

**PROPOSED CHANGES IN THE
KANSAS UNIFORM TRUST CODE**

GENERAL COMMENT

The 2005 Legislature requested the Judicial Council review 2005 House Bill 2435 which is a bill requested by the Kansas Bar Association that proposes amendments to the Uniform Trust Code. The study was assigned by the Judicial Council to the Probate Law Advisory Committee (PLAC).

In addition to the amendments proposed by the Kansas Bar Association (Bar), The Committee considered the "2004 and 2005 Amendments to the Uniform Trust Code" proposed by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and amendments proposed by the Kansas Bankers Association's Trust Division (Bankers).

The following are sections of the Kansas Uniform Trust Code in which the PLAC proposes amendments be made. The source of the amendment and a discussion of the proposed change is found in the comment following each section.

- 1 **58a-103. Definitions.** As used in this code:
- 2 (1) "Action," with respect to an act of a trustee, includes a failure to act.
- 3 (2) "Beneficiary" means a person that:
- 4 (A) Has a present or future beneficial interest in a trust, vested or contingent; or
- 5 (B) in a capacity other than that of trustee, holds a power of appointment over trust property.

- 1 (3) "Charitable trust" means a trust, or portion of a trust, created for a charitable purpose described
2 in subsection (a) of K.S.A. 2004 Supp. 58a-405, and amendments thereto.
- 3 (4) "Conservator" means a person appointed by the court pursuant to K.S.A. 59-3001 *et seq.*, and
4 amendments thereto, to administer the estate of a minor or adult individual.
- 5 (5) "Environmental law" means a federal, state, or local law, rule, regulation, or ordinance relating
6 to protection of the environment.
- 7 (6) "Guardian" means a person appointed by the court pursuant to K.S.A. 59-3001 *et seq.*, and
8 amendments thereto, to make decisions regarding the support, care, education, health, and welfare
9 of a minor or adult individual. The term does not include a guardian ad litem.
- 10 (7) "Interests of the beneficiaries" means the beneficial interests provided in the terms of the trust.
- 11 (8) "Jurisdiction," with respect to a geographic area, includes a state or country.
- 12 (9) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited
13 liability company, association, joint venture, government; governmental subdivision, agency, or
14 instrumentality; public corporation, or any other legal or commercial entity.
- 15 (10) "Power of withdrawal" means a presently exercisable general power of appointment other than
16 a power: (A) exercisable by a trustee and limited by an ascertainable standard relating to an
17 individuals health, education, support or maintenance within the meaning of Section 2041(b)(1)(A)
18 or 2514 (c)(1) of the Internal Revenue Code of 1986, as in effect on the effective date of this
19 amendment; or (b) exercisable by another person only upon consent of the trustee or a person
20 holding an adverse interest.

1 (11) "Property" means anything that may be the subject of ownership, whether real or personal,
2 legal or equitable, or any interest therein.

3 (12) (a) "Qualified beneficiary" means a beneficiary who, ~~on the date of the beneficiary's~~
4 ~~qualification is determined to be either:~~

5 ~~(A) A distributee of trust income or principal; or~~

6 ~~(B) a distributee of trust income or principal if the trust terminated on that date;~~ as of the date in
7 question, either is entitled to receive distributions of trust income or principal, or would be so
8 entitled if the trust terminated on that date.

9 (b) For the purpose of the trustee determining "qualified beneficiaries" of a trust in which a
10 beneficial interest is subject to a power of appointment of any nature, the trustee may conclusively
11 presume such power of appointment has not been exercised unless the trustee has been furnished
12 by the powerholder or the legal representative of the powerholder or the powerholder's estate with
13 the original or a copy of an instrument validly exercising such power of appointment, in which
14 event the "qualified beneficiaries" shall be subsequently determined by giving due consideration
15 to such exercise unless and until the trustee has been given notification in a similar manner of a
16 instrument which validly revokes or modifies such exercise.

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

19 (14) "Settlor" means a person, including a testator, who creates, or contributes property to, a trust.
20 If more than one person creates or contributes property to a trust, each person is a settlor of the
21 portion of the trust property attributable to that person's contribution except to the extent another

1 person has the power to revoke or withdraw that portion.

2 (15) "Spendthrift provision" means a term of a trust which restrains either voluntary or involuntary
3 transfer of a beneficiary's interest.

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

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

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

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

14 COMMENT

15 Both NCCUSL and the Bar recommend subsection (10), relating to the power of withdrawal,
16 be revised to specifically exclude exercise by a trustee. This avoids the failure of a trustee to make
17 a distribution from constituting a lapse of a "power of withdrawal" under K.S.A. 58-505(b)(2),
18 thereby subjecting the assets subject to the lapsed power to the claims of the trustee's creditors.

19 The PLAC adopted the amendment proposed by the Uniform Law Commissioners. Because the
20 amendment includes the phrase "ascertainable standard" the meaning of that phrase is included in
21 the subsection, which is the only place in the code the phrase appears..
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23 Both NCCUSL and the Bar recommended amendments to subsection (12), which defines
24 "Qualified Beneficiary". The changes proposed by the Judicial Council Committee generally follow
25 the recommendations of the Bar.

1 Currently subsection (12) defines "qualified beneficiary" to include not only current
2 distributees but also a distributee of trust income or principal, if the trust terminated on that date.
3 The current provision raises an issue as to the trustee's burden to determine whether such power has
4 been exercised, thereby changing qualified beneficiaries.

5 The provision is amended to place the burden of informing the trustee of any exercise of a
6 non general power of appointment on the power holder. The change also avoids the trustee having
7 to notify a remainder beneficiary that such beneficiary has been disinherited by the exercise of a
8 power of appointment, in circumstances where the power holder does not wish the remainder
9 beneficiary notified.

10 In subsection (12)(a), the PLAC changed the word "distributee" to the phrase "entitled to
11 receive distributions". The purpose of the change is to clarify that a person is a "qualified
12 beneficiary" only if the trustee is required to make distributions to that person.

1 **58a-105. Default and mandatory rules.** (a) Except as otherwise provided in the terms of the trust,
2 this code governs the duties and powers of a trustee, relations among trustees and the rights and
3 interests of a beneficiary.

4 (b) The terms of a trust prevail over any provision of this code except:

5 (1) The requirements for creating a trust;

6 (2) the duty of a trustee to ~~act in good faith and~~ administer the trust in accordance with ~~the~~
7 ~~purposes of the trust~~ K.S.A. 58a-801, and amendments thereto.

8 (3) the requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust
9 have a purpose that is lawful, not contrary to public policy and possible to achieve;

10 (4) the power of the court to modify or terminate a trust under K.S.A. 2004 Supp. 58a-410 through
11 58a-416, and amendments thereto;

12 (5) the effect of the rights of creditors to reach a trust as provided in article 5 of chapter 58a of the
13 Kansas Statutes Annotated, and amendments thereto;

14 (6) the power of the court under K.S.A. 2004 Supp. 58a-702, and amendments thereto, to require,
15 dispense with, or modify or terminate a bond;

16 (7) the power of the court under subsection (b) of K.S.A. 2004 Supp. 58a-708, and amendments
17 thereto, to adjust a trustee's compensation specified in the terms of the trust which is unreasonably
18 low or high;

19 (8) the effect of an exculpatory term under K.S.A. 2004 Supp. 58a-1008, and amendments thereto;

1 (9) the rights under K.S.A. 2004 Supp. 58a-1010 through 58a-1013, and amendments thereto, of
2 a person other than a trustee or beneficiary;

3 (10) periods of limitation for commencing a judicial proceeding under K.S.A. 2004 Supp. 58a-604,
4 and amendments thereto;

5 (11) the power of the court to take such action and exercise such jurisdiction as may be necessary
6 in the interests of justice; and

7 (12) the barring of claims against trusts and trustees under K.S.A. 2004 Supp. 58a-818, and
8 amendments thereto.

9 (c) Notwithstanding any provisions of the Kansas uniform trust code to the contrary, any trust
10 created by will and admitted to probate shall be subject to the requirements of chapter 59 of the
11 Kansas Statutes Annotated.

12 COMMENT

13 Both NCCUSL and the Bankers proposed amendments to subsection (b)(2) to make it
14 consistent with section 801 (K.S.A. 58a-801). The PLAC took the approach of amending the
15 subsection to refer to K.S.A. 58a-801 to avoid repeating the same language at two places in the
16 Code.
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1 **58a-108. Principal place of administration.** (a) Without precluding other means for establishing
2 a sufficient connection with the designated jurisdiction, terms of a trust designating the principal
3 place of administration are valid and controlling if:

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

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

7 (b) A trustee is under a ~~continuing~~ duty to administer the trust at a place appropriate to its
8 purposes, its administration, and the interests of the beneficiaries. In determining the appropriate
9 place for the administration of the trust, consideration shall be given to the designation of the
10 settlor, the purposes of the trust, the interests of the beneficiaries and the manner and costs of trust
11 administration.

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

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

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

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

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

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

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

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

7 (f) In connection with a transfer of the trust's principal place of administration, the trustee may
8 transfer some or all of the trust property to a successor trustee designated in the terms of the trust
9 or appointed pursuant to K.S.A. 2004 Supp. 58a-704, and amendments thereto.

10 COMMENT
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12 The new language in subsection (b) was proposed by the Bankers. The new language gives
13 guidance to the duty stated in the first sentence of the subsection.

14 The Bankers proposed striking the first sentence of the subsection, but the PLAC did not
15 agree. The PLAC did strike the word "continuing" in the first sentence because it is unnecessary.

1 **58a-110. Others treated as qualified beneficiaries.** (a) A charitable organization expressly
2 mandated to receive distributions under the terms of a trust ~~or a~~ has the rights of a qualified
3 beneficiary under this Code, if the charitable organization, on the date the charitable organization's
4 qualification is being determined:

5 (1) is a distributee of trust income or principal;

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

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

9 ~~a~~
10 (b) A person appointed to enforce a trust created for the care of an animal or another noncharitable
11 purpose as provided in K.S.A. 2004 Supp. 58a-408 or 58a-409, and amendments thereto, has the
12 rights of a qualified beneficiary under this code.

13 ~~(b)~~ (c) The attorney general of this state has the rights of a qualified beneficiary with respect to a
14 charitable trust having its principal place of administration in this state.

15 COMMENT

16 NCCUSL, the Bar and the Bankers all proposed amendment to clarify the intent of subsection
17 (a). The effect of all the proposals is to exclude charitable organizations, which hold only remote
18 remainder interests, though they are named in the terms of the trust.

19 The amendment proposed was prepared by the Bankers, and the PLAC Committee is of the
20 opinion it more clearly states the intent of the subsection. The language stricken in subsection (a)
21 had a similar intent but could have been read more broadly.
22

1 **58-111. Nonjudicial settlement agreements.** (a) For purposes of this section, "interested persons"
2 means persons whose consent would be required in order to achieve a binding settlement were the
3 settlement to be approved by the court.

4 (b) Except as otherwise provided in subsection (c), interested persons may enter into a binding
5 nonjudicial settlement agreement with respect to ~~any matter involving a trust~~, the matters listed in
6 subsection (d).

7 (c) A nonjudicial settlement agreement is valid only to the extent it does not violate a material
8 purpose of the trust and includes terms and conditions that could be properly approved by the court
9 under this code or other applicable law.

10 (d) Matters that may be resolved by a nonjudicial settlement agreement are limited to:

11 (1) The approval of a trustee's report or accounting;

12 (2) the resignation or appointment of a trustee and the determination of a trustee's
13 compensation;

14 (3) transfer of a trust's principal place of administration; and

15 (4) liability of a trustee for an action relating to the trust.

16 (e) Any interested person may request the court to approve a nonjudicial settlement agreement, to
17 determine whether the representation as provided in article 3 of this code was adequate, and to
18 determine whether the agreement contains terms and conditions the court could have properly
19 approved.

20 COMMENT

21 Subsection (b) is amended as recommended by the Bankers. The language stricken ", any matter
22 involving a trust" is inconsistent with subsection (d).

1 **58a-411. Modification or termination of noncharitable irrevocable trust by consent.** (a) A
2 noncharitable irrevocable trust may be modified or terminated upon consent of the settlor and all
3 qualified beneficiaries, even if the modification or termination is inconsistent with a material
4 purpose of the trust. A settlor's power to consent to a trust's modification or termination may be
5 exercised by an attorney in fact under a power of attorney only to the extent expressly authorized
6 by the power of attorney or the terms of the trust; by the settlor's conservator with the approval of
7 the court supervising the conservatorship if an agent is not so authorized; or by the settlor's guardian
8 with the approval of the court supervising the guardianship if an agent is not so authorized and a
9 conservator has not been appointed. This subsection does not apply to irrevocable trusts created
10 before, or to revocable trusts that became irrevocable before, January 1, 2003.

11 (b) A noncharitable irrevocable trust may be terminated upon consent of all of the qualified
12 beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any
13 material purpose of the trust. A noncharitable irrevocable trust may be modified upon consent of all
14 of the qualified beneficiaries if the court concludes that modification is not inconsistent with a
15 material purpose of the trust.

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

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

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

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

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

4 COMMENT

5 Changes were proposed to subsection (a) by both NCCUSL and the Bar. While the changes were
6 different in their approaches, both dealt with the problem of the unintentional inclusion of the trust
7 estate in the settlors taxable estate.

8 In the comments to the NCCUSL proposal several options are discussed to amend subsection (a).
9 The PLAC has chosen language proposed by the Uniform Law Commissioners which makes the
10 subsection prospective and applicable only to irrevocable trusts created on or after the effective date
11 of the Code or to revocable trusts that become irrevocable on or after the effective date of the Code.

1 **58a-417. Combination and division of trusts.** (a) After notice to the qualified beneficiaries, a
2 trustee may combine two or more trusts into a single trust or divide a trust into two or more separate
3 trusts, if the result does not impair rights of any beneficiary or adversely affect achievement of the
4 purposes of the trust. The terms of each new trust created by a division under this section do not
5 have to be identical if the interest of each beneficiary is substantially the same under the terms of
6 the trust prior to its division and the combined terms of all trusts after the division. Two or more
7 trusts may be combined into a single trust if the interests of each beneficiary in the trust resulting
8 from the combination are substantially the same as the combined interests of the beneficiary in the
9 trusts prior to the combination. The trustee shall determine the terms controlling any trust after its
10 combination as authorized by this section. The trustee may make a division under this section by:

11 (1) Giving written notice of the division, not later than the 30th day before the date of a division
12 under this subsection, to each qualified beneficiary; and

13 (2) executing a written instrument, acknowledged before a notary public or other person authorized
14 to take acknowledgments of conveyances of real estate stating that the trust has been divided
15 pursuant to this section and that the notice requirements of this subsection have been satisfied.

16 (b) A trustee, in the written instrument dividing a trust, shall allocate trust property among the
17 separate trusts on a fractional basis by identifying the assets and liabilities passing to each separate
18 trust, or on any other reasonable basis. The trustee shall allocate undesignated trust property received
19 after the trustee has divided the trust into separate trusts in the manner provided by the written
20 instrument dividing the trust, or, in the absence of a provision in the written instrument, in a manner
21 determined by the trustee.

22 (c) The trustee may combine two or more trusts under this section by:

1 (1) Giving a written notice of the combination, not later than the 30th day before the effective date
2 of the combination, to each qualified beneficiary; and

3 (2) executing a written instrument, acknowledged before a notary public or other person authorized
4 to take acknowledgments of conveyances of real estate stating that the trust has been combined
5 pursuant to this section and that the notice requirements of this subsection have been satisfied.

6 (d) The trustee may divide or combine a testamentary trust after the will establishing the trust has
7 been admitted to probate, even if the trust will not be funded until a later date. The trustee may
8 divide or combine any other trust before it is funded if the instrument establishing the trust is not
9 revocable at the time of the division or combination.

10 COMMENT

11 The proposed amendment to subsection (a) was suggested by the Bar. The amendment is
12 intended to clarify that the provisions of trusts which can be merged or divided under this provision
13 do not have to be identical, if the interests of each beneficiary is substantially unchanged by the
14 division or merger. Similar language was included in Missouri's version of the UTC, which was
15 enacted in 2004.

1 **58a-501. Rights of beneficiary's creditor or assignee.** To the extent a beneficiary's interest is not
2 ~~protected by~~ subject to a spendthrift provision, the court may authorize a creditor or assignee of the
3 beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or
4 for the benefit of the beneficiary or other means. The court may limit the award to such relief as is
5 appropriate under the circumstances.

6 COMMENT

7 The amendment to this section was proposed by NCCUSL and is not intended to be substantive.
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1 **58a-506. Overdue distribution.** (a) In this section, "mandatory distribution" means a distribution
2 of income or principal which the trustee is required to make to a beneficiary under the terms of the
3 trust, including a distribution upon termination of the trust. The term excludes a distribution subject
4 to the exercise of the trustee's discretion whether or not the terms of the trust (i) include a support
5 or other standard to guide the trustee in making distribution decisions, or (ii) provide that the trustee
6 "may" or "shall" made discretionary distributions, including distributions pursuant to a support or
7 other standard..

8 (b) Whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary
9 may reach a mandatory distribution of income or principal, including a distribution upon termination
10 of the trust, if the trustee has not made the distribution to the beneficiary within a reasonable time
11 after the mandated distribution date.

12 COMMENT

13 New subsection (a) adds a definition of "mandatory distribution". No change in substance is
14 intended by the amendment. The amendment clarifies that a mandatory distribution is to be
15 understood in its traditional sense, such as provisions requiring that the beneficiary receive an
16 income or receive principal upon termination of the trust.

17 The Bankers suggested that if the amendment is adopted, the sections headnote should be
18 changed from "Overdue distribution" to "Overdue mandatory distribution".

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23 **58a-603. Settlor's powers; powers of withdrawal.** ~~(a) While a trust is revocable and the settlor has~~
24 ~~capacity to revoke the trust, rights of the beneficiaries are subject to the control of, and the duties~~
25 ~~of the trustee are owed exclusively to the settlor.~~

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

4 (c) (1) If a settlor of a revocable trust is or becomes an incapacitated person, on petition of the
5 settlor's legal representative, an adult member of the settlor's family or any interested person,
6 including a person interested in the welfare of the settlor, for good cause shown, the court may: order
7 the trustee to exercise or refrain from exercising the trustee's authority in a manner inconsistent with
8 the trustee's fiduciary responsibilities under the provisions of the trust; remove the trustee; require
9 the trustee to account; and issue such other orders as the court finds will be in the best interests of
10 the settlor.

11 (2)(a) The court may require any person petitioning for any such order to file a bond in such amount
12 and with such sureties as required by the court to indemnify either the trustee or the trust estate for
13 the expenses, including attorney fees, incurred with respect to such proceeding.

14 (b) None of the actions described in this section shall be taken by the court until after hearing upon
15 reasonable notice to the trustee, the settlor, and any legal representative of the settlor, such as a
16 conservator or attorney-in-fact under a durable power of attorney authorizing the attorney -in-fact
17 to act on the behalf of the settlor in such matters.

18 (c) If there is no legal representative of the settlor, the court shall appoint a guardian ad litem to
19 represent the settlor in such proceeding.

20 (d) In the event of an emergency as determined by the court, the court, without notice, may enter
21 such temporary order as seems proper to the court, but no such temporary order shall be effective

1 for more than 30 days unless extended by the court after hearing on reasonable notice to the persons
2 identified as herein provided.

3 COMMENT

4 Amendments were proposed to this section by NCCUSL, the Bar and the Bankers. This section
5 generally provides that while a trust is revocable, all rights that the trust's beneficiaries would
6 otherwise possess are subject to control of the settlor. However, the settlor's control is negated if
7 the settlor is incapacitated. Concern has been expressed that the section prescribes a different rule
8 for revocable trusts than for wills, and that the rules should be the same. In its 2004 amendments,
9 NCCUSL made the language relating to the incapacity limitation optional.

10 The Bar proposed striking the phrase "and the settlor has the capacity to revoke the trust". The
11 PLAC agreed that phrase should be stricken and further amended subsections (a) and (b) for
12 simplicity and clarity.

13 In addition the Bar proposed a number of additional subsections which relate to procedures to
14 be followed if the settlor of a revocable trust is, or becomes, disabled. The PLAC approved the
15 Bar's proposals, with minor editing and reorganization.

16 In subsection (c)(1) the phrase "incapacitated person" is used, it is defined at K.S.A. 2004 Supp.
17 77-201(31).

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19 While approving of the changes in subsections (b),(c) and (d), it is the position of the Bankers
20 that subsection (a) should not be amended.

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27 **58a-802. Duty of loyalty.** (a) A trustee shall administer the trust solely in the interests of the
28 beneficiaries.

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

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

7 (2) the transaction was approved by the court;

8 (3) the beneficiary did not commence a judicial proceeding within the time allowed by Section
9 1005;

10 (4) the beneficiary consented to the trustee's conduct, ratified the transaction, or released the
11 trustee in compliance with Section 1009; or

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

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

17 (1) the trustee's spouse;

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

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

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

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

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

8 (f) An investment by a trustee in securities of an investment company or investment trust to which
9 the trustee, or its affiliate, provides services in a capacity other than as trustee is not presumed to be
10 affected by a conflict between personal and fiduciary interests if the investment otherwise complies
11 with the prudent investor rule of [Article] 9. In addition to its compensation for acting as trustee,
12 the trustee may be compensated by the investment company or investment trust for providing those
13 services out of fees charged to the trust. If the trustee receives compensation from the investment
14 company or investment trust for providing investment advisory or investment management services,
15 the trustee must at least annually notify the person entitled under Section 813 to receive a copy of
16 the trustee's annual report of the rate and method by which that compensation was determined.

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

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

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

3 (2) payment of reasonable compensation to the trustee;

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

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

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

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

11 COMMENT

12 Both NCCUSL and the Bar recommend this section of the Code be amended. The PLAC
13 approved the change proposed by the Uniform Law Commissioners.

14 Subsection (f) creates an exception to the prohibition on self-dealing for certain investments in
15 mutual funds in which the trustee, or its affiliate, provides services in a capacity other than as
16 trustee. As originally drafted, Section 802(f) provided that the exception applied only if the
17 investment complied with the Uniform Prudent Investor Act and the trustee notified the qualified
18 beneficiaries of the additional compensation received for providing the services. However, the
19 Uniform Prudent Investor Act itself contains its own duty of loyalty provision (Section 5), thereby
20 arguable limiting or undoing this exception to the UTC's loyalty provision. The amendment, by
21 providing that the investment does not violate the duty of loyalty under the UTC if it "otherwise"
22 complies with the Uniform Prudent Investor Act, is intended to negate the implication that the
23 investment must also comply with the Uniform Prudent Investor Act's own duty of loyalty
24 provision.

1 **58a-813. Duty to inform and report.** (a) A trustee shall keep the qualified beneficiaries ~~and~~
2 ~~permissible current distributees of the trust income or principal~~ reasonably informed about the
3 administration of the trust and of the material facts necessary for them to protect their interests.
4 Unless unreasonable under the circumstances, a trustee shall promptly respond to a qualified
5 beneficiary's ~~and a permissible current distributee's~~ request for information related to the
6 administration of the trust.

7 (b) ~~A trustee~~ Except as otherwise provided under the terms of the trust, a trustee shall

8 (1) Upon request of a qualified beneficiary ~~or a permissible current distributee,~~ shall promptly
9 furnish to the qualified beneficiary ~~or permissible current distributee~~ a copy of the portions of the
10 trust instrument relating to the interest of the qualified beneficiary;

11 (2) within 60 days after accepting a trusteeship, shall notify the qualified beneficiaries ~~and~~
12 ~~permissible current distributees~~ of the acceptance and of the trustee's name, address, and telephone
13 number;

14 (3) within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable
15 trust, or the date the trustee acquires knowledge that a formerly revocable trust has become
16 irrevocable, whether by the death of the settlor or otherwise, shall notify the qualified beneficiaries
17 ~~and permissible current distributees~~ of the trust's existence, of the identity of the settlor or settlors,
18 of the right to request a copy of the trust instrument and of the right to a trustee's report as provided
19 in subsection (c); and

20 (4) shall notify the qualified beneficiaries ~~and permissible current distributees~~ in advance of any
21 change in the method or rate of the trustee's compensation.

1 ~~(c) A trustee shall send to the distributees or permissible current distributees of trust income or~~
2 ~~principal, and to other qualified beneficiaries who request it, at least annually and at the termination~~
3 ~~of the trust, a report of the trust property including liabilities, receipts and disbursements, including~~
4 ~~the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their~~
5 ~~respective market values, and if requested, the trust's association of investment management and~~
6 ~~research compliant rate of return. Upon a vacancy in a trusteeship, unless a cotrustee remains in~~
7 ~~office, a report must be sent to the qualified beneficiaries by the former trustee. A personal~~
8 ~~representative, conservator, or guardian may send the qualified beneficiaries and permissible current~~
9 ~~distributees a report on behalf of a deceased or incapacitated trustee.~~

10 (5) At least annually, send a trust report for the trust's most recent fiscal year to each qualified
11 beneficiary who actually received a distribution during such fiscal year. The trustee shall also send
12 a trust report to any additional qualified beneficiary who would have been entitled to receive a
13 distribution during the fiscal year and who requests a copy of the trust report. The trust report shall
14 include a list of the trust assets, and, if feasible, their market values; liabilities, receipts and
15 disbursements; the source and amount of the trustee's compensation; and if requested, the trust's
16 investment rate of return and whether the rate complies with standards established by the
17 Association of Investment Management and Research (AIMR). Upon a vacancy in a trusteeship,
18 unless a cotrustee remains in office, a trust report must be sent to the qualified beneficiaries by the
19 former trustee. A personal representative, conservator, or guardian may send the qualified
20 beneficiaries a trust report on behalf of a deceased or incapacitated trustee.

21 ~~(c) A qualified beneficiary or permissible current distributee may waive the right to a trustee's report~~
22 ~~or other information otherwise required to be furnished under this section. A qualified beneficiary~~

1 ~~or permissible current distributee~~, with respect to future reports and other information, may
2 withdraw a waiver previously given.

3 (d) The provisions of this section are inapplicable to persons qualified beneficiaries other than a
4 surviving spouse so long as a the surviving spouse is ~~or may be entitled to receive income or~~
5 ~~principal distributions from a~~ qualified beneficiary of the trust, or holds any power of appointment
6 ~~therein over the entire trust estate~~, and where ~~any or all other~~ qualified beneficiaries are the issue
7 of the surviving spouse.

8 (e) At the termination of a trust, the trustee shall send a trust report to each qualified beneficiary who
9 will be entitled to receive a distribution from the trust. Such trust report shall include the
10 information required by subsection (b)(5), except information relating to receipts and disbursements
11 need only be prepared for the period from the date of the event that caused the termination of the
12 trust.

13 (f) ~~As used in this section "permissible current distributee" means a person presently entitled to~~
14 ~~receive, subject to the discretion of the trustee, income or principal.~~

15 COMMENT

16 Amendments to this section were proposed by NCCUSL, the Bar and the Bankers.

17 Subsection (b)(1) previously required a trustee to send a copy of the trust instrument to all
18 qualified beneficiaries who requested it. The section was amended to limit this duty to permit the
19 trustee to provide only those portions of the trust instrument that relate to the qualified beneficiary's
20 interest in the trust. This provision allows the trustee to protect the privacy of other provisions of
21 the trust instrument that are unrelated to the interests of the qualified beneficiary who requested a
22 copy of the trust instrument. This change was primarily drafted to limit disclosure to legatees and
23 devisees, who typically have no beneficial interest in distributions to other legatees or devisees or
24 in the residue of the trust.

25 The PLAC restructured former subsection (c) by splitting it into a new subsection (b)(5) and
26 a new subsection (e). Subsection (b)(5) defines a trustee's duties with respect to sending annual
27 trust reports to qualified beneficiaries. New subsection (e) defines a trustee's duties with respect

1 to sending trust reports upon the termination of a trust. The PLAC created a separate subsection
2 because the types of information that should be sent to qualified beneficiaries in these two
3 circumstances are quite different.

4 Subsection (b)(5) also changes which qualified beneficiaries must receive annual trust
5 reports and the types of information that must be included in the trust reports. Qualified
6 beneficiaries who have actually received a distribution will continue to automatically receive an
7 annual trust report that covers the period in which the beneficiary received the distribution. In
8 addition, any qualified beneficiary who would have been entitled to receive a distribution, but did
9 not receive such a distribution (usually a discretionary distribution) could request a copy of the trust
10 report. The PLAC believes that this provision will limit the mailing of trust reports to beneficiaries
11 who have only remote interests in the trust, but still allows them the opportunity to obtain the
12 information necessary to protect their interests.

13 As amended, subsection (b)(5) limits the trustee's duty to provide the trust's investment rate
14 of return. Formerly, a trustee was obligated to provide a rate of return that complied with the
15 standards established by the Association of Investment Management and Research (AIMR). This
16 section now requires the trustee to disclose whether or not the reported return calculation complies
17 with AIMR standards. The PLAC believes that mandating AIMR-compliant returns would be
18 burdensome to trustees, particularly individual trustees.

19 New subsection (e) defines the requirements for sending trust reports upon termination of
20 a trust. The only substantive change is to limit the transactions disclosed in the trust report to
21 receipts and disbursements that occurred after the event that caused the termination of the trust,
22 typically the death of a settlor. The PLAC believes this enables the trustee to protect the privacy of
23 the settlor regarding transactions prior to his or her death. In the event that a qualified beneficiary
24 questions any transactions by a trustee prior to such termination event, the beneficiary may seek
25 disclosure through a judicial proceeding.

26 References to "permissible current distributee" throughout Section 813 were removed
27 because the PLAC believes it is redundant. Permissible current distributees is a class of
28 beneficiaries that is included in the definition of "qualified beneficiaries" in Section 103(12).
29 Subsection (f), which defined permissible current distributee is stricken.

30 A key issue considered by the PLAC is this section's retroactive application to pre-existing
31 trust instruments. Despite proposals by NCCUSL the Bar and the Bankers to limit the section's
32 retroactivity, the PLAC declined to adopt these proposals. The primary rationale is that, upon
33 adoption of the UTC in Kansas as of January 1, 2003, the entire act was made retroactive, and to
34 now apply a different set of rules after three years would create confusion in the law.

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38 **58a-1008. Exculpation of trustee.** (a) A term of a trust relieving a trustee of liability for breach of

1 trust is unenforceable to the extent that it:

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

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

6 (b) ~~An~~ Unless the settlor was represented by an attorney not employed by the trustee with respect
7 to the trust containing the exculpatory term, an exculpatory term drafted or caused to be drafted by
8 the trustee is invalid as an abuse of a fiduciary or confidential relationship unless : (1) the trustee
9 proves that the exculpatory term is fair under the circumstances and that its existence and contents
10 were adequately communicated to the settlor; or (2) the settlor was represented by an attorney not
11 employed by the trustee with respect to the trust.

12 COMMENT

13 Both the Bar and the Bankers recommended modifying subsection (b) to provide that if a settlor
14 was represented by an attorney not employed by the trustee, a provision exculpating the trustee from
15 liability would not have to be determined "fair under the circumstances" and adequately
16 communicated to the settlor to be given efficiency. The PLAC agreed.