEALING WITH TRUSTEE

1. UTC SECTION	**1010**
2. SUBJECT	**LIMITATION ON PERSONAL LIABILITY OF TRUSTEE**
3. UTC STATUTE	(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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section is based on Section 7-306 of the Uniform Probate Code. However, unlike the Uniform Probate Code, which requires that the contract both disclose the representative capacity and identify the trust, subsection (a) protects a trustee who reveals the fiduciary relationship either by indicating a signature as trustee or by simply referring to the trust. The protection afforded the trustee by this section applies only to contracts that are properly entered into in the trustee's fiduciary capacity, meaning that the trustee is exercising an available power and is not violating a duty. This section does not excuse any liability the trustee may have for breach of trust. Subsection (b) addresses trustee liability arising from ownership or control of trust property and for torts occurring incident to the administration of the trust. Liability in such situations is imposed on the trustee personally only if the trustee was personally at fault, either intentionally or negligently. This is contrary to Restatement (Second) of Trusts § 264 (1959), which imposes liability on a trustee regardless of fault, including liability for acts of agents under respondeat superior. Responding to a particular concern of trustees, subsection (b) specifically protects a trustee from personal liability for violations of environmental law such as CERCLA (42 U.S.C. § 9607) or its state law

	or in the partnership certificate on file.
	Special protection is not needed for other business interests that the trustee may own, such as an interest as a limited partner, a membership interest in an LLC, or an interest as a corporate shareholder. In these cases the nature of the entity or the interest owned by the trustee carries with it its own limitation on liability. Certain exceptions apply. The section is not intended to be used as a device for individuals or their families to shield assets from creditor claims. Consequently, subsection (c) excludes from the protections provided by this section trustees who own an interest in the partnership in another capacity or if an interest is owned by the trustee's spouse or the trustee's descendants, siblings, parents, or the spouse of any of them. Nor can a revocable trust be used as a device for avoiding claims against the partnership. Subsection (d) imposes personal liability on the settlor for partnership contracts and other obligations of the partnership the same as if the settlor were a general partner. This section has been placed in brackets to alert enacting jurisdictions to consider modifying the section to conform it to the State's specific laws on partnerships and other forms of unincorporated businesses.
5. COLORADO COMMITTEE COMMENTS	Section 1010 protects a trustee from personal liability on contracts that the Trustee enters into on behalf of the trust. The Trustee is absolved from liability for torts committed in administering the trust unless the Trustee was personally at fault. It does not protect a Trustee from personal liability for contracts entered into or torts committed by a general or limited partnership of which the Trustee was a general partner. Comments from the November 2000 Minutes reflect the general committee's support for the adoption of this provision. Section 1011(a) provides that, except as provided in subsection (c), a trustee who holds an interest as a general partner in a general or limited partnership is not personally liable on a contract entered into by the partnership after the trust acquisition of the partnership interest so long as the fiduciary capacity is disclosed in the contract or in a statement previously filed pursuant to the Colorado Uniform Partnership Act. An issue was raised regarding the use of nominee partnerships in which trustees act as sole or one of several general partner(s). The Committee agreed that the fiduciary capacity of the trustee acting as a general partner would be disclosed in the nominee partnership agreement and therefore would be covered by Section 1011. A question was also raised as to where the fiduciary status of the

	trustee is to be disclosed. The Committee acknowledged that disclosure of the
	fiduciary capacity would be made in a statement of partnership authority pursuant to §7-64-303, C.R.S. Although the statement of partnership authority does not, in itself, expressly require the disclosure of the fiduciary capacity of any partner, the statement of partnership authority, in addition to any other related documentation would appear to be the documentation in which the fiduciary capacity should be disclosed. The Committee also addressed the mandatory rule of UTC Section 105(b)(11), which specifies that the terms of the trust cannot override Section 1011, which would allow a trustee to avoid disclosure requirements and still receive immunity on a contract entered into by the partnership after the trust's acquisition of interest. It appears appropriate to have a mandatory rule which places the burden on the trustee to fully disclose his fiduciary capacity, who holds a partnership interest in order to claim immunity. Similarly, it appears appropriate to have a mandatory rule where trust instruments could not exculpate a trustee who holds partnership interest in a capacity other than that of a trustee or is held by one or more of the trustee's decedents, siblings, parents or the spouse of any of them. Accordingly, making UTC Section 105(b)(11) effective for trusts in existence on the effective date of the UTC should not have a negative impact on existing trusts. I surmise that there are few existing trusts that have provisions which provide that a trustee who holds partnership interests is not required to disclose to third parties his fiduciary capacity or grants immunity to a trustee who holds a partnership interests in his individual capacity and even if there was such a trust such a provision may not be enforceable under Colorado law. The mandatory rule appears appropriate.
6. COLORADO LAW	Colorado has adopted the Colorado Uniform Partnership Act. I have not found any reference to the filing requirements under the UPC which require disclosure of fiduciary capacity.
7. RECOMMENDATIONS	The committee recommends approval of this section to the extent that it is consistent with the Colorado Uniform Partnership Act (1997).

UNIFORM TRUST CODE COMMITTEE
ARTICLE 10
LIABILITY OF TRUSTEES AND
RIGHTS OF PERSONS DEALING WITH TRUSTEE

1. UTC SECTION	**1012**
2. SUBJECT	**PROTECTION OF PERSON DEALING WITH TRUSTEE**
3. UTC STATUTE	(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 and 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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section is derived from Section 7 of the Uniform Trustee Powers Act. Subsection (a) protects two different classes; persons other than beneficiaries who assist a trustee with a transaction, and persons other than beneficiaries who deal with the trustee for value. As long as the assistance was provided or the transaction was entered into in good faith and without knowledge, third persons in either category are protected in the transaction even if the trustee was exceeding or improperly exercising the power. For the definition of "know," see Section 104. This Code does not define "good faith" for purposes of this and the next section. Defining good faith with reference to the definition used in the State's commercial statutes would be consistent with the purpose of this section, which is to treat commercial transactions with trustees similar to other commercial transactions.

	Subsection (b) confirms that a third party who is acting in good faith is not charged with a duty to inquire into the extent of a trustee's powers or the propriety of their exercise. The third party may assume that the trustee has the necessary power. Consequently, there is no need to request or examine a copy of the trust instrument. A third party who wishes assurance that the trustee has the necessary authority instead should request a certification of trust as provided in Section 1013. Subsection (b), and the comparable provisions enacted in numerous States, are intended to negate the rule, followed by some courts, that a third party is charged with constructive notice of the trust instrument and its contents. The cases are collected in George G. Bogert & George T. Bogert, The Law of Trusts and Trustees § 897 (Rev. 2d ed. 1995); and 4 Austin W. Scott & William F. Fratcher, The Law of Trusts § 297 (4th ed. 1989). Subsection (c) protects any person, including a beneficiary, who in good faith delivers property to a trustee. The standard of protection in the Restatement is phrased differently although the result is similar. Under Restatement (Second) of Trusts § 321 (1959), the person delivering property to a trustee is liable if at the time of the delivery the person had notice that the trustee was misapplying or intending to misapply the property. Subsection (d) extends the protections afforded by the section to assistance provided to or dealings for value with a former trustee. The third party is protected the same as if the former trustee still held the office. Subsection (e) clarifies that a statute relating to commercial transactions controls whenever both it and this section could apply to a transaction. Consequently, the protections provided by this section are superseded by comparable protective provisions of these other laws. The principal statutes in question are the various articles of the Uniform Commercial Code, including Article 8 on the transfer of securities, as well as the Uniform Simplification of Fiduciary Securities Transfer Act.
5. COLORADO COMMITTEE COMMENTS	This section is originally derived from Section 7 of the Uniform Trustee's Powers Act with two changes. This section has been modified to conform with the Uniform Commercial Code, definition of "good faith" and definition of "know". The effect of these definitions, as applied to this section, is to protect a third party who deals with a trustee while observing reasonable standards of fair dealing and without reason to inquire as to whether the trustee is committing breach of trust. The definition of "good faith" requires that a third party, to receive protection, must not only exhibit honesty of intention but also must observe reasonable standards of fair dealing. The definition of "know" refers to more than actual knowledge. While a person is not charged with knowledge

	of facts discoverable upon reasonable inquiry, the third party is charged with knowledge of facts the person had reason to know based upon the facts and circumstances actually known to the person at the time in question. In other words, if the person should have been aware of a particular fact based on the circumstances and other facts of which the person was actually aware, the person is charged with knowledge of that fact. Subsection (a) protects two different classes; persons who assist a trustee with a transaction, and persons who deal with a trustee for value. The third person is protected in the transaction despite the fact the trustee was exceeding or improperly exercising the power as long as the assistance was provided or the transaction was entered into in "good faith" and without "knowledge." Subsection (b) confirms that a third party acting in good faith and with knowledge that the other is trustee is not charged with a duty to inquire into the extent of a trustee's powers or the propriety of their exercise. Subsection (c) protects any person, including a beneficiary, who, in good faith, delivers property to a trustee. The standard of protection and the Restatements are similar (see Restatement (Second) of Trust, § 321 (1959)). Subsection (d) extends to the protections afforded by this section to assistance provided to or dealings for value with the former trustee. The third party is protected the same as if the former trustee still held the office. The purpose of subsection (e) is to allow a statute relating to commercial transactions to control whenever both it and this section could apply to a transaction. Consequently, the protection provided by this section is superceded by comparable protective provisions of these other laws. The principal statutes in question are various articles of the Uniform Commercial Code as well as the Uniform Simplification of Transfer of Securities by Fiduciaries Act.
6. COLORADO LAW	The Colorado Probate Code, §15-1-509, C.R.S., provides that a fiduciary has a duty to act reasonably and equitably with due regard for his obligations and responsibilities towards the interests of beneficiaries and creditors and the estate or trust involved. Section 15-1.1-101, et. seq., C.R.S., of the Prudent Investor Rule, provides that a trustee is not liable to a beneficiary to the extent that the trustee has acted reasonably and with reasonable reliance under the provisions of the trust.

7. RECOMMENDATIONS	To the extent that Section 1012 is consistent with Colorado law, the general committee adopted this section as is.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 10
LIABILITY OF TRUSTEES AND
RIGHTS OF PERSONS DEALING WITH TRUSTEE

1. UTC SECTION	1013
2. SUBJECT	CERTIFICATION OF TRUST
3. UTC STATUTE	(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) 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 in the pending transaction; (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 cotrustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee; and ~~(7) thetrust's taxpayer identification number; and~~ (7) the ~~(8) the manner of taking~~ name in which title to trust property may be taken. (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) 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. 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 costs, expenses, attorney fees and damages if the 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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section, derived from California Probate Code § 18100.5, is designed to protect the privacy of a trust instrument by discouraging requests from persons other than beneficiaries for complete copies of the instrument in order to verify a trustee's authority. Even absent this section, such requests are usually unnecessary. Pursuant to Section 1012(b), a third person proceeding in good faith is not required to inquire into the extent of the trustee's powers or the propriety of their exercise. This section adds another layer of protection. Third persons frequently insist on receiving a copy of the complete trust instrument solely to verify a specific and narrow authority of the trustee to engage in a particular transaction. While a testamentary trust, because it is created under a will, is a matter of public record, an inter vivos trust instrument is private. Such privacy is compromised, however, if the trust instrument must be distributed to third persons. A certification of trust is a document signed by a currently acting trustee that may include excerpts from the trust instrument necessary to facilitate the particular transaction. A certification provides the third party with an assurance of authority without having to disclose the trust's dispositive provisions. Nor is there a need for third persons who may already have a copy of the instrument to pry into its provisions. Persons acting in reliance on a certification may assume the truth of the certification even if they have a complete copy of the trust instrument in their possession. Subsections (a) through (c) specify the required contents of a certification. Subsection (d) clarifies that the certification need not include the trust's dispositive terms. A certification, however, normally will contain the administrative terms of the trust relevant to the transaction. Subsection (e) provides that the third party may make this a condition of acceptance.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 11
MISCELLANEOUS PROVISIONS

1. UTC SECTION	**1101**
2. SUBJECT	**UNIFORMITY OF APPLICATION AND CONSTRUCTION**
3. UTC STATUTE	In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	No comments.
5. COLORADO COMMITTEE COMMENTS	This Section is fairly standard in the adoption of uniform acts and sets forth the basic principle that uniform construction and application of the Code is to be promoted among enacting States.
6. COLORADO LAW	None.
7. RECOMMENDATIONS	Section 1101 should be enacted without modification.

	trust instrument and facilitating transactions with trusts. However, the committee recommends that in addition to damages, Section 1013(h) should include an authorization for a court to award costs, expenses and attorney fees if the request for the trust instrument is found to be lacking good faith.
	Accordingly, the committee recommends approval of Section 1013(h) to read in its entity as follows: "A person making a demand for the trust instrument in addition to a certification of trust or excerpts is liable for costs, expenses, attorney fees and damages if the court determines that the person did not act in good faith in demanding the trust instrument." (Emphasis supplied)
6. COLORADO LAW	Section 15-16-101, C.R.S., provides that a trustee of a trust having its principal place of business in the state, within thirty days after his acceptance, must register the trust in a court of Colorado at the principal place of administration. The registration requirement does not require that the trust be made a matter of public record and therefore insures that the terms of the trust remain private.
7. RECOMMENDATIONS	The committee recommends adoption of Section 1013 with modification to subsections (a)(4); (a)(7); (a)(8) and (h).

UNIFORM TRUST CODE COMMITTEE
ARTICLE 11
MISCELLANEOUS PROVISIONS

1. UTC SECTION	**1102**
2. SUBJECT	**ELECTRONIC RECORDS AND SIGNATURES**
3. UTC STATUTE	The provisions of this [Code] governing the legal effect, validity, or enforceability of electronic records or electronic signatures, and of contracts formed or performed with the use of such records or signatures, conform to the requirements of Section 102 of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. § 7002) and supersede, modify, and limit the requirements of the Electronic Signatures in Global and National Commerce Act.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	This section, which is being inserted in all Uniform Acts approved in 2000 or later, preempts the federal Electronic Signatures in Global and National Commerce Act. Section 102(a)(2)(B) of that Act provides that the federal law can be preempted by a later statute of the State that specifically refers to the federal law. The effect of this section, when enacted as part of this Code, is to leave to state law the procedures for obtaining and validating an electronic signature. The Uniform Trust Code does not require that any document be in paper form, allowing all documents under this Code to be transmitted in electronic form. A properly directed electronic message is a valid method of notice under the Code as long as it is reasonably suitable under the circumstances and likely to result in receipt of the notice or document. *See* Section 109(a).
5. COLORADO COMMITTEE COMMENTS	This Section specifies that enactment of the Uniform Trust Code supersedes, modifies and limits the requirements of the Electronic Signatures in Global and National Commerce Act to the extent that the Code governs the legal affect, validity or enforceability of electronic records or signatures and of contracts formed or performed with the use of such records or signatures. Essentially, the state law, including the law of the Uniform Trust Code, will address the validity, legal effect and enforceability of electronic records and signatures when they are used. Since the Code does not require that any document, whether a notice or trust, be in paper form, all documents under the Code may be transmitted in electronic form. While the Commissioners' Comments address documents and transmissions of documents in electronic form, this Section would also apply with respect to the creation of trusts.

6. COLORADO LAW	While an exhaustive search was not performed, the increasing use of electronic means of communication and its impact is addressed in some Colorado statutes. See, e.g., C.R.S. §§ 4-8-113 and 4-9-413 (relating to UCC financing statements and electronic signatures). See also C.R.S. § 24-71-101 (defining "electronic signatures" in government-state transactions) and C.R.S. § 5-1-301 (consumer credit transactions).
7. RECOMMENDATIONS	Section 1102 should be enacted without modification.

	Subsections (f) and (g) protect a third party who relies on the certification. The
	third party may assume that the certification is true, and is not charged with constructive knowledge of the terms of the trust instrument even if the third party has a copy. To encourage compliance with this section, a person demanding a trust instrument after already being offered a certification may be liable under subsection (h) for damages if the refusal to accept the certification is determined not to have been in good faith. A person acting in good faith would include a person required to examine a complete copy of the trust instrument pursuant to due diligence standards or as required by other law. Examples of such due diligence and legal requirements include (1) in connection with transactions to be executed in the capital markets where documentary standards have been established in connection with underwriting concerns; (2) to satisfy documentary requirements established by state or local government or regulatory agency; (3) to satisfy documentary requirements established by a state or local government or regulatory agency; and (4) where the insurance rates or premiums or other expenses of the party would be higher absent the availability of the documentation. The Uniform Trust Code leaves to other law the issue of how damages for a bad faith refusal are to be computed and whether attorney's fees might be recoverable. For a discussion of the meaning of "good faith," see Section 1012 Comment.
5. COLORADO COMMITTEE COMMENTS	This section, based on the California Probate Code Section 18100.5, is designated to protect the privacy of a trust instrument by reducing requests by third parties for complete copies of the instrument when verifying a trustee's authority. Third parties frequently insist on receiving a copy of the complete trust instrument solely to verify a specific or narrow authority of the trustee to engage in a particular transaction. While a testamentary trust, because it is created under a will, is a public matter, an inter vivos instrument is private. Such privacy is compromised, however, if the trust instrument must be widely distributed among third parties. The certification of trust is a document signed by all currently acting trustees that may include excerpts from the trust instrument necessary to facilitate the particular transaction. The benefit of a certification is that it will enable the transaction to proceed without disclosure of the trust's beneficial provisions. Persons acting on reliance on a certification may assume the truth of the certification, even if they have a complete copy of the trust instrument in their possession. Section 1013(a)(7) requires the certification of trust to disclose the trustee's

	taxpayer identification number. The committee questioned the proprietary of this requirement given the variety of privacy laws that may have an impact on
	the disclosure of this information in transactions where the trust's taxpayer identification number might not otherwise be required. The committee also noted that if a third party engaging in a transaction with the trust was required to be furnished with the trust's taxpayer identification number, then appropriate forms, including Form W-9, would be completed and, in that regard, merely setting forth that information in the certification of trust pursuant to Section 1013 would be insufficient to satisfy the required tax reporting. Accordingly, the committee recommended that Section 1013(a)(7) be deleted. Section 1013(a)(8) requires the trust certification to provide information regarding the "manner" in which title to trust property may be taken. The committee feels that the use of the word "manner" is unclear although the committee acknowledges that it is likely to be satisfied by simply setting forth the name of the trust and the name of the trustee rather than more substantive requirements regarding titling. Accordingly, the committee recommended that the word "manner" be deleted and that the word "name" be inserted into Section 1013(a)(8). The certification of trust is also required to contain information regarding the powers of the trustee. Since the powers of the trustee could span a variety of transactions and issues, the committee feels it is proper to limit this item of the trust certification to require disclosure only of those powers that authorize the specific transaction pending between the third party and the trust. Accordingly, the committee recommends that the phrase "in the pending transaction" be added to the end of Section 1013(a)(4). Section 1013(h) specifies that a person making a demand for the entire trust instrument in addition to a certification of trust or excerpts from the trust instrument will be liable for damages if a court determines that the requesting party did not act in good faith in demanding the entire trust instrument. In comparing this provision to similar provisions regarding powers of attorney that exist in Colorado law, it was noted that Section 1013(h) is broader because it permits an award of damages. Under current Colorado law, the failure of a third party to accept a power of attorney and act in accordance with the actions of a duly nominated agent will be liable only for the costs of any enforcement or other proceeding that were incurred by the agent to obtain the third party's compliance with the power of attorney. It was agreed that Section 1013(h) is helpful in maintaining the privacy of the

UNIFORM TRUST CODE COMMITTEE
ARTICLE 11
MISCELLANEOUS PROVISIONS

1. UTC SECTION	**1103**
2. SUBJECT	**SEVERABILITY CLAUSE**
3. UTC STATUTE	If any provision of this [Code] or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this [Code] which can be given effect without the invalid provision or application, and to this end the provisions of this [Code] are severable.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	No comments.
5. COLORADO COMMITTEE COMMENTS	This Section contains standard language that would be expected with respect to the Code.
6. COLORADO LAW	Similar provisions have been enacted in other Uniform Acts. See, e.g., Uniform Principal and Income Act (C.R.S. § 15-1-433) and Uniform Statutory Form of Power of Attorney Act (C.R.S. § 15-1-1320).
7. RECOMMENDATIONS	Section 1103 should be enacted without modification.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 11
MISCELLANEOUS PROVISIONS

1. UTC SECTION	**1104**
2. SUBJECT	**EFFECTIVE DATE**
3. UTC STATUTE (NOT AMENDED IN 2004)	This [Code] takes effect on _____.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	None.
5. COLORADO COMMITTEE COMMENTS	The Code provides much needed guidance in Colorado regarding the law of trusts particularly given the increasingly greater use of trusts in estate planning. There is a lack of Colorado statutory and case law on many of the subjects addressed by the Code, although a significant portion of the Uniform Trust Code is a codification of the common law of trusts. The Code will provide Colorado with precise, comprehensive and easily accessible guidance on trust law questions and on issues on which the law is currently unclear or nonexistent. The Code also contains a number of innovative provisions intended to keep in step with the increasing use of trusts. Although a one year effective date provision applied upon enactment of the Uniform Probate Code II, the Uniform Trust Code does not contain many controversial provisions and the committee feels members of the Bar can learn the Code relatively quickly. Moreover, the Uniform Trust Code is not likely to have a significant impact on the drafting of trusts because there are very few mandatory rules that are specified and in most cases, the terms and provisions of the trust control thereby permitting a drafter to override a substantial majority of the Code's provisions. For these reasons, a shortened effective date is appropriate.
6. COLORADO LAW	None.
7. RECOMMENDATION	The Committee recommends that the Code take effect six months after enactment.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 11
MISCELLANEOUS PROVISIONS

1. UTC SECTION	**1105**
2. SUBJECT	**REPEALS**
3. UTC STATUTE	~~(1) Uniform Trustee Powers Act;~~ Parts 2, 3 and 4 of the Uniform Probate Code, Article VII are repealed. ~~(3) Uniform Trusts Act (1937); and~~ ~~(4) Uniform Prudent Investor Act.~~
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	For the reasons why the above Uniform Acts should be repealed upon enactment of the Uniform Trust Code, see the Prefatory Note. Enacting jurisdictions that have not enacted one or more of the specified Uniform Acts should repeal their comparable legislation. Because of the comprehensive scope of the Uniform Trust Code, many States will have trust provisions not based on any Uniform Act that will need to be repealed upon enactment of this Code. This section does not attempt to list the types of conforming amendments, whether in the enacting State's probate code or elsewhere, that need to be made upon enactment of this Code.
5. COLORADO COMMITTEE COMMENTS	The Uniform Trustee Powers Act is the Colorado Fiduciaries' Powers Act. Since the Colorado Committee has recommended retention of the Colorado Fiduciaries' Powers Act and addition of language to harmonize it with Section 816 of the Uniform Trust Code (see Section 816(a)), the Uniform Trustee Powers Act should not be repealed. The Colorado Committee has recommended retention of the Trust Registration provisions contained in Part 1, Article 16 of the Uniform Probate Code (C.R.S. §§ 15-16-101 through 105). Parts 2, 3 and 4 of Article 16 of the Uniform Probate Code deal with jurisdiction of the court concerning trusts, duties and liabilities of trustees and consolidation and division of trusts. The subject matter of each of these Parts is addressed in various sections of the Uniform Trust Code which the Colorado Committee has approved. Accordingly, only Parts 2 through 4 of Article VII of the Uniform Probate Code will be repealed.

	The Uniform Trust Act (1937) was never adopted in Colorado and could be repealed. Indicating repeal of the Uniform Trust Act should not be taken to suggest that the Uniform Trust Act was enacted in Colorado. The Uniform Prudent Investor Act is codified in C.R.S. Section 15-1.1-101 et seq. and should not be repealed.
6. COLORADO LAW	None.
7. RECOMMENDATIONS	The committee recommends adoption of Section 1105 to read as drafted above.

	then such spendthrift clauses would not be enforceable as to those claimants; c.) Section 105(b)(6) provides that the terms of a trust cannot prevail over the power of the court to require, dispense with or modify or terminate a bond. The committee believes that this mandatory rule should apply (and probably already does apply) to trusts created before and after the effective date of the Uniform Trust Code; d.) Section 105(b)(7) provides that the terms of the trust cannot override the power of the court to adjust the terms of a trustee's compensation if it is unreasonably low or high. The committee acknowledged that any compensation that might have been paid before the effective date of the to be unreasonably high or low; Uniform Trust Code might not continue to be paid after the effective date of the Uniform Trust Code if a court found the compensation arrangements to be unreasonably high or low. e.) Section 105(b)(8) provides that with respect to qualified beneficiaries of an irrevocable trust who have attained 25 years of age, the terms of a trust cannot prevail over the duty of the trustee specified in Uniform Trust Code Sections 813 (b)(2)-(3) to notify such beneficiaries of the existence of the trust, the identity of the trustee and their right to request trustee reports. Under current Colorado law, a settlor of a trust cannot, based on the age of the beneficiary, limit the trustee's obligations to provide notice and information regarding the trust. Accordingly, the committee concluded that making Uniform Trust Code Section 105(b)(8) effective for trusts in existence on the effective date of the Uniform Trust Code should not have a negative impact on existing trusts. The committee surmised that it would be unlikely to find a pre-Uniform Trust Code trust that specifically eliminated notice to beneficiaries who had not attained age 25 and even if such a trust did exist, the provision would not likely be enforceable under current Colorado law. Accordingly, the application of the effective date rules of the Uniform Trust Code to Section 105(b)(8) should not have any impact. With respect to Section 105(b)(9) which requires a trustee to respond to the request of certain beneficiaries of an irrevocable trust for reports and other information reasonably related to the administration of the trust, here again the committee concluded that application of this mandatory rule to trusts in existence on the effective date of the Uniform Trust Code is appropriate; f.) Section 105(b)(10) provides that the terms of a trust cannot prevail over the effect of an exculpatory provision addressed under Section 1008 of the Uniform Trust Code. The committee felt that this was particularly appropriate with respect to trusts in existence on the effective date of the Uniform Trust Code to place a

	701(2). The committee concluded that if any rules of construction applicable to trusts that are incorporated into the Uniform Probate Code contain specific
	effective date provisions, then Section 1106(a)(4) of the Uniform Trust Code would apply only to trusts that are executed, amended or reaffirmed on or after the same specific effective date applicable to the particular rule of construction under consideration. Accordingly, for example, in the context of the antilapse provisions, the committee concluded that it was clear that the antilapse provisions contained in C.R.S. Section 15-11-706 would only apply to trusts executed or amended on or after July 1, 1995 and that prior law would apply to trusts executed prior to July 1, 1995. The committee recommended approval of subparagraph (4). Section 1106(a)(5) provides that any act done before the effective date of the Uniform Trust Code is not affected by the Uniform Trust Code. The committee examined this provision in the context of the mandatory and default rules contained in Section 105 of the Uniform Trust Code. The examination resulted in the following discussion and conclusions: a.) Section 105(b)(4) provides that the terms of the trust prevail over any provision of the Uniform Trust Code except with respect to the power of the court to terminate a trust under Sections 410 through 416 of the Uniform Trust Code. The committee agreed that express prohibitions against court modification or termination are probably not enforceable under current Colorado law and therefore Section 105(b)(4) likely does not reflect a change in Colorado law and would not be affected by Section 1106 (a)(5); b) Section 105(b)(5) provides that the terms of the trust override the Uniform Trust Code except with respect to the effect of spendthrift provisions and the rights of certain creditors and assignees to reach the trust. The claimants that may reach trust assets under the Uniform Trust Code are former spouses of a trust beneficiary with respect to alimony claims and claims for child support. Spendthrift clauses in trusts created before the effective date of the Uniform Trust Code that might purport to be effective against such claimants will not, in fact, be effective pursuant to the provisions of Section 105(b)(5). Accordingly, enactment of the Uniform Trust Code will not upset any resolution of issues by claimants against a spendthrift trust that was concluded before the effective date of the Uniform Trust Code. The committee agreed that the application of Section 1106 (a)(5) was appropriate in this context. If new claims for child support or alimony are brought against a beneficiary with respect to such beneficiary's interest in a trust after the effective date of the Uniform Trust Code,

UNIFORM TRUST CODE COMMITTEE
ARTICLE 11
MISCELLANEOUS PROVISIONS

1. UTC SECTION	**1106**
2. SUBJECT	**APPLICATION TO EXISTING RELATIONSHIPS**
3. UTC STATUTE	(a) Except as otherwise provided in this [Code], on [the effective date of this [Code]]: (1) this [Code] applies to all trusts created before, on, or after [its effective date]; (2) this [Code] applies to all judicial proceedings concerning trusts commenced on or after [its effective date]; (3) this [Code] applies to judicial proceedings concerning trusts commenced before [its effective date] unless the court finds that application of a particular provision of this [Code] 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 [Code] does not apply and the superseded law applies; (4) any rule of construction or presumption provided in this [Code] applies to trust instruments executed before [the effective date of the [Code]] unless there is a clear indication of a contrary intent in the terms of the trust; and (5) an act done before [the effective date of the [Code]] is not affected by this [Code]. (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 [the effective date of the [Code]], that statute continues to apply to the right even if it has been repealed or superseded.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	The Uniform Trust Code is intended to have the widest possible effect within constitutional limitations. Specifically, the Code applies to all trusts whenever created, to judicial proceedings concerning trusts commenced on or after its effective date, and unless the court otherwise orders, to judicial proceedings in progress on the effective date. In addition, any rules of construction or presumption provided in the Code apply to preexisting trusts unless there is a clear indication of a contrary intent in the trust's terms. By applying the Code to preexisting trusts, the need to know two bodies of law will quickly lessen. This Code cannot be fully retroactive, however. Constitutional limitations preclude retroactive application of rules of construction to alter property rights under trusts that became irrevocable prior to the effective date. Also, rights

	already barred by a statute of limitation or rule under former law are not revived
	by a possibly longer statute or more liberal rule under this Code. Nor is an act done before the effective date of the Code affected by the Code's enactment. The Uniform Trust Code contains an additional effective date provision. Pursuant to Section 602(a), prior law will determine whether a trust executed prior to the effective date of the Code is presumed to be revocable or irrevocable. For a comparable uniform law effective date provision, see Uniform Probate Code § 8-101.
5. COLORADO COMMITTEE COMMENTS	With respect to Section 1106(a)(1), the committee noted that Section 602(a) which changes the common law regarding the presumption of revocability where the settlor does not expressly reserve the right the revoke the trust, contains its own effective date provision with respect to the issue of the revocability of the trust. Accordingly, Section 1106(a)(1) effective date provisions will not apply to the question of the revocability of a trust; rather the effective date provisions of Section 602(a) will apply. The committee agreed that the effective date of the Code should apply to judicial proceedings that are commenced on or after the effective date of the Code. Section 1106(a)(3) concerns the application of the Uniform Trust Code to judicial proceedings commenced before the effective date of the Code. In general, the Uniform Trust Code will apply to all judicial proceedings commenced before the Code's effective date unless the court finds that the application of a particular provision of the Code would substantially interfere with the conduct of the judicial proceedings or prejudice the rights of parties. For example, a petition for removal of a trustee filed prior to the effective date of the Uniform Trust Code which was not concluded before the effective date of the Uniform Trust Code would be determined under the Uniform Trust Code unless the court chose to disregard the provisions of the Uniform Trust Code and apply prior law. The committee recommended that subparagraph (3) be adopted. Section 1106(a)(4) provides that on the effective date of the Uniform Trust Code, all rules of construction or presumptions contained in the Code apply to trust instruments executed before the effective date of the Uniform Trust Code unless there is a clear indication of a contrary intent in the terms of the trust. Rules of construction in the Uniform Probate Code also apply, as appropriate, to the interpretation of trusts. For example, the antilapse provisions will apply to trusts. C.R.S. Section 15-11-706 contains the antilapse provisions applicable to trust and it is noted that C.R.S. Section 15-11-706 is effective only with respect to trusts executed, republished or reaffirmed on or after July 1, 1995. Section 15-11-

	burden of proof on companies providing trust services that are affiliated with brokerage firms to prove that exculpatory clauses in their trust documents are appropriate; g.) With respect to Sections 105(b)(12) and (b)(14), a trust cannot override the periods of limitation regarding judicial proceedings, the power of a court to take
	action and exercise jurisdiction or upset the subject matter jurisdiction of a court or venue for commencing a judicial proceeding as otherwise established pursuant to Sections 203 and 204 of the Uniform Trust Code. The committee acknowledged that a trust could contain provisions mandating alternative dispute resolution proceedings on issues concerning the internal administration of a trust and that the exclusive jurisdiction of the district court with respect to trust administration matters was not intended to preclude judicial or non-judicial alternative dispute resolution procedures. Rather, the committee determined that the exclusive jurisdiction provision was really intended to specify the jurisdiction of the district court vis a vis other courts in the state. Accordingly, the committee concluded that application of the mandatory rule contained in Section 105(b)(14) is appropriate and consistent with current Colorado law and the committee agreed to clarify Section 203 of the Uniform Trust Code to highlight that judicial or non-judicial alternative dispute resolution procedures are not supplanted by the provisions of Section 105(b)(14). With respect to venue matters, the Uniform Trust Code, Sections 203 and 204 conform with current Colorado law and therefore making the Uniform Trust Code effective for trusts in existence on the effective date of the Uniform Trust Code dovetails with the mandatory subject matter jurisdiction and venue provisions and is appropriate; h.) Section 105(b)(13) provides that the terms of a trust cannot prevail over the power of a court to take action and exercise jurisdiction as may be necessary and in the interests of justice. Since this provision is consistent with Uniform Trust Code Section 106 which specifies that the common law of trusts and principles of equity supplement the Uniform Trust Code (except as otherwise modified), the mandatory rule of Section 105(b)(13) being effective on the effective date of the Uniform Trust Code is appropriate; i.) Section 105(b)(12) provides that the trust terms cannot prevail over periods of limitation for commencing judicial proceedings. In essence, the terms of a trust instrument cannot lengthen or shorten the time periods in which actions can be brought against a trustee which time periods are specified in Section 1005 of the Uniform Trust Code. Since the mandatory rule preserves the applicable limitations periods under current Colorado law (in the form the Uniform Trust Code Section 1005 is amended per our committee's comments), making this

	mandatory rule effective for trusts in existence on the effective date of the Uniform Trust Code should not have a negative impact on existing trusts.
6. COLORADO LAW	None.
7. RECOMMENDATIONS	The committee recommends adoption of Section 1106 without modification.

5. COLORADO COMMITTEE COMMENTS	This section codifies the equitable remedies available if a trustee has committed a breach of trust or threatens to do so. Beneficiaries and co-trustees have standing to sue. *See* Restatement (Second) of Trusts § 198 (1959). Traditionally, remedies for breach of trust were exclusively equitable, and as such, punitive damages were not available and findings of fact were made by the judge and not a jury. *See* Restatement (Second) of Trusts § 197 (1959). The remedies identified in this section are derived from Restatement (Second) of Trusts § 199 (1959). The reference to payment of money in subsection (b)(3) includes liability that might be characterized as damages, restitution, or surcharge. A successor trustee has standing to sue a predecessor (Restatement (Second) of Trust § 200 [1959]). Although these remedies are exclusively equitable and, as such, there is no right to jury trial or punitive damages, the act does not preclude the possibility that a particular enactment or jurisdiction might allow jury trials or punitive damages for actions for breach of trust. If this Section 1001 is enacted, it will be necessary to repeal C.R.S. §15-16-201.
6. COLORADO LAW	Colorado Probate Code §15-16-201, C.R.S., which discusses court jurisdiction, lists some of the equitable remedies available to beneficiaries. The Colorado courts, under limited circumstances, have recognized a right to jury trial and punitive damages for breach of fiduciary duty claims. *Paine Webber Jackson & Curtis*, 718 P.2d 508, 514 (Colo. 1986); *Vento v. Colorado Nat. Bank / Pueblo*, 907 P.2d 642 (Colo. App. 1995), reh'g denied (1995), cert. denied (1995). *Peterson v. McMahon*, 99 P.3d 594 (Colo. 2004).
7. RECOMMENDATIONS	The general committee recommended enactment as is.

UNIFORM TRUST CODE COMMITTEE
ARTICLE 10
LIABILITY OF TRUSTEES AND
RIGHTS OF PERSONS DEALING WITH TRUSTEE

1. UTC SECTION	**1002**
2. SUBJECT	**DAMAGES FOR BREACH OF TRUST**
3. UTC STATUTE	(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.
4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS	Subsection (a) is based on Restatement (Third) of Trusts: Prudent Investor Rule § 205 (1992). If a trustee commits a breach of trust, the beneficiaries may either affirm the transaction or, if a loss has occurred, hold the trustee liable for the amount necessary to compensate fully for the consequences of the breach. This may include recovery of lost income, capital gain, or appreciation that would have resulted from proper administration. Even if a loss has not occurred, the trustee may not benefit from the improper action and is accountable for any profit the trustee made by reason of the breach. For extensive commentary on the determination of damages, traditionally known as trustee surcharge, with numerous specific applications, see Restatement (Third) of Trusts: Prudent Investor Rule §§ 205-213 (1992). For the use of benchmark portfolios to determine damages, see Restatement (Third) of Trusts: Prudent Investor Rule Reporter's Notes to §§ 205 and 208-211 (1992). On the authority of a court of equity to reduce or excuse damages for breach of trust, see Restatement (Second) of Trusts § 205 cmt. g (1959). For purposes of this section and Section 1003, "profit" does not include the trustee's compensation. A trustee who has committed a breach of trust is entitled