THE NEBRASKA UNIFORM TRUST CODE FROM THE TRENCHES: A PRACTITIONER'S GUIDE TO UNDERSTANDING NEBRASKA'S NEW UNIFORM TRUST CODE

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I. INTRODUCTION

The National Conference of Commissioners on Uniform State Laws adopted a Uniform Trust Code ("UTC") in 2000. Changes were made to the original act in 2001. The UTC was first introduced in the 2001 Nebraska Legislature as Legislative Bill 361. At that time, the Nebraska Legislature appointed a study committee to review the proposed legislation. A report of that study committee, pursuant to 2002 Legislative Resolution 367, was presented to the 2003 Legislature's Banking, Insurance and Commerce Committee. The 2003 Legislature passed Legislative Bill 130 on March 14, 2003 and the governor signed the bill on March 20, 2003.[1]

When you are researching an issue under the Nebraska Uniform Trust Code ("Nebraska UTC"), the place to start is the report of the interim study committee called "Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code."[2] The author suggests that this report will be very helpful in future years and that this report should be printed and retained by any Nebraska attorney who handles trusts.[3] The committee report contains the Uniform Trust Code with all of its comments and also includes Nebraska comments. The Nebraska comments are organized into seven different categories. There were five changes in the legislation enacted in Nebraska from the recommendations contained in the committee report.[4]

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1. The slip law is *available at*: http://www.unicam.state.ne.us/Legal/SLIP_LB130.pdf.

2. The report is *available at* http://www.nebar.com/trustcode/barhome.htm.

3. Information available on the internet disappears and websites are often reorganized. This problem has become so widespread that a website has been developed to archive the internet. "The Internet Archive is building a digital library of Internet sites and other cultural artifacts in digital form. Like a paper library, we provide free access to researchers, historians, scholars, and the general public."

4. These five changes are summarized in a memorandum to the members of the banking, commerce and insurance committee from William A. Marieanau, legal counsel for the committee, dated April 2003 regarding amendments to L.B. 130. This memorandum is part of the official record of the legislative committee. This memorandum to-

There are other sources of information for the UTC. For example, the UTC itself appears on the internet.[5] This official version of the UTC contains extensive commentary. The commentary is helpful in analyzing the law of trusts throughout the nation and in understanding the UTC. However, this website contains the UTC as it is modified from time to time. There are ongoing revisions to the UTC. The drafter of a trust must be careful to determine whether or not a particular provision of the UTC was adopted in Nebraska. The drafter must also determine whether or not the language used is the same. The comments are also contained in the Nebraska legislative report that is described above.

There are several uniform acts that have been adopted in Nebraska that are unaffected by or have had only minor amendments made to them by Legislative Bill 130 ("L.B. 130") in adopting the Nebraska UTC.[6] The first of these is the Uniform Statutory Rule Against Perpetuities Act.[7] The only changes to this act that the Nebraska UTC made were alterations of some statutory cross references.[8] Although the Uniform Statutory Rule Against Perpetuities Act in Nebraska was not modified by the adoption of the Nebraska UTC, it was modified by the 2002 legislature[9] which added to section 76-2005(9); a statute permitting the creation of dynasty trusts in Nebraska. In other words, the Nebraska Statutory Rule Against Perpetuities Act does provide that a trust in which the governing instrument states that the Rule Against Perpetuities does not apply to the trust and which complies with other statutes is not subject to the Rule Against Perpetuities. This means there is no time in which the trust assets need to vest outside of the trust. This applies only to trusts created by will or inter vivos agreement executed or amended on or after July 20, 2003 and all trusts created by exercise of power of appointment granted under instruments executed or amended on or after July 20, 2003.[10]

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gether with a copy of L.B. 130 is also available under Tab XIV of the Materials from the Estate and Business Planning Seminar sponsored by the University of Nebraska College of Law and School of Accountancy on May 15 and 16, 2003.

5. The UTC is *available at* http://www.law.upenn.edu/bll/ulc/uta/2001final.htm.

6. L.B. 130 is the legislative bill in the 2003 session of the Nebraska Legislature which includes the Nebraska version of the Uniform Trust Code. This legislative bill is on the Nebraska Legislature's website *available at*: http://www.nebar.com/trustcode/barhome.htm.

7. NEB. REV. STAT. §§ 76-2001 - 76-2008 (1996).

8. NEB. REV. STAT. § 76-2004 (1996); NEB. REV. STAT. § 76-2006 (1996) modified by §§ 138 and 139 of 2003 L.B. 130.

9. L.B. 385, Neb. Unicameral, 97th Leg., 1st Sess. (2002).

10. NEB. REV. STAT. § 76-2005(9) (2002). This topic created quite a discussion in the study committee.

The next act is the Uniform Testamentary Additions to Trust Act.[11] The comment to the UTC states that the Uniform Testamentary Additions to Trust Act is part of the Uniform Probate Code because it validates provisions in wills; as such, it is not considered part of the UTC. The next act is the Nebraska Uniform Principal and Income Act.[12] Nebraska adopted the 1997 version of the Uniform Principal and Income Act in 2001. The Principal and Income Act applies to both estates and trusts. Allocation of principal and income is made in accordance with the act, except as provided by terms of the trust. Provisions in trust agreements, which determine the share of income or principal, should be compared to the Principal and Income Act.

The Uniform Probate Code was originally approved in 1969. Nebraska has generally adopted the 1969 version of the Uniform Probate Code with modifications.[13] There have been a number of changes to provisions in the Nebraska Probate Code based upon the Nebraska UTC. Procedures that formerly applied to trusts that were contained in the Uniform Probate Code have been placed into the Nebraska UTC. Nebraska had also adopted the Nebraska Uniform Prudent Investor Act, which now has been incorporated into Article 9 of the Nebraska UTC.

The Nebraska Uniform Trust Code becomes active on the second of January 1 after the operative date of the act.[14] Except as otherwise provided by the Nebraska UTC, the Nebraska UTC applies to all trusts created before, on or after the operative date of the UTC. The Nebraska UTC applies to all judicial proceedings concerning trusts commenced on or after the operative date of the act. The Nebraska UTC applies to judicial proceedings concerning trusts commenced before the operative date of the act. However, if a court is able to find that the application of a particular provision of the Nebraska UTC would substantially interfere with the effective conduct of the judicial proceedings or prejudice rights of the parties, the court may disregard the particular provisions of the Nebraska UTC and apply the former law.[15] Section 30-38,110 of the Nebraska Revised Statutes is section 1106 of the Nebraska UTC.[16]

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11. NEB. REV. STAT. §§ 30-3601 - 30-3604 (2002).

12. NEB. REV. STAT. §§ 30-3116 - 30-3149 (2002).

13. NEB. REV. STAT. §§ 30-2201 - 30-2902 (1995) (the Nebraska Probate Code).

14. L.B. 130, Neb. Unicameral, 98th Leg., 1st Sess. (2003).

15. *Id.*

16. An article will be appearing in the University of Nebraska Law Review examining the constitutionality of the provisions of § 1106 of the Uniform Trust Code under both Nebraska and federal law and is scheduled for publication in the fall of 2003. *Constitutional and Other Issues in the Application of Nebraska Uniform Trust Code to Pre-existing Trusts*, 82 NEB. L. REV. ___ (No. 2) (2003).

II. RECOMMENDED READING ORDER FOR THE NEBRASKA UNIFORM TRUST CODE

The purpose of a reading order, with the particular sections read in the order listed below, is to allow the reader to conceptualize how the Nebraska Uniform Trust Code works.

Neb. Rev. Stat. §	Title
30-3801	Code, How Cited
30-3802	Scope
30-3803	Definitions
30-3805	Default and Mandatory Rules
30-3827	Methods of Creating Trusts
30-3828	Requirements for Creation
30-3829	Trusts Created in Other Jurisdictions
30-3830	Trust Purposes
30-3853	Capacity of Settlor of Revocable Trust
30-3854	Revocation or Amendment of Revocable Trust
30-3855	Settlor's Powers, Powers of Withdrawal
30-3866	Duty to Administer Trust
30-3867	Duty of Loyalty
30-3878	Duty to Inform and Report
30-3880	General Powers of Trustee
30-3890	Remedies for Breach of Trust
30-3897	Exculpation of Trustee
30-38,109	Electronic Records and Signatures
30-38,110	Application to Existing Relationships

Of particular importance is section 105[17] of the Nebraska UTC, which contains a set of default provisions. Ordinarily, any part of the Nebraska UTC can be overridden by the "terms of the trust."[18] However, there are a number of provisions which can not be overridden by terms of the trust.[19] This reflects a change from current Nebraska law. Other than a few examples from case law, neither the Nebraska statutes nor case law have provided for mandatory rules that cannot be changed by the settlor. One Nebraska case law exception is that the use of the words "absolute, uncontrolled discretion" has not been interpreted literally. Historically, there have been some limits on the use of such a phrase.[20]

17. NEB. REV. STAT. § 30-3805 (Supp. 2003).

18. NEB. REV. STAT. § 30-3803(18) (Supp. 2003) defines "terms of the trust" as "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." In other words, extrinsic evidence may be use if admissible in a judicial proceeding.

19. NEB. REV. STAT. § 30-3805(b).

20. "Courts are always reluctant to interfere with the exercise of a discretion lodged in a trustee. Courts of equity may, however, intervene on behalf of a beneficiary

III. SCOPE (SECTION 102)

Section 102 of the Nebraska UTC provides for the scope of coverage of the act.[21] The statute provides "[t]he Nebraska Uniform Trust Code applies to express trusts, charitable or non-charitable, and trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust."[22]

A. EXPRESSED TRUSTS

Expressed trusts do not always arise in an estate planning or other donative context. A trust created pursuant to a divorce decree would be included under the Nebraska UTC. For example, the Nebraska UTC would cover a trust created to provide for the benefit of a child's education at the collegiate level, which was made pursuant to the requirements of the divorce decree.[23] Another example of a trust which would be subject to the Nebraska UTC, to the extent not supplanted by federal law, is a trust created by a parent, guardian or a court under 42 U.S.C. § 1396p(d)(4)(A). This type of trust contains assets belonging to an individual who is under age sixty-five and who is disabled as defined in the Medicaid Act.[24] This trust is established for the benefit of the individual by a parent, grandparent, legal guardian or a court. The trust provides for the distribution to the state of all amounts remaining in the trust upon the death of the individual up to an amount equal to the total medical assistance paid on behalf of the individual. Except to the extent supplanted by the requirements of the federal Medicaid law, the Nebraska UTC would apply to such a trust.

B. RESULTING AND CONSTRUCTIVE TRUSTS

Resulting trusts and constructive trusts are actually a remedy. They are not an expressed trust and thus are not included within the scope of the Nebraska UTC. In other words, the Nebraska UTC does

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if the evidence discloses that a trustee's denial of the relief sought might be influenced by self-interest." Scully v. Scully, 162 Neb. 368, 375, 76 N.W.2d 239, 245 (1956). The extent of the discretion of the trustee is determined by the trust instrument, but if the trustee abuses that discretion, the court can take action. Where the settlor provides that the trustee shall have uncontrolled discretion in carrying out the purpose of the trust, the words "uncontrolled discretion" are ordinarily construed as merely dispensing with the standard of reasonableness. *In re* Sullivan's Will, 144 Neb. 36, 39, 12 N.W.2d 148, 150 (1943). "Thus, the trustee will not be permitted to act dishonestly, or from some motive other than the accomplishment of the purposes of the trust, or ordinarily to act arbitrarily without an exercise of his judgment."

21. NEB. REV. STAT. § 30-3802 (Supp. 2003).
22. NEB. REV. STAT. § 30-3802.
23. UNIF. TRUST CODE § 102 cmt., 7C U.L.A. 13 (Supp. 2003).
24. 42 U.S.C. § 1382c(a)(3) (2001).

not apply to a resulting trust or to a constructive trust. Because these remedies are equitable, if a resulting trust or a constructive trust is to be declared, the action must be filed in the district court.

C. Testamentary Trusts

A testamentary trust is an expressed trust. It is not a trust until the death of the decedent. Creation of a testamentary trust (if it is not a living trust) is made pursuant to the law relating to wills. If the decedent leaves a will that is determined to be invalid, any testamentary trust created by that will is also invalid. Once the testamentary trust is established after the death of the decedent and is operating, the trust will be subject to the Nebraska UTC.

The applicability of the Nebraska UTC to testamentary trusts is not as clear as the fact that the Nebraska UTC does not apply to a resulting or a constructive trust. To some extent, the Nebraska Probate Code applies to a testamentary trust. For example, a distributee is defined under the Nebraska Probate Code, section 30-2209(11), to include a testamentary trustee. A beneficiary of a testamentary trust, to whom the trustee has distributed property received from a personal representative, is also defined to be a distributee of the personal representative.[25] This statute also provides that for purposes of this definition a testamentary trustee includes a trustee to whom assets are transferred by will, to the extent of the devised assets. It is possible for the revocable living trust to be the beneficiary under a will. To the extent that assets are transferred to the living trust by will, it is treated under the Nebraska Probate Code as a testamentary trust.[26]

The Nebraska Probate Code permits private agreements among beneficiaries under an estate. This applies whether there is a will or the estate is intestate.[27] For purposes of this section, the testamentary trustee is considered to be a beneficiary of the estate. However, the trustees of the testamentary trust are not relieved of any duties owed to the beneficiaries of the trust. The trustee's fiduciary liabilities and duty of loyalty would be determined by the Nebraska UTC.

A compromised agreement can be presented to a court for the purposes of securing court approval. This is a compromised agreement with regard to the estate. The trustee of any affected testamentary trust is an interested person for the purposes of dealing with the court approval of a compromise.[28]

25. Neb. Rev. Stat. § 30-2209(11) (1995).
26. Neb. Rev. Stat. § 30-2209(11).
27. Neb. Rev. Stat. § 30-24,110 (1995).
28. Neb. Rev. Stat. § 30-24,124 (1995).

The Nebraska Renunciation Statute does permit the appropriate court to authorize a testamentary trust's trustee to renounce a power or restriction that may defeat or impair the accomplishment of the purposes of the trust.[29] Notice must be given to qualified beneficiaries as defined in the Nebraska UTC.[30]

IV. DEFINITIONS (SECTIONS 103)

Most of the definitions involved in the Nebraska UTC are contained within section 103. This particular section is extremely important and it should be carefully read.

A. BENEFICIARY; QUALIFIED BENEFICIARY; OTHERS TREATED AS QUALIFIED BENEFICIARIES (SECTION 110)

There is a major distinction in the Nebraska Uniform Trust Code between a "beneficiary" and a "qualified beneficiary." A beneficiary means a person that has a present or future beneficial interest in a trust, whether vested or contingent, or someone, who, in a capacity other than that of trustee, holds a power of appointment over trust property.[31] Anyone who might be an actual beneficiary in the future fits within the definition of beneficiary. For example, if a trust created by one spouse names the surviving spouse as a lifetime beneficiary to receive interest and principal distributions and also names the children as remainder beneficiaries if they survive the surviving spouse, then grandchildren and all other descendants are considered beneficiaries under this definition. Furthermore, a great-grandchild could be a beneficiary. If both the child and the grandchild, who were the ancestors of the great-grandchild, died before the surviving spouse, that great-grandchild receives a remainder distribution and thus fits within the literal definition of beneficiary. This applies whether or not the great-grandchild has yet been conceived. Knowing this definition of beneficiary becomes very important in understanding the rules of virtual representation under Article 3 of the Nebraska UTC.

A "qualified beneficiary" must first be a beneficiary.[32] If a person is not a beneficiary, then he or she cannot be a qualified beneficiary (there is an exception where certain beneficiaries are given the rights of a qualified beneficiary).[33] Determining whether or not a benefici-

29. NEB. REV. STAT. § 30-2352(a)(3) (1995). Please note that this section is modified by 2003 L.B. 130 § 127.

30. NEB. REV. STAT. § 30-3803 (Supp. 2003).

31. NEB. REV. STAT. § 30-3803(2) (Supp. 2003).

32. NEB. REV. STAT. § 30-3803(12).

33. *See* NEB. REV. STAT. § 30-3810 (Supp. 2003) (noting parties which are treated as qualified beneficiaries).

ary is a qualified beneficiary depends on the date that the determination of qualification is being made. The following factors are considered in ascertaining the status of a qualified beneficiary as of the date of determination:

1. Whether the beneficiary is a distributee or permissible distributee of either trust income or principal;
2. Whether the beneficiary would be a distributee or permissible distributee of trust income or principal if those persons who are distributees in the proceeding clause had their interest terminated on the date that qualification is being determined; or
3. Whether the beneficiary would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.[34]

The comments to section 103 of the UTC state that the reason that it is so important to determine who is a qualified beneficiary is:

> [d]ue 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'. . .to limit the class of beneficiaries to whom certain notices must be given or consents received.[35]

For example, if the trustee intends to transfer the principal place of administration the notice only needs to go to the qualified beneficiaries.[36]

Those beneficiaries who are the current mandatory or permissive beneficiaries of income or principal from the trust, together with those who might be termed the first-line remainderman, are considered qualified beneficiaries. These are the beneficiaries who would become eligible to receive distributions if the current beneficiaries' interests were terminated on that date or if the trust itself were terminated on that date.[37]

Perhaps some examples can help in our discussion. We will use the same example previously used to determine who is a beneficiary. We have a surviving spouse as the current distributee of income and principal with the children being the first-line remaindermen. The result is that the qualified beneficiaries are the surviving spouse and the

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34. NEB. REV. STAT. § 30-3803(12).

35. UNIF. TRUST CODE § 103 cmt., 7C U.L.A. 20 (Supp. 2003); NEB REV. STAT. § 30-3803.

36. NEB. REV. STAT. § 30-3808(d) (Supp. 2003).

37. NEB. UNICAMERAL, *Banking, Insurance and Commerce Committee: Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code*, LR 367, 16-17 (Dec. 2002) (discussing changes in Nebraska law under section 103).

children. Grandchildren and other decedents are *beneficiaries* but not *qualified beneficiaries.*

The more problematic situation, in determining who the qualified beneficiaries are, comes in the case of a discretionary trust. Sometimes, the family trust or unified credit trust provides that the income may be distributed among the surviving spouse and the children. In that case, the surviving spouse and the children all are permissible distributees meeting the requirements of Nebraska UTC section 103.[38] As such, those who would receive if the trust terminated on that date would be the same class of persons. However, the persons who would receive if the current beneficiaries died on that date would be the grandchildren. In this particular case, the qualified beneficiaries would be the surviving spouse, the children and the grandchildren. Under these circumstances, it is quite likely that we will have minor, unborn or unascertained qualified beneficiaries.

A charitable trust means a trust or a portion of a trust created for a charitable purpose described in section 30-3831(a).[39] In the standard split-interest charitable remainder trust created to comply with federal tax law, the charity receives the remainder. This trust seems to fit within the language of a "portion" of the "trust" and thus this trust would be considered to be a charitable trust and subject to the rules of a charitable trust as well as being subject to the rules relating to non-charitable trusts for the portion of the trust held by non-charitable beneficiaries. This interpretation of the intention of the drafters of the UTC is confirmed by the comments to the UTC which state that "a split-interest trust is subject to two sets of provisions, one applicable to the charitable interest, the other the noncharitable."[40]

The UTC does not define who has the capacity to be a beneficiary. The comments state that any person with capacity to take and hold legal title to property has capacity to be a beneficiary.[41] A corporation or a limited liability company have the authority under Nebraska state law to hold title to property and they can be beneficiaries. A trust is not a separate legal person and thus could not be a beneficiary of a different trust. However, a trustee of a second trust can be a beneficiary of the first trust. For example, the following distribution could be made validly to the named beneficiary who is a trustee:

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38. NEB. REV. STAT. § 30-3803(12)(a).

39. NEB. REV. STAT. § 30-3803(3).

40. NEB. UNICAMERAL, *Banking, Insurance and Commerce Committee: Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code*, LR 367, 15 (Dec. 2002) (discussing changes in Nebraska law under section 103).

41. NEB. UNICAMERAL, *Banking, Insurance and Commerce Committee: Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code*, LR 367, 14 (Dec. 2002) (discussing changes in Nebraska law under section 103).

> Upon the death of the Settlor, the trustee of this trust, the Thomas Q. Test Trust dated January 4, 2005, shall distribute the sum of $50,000.00 to Violet Z. Test, as Trustee of the Maxine N. Test Trust dated January 2, 2005, as that trust is amended. If Violet Z. Test is not then the trustee of the Maxine N. Trust, then the distribution shall be made to the trustee who is serving as trustee of that trust when the distribution or distributions are made. If the Maxine N. Test Trust is revoked before the death of the Settlor, then this distribution shall lapse.

The UTC also does not deal with how the beneficiary's interest is ended. This is generally determined by the terms of the trust or by the law of the state. While normally a beneficial interest is terminated by death, it is possible that a beneficial interest is held by a beneficiary and that it is subject to the will of the beneficiary or the laws of descent and distribution.[42] For example, if under the terms of the trust the interest of a remainder beneficiary vests in that beneficiary and is not subject to other conditions subsequent, such as being divested upon death, then that remainder interest may be subject to the will of the beneficiary. If the beneficiary dies before the lifetime beneficiary has died, the remainder interest may need to be probated. For an example of an interest being terminated by the death of a beneficiary and also the interest not being terminated by the death of the beneficiary, look at the following clause:

> After the death of the Settlor, the income of the trust shall be distributed to the Settlor's husband for the remainder of his life. The remainder interest in the trust shall be distributed to the Settlor's daughter upon the death of the Settlor's husband. If the Settlor's daughter does not survive the Settlor and if the Settlor's daughter has no descendants surviving her, then the remainder interest in the trust shall be distributed to ABC Charity. If the Settlor's daughter survives the Settlor, but if she does not survive the Settlor's husband, then the remainder interest in the trust shall be distributed according to the terms of the Settlor's daughter's will.[43]

In one case, the interest of the daughter terminates, if she does not survive her mother. In the other case, the interest vests upon the death of the mother if the daughter is then surviving. The daughter's will controls the disposition of the trust assets upon the death of the Settlor's husband if the daughter survives her mother.

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42. NEB. UNICAMERAL, *Banking, Insurance and Commerce Committee: Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code*, LR 367, 15 (Dec. 2002) (discussing changes in Nebraska law under section 103).

43. The author does not recommend this particular type of disposition. It is used for example purposes only.

B. OTHER DEFINED TERMS

"Interests of the beneficiaries" means the beneficial interest provided in the terms of the trust.[44] However, the "terms of the trust" may include outside evidence of the settlor's intent regarding a trust's provisions. "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.[45]

A "Settlor" means a person, including a testator, who creates, or contributes property to a trust.[46] Because the definition of settlor can include a testator, to some extent the trust created by the terms of a will are subject to the UTC. That trust may also be subject to the Nebraska Probate Code. If there is more than one person who 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 that another person has the power to revoke or withdraw that portion.

For example, an adult child creates a living trust which is funded by the adult child. The child's mother uses her will to fund the living trust created by the child. The living trust is revocable. Under these circumstances, only the adult child is considered a settlor. Although the trust funds were contributed by the mother, the mother cannot withdraw the funds, so she is not a settlor. Determining who the settlor is will often be extremely important because the trustee's responsibilities to the beneficiaries while the trust is revocable are owed to the settlor rather than to the beneficiaries.[47]

C. POWER OF APPOINTMENT

A term which is not defined in the UTC is "power of appointment." Under common law, the holder of a power of appointment is not considered a trust beneficiary. However, they are considered to be trust beneficiaries under the UTC. Holders of powers of appointment are included as beneficiaries because the drafters believed the holders' interests are significant enough that they should be afforded the rights

44. NEB. REV. STAT. § 30-3803(7).

45. NEB. REV. STAT. § 30-3803(18).

46. NEB. REV. STAT. § 30-3803(15).

47. NEB. REV. STAT. § 30-3855 (Supp. 2003). Remember that under section 30-3855(c) while a power of withdrawal is exercisable, the holder of that power of withdrawal has the same rights as the settlor of the revocable trust to the extent the property of the trust is subject to the power.

of beneficiaries.[48] A power of appointment is defined in state property law and is not based on federal tax law.

A power of appointment is the authority to designate the recipients of beneficial interests in all or part of the trust property.[49] A power of appointment is either general or non-general and is either presently exercisable or not presently exercisable. A general power of appointment is a power of appointment which is 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.[50] If a power is not general it is a non-general power. Powers of appointment may be held in a fiduciary or in a non-fiduciary capacity.

Practitioners must also remember that a power of appointment may be exercisable by will or exercisable by a lifetime instrument. The terms of the trust control the exercise of the power of appointment. A power exercisable by will is obviously not a present power of appointment.

The phrase "power of appointment" is used in determining the meaning of "power withdrawal" which means a presently exercisable general power of appointment other than a power exercisable only upon consent of the trustee or person holding an adverse interest.[51] A general power of appointment exercisable at a future date is not a "power of withdrawal" until the date comes that the general power of appointment is exercisable. If the general power of appointment is conditioned on the occurrence of an event which never occurs, then it is never a "power of withdrawal." Please note that the holder of a power of withdrawal has the rights of the settlor of a revocable trust while the power may be exercised.[52]

V. KNOWLEDGE (SECTION 104)

A person is considered to have knowledge of a fact if that person has actual knowledge of it, has received a notice or notification of the fact, or from all of the facts and circumstances known to the person at the time in question has reason to know it.[53]

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48. NEB. UNICAMERAL, *Banking, Insurance and Commerce Committee: Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code*, LR 367, 14 (Dec. 2002) (discussing changes in Nebraska law under section 103).

49. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 11.1 (1986).

50. NEB. UNICAMERAL, *Banking, Insurance and Commerce Committee: Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code*, LR 367, 14 (Dec. 2002) (discussing changes in Nebraska law under section 103). *See also* RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 11.4 (1986).

51. NEB. REV. STAT. § 30-3803(10).

52. NEB. REV. STAT. § 30-3855(c).

53. NEB. REV. STAT. § 30-3805(a) (Supp. 2003).

If the person involved is a member of an organization that conducts activity through employees, than notice or knowledge of a fact involving a trust applies only from the time that the employee having responsibility to act for the trust has received notice or would have received notice if the organization had exercised reasonable diligence. If there are reasonable routines established for communicating significant information to the employee having responsibility to act for the trust and there is reasonable compliance with the routines, then the reasonable diligence requirement has been met.[54] The initial portion of the definition of knowledge is similar to that in the Nebraska Uniform Commercial Code.[55]

VI. MANDATORY AND DEFAULT PROVISIONS (SECTION 105)

Section 105 generally states that the Nebraska UTC provides default provisions for trusts. The trust agreement can generally use provisions in the trust which differ from the default provisions in the statutes. If there is a question about the trust provisions, we first look at the terms of the trust; then we look at the Nebraska UTC provisions.

Terms of the trust control, except for the sixteen items listed under section 30-3805(b). Subdivisions (15) and (16) of that section were added by Nebraska and there was a modification made to subsection (8) from the actual UTC provisions.[56]

The provisions described in this part of the article are mandatory. You cannot draft around them. A close examination of each subdivision of the statute needs to be made because the mandatory provision may not extend as far as it might seem on first reading.

Subdivision (1) provides that the statutory requirements for the creation of the trust may not be avoided by the terms of the trust.[57] Please refer to section 30-3828 which contains the requirements for the creation of a trust. The duty of the trustee to act in good faith and in accordance with the terms of the trust is provided in subdivision (2) and is also a mandatory requirement.[58] Subdivision (3) deals with the requirements that the trust and its terms be for the benefit of the ben-

54. NEB. REV. STAT. § 30-3804(b) (Supp. 2003).

55. NEB. REV. STAT. U.C.C. § 1-201(25) (2000).

56. The August 2003 meeting of the National Conference of Commissioners on Uniform State Laws adopted an amendment to U.T.C. section 105(b)(8). This language used in the 2003 UTC amendment is the same language that Nebraska used in its adoption of the Trust Code. There had been questions raised by several states including Nebraska.

57. NEB. REV. STAT. § 30-3805(b)(1).

58. NEB. REV. STAT. § 30-3805(b)(2).

eficiaries, the trust have a lawful purpose that is not contrary to public policy and the trust's purpose be possible to achieve.[59]

Other mandatory provisions of the Nebraska UTC include the power of the court to modify or terminate a trust;[60] the effect of spendthrift provisions and the power of the creditors or assignees to reach trust assets; the power of the court to deal with a bond; the power of the court to adjust the trustee's compensation; the effect of an exculpatory term under section 30-3897; the rights under sections 30-3899 to 30-38,107; the periods of limitation for a judicial proceeding; the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice; the subject matter jurisdiction and venue of the court; the power of the court under section 30-3807(a)(1); and the power of the court to review the action or proposed action of a trustee for abuse of discretion.

VII. GOVERNING LAW (SECTION 107)

When drafting a trust document, many attorneys include a provision stating which state's law applies to the trust. Prior to the Nebraska UTC section 107, Nebraska would enforce choice-of-law provisions in trusts, unless the provisions were contrary to public policy.[61] However, a different rule would apply to trusts involving real estate. With regard to trusts involving real property, the Nebraska Supreme Court has held:

> In *Morris v. Linton*, 74 Neb. 411, 104 N.W. 927 (1905), we stated that "the law of the situs shall exclusively govern in regard to all rights, interests and titles in and to immovable property." *Id.* at 417, 104 N.W. at 929. The same rule, although more particularized, is stated in the Restatement (First) of Conflict of Laws [section] 241 (1934): 'The validity of a trust of an interest in land is determined by the law of the state where the land is.'[62]

The Nebraska Supreme Court has adopted many provisions of the Restatement (Second) of Conflicts of Law. For example, the Nebraska Supreme Court has adopted the Restatement (Second) of Conflict of Laws section 188 (1971), at 575, which provides, in relevant part:

> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the

59. NEB. REV. STAT. § 30-3805(b)(3). *See* NEB REV. STAT. § 30-3830 (Supp. 2003) (regarding trust purposes).

60. *See* NEB. REV. STAT. §§ 30-3836 - 30-3842 (Supp. 2003) (regarding modification, termination and reformation of trusts).

61. First Nat'l Bank in Mitchell v. Daggett, 242 Neb. 734, 736-37, 497 N.W.2d 358, 362 (1993).

62. *Daggett*, 242 Neb. at 736-37, 497 N.W.2d at 362.

state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in [section] 6.

(2) In the absence of an effective choice of law by the parties . . . the contacts to be taken into account in applying the principles of [section] 6 to determine the law applicable to an issue include:
   (a) the place of contracting,
   (b) the place of negotiation of the contract,
   (c) the place of performance,
   (d) the location of the subject matter of the contract, and
   (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.[63]

UTC section 107 was modified by Nebraska. The study committee was concerned that the law of other states would be used to determine title to Nebraska real estate. As a result, Nebraska law applies in determining the title to Nebraska real estate.[64] If the property is personal property rather than real estate, then the law of the jurisdiction designated in the trust applies 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.[65] This provision is similar to current law. If no designation is made in the terms of the trust, the law of the jurisdiction having the most significant relationship to the matter at issue is used.[66] The comments to UTC section 107 states that usually the law of the 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.

VIII. PRINCIPAL PLACE OF ADMINISTRATION (SECTION 108)

Nebraska law did permit the trustee of a trust to have the principal place of administration in this state and to register the trust in the court of this state at the principal place of administration — this remains the law in Nebraska. By accepting the trusteeship of a trust in which the principal place of administration is this state or by moving the principal place of administration to this state, the trustee submits

63. Mertz v. Pharmacists Mut. Ins. Co., 261 Neb. 704, 709-10, 625 N.W.2d 197, 199, 202-03 (2001).

64. Section 30-3807(b) of the Revised Statutes of Nebraska was added by Nebraska to require that Nebraska law be used to determine title to Nebraska real estate.

65. NEB. REV. STAT. § 30-3807(a)(1) (Supp. 2003).

66. NEB. REV. STAT. § 30-3807(a)(2).

personally to the jurisdiction of the Nebraska courts. This was the old Nebraska law[67] and remains the law under the Nebraska UTC.[68]

The old Nebraska law provided that the trustee was under a duty to administer the trust at a place appropriate to the purposes of the trust. If the principal place of administration became inappropriate, the court could order a change of the place of administration or a change of trustee.[69] The trustee still must comply with the continuing duty to administer the trust in a place appropriate to its purposes.[70] The Nebraska UTC differs on how the principal place of administration is established or may be changed. The terms of the trust may designate the principal place of administration and this will be controlling if the trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction or if all or part of the administration occurs in the designated jurisdiction.[71]

The Nebraska UTC also grants the right of the trustee to transfer the trust's principal place of administration to another state or to a jurisdiction outside of the United States. Previously, this was done by court order unless the trust agreement had a change of principal place of administration provision in it. This may now be done without court order, although the court may approve or disapprove the transfer assuming an interested party has filed a complaint in a court with jurisdiction.[72]

The Nebraska UTC section 108 also provides the method by which this change of principal place of administration may occur.[73] A trustee wishing to transfer a trust's principal place of administration is required to provide sixty days notice to qualified beneficiaries.[74] The statute also provides for the required terms of the notice. If the trustee received an objection from a qualified beneficiary, then the trustee may not, on the trustee's own accord, transfer the principal place of administration.[75] However, the trustee is not precluded from filing a court proceeding to allow the change of the principal place of administration.

67. NEB. REV. STAT. § 30-2804 (1995).
68. NEB. REV. STAT. § 30-3813(a) (Supp. 2003).
69. NEB. REV. STAT. § 30-2816 (1995).
70. NEB. REV. STAT. § 30-3808(b) (Supp. 2003).
71. NEB. REV. STAT. § 30-3808(a).
72. NEB. REV. STAT. § 30-3808(c).
73. NEB. REV. STAT. § 30-3808.
74. NEB. REV. STAT. § 30-3808(b).
75. NEB. REV. STAT. § 30-3808(e).

IX. NON-JUDICIAL SETTLEMENT AGREEMENTS (SECTION 111)

The Nebraska UTC enables the interested persons in a trust to enter into a non-judicial settlement agreement.[76] Such non-judicial settlement agreements are binding. Interested persons mean those persons whose consent would be required in order to achieve a binding settlement if the agreement were to be approved by the court. This does not necessarily mean all beneficiaries. If the court may act upon approval of all qualified beneficiaries, then only qualified beneficiaries would be required to be part of a non-judicial settlement agreement. The statute lists a number of examples of matters that may be resolved by a non-judicial settlement agreement. An example is the approval of a trustee's report or accounting, which could be done on a non-judicial basis.

The fact that there may be minor, incompetent or unascertained beneficiaries must be considered. To deal with these situations, an examination of the representation provisions provided in Article 3 of the UTC is required. The consent of the person who may represent and bind another person under Article 3 of the UTC[77] is binding on the person represented unless the person represented objects to representation before the consent would otherwise have become effective.[78]

So long as there is no conflict of interest between the representative and the person represented, a parent may represent and bind the parent's minor or unborn child.[79] Language to effectuate this type of representation could be as follows:

> Jane Jones as parent and natural guardian of Thomas Jones, a minor child, and for any other unborn children of hers, and on her own behalf hereby consents to the above agreement. This consent is intended to be binding upon the minor and unborn children of Jane Jones pursuant to NEB. REV. STAT. § 30-3822(b) and § 30-3824(6).

If there is a concern that there may be a conflict of interest with a parent, there is still the possibility that someone else with a substantially identical interest may bind a minor, incapacitated, or unborn individual or a person whose identity or location is unknown and not reasonably ascertainable.[80]

For example, Tom Smith is an adult child of Jane Smith. There is some concern that Jane Smith may have a conflict of interest in deal-

76. NEB. REV. STAT. § 30-3811 (Supp. 2003).
77. NEB. REV. STAT. §§ 30-3822 - 30-3826 (Supp. 2003).
78. NEB. REV. STAT. § 30-3822(b).
79. NEB. REV. STAT. § 30-3824(6).
80. NEB. REV. STAT. § 30-3825.

ing with her minor children. Tom's brother, Jerry Smith, is not mentally competent, but is an adult. Tom has a sister, Alice Smith, who is a minor. Harry Smith is an adult child of Jane Smith whose location is unknown. The family has made diligent efforts to locate Harry, including employing private detective or skip tracing services. The trust provides for income to Jane Smith for life, along with an invasion of principal based upon an ascertainable standard. Jane is also the trustee. Jane desires to have an annual accounting approved. In this case, Tom Smith could bind the other siblings by using language such as this:

> I, Tom Smith, hereby approve the above accounting and hereby consent to treat the above accounting as final and binding. This consent is considered to be a non-judicial settlement agreement pursuant to NEB. REV. STAT. § 30-3811. In approving this annual accounting, I am acting not only on my own behalf, but also on behalf of my brother Jerry Smith who is an adult who is not mentally competent; on behalf of my brother Harry Smith, who is an adult but whose location is unknown and is not reasonably ascertainable after diligent efforts have been made to locate him; on behalf of my sister, Alice Smith, who is a minor; and on behalf of any other unborn siblings who might acquire an interest in the trust in the event of their birth. These interests are all substantially identical to my interest and the intention is to bind all of the persons named in this paragraph pursuant to NEB. REV. STAT. § 30-3822(b) and § 30-3825.

If there is still a concern that there is an interest whose representation in a non-judicial settlement agreement is otherwise inadequate, there is still the possibility for a court appointment of a representative to act on behalf of that interested person. The use of the term "representative" was intentional.[81] The study committee considered the comments of the drafters of the UTC and agreed that the term representative should be used rather than guardian ad litem or some other term. The representative may act on behalf of a minor child, an incapacitated person, an unborn individual, or a person whose identity if unknown or whose location is unknown. In the practice of law, you will occasionally represent a family where a member of that family cannot be located. There has been no determination that the family

81. *See* NEB. UNICAMERAL, *Banking, Insurance and Commerce Committee: Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code*, LR 367, 82 (Dec. 2002) (discussing changes in Nebraska law under section 305). 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 may appointed to act with respect to a non-judicial 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.

member is deceased. The appointing of a representative may be an ideal solution in such a case where a conservator is not otherwise necessary.

The representative may be appointed by the court for any matter arising under the Nebraska UTC even if there is no judicial proceeding concerning the trust pending.[82] Nothing in the statute requires that a representative be separately appointed in every single instance. For example, a representative could be appointed for a period of time to approve each annual accounting presented during that period of time. If a representative is consenting to a non-judicial settlement agreement language such as the following might be used:

> I, Mary Smith, having been appointed by the County Court of Sarpy County, Nebraska at case number 05-9999 as the representative of Alice Smith, the minor child of Jane Smith and as the representative of Jerry Smith, an incapacitated adult individual, and as the representative of Harry Smith, an individual whose location is unknown, and as the representative of any unborn individuals who would be descendants of Jane Smith and as the representative of any other person whose identity is unknown who may become a beneficiary of the Howard Smith Trust dated January 1, 2005, now, on behalf of the individuals for whom I have been appointed representative by the court, hereby consent to the above judicial settlement agreement and bind the above individuals as if they had individually signed the above settlement agreement while adult and mentally competent.

X. COURTS (ARTICLE 2)

Trusts are generally administered without judicial supervision. This has been the case in Nebraska law[83] and will remain the law under the Nebraska UTC.[84] The court intervenes in the administration of a trust only when its jurisdiction is invoked by an interested person or as provided by law.[85] A judicial proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and a declaration of rights.[86] This was also true under the old law of Nebraska.[87]

The UTC does not limit the court's equity jurisdiction. The types of judicial proceedings involving trust administration that may be

82. NEB. REV. STAT. § 30-3826(b).
83. NEB. REV. STAT. § 30-2806 (1995).
84. NEB. REV. STAT. § 30-3812 (Supp. 2003).
85. NEB. REV. STAT. § 30-3812(a).
86. NEB. REV. STAT. § 30-3812(c).
87. NEB. REV. STAT. § 30-2806.

brought are not listed.[88] The California Probate Code Statute lists a substantial number of items as relating to the internal affairs of a trust. These should all fall within the equitable jurisdiction of the court. The comment of Nebraska UTC section 201[89] should be closely examined if you are attempting to determine the extent of the jurisdiction of a particular court. However, because county courts in Nebraska do not have equity jurisdiction and district courts do have equity jurisdiction, this factor may need to be considered when determining the court in which to file a case where jurisdiction may be questioned.

A. PERSONAL JURISDICTION

Personal jurisdiction over the trustee is obtained by either the acceptance of the trustee of the trusteeship when principal place of administration is in this state or when the trustee moves the principal place of trust administration to this state. By undertaking either of those two actions, the trustee has voluntarily accepted the personal jurisdiction of the Nebraska court.[90]

The beneficiaries of a trust that has its principal place of administration in this state are subject to the jurisdiction of the courts of this state.[91] The issue of whether or not this is personal jurisdiction prior to the beneficiary receiving a distribution is left open. The jurisdiction in such cases may be *in rem*. However, once the beneficiary has accepted a distribution from a trust which has its principal place of administration in this state, the court has personal jurisdiction over that beneficiary regarding any matter involving the trust.[92] Please note that the statute does not say that beneficiaries are the only persons for whom personal jurisdiction is obtained by this method. It speaks about any recipient of a distribution; this includes a recipient who receives a distribution wrongfully where the trustee had a mistaken belief that the distributee was a beneficiary.[93]

88. NEB. UNICAMERAL, *Banking, Insurance and Commerce Committee: Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code*, LR 367, 56 (Dec. 2002) (discussing changes in Nebraska law under section 201).

89. NEB. REV. STAT. § 30-3812.

90. NEB. REV. STAT. § 30-3813(a) (Supp. 2003).

91. NEB. REV. STAT. § 30-3813(b).

92. NEB. REV. STAT. § 30-3813(b).

93. NEB. UNICAMERAL, *Banking, Insurance and Commerce Committee: Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code*, LR 367, 59 (Dec. 2002) (discussing changes in Nebraska law under section 202).

B. SUBJECT MATTER JURISDICTION

Under current Nebraska law, the Nebraska county courts have jurisdiction over trusts[94] and the county court has jurisdiction of proceedings initiated by interested parties concerning the internal affairs of trusts.[95] However, unlike probate matters, the county court's jurisdiction is not exclusive. The district courts also have concurrent original jurisdiction. The Nebraska Constitution has a provision which grants equity jurisdiction to the district courts[96] and, because this jurisdiction is granted by the state constitution, the legislature may not take away this jurisdiction. This jurisdiction is not exclusive original jurisdiction, but the state constitution requires that the district court have at least concurrent original jurisdiction with other courts. This district court jurisdiction specifically applies to the administration of trusts.[97]

The county court generally does not have equity jurisdiction.[98] Both probate and trust cases, by their very nature, often involve equitable matters. In matters arising under the Nebraska Probate Code, the Nebraska Supreme Court has held that "county courts, in exercising exclusive original jurisdiction over estates, may apply equitable principles to matters within probate jurisdiction."[99] No case has yet stated the same result for a county court regarding a trust, but based upon the Nebraska Supreme Court's decision allowing the probate court to apply equitable principles, the same should apply to trust cases.

Under the current Nebraska Probate Code, the Nebraska Supreme Court has held that county courts do not have jurisdiction over a constructive trust and that such jurisdiction only rests with the district court.[100] The Nebraska UTC does not include constructive or resulting trusts within its scope.[101] Because these remedies are not included within the scope of the Nebraska UTC, any action filed where

94. NEB. REV. STAT. § 30-2211(3) (1995).

95. NEB. REV. STAT. § 30-2806.

96. NEB. CONST. Art. V, § 9.

97. Burnham v. Bennison, 121 Neb. 291, 298, 236 N.W. 745, 748 (1931); John A. Creighton Home v. Waltman, 140 Neb. 3, 9, 299 N.W. 261, 265 (1941).

98. *In re* Adoption of Hemmer, 260 Neb. 827, 829, 619 N.W.2d 848, 850 (2000). "A county court acquires equity jurisdiction only through legislative action."

99. *In re* Estate of Steppuhn, 221 Neb. 329, 332, 377 N.W.2d 83, 85 (1985). At the time that this case was decided the county court had trust jurisdiction because of a statute within the Nebraska Probate Code.

100. Miller, v. Janecek, 210 Neb. 316, 320, 314 N.W.2d 250, 252 (1982).

101. Section 102 of the Uniform Trust Code (NEB. REV. STAT. § 30-3802 (Supp. 2003)) provides that it applies to express trusts. Constructive and resulting trusts are remedies rather than express trusts. They do not fit within the meaning of an express trust. Comment to section 102 of the *Uniform Trust Code* states: "The Uniform Trust Code, while comprehensive, applies only to express trusts. Excluded from the Code's

these remedies are or may be used must be filed in the district court rather than the county court.

C. VENUE

If a trust has been registered in Nebraska under the registration provision, unless the registration has been released, the proper venue is in the court in which the trust is registered, even if there is no trustee.[102] If the trust is created by a will and the estate is not yet closed, the venue is in the county in which the decedent's estate is being administered.[103] The district court of the county in which the probate proceeding is held may have proper venue and jurisdiction. Remember that subject matter jurisdiction lays both in the district court and the county court of the particular county involved.[104]

The Nebraska UTC does not define a testamentary trust. The Nebraska Probate Code defines a testamentary trust,[105] but it includes within the definition of a testamentary trust a trust which receives a distribution under a will. Thus, a living trust could be considered a testamentary trust under the Nebraska Probate Code. This venue provision applies only to trusts created by a will. The venue for a matter involving a living trust which is a beneficiary under a will might not be the county in which the probate is occurring. Under the general venue provisions, the proper venue for a living trust is in the county of the state in which the trust's principal place of administration is or will be located.[106]

If there is no trustee, venue for the appointment of a trustee is a county in which a beneficiary resides, in a county in which any trust property is located or in a county in which the trust's principal place of administration was located before a vacancy in the office of trustee occurred.[107] If the trust is created by a will, proper venue is in the county in which the decedent's estate was or is being administered.[108] Section 204 of the Nebraska UTC was modified to deal with the possibility of two or more counties having proper venue and then what hap-

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coverage are resulting and constructive trusts, which are not express trusts but remedial devices imposed by law."

102. NEB. REV. STAT. § 30-3815(c) (Supp. 2003). This subsection was in addition to section 204 of the Uniform Trust Code.

103. NEB. REV. STAT. § 30-3815(a).

104. NEB. REV. STAT. § 30-3814 (Supp. 2003).

105. NEB. REV. STAT. § 30-2209(11) (2001).

106. NEB. REV. STAT. § 30-3815(a).

107. This was in addition to section 204 of the Uniform Trust Code.

108. NEB. REV. STAT. § 30-3815(b).

pens if two proceedings are filed.[109] This provision is based on section 30-2212 of the Nebraska Probate Code.[110]

D. Notice of Hearing and Service

The Nebraska UTC changes the method under which notice of a judicial proceeding is to be given. Actions in the county court involving trusts have used the Nebraska Probate Code notice procedures.[111] This has been the practice in Nebraska for more than twenty-five years and has worked well.[112] The UTC would have required application of the normal rules of civil procedure. Section 109 of the Nebraska UTC provides that "[n]otice of a judicial proceeding may be given as provided in the applicable rules of civil procedure or as in section 30-2220."[113] Thus, current practices regarding notice may continue. However, there may be some circumstances where personal service is required such as continuation of the notice requirement for the protected person in establishing a conservatorship.

E. Appeal

L.B. 130 amended the Nebraska statutes providing for appeals.[114] If the lower court was the district court, then no special appeal procedure is needed. If the lower court is the county court, the old Nebraska statutes provided for a direct appeal to the Court of Appeals.

The Nebraska statutes state that:

> When the appeal is made by someone other than a personal representative, conservator, trustee, guardian or guardian ad litem, the appealing party shall, within thirty days after the entry of the judgment or final order complained of, deposit with the clerk of the county court a supersedeas bond. . .in such sum as the court shall direct, with at least one good and sufficient surety approved by the court."[115]

Failure to comply with the supersedeas requirement allows the court of appeals, on motion and notice, to take such action, including

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109. Neb. Rev. Stat. § 30-3815(d).

110. Section 30-3815(d) of the Revised Statutes of Nebraska is based on section 30-2212.

111. Neb. Rev. Stat. § 30-2220 (2001).

112. The Nebraska Probate Code was adopted by the 1974 Nebraska Legislature and had an effective date of January 1, 1977.

113. Neb. Rev. Stat. § 30-3809(d) (Supp. 2003).

114. Appellate review of the Nebraska Uniform Trust Code is governed by § 30-1601. *See* Neb. Rev. Stat. § 30-3821. Section 119 of legislative bill number 130 amended section 30-1601(1) to add that in all matters in county court arising under the Nebraska Uniform Trust Code, appeals may be taken to the court of appeals in the same manner as an appeal from the district court to the court of appeals.

115. Neb. Rev. Stat. § 30-1601(3) (2001).

dismissal of the appeal. An appeal may be taken by any party and may also be taken by any person against whom the final judgment or final order may be made or who may be affected by the judgment or order. However, the appeal must be from a *final* order.[116]

XI. REPRESENTATION (ARTICLE 3)

The drafters of the UTC believed that representation was a topic not adequately addressed under the trust law of most states.[117] All of the representation provisions are subject to modification by the terms of the trust. For example, rather than using a representative appointed by a court,[118] the trust itself could provide for an independent person to represent all minors, incapacitated persons, unborn or unascertained beneficiaries and any beneficiary whose location has become unknown. The trust agreement could even remove the requirement that a representative not have a conflict of interest.[119] This could be combined with the concept of a trust protector.

The applicability of representation in a non-judicial settlement agreement has been described above.[120] With regard to a court proceeding, the principles of representation apply to consents required by persons who would not otherwise be able to give consent.[121] The comment to UTC section 301 indicates that the representation provisions do not apply to notices of a judicial proceeding.[122]

XII. TRUST CREATION (ARTICLE 4)

A. METHODS; REQUIREMENTS; NECESSITY OF A WRITING

The methods of creating a trust are set forth in the Nebraska UTC, and provide three basic methods for creating a trust.[123] These are:

1. A 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.

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116. NEB. REV. STAT. § 30-1601(2).

117. General comment to Article 3 of the Uniform Trust Code appearing on page 67 of the Report of the study committee to the Nebraska Legislature.

118. NEB. REV. STAT. § 30-3826 (Supp. 2003).

119. NEB. REV. STAT. § 30-3805(b) does not apply to Article 3 of the Uniform Trust Code (NEB. REV. STAT. §§ 30-3822 - 30-3826). Instead the general rule of section 30-3805(a) applies, that the Nebraska Uniform Trust Code provides for the default rules that may be altered by the terms of the trust.

120. *See supra* notes 76-82 and accompanying text.

121. NEB. REV. STAT. § 30-3822(a) (Supp. 2003).

122. NEB. UNICAMERAL, *Banking, Insurance and Commerce Committee: Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code*, LR 367, 68 (Dec. 2002) (discussing changes in Nebraska law under section 301).

123. NEB. REV. STAT. § 30-3827 (Supp. 2003).

2. Except as required by a statute other than the Nebraska UTC, a declaration by the owner of property that the owner holds identifiable property as a trustee.
3. The exercise of a power of appointment in favor of a trustee.

These methods of creation are not exclusive; a trust can also be created by a statute or a court order.[124]

The problem with using a declaration of trust is proving that the transfer has been made. The drafters of the UTC do not recommend attempting to transfer assets to a trust by attaching a list to a declaration of trust. The drafters specifically stated that such a practice can make it difficult to later confirm title of third-party transferees and for that reason, it is not recommended.[125] Another potential problem arises in attempting to prove that title to real estate has been changed. If a declaration of trust is used, the entire declaration must be recorded and it must meet the statutory requirements for recording with the Register of Deeds Office. This can be quite costly compared to recording a deed.

Nebraska law previously permitted oral trusts.[126] Current law provides that the burden of proof upon a party seeking to establish an oral trust is clear and convincing evidence.[127] Nebraska adopted the provision dealing with evidence of an oral trust provided in the UTC with a minor amendment. The same burden of proof that applies to the creation of an oral trust, a clear and convincing evidence standard, also applies to the amendment or revocation of an oral trust.[128]

The Nebraska statutes contain a Statute of Frauds, which was originally developed under English common law. The Statute of Frauds provides that "no trust or a power over or concerning real estate or in manner relating thereto can be created, granted or assigned, surrendered or declared unless by operation of law or by a deed of conveyance in writing."[129] If there is a finding of partial performance, a court of equity may enforce the contract or conveyance.[130] There are other possible examples of the Statute of Frauds applying to a trust as exemplified by the following:

> In the following cases every agreement shall be void, unless such agreement, or some note or memorandum thereof, be in

124. NEB. REV. STAT. § 30-3802 (Supp. 2003).
125. NEB. UNICAMERAL, *Banking, Insurance and Commerce Committee: Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code*, LR 367, 88 (Dec. 2002) (discussing changes in Nebraska law under section 401).
126. Whalen v. Swircin, 141 Neb. 650, 653, 4 N.W.2d. 737, 739 (1942).
127. Schaneman v. Wright, 238 Neb. 309, 315, 470 N.W.2d. 566, 572 (1991).
128. NEB. REV. STAT. § 30-3833 (Supp. 2003).
129. NEB. REV. STAT. § 36-103 (1998).
130. NEB. REV. STAT. § 36-106 (1998).

> writing, and subscribed by the party to be charged therewith: (1) Every agreement that, by its terms, is not to be performed within one year from the making thereof; (2) every special promise to answer for the debt, default, or misdoings of another person; . . . and (5) every agreement for the repurchase of corporate stocks, bonds or other securities.[131] Every grant or assignment of any existing trust in lands, goods or things in action, unless the same shall be in writing, subscribed by the party making the same, shall be void.[132]

The Nebraska UTC also sets forth the requirements to be met for creation of a trust.[133]

The requirements for the creation of a trust are:

1. The settlor has capacity to create the trust.
2. The settlor indicates an intention to create the trust.
3. The trust has a definite beneficiary or it is a charitable trust, a trust for an animal or a trust for a non-charitable purpose as provided in the statute.
4. The trustee has duties to perform.
5. The same person is not the sole trustee and sole beneficiary.

A beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities. Nebraska has previously adopted the Uniform Statutory Rule Against Perpetuities. Under that rule, the time period for vesting of an interest is either the common law period of twenty-one years after the death of an individual then alive or ninety years after its creation.[134] There is a major problem when there is no definite beneficiary — to who is the trustee to account? This type of trust should be created very carefully and only if there is an independent trust protector. The other concern when there is no one to receive distributions of income is

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131. NEB. REV. STAT. § 36-202 (1998).

132. NEB. REV. STAT. § 36-404 (1998).

133. NEB. REV. STAT. § 30-3828 (Supp. 2003).

134. NEB. REV. STAT. § 76-2002(a) (1989). However, please note section 76-2005(9) (added by the 2002 Nebraska Legislature), which provides that section 76-2002 does not apply to:

> (9) A trust in which the governing instrument states that the rule against perpetuities does not apply to the trust and under which the trustee or other person to whom the power is properly granted or delegated has power under the governing instrument, any applicable statute, or the common law to sell, lease, or mortgage property for any period of time beyond the period which would otherwise be required for an interest created under the governing instrument to vest. This subdivision shall apply to all trusts created by will or inter vivos agreement executed or amended on or after July 20, 2002, and to all trusts created by exercise of power of appointment granted under instruments executed or amended on or after July 20, 2002.

Query: When must there be a definite beneficiary in a dynasty trust, such as is now permitted by Nebraska law?

the high rates of income tax on trusts compared to individuals.[135] The trustee in this type of trust needs to consider carefully the types of investments that such a trust will hold in establishing the investment strategy of the trust and complying with the prudent investor rule.

In addition, a power for a trustee to select a beneficiary from an indefinite class is valid. If the power is not exercised within a reasonable period of 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.

A trust not created by a 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 or except with regard to Nebraska real estate a trustee was domiciled or had a place of business or any trust property was located.[136]

B. Charitable Trusts

A charitable trust is defined in UTC section 103 as a trust or a portion of a trust created for a charitable purpose. As described above, a trust may be subject to the rules of a charitable trust as well as the rules for a non-charitable trust. This would apply to a split-interest trust.

Under common law, a charitable trust does not have a beneficiary in the usual sense. The charitable organizations that are to receive distributions and the state's attorney general are granted the rights of qualified beneficiaries under the Nebraska UTC. By being granted the rights of a qualified beneficiary, they are treated as both a beneficiary and a qualified beneficiary.[137] Under current Nebraska law, a charity which is entitled to enforce a trust is a beneficiary under the definitions section provided in the Nebraska Probate Code.[138]

Prior Nebraska law provided that the county attorney had the duty to enforce charitable trusts in the district court.[139] Under the Nebraska UTC, the Nebraska Attorney General is given the rights of

135. Under Rev. Proc. 2002-70, I.R.B. 2002-46, 845, for the year 2003 the maximum rate of federal income tax on trust income is 38.6% on taxable income of only $9,350.00. In 2002, the maximum Nebraska income tax rate on a trust was 6.68% on a Nebraska taxable income of only $15,150. The effect of the 2003 tax law changes allowing certain dividends to be taxed as capital gains must also be considered.

136. Neb. Rev. Stat. § 30-3829 (Supp. 2003).

137. Neb. Rev. Stat. § 30-3810 (Supp. 2003).

138. Neb. Rev. Stat. § 30-2209(2) (1995).

139. Neb. Rev. Stat. § 30-240, *repealed by* L.B. 130, Neb. Unicameral, 98th Leg., 1st Sess. (2003).

a qualified beneficiary with regard to a charitable trust having its principal place of administration in Nebraska.[140]

The charitable purposes for which a charitable trust may be created in Nebraska are now set forth in the Nebraska UTC.[141] A charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, governmental and municipal purposes or other purposes the achievement of which is beneficial to the community.

The federal tax definition of a charitable organization is an organization organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or education purposes or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment) or for the prevention of cruelty to children or animals.[142] These types of charitable organizations are commonly called 501(c)(3) organizations. It is possible for a charitable trust under Nebraska law to be classified as a social welfare organization or a 501(c)(4) organization.[143] A social welfare trust might qualify as a charitable trust under Nebraska law, even though it would not qualify for a deduction for charitable contributions under federal income tax law.[144] Under common law, the settlor of a charitable trust did not have the authority to maintain a proceeding to enforce a charitable trust.[145] This authority has now been granted to the settlor.[146]

The Nebraska UTC also provides that if the terms of a charitable trust do not indicate a particular charitable purpose or beneficiary, the court may select one or more charitable purposes or beneficiaries. The selection must be consistent with the settlor's intention to the extent it can be ascertained.[147]

Common law developed the doctrine of *cy pres*.[148] *Cy pres* permitted the court to preserve the charitable purpose of the trust if the trust failed for some reason. Nebraska law has been modified by the UTC. The UTC presumes a general charitable intent when the particular

140. NEB. REV. STAT. § 30-3810(c) (Supp. 2003).
141. NEB. REV. STAT. § 30-3831 (Supp. 2003).
142. 26 U.S.C. § 501(c)(3) (2000).
143. 26 U.S.C. § 501(c)(4).
144. Title 26, Section 170 of the United States Code provides for the charitable contribution income tax deduction. Only charities qualified under 26 U.S.C. § 501(c)(3) can qualify as an organization which may receive deductible charitable income tax contributions.
145. RESTATEMENT (SECOND) OF TRUSTS § 391 (1959).
146. NEB. REV. STAT. § 30-3831(c).
147. NEB. REV. STAT. § 30-3831(b).
148. RESTATEMENT (SECOND) OF TRUSTS § 399 (1959). Nebraska applied this doctrine. *In re* Last Will and Testament of Teeters, 205 Neb. 576, 288 N.W.2d 735 (1980).

charitable purpose becomes impossible or impractical to achieve.[149] If there is a provision in the trust that provides for a reversion to the settlor in the event the charitable purpose fails, that provision is enforced only if the trust property is to revert to the settlor and the settlor is still living or if the time since the date of the trust's creation is less than twenty-one years.[150] Please remember that this is a mandatory rule granting the court the power to modify a charitable trust as provided in the statute. The *cy pres* doctrine is included in that particular statute and so the lifetime of the settlor or the twenty-one year term cannot be modified to increase the term.[151]

C. Animal and Other Non-beneficiary Trusts (Section 408)

A problem that occasionally comes up in the active practice of law is the desire of some clients to create a trust for the benefit of an animal. Because an animal does not meet the definition of a beneficiary, there has been a question about the validity of such a trust. Starting January 1, 2005, there will no longer be such a question.[152]

The trust for the care of an animal can only be for an animal alive during the settlor's lifetime and the trust terminates on the death of the last surviving animal alive during the settlor's lifetime.[153] As a practical matter, because an animal has no voice, someone must be appointed to enforce the trust. If there is no one else appointed, a person may be appointed by the court. Any person having an interest in the will for the animal may request the court to appoint a person to enforce the trust or to remove a person who has been appointed as the voice of the animal.

Although animal trusts are generally valid, the funding of such a trust is limited. The court can determine that the value of the trust property on a particular date exceeds the amount required for the intended use. The trust could provide for what happens to property if such an excess is determined, but if it does not, it is distributed to the settlor if alive, otherwise to the settlor's successors in interest. However, the settlor can provide that the power of the court to determine that there is an excess amount of property in the trust does not apply to the particular trust.[154] We must remember that the provisions of the UTC are default provisions and may be modified by the trust ex-

149. Neb. Rev. Stat. § 30-3839(a) (Supp. 2003). Nebraska law currently provides that a general charitable intent is a precondition to the exercise of the court's *cy pres* power. *Teeters*, 205 Neb. at 576, 288 N.W.2d at 735.
150. Neb. Rev. Stat. § 30-3839(b) (Supp. 2003).
151. Neb. Rev. Stat. § 30-3805(b)(4) (Supp. 2003).
152. Neb. Rev. Stat. § 30-3834 (Supp. 2003).
153. Neb. Rev. Stat. § 30-3834(a).
154. Neb. Rev. Stat. § 30-3805(a).

cept for those that are specifically provided in the UTC to be mandatory provisions that cannot be written around. Language such as the following could be put into the trust to limit the power of the courts:

> The provisions of Nebraska Uniform Trust Code section 30-3834(c) permitting a court to determine that there are excess funds in the trust over the amount required for the intended use shall not apply to this trust.

There is another provision that would also need to be considered in this situation. The trustee has the power to modify or terminate an uneconomic trust.[155] In order to avoid this particular provision, the trust would have to contain language such as the following:

> The provisions of Nebraska Uniform Trust Code § 30-3840(a) granting the authority to the trustee of a trust to terminate a trust whose size is insufficient to justify the cost of administration shall not apply to this trust while any of the protected animal or animals remain alive.

As a practical matter, consideration should be given to placing some dollar limit into the preceding language. It would be impractical to continue such a trust, at least with a trustee charging a fee, with a very small trust. However, the court does have the power to modify or terminate a trust if it determines the value of the trust property is insufficient to justify the cost of administration.[156] This provision is a mandatory rule that cannot be avoided.[157]

There may be trusts, for purposes other than caring for an animal, which are also validated by the Nebraska UTC.[158] This provision does not apply to perpetual care funds administered by a cemetery association.[159] This type of trust can be enforced for a non-charitable purpose even though there is no definite or definitely ascertainable beneficiary so long as the non-charitable purpose is otherwise valid. The trust cannot be enforced for more than twenty-one years after the death of the settlor. The most common example of a trust for such a purpose is a trust for the care of a cemetery plot.

XIII. CAPACITY ISSUES RELATED TO TRUST CREATION

To create a trust, the 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

155. NEB. REV. STAT. § 30-3840(a) (Supp. 2003).
156. NEB. REV. STAT. § 30-3840(b).
157. NEB. REV. STAT. § 30-3805(4) (Supp. 2003).
158. NEB. REV. STAT. § 30-3835 (Supp. 2003).
159. NEB. REV. STAT. §§ 12-509 - 12-512.08 (1995).

settlor must have the capacity during lifetime to transfer the property free of trust.

The capacity necessary to create a revocable trust has changed under the Nebraska UTC. The capacity required to create, amend or revoke or to add property to a revocable trust or to direct the action of a trustee of a revocable trust is the same as that required to make a will.[160] This does not mean that the execution requirements for making a will apply to a trust, except for a trust created by a will. If the trust is revocable, it can be created orally unless the corpus of the trust contains real estate. Nebraska law currently requires that transferors of lifetime transfers have capacity to understand what they are doing, know the nature and extent of the property dealt with, what they propose to do with it and to intelligently decide to make the conveyance.[161]

The capacity to make a will is first determined by Nebraska Probate Code section 30-2326. Anyone who is at least eighteen years old or is not a minor and who is of sound mind may make a will. Sound mind is also used to define testamentary capacity. One possesses testamentary capacity if he or she understands the nature of his or her act in making a will or codicil, knows the extent and character of his or her property, knows and understands the proposed distribution of his or her property and knows the natural objects of his or her bounty.[162] In addition, in regards to the capacity to make a will, it is not medical soundness of mind that governs, but testamentary capacity as defined in law. [163] A high degree of mentality is not required.[164]

The UTC changed the standard of capacity for a revocable trust because of the uncertainty in existing case law and the importance of the issue in modern estate planning. Because revocable trusts are used as a will substitute, it is a reasonable conclusion that the same standard of capacity should be used for both.[165]

The standard of capacity necessary to create an irrevocable trust is not changed by the UTC. The current standard is not clear in Nebraska law. However, Nebraska does appear to require a competent settlor. Nebraska law does require that transferors of an inter vivos transfer have the capacity to understand what they are doing, know the nature and extent of the property dealt with, what they propose to

160. NEB. REV. STAT. § 30-3853 (Supp. 2003).
161. Marston v. Drobny, 166 Neb. 747, 752, 90 N.W.2d 408, 412 (1958).
162. *In re* Estate of Wagner, 246 Neb. 625, 631, 522 N.W.2d 159, 165 (1994).
163. *In re* Bow's Estate, 136 Neb. 156, 169, 285 N.W. 319, 327 (1939).
164. *In re* Bow's Estate, 136 Neb. at 169, 285 N.W. at 327.
165. NEB. UNICAMERAL, *Banking, Insurance and Commerce Committee: Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code*, LR 367, 170 (Dec. 2002) (discussing changes in Nebraska law under section 601).

do with it and to decide intelligently whether or not they intend to make the conveyance.[166] In general, to create an irrevocable trust the settlor must have the capacity that would be needed to transfer the property free of trust. In other words, the same standard that would be required to make a gratuitous deed of conveyance of real estate would apply to the creation of an irrevocable trust involving real estate.

XIV. EFFECT OF INCOMPETENCY OF SETTLOR

A. REVOCABLE TRUST

What happens if the trust is a revocable trust? Who may act for the settlor who now lacks capacity to receive notice and to give a binding consent on the settlor's behalf?[167] In analyzing this question, we first ask whether a conservator may represent and bind the settlor. The answer is yes, but only with the approval of the court supervising the conservatorship.[168]

The settlor's power of attorney is subject to some limitations on the extent of the authority of the agent acting under the power of attorney. The first thing that must be considered is that the power of attorney must be durable or the agent has already lost authority to act.[169] Assuming the power of attorney is durable, the Nebraska UTC requires that any action dealing with the 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.[170] The durable general power of attorney and the trust document now need to be specifically coordinated.

There is often either a special durable power of attorney or a general power of attorney created at the same time that a revocable trust agreement is created to serve as a will substitute. The durable power of attorney allows the trust to be funded even after the settlor has become incapacitated. For example, suppose an incapacitated person, who has prepared a durable general power of attorney, receives an inheritance. The inheritance could be assigned to the trust by the agent acting under the durable general power of attorney. When this would be permitted is subject to the rules relating to the assignment of

166. *Marsten*, 166 Neb. at 752, 90 N.W.2d at 412.
167. NEB. REV. STAT. § 30-3822(c) (Supp. 2003).
168. NEB. REV. STAT. § 30-3854(f) (Supp. 2003). *See also* NEB. REV. STAT. § 30-3824 (Supp. 2003).
169. NEB. REV. STAT. § 30-2665 (1999); NEB. REV. STAT. § 30-2666 (1995).
170. NEB. REV. STAT. § 30-3854(e).

an inheritance according to the laws of the jurisdiction under which the inheritance arose.

Please note that the powers of the settlor, which are affected by the restrictions on the power of attorney, are those involving revocation, amendment or distribution. The power to consent to an annual accounting is not covered by these limitations and the approval of an annual accounting could be accomplished under a durable general power of attorney. Unless that power is specifically included in a durable special power of attorney or can be implied from its terms, the agent under a special power of attorney could not act on behalf of the settlor.

Agency law must also be consulted when dealing with a power of attorney. An agent is prohibited from profiting from the agency relationship to the detriment of the principal or having a personal stake that conflicts with the principal's interest in a transaction in which the agent represents the principal.[171] An attorney-in-fact, under the duty of loyalty, always has the obligation to act in the best interest of the principal, unless the principal voluntarily consents to the attorney-in-fact engaging in an interested transaction after full disclosure.[172] When drafting the power of attorney, consideration must be given to these principles. If the agent, under the power of attorney, is a family member to whom gifts might be made, both the trust document and the power of attorney should specify what gifts are to be made.

Often, the limitation on the ability of the agent under the power of attorney to exercise the principal's gifting authority has been expressed in terms of the federal gift tax exclusion, which is currently $11,000 per donee per year.[173] This may not be the appropriate limit. The 2003 Nebraska Legislature also changed the Nebraska estate tax rates. The Nebraska taxable estate for the Nebraska estate tax is based on the federal taxable estate.[174] The federal taxable estate does not include taxable gifts, unless they have been brought back into the estate. If a gift is made, which is not included in the federal taxable estate, it is removed from the Nebraska taxable estate for purposes of the Nebraska estate tax. The Nebraska taxable estate will remain at $1,000,000 even though the federal exemption will be gradually increased. The rate on the first $100,000 of the Nebraska taxable estate, for deaths occurring after June 30, 2003, is 41%.[175] In a case of a terminally ill parent whose sole beneficiary is an only child with an

171. Crosby v. Luehrs, 266 Neb. 827, 834, 669 N.W.2d 635, 644 (2003).
172. *Crosby*, 266 Neb. at 834, 669 N.W.2d at 644.
173. 26 U.S.C. § 2503(b) (1997). *See also* Rev. Proc. 2001-59, 2001-52 I.R.B. 623.
174. NEB. REV. STAT. § 77-2101 (2002).
175. NEB. REV. STAT. § 77-2101.03 (2003).

estate of $1,100,000, there is a potential savings of nearly $41,000 in Nebraska estate tax by making a lifetime gift to the child of $100,000.00. Under a series of Nebraska Supreme Court rulings dealing with gifts by an attorney-in-fact, this could not be done under a power of attorney that permits the child to gift to himself or herself. Special language needs to be considered for the terminally ill principal to authorize such a gift.

If the trust is serving as the primary estate planning document, the question arises as to whether or not the agent acting under durable general power of attorney should be given the power to make substantive amendments affecting the disposition of the beneficial interests or revocation of the trust. The authority can be granted to the agent with regard to a trust, even though the power to make a will is inherently personal and the power to make a will cannot be granted in a durable general power of attorney.

If the trust is serving as a substitute for a will, the drafter must carefully consider the circumstances under which the power to revoke the trust or the power to amend the trust is to be granted. If the amendment to the trust does not really affect the beneficial interest, then the power to make such an amendment might well be granted. For example, the power to lift investment restrictions placed in the trust might be contained in a durable general power of attorney. A trust, drafted during extreme economic times, might place investment restrictions on the trustee that the settlor might not want when the economic conditions change. The power to place investment restrictions on the trust might also be provided in the power of attorney.

B. Irrevocable Trust

The settlor may have the authority to consent to the termination of an irrevocable trust.[176] The Comment to UTC section 411 states:

> Consistent with [section 30-3854] on revocation or modification of a revocable trust, the section[177] 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 [an irrevocable] 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 [irrevocable] trust, such authority must

176. Neb. Rev. Stat. § 30-3837 (Supp. 2003).
177. *Id.*

be expressly conveyed either in the power or in the terms of the trust.[178]

The conservator must take into account any known estate plan of the incompetent settlor.[179] Although not specifically mentioned by the statute,[180] the power of the conservator to consent to the termination of an irrevocable trust is likely to need approval of the court in which the conservatorship is pending.

XV. MODIFICATION AND TERMINATION (SECTIONS 414 - 417)

Current Nebraska law provides that a trust terminates when the terms of the trust have been fulfilled or no purpose remains to be achieved.[181] A trust terminates if it is revoked or expires pursuant to its terms, if no purpose of the trust remains to be achieved, or if the purpose of the trust had become unlawful, contrary to public policy or impossible to achieve.[182] Parties with standing, under the modification provisions of the Nebraska UTC[183] and section 30-3803, are generally a trustee or a beneficiary.[184]

A non-charitable irrevocable trust may be modified or terminated upon consent of the settlor and all the beneficiaries even if the modification or termination is inconsistent with the material purpose of the trust.[185] There are restrictions provided for the settlor's power. The provisions of this particular subsection do not seem to require approval by a court or action by a court. In addition, the trustee's consent is not required. However, if the trustee's duties are increased, the trustee would need to consent based upon general principles of trust law and the trustee would have a right to object to such a modification.

A non-charitable irrevocable trust may be terminated upon the consent of all the beneficiaries (without the settlor) if the court concludes that the continuance of the trust is not necessary to achieve

178. NEB. UNICAMERAL, *Banking, Insurance and Commerce Committee: Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code*, LR 367, 120 (Dec. 2002) (discussing changes in Nebraska law under section 411).

179. NEB. REV. STAT. § 30-2656 (1995).

180. NEB. REV. STAT. § 30-2637(3) (1995).

181. *See* NEB. UNICAMERAL, *Banking, Insurance and Commerce Committee: Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code*, LR 367, 117 (Dec. 2002) (discussing changes in Nebraska law under section 410).

182. NEB. REV. STAT. § 30-3836(a) (Supp. 2003).

183. NEB. REV. STAT. §§ 30-3837 - 30-3842 (Supp. 2003).

184. NEB. REV. STAT. § 30-3836(b). The settlor may commence a proceeding under section 30-3837 and the settlor of a charitable trust may commence a proceeding to modify the trust under section 30-3839.

185. NEB. REV. STAT. § 30-3837(a).

any material purpose of the trust.[186] Please note that a spendthrift provision in the terms of the trust is not presumed to constitute a material purpose of the trust.[187] However, section 30-3805(b)(4) needs to be considered. The power of the court to modify or terminate a trust prevails over the terms of the trust. The settlor, when drafting the trust, could provide that the spendthrift provision is intended to be a material purpose of the trust. The court still has the power to modify or terminate the presumption of section 30-3837(c) that the spendthrift provision is not a material provision is merely reversed.

What happens if not all of the beneficiaries consent to a proposed modification or termination of the trust? The court can approve the modification or termination if satisfied that it could have done the modification or termination if all of the beneficiaries had consented and the interests of a beneficiary who does not consent will be adequately protected.[188] The concept of adequate protection is not a new concept in Nebraska law; adequate protection is often required when a bankruptcy court denies relief from the automatic stay.[189]

Because an irrevocable trust may have already created vested rights in property in certain individuals, the applicability of section 30-3837 to an irrevocable trust that was created prior to the effective date of the Nebraska UTC will be a matter that is likely to be litigated.[190] There will be a difference between the administrative terms of the trust and the dispositive provisions of such a trust. To the extent that the power to modify the trust existed before the Nebraska UTC was adopted, there would appear to be no transitional issue.

Under section 30-3838, the court may modify the administrative or dispositive terms of the 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 to the settlor's probable intentions.[191] Please note that modification under section 30-3838, because it does not require the action of a beneficiary, is not precluded by a spendthrift provision.[192]

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186. NEB. REV. STAT. § 30-3837(b).

187. NEB. REV. STAT. § 30-3837(c).

188. NEB. REV. STAT. § 30-3837(e).

189. 11 U.S.C. § 361 (2000).

190. *See Constitutional and Other Issues in the Application of the Nebraska Uniform Trust Code to Preexisting Trusts*, 82 NEB. L. REV. ___ (No. 2) (2003).

191. 82 NEB. L. REV. at ___. The article described above may also apply to the ability of the court to act under section 30-3838.

192. NEB. UNICAMERAL, *Banking, Insurance and Commerce Committee: Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code*, LR 367, 127 (Dec. 2002) (discussing changes in Nebraska law under section 412). Section 412 of the Nebraska study committee's comments on the Uniform Trust Code states: (1) "[I]t seems clear there is currently no authority in Nebraska for the court to modify the dis-

Many attorneys have put a provision in trust agreements permitting the trustee to terminate the trust if the continued existence of the trust would be uneconomical. Due to the cost of operating the trust, a trust with minimal value may be inefficiently administered. This is particularly true with low interest rate markets. The rule provided in section 30-3840, which permits the trustee to terminate the trust which has a total value of less than $100,000 if the trustee concludes that the value of the property is insufficient to justify the costs of the administration, may be modified by the settlor in the terms of the trust.[193] Please note that notice is only given to the qualified beneficiaries and section 30-3840(a) does not require court approval.

The terms of the trustee's power to terminate an uneconomical trust may be modified by the settlor or the trustee's power may be removed entirely by the settlor.[194] The court also may modify or terminate the uneconomic trust or, if the trustee's costs are substantial, the court may remove the trustee and appoint a different trustee.[195] The court's power may not be altered by the terms of the trust.[196]

It is very important to note that the power of the court and the power of the trustee under section 30-3840 are limited in one circumstance; it applies to an easement for conservation or preservation. The trust document cannot grant to the court the ability to act under this section in the case of an easement for conservation or preservation. Because the court has no power to terminate an uneconomical trust under section 30-3840 in that case, an attempt to grant a power would appear to violate section 30-3805(b)(4).

The court is granted the power to reform the terms of a trust, even if the trust is 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 an expression or an inducement.[197] It is possible that the burden of proof has been raised when compared to current Nebraska law. The burden of proof is now "clear and convincing evi-

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positive provisions of a trust using the court's statutory authority or its equitable power of deviation."

193. Section 414(a) of the Uniform Trust Code was modified by the Nebraska Legislature to increase the size which may be determined by the trustee to be uneconomical from $50,000 to $100,000.

194. Section 30-3840(a) of the Revised Statutes of Nebraska is a trustee only power and is not included under section 30-3805(b)(4) as it is not a power of a court that is being discussed. This is another example where careful examination of section 30-3805 is required before concluding that the provision is mandatory.

195. NEB. REV. STAT. § 30-3840(b) (Supp. 2003).

196. NEB. REV. STAT. § 30-3805(b)(4) (Supp. 2003).

197. NEB. REV. STAT. § 30-3841 (Supp. 2003).

dence."[198] However, reformation of a contract under Nebraska law may not be granted unless a mistake sufficient to justify reformation is established by clear and convincing evidence.[199] A similar burden of proof was required in the reformation of a mortgage according to Nebraska case law.[200]

Modification may also be appropriate in other circumstances. The Nebraska UTC has granted authority to the court to modify the terms of a trust in order to achieve the settlor's tax intentions, provided that the modification is not contrary to the settlor's other probable intention.[201] In addition, the court may provide that the modification has retroactive effect.

What is the effect under federal tax law of state property law? State law controls in determining the nature of the legal interests and rights which the taxpayer has in the property or income sought to be reached. The federal tax law designates what interests or rights shall be taxed.[202] In a case in which the matter was not in fact collusive, a retroactive reformation of a trust was permitted. The case involved a mutual mistake of the parties over whether or not an irrevocable trust was created. The California law permitted the reformation of a trust to correct a mistake (California law provided that a trust must state it is irrevocable to be irrevocable) and was given effect for federal tax purposes as well as state law purposes.[203]

Other types of modifications are also permitted. After notice is given to the qualified beneficiaries, the trustee is permitted to combine or divide trusts. This occurs if the result does not impair rights of any beneficiary or adversely affect the achievement of the purposes of the trust.[204]

198. *See* NEB. UNICAMERAL, *Banking, Insurance and Commerce Committee: Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code*, LR 367, 137 (Dec. 2002) (discussing changes in Nebraska law under section 415).

199. Eisenhart v. Lobb, 11 Neb. App. 124, 124, 647 N.W.2d 96, 97 (2002). Please also note that the court found that actions for accident or mistake, although not specifically mentioned in this statute, are classed with fraud and have a four year statute of limitations. The statute of limitations period begins to run upon the discovery of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which should lead to the discovery of such fraud or mistake.

200. Nebraska State Bank v. Pedersen, 234 Neb. 499, 499, 452 N.W.2d 12, 12 (1990).

201. NEB. REV. STAT. § 30-3842 (Supp. 2003).

202. Helvering v. Stuart, 317 U.S. 154, 161 (1942). That court held "once rights are obtained by local law, whatever they may be called, these rights are subject to the federal definition of taxability."

203. Flitcroft v. Comm'r, 328 F.2d 449, 459 (9th Cir. 1964).

204. NEB. REV. STAT. § 30-3843 (Supp. 2003).

XVI. SPENDTHRIFT TRUSTS AND CREDITORS' RIGHTS (ARTICLE 5)

A. SPENDTHRIFT TRUSTS; EXCEPTIONS; DISCRETIONARY TRUSTS

Nebraska has distinguished between support trusts and discretionary trusts in regards to creditor's rights. A spendthrift clause (for beneficiaries other than the settlor) in Nebraska generally has been enforced. However, a support trust could be reached by creditors for support-related debts,[205] but a discretionary trust could not be reached by creditors for any reason. The Nebraska Supreme Court had held, in a discretionary support trust where the children had already become emancipated, the trusts could not be reached for the payment of the child support arrearage. Unless the payment of the arrearage would contribute to the support of the beneficiaries of the trust, the trustee could not be compelled to distribute the trust assets.[206]

One method used in Nebraska to obtain distributions from a trust has been a creditor's bill. This is a proceeding in equity to enforce the payment of a debt out of something belonging to the debtor which cannot be reached by ordinary legal process.[207] A creditor's bill has been referred to as an equitable execution with the purpose of bringing the execution of the court's equitable powers to enforce the satisfaction of judgments when execution at law cannot be obtained.[208]

Nebraska recognizes two types of creditor's bills. The first is used to reach equitable assets or property of a debtor on which execution at law cannot be levied. The second is used in aid of execution at law; for example, to set aside an encumbrance or a transfer of property made to defraud creditors. Unless there are allegations of fraud, the first type of creditor's bill is used to enforce a claim against a beneficiary's interest in the trust.[209]

There are three requirements for an equitable assets creditor's bill. These are that the creditor must have a judgment against the debtor; that the creditor must allege and show that the creditor has exhausted his remedy at law (and obviously that the creditor has not satisfied the judgment by execution); and that the debtor must have some interest in property that the creditor is unable to reach through execution. The procedures to be used to enforce a judgment against a

205. Smith v. Smith, 246 Neb. 193, 197, 517 N.W.2d 394, 398 (1994).
206. *Smith*, 246 Neb. at 197, 517 N.W.2d at 398.
207. Doksansky v. Norwest Bank Neb., 260 Neb. 100, 104, 615 N.W.2d 104, 108 (2000).
208. *Doksansky*, 260 Neb. at 104, 615 N.W.2d at 108.
209. *Id.*

beneficiary's interest in a trust are not changed by the Nebraska UTC.[210]

If there is no spendthrift provision, under the Nebraska Uniform Trust Code, a court may authorize the creditor and assignee of a beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or by other means.[211] The purpose of a spendthrift clause is to protect against the voluntary or involuntary alienation of an interest of a beneficiary under a trust. Nebraska law has permitted the use of such spendthrift provisions to prohibit both voluntary and involuntary alienation of trust interests.[212] No particular form of words is necessary under our current law to create the spendthrift provision and it is also not necessary that the restrictions be expressed directly in the language employed.[213]

There are exceptions to the general rule that the spendthrift provision will protect against involuntary alienation such as by a creditor's execution. However, before there is even a need to look at the spendthrift clause, a determination must be made as to whether or not the beneficiary actually has any current rights. If the trust is revocable, all of the duties of the trustee are owed to the settlor rather than to the beneficiaries.[214] Because there are no duties owed to the beneficiary and because the settlor has total ability to terminate the beneficiary's interest, there is nothing for a creditor to attach.

Once the beneficiary has rights to receive assets from the trust, such as upon the death of the settlor, then there are potential distributions that creditors might reach. The first example is that a creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal, including the terminating distribution if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date.[215] This is consistent with current Nebraska law. There is nothing in the Comments to the UTC describing what a reasonable time would be. It would not appear to be reasonable to require a trustee to make such a distribution before the time for contesting a trust has expired. This applies to a revocable

210. NEB. UNICAMERAL, *Banking, Insurance and Commerce Committee: Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code*, LR 367, 146 (Dec. 2002) (discussing changes in Nebraska law under section 501).

211. NEB. REV. STAT. § 30-3846 (Supp. 2003).

212. First Nat'l Bank of Omaha v. First Cadco Corp., 189 Neb. 734, 737, 205 N.W.2d 115, 118 (1973).

213. Lancaster County Bank v. Marshel, 130 Neb. 141, 152, 264 N.W. 470, 475-76 (1936).

214. NEB. REV. STAT. § 30-3855 (Supp. 2003).

215. NEB. REV. STAT. § 30-3851 (Supp. 2003).

trust that remained revocable until the settlor's death.[216] The trust's validity can be contested within the earlier of one year after the settlor's death or 120 days after the trustee has sent the required notice. A trustee needs to be provided time to give such a notice and a trustee cannot be held responsible for giving such a notice until the trustee knows of the death of the settlor. Assuming the trustee can give such a notice within sixty days after the death of the settlor and allowing for a 120 day period to expire, it would seem unreasonable to allow anyone to pursue an overdue distribution until at least six months have passed since the date of the settlor's death for distributions from a trust that was revocable until the settlor's death.

Another possibility is that there may be a federal estate tax return. Although the trustee may make partial distributions, the trustee should not be required to make a distribution until the federal estate tax closing letter has been received. Because the estate tax return is not due until nine months after death and it takes usually at least six months to obtain a closing letter, a reasonable time under those circumstances would probably be at least fifteen months.

Another example of an exception in the Nebraska UTC to the spendthrift provision is that, even if there is a spendthrift provision, a beneficiary's child, spouse or former spouse who has a court order 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 the court an order attaching present or future distributions to or for the beneficiary.[217] A spendthrift provision is also unenforceable against a claim of the State of Nebraska or of the United States to the extent that a statute of the state or the federal law provides.[218]

A creditor of the beneficiary, whether or not there is a spendthrift provision, may not compel a distribution that is subject to the trustee's discretion, even if the discretion is expressed in the form of a standard of distribution or the trustee has abused the discretion.[219] The power to force a distribution due to abuse of discretion or failure to comply with the standard belongs solely to the beneficiary.[220] However, if the trust is a discretionary trust and the trustee has not complied with the standard of distribution or has abused the discretion, the court may order a distribution to be made to satisfy the court order for support. The amount that the court can direct the trustee to pay is an amount that is equitable under the circumstances, but not more than the amount the trustee would have been required to distribute to or for

216. NEB. REV. STAT. § 30-3856(a) (Supp. 2003).
217. NEB. REV. STAT. § 30-3848(b) (Supp. 2003).
218. NEB. REV. STAT. § 30-3848(c).
219. NEB. REV. STAT. § 30-3849(b) (Supp. 2003).
220. NEB. REV. STAT. § 30-3849(d).

the beneficiary had the trustee complied with the standard or not abused the discretion.[221]

The issue sometimes arises regarding the liability of trust property for personal obligations of the trustee. The Nebraska UTC provides that trust property is not subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt.[222] The trustee only holds legal title to the property and property in which the trustee holds legal title as trustee is not part of the trustee's bankruptcy estate.[223]

B. Rights of Creditors at Death of Settlor (Section 505)

The UTC does not deal with the rights of creditors to reach the assets of a living trust established by the settlor that became irrevocable during the settlor's lifetime. This issue remains open. For example, if a settlor establishes an irrevocable trust with directions to pay income for life to the settlor with the principal being distributed to the settlor's child upon the settlor's death, the UTC does not provide for what happens to the creditors of the settlor after the settlor's death. Because the rights of the settlor expire at death, in our example it is possible that there is no claim to be pursued. However, the settlor's estate may have a right to income accrued during his lifetime, but which has not yet been paid to the settlor prior to his death. Thus, there may be an asset available in such a trust and the only person who can obtain such an asset is the personal representative of the decedent's estate. If no personal representative has been appointed more than forty-five days after the death of the settlor, any creditor of the settlor can petition for appointment as personal representative of the estate.[224]

Property of a trust that remains revocable until the settlor's death will be subject to the claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the funeral and the three statutory allowances, exempt property allowance, homestead allowance and family maintenance allowance.[225] Nebraska modified the UTC provision for two reasons. First, the UTC provision does not provide a procedure for the enforcement of the debts, expenses of administration and allowances. Second, there was a desire to make certain that property, that is exempt from claims of creditors under the laws of Nebraska or under federal law, does not become subject to those

221. Neb. Rev. Stat. § 30-3849(c).
222. Neb. Rev. Stat. § 30-3852 (Supp. 2003).
223. 11 U.S.C. § 541(d) (2000).
224. Neb. Rev. Stat. § 30-2412 (1978).
225. Neb. Rev. Stat. § 30-3850(a)(3) (Supp. 2003).

claims merely because it passes through a trust that was revocable at the time of the settlor's death.

The procedures that were adopted as part of the Nebraska UTC, for asserting claims against a revocable trust upon the settlor's death, were based upon the procedures already contained in the Nebraska Probate Code for recovery of property from certain other non-probate assets. These include the rights of creditors to joint accounts in a financial institution, accounts with a POD[226] designation at a financial institution,[227] and the procedures for a TOD[228] registration of securities.[229]

The settlor retains the right to direct the source from which the liabilities will be paid. If the settlor does not exercise that right, the primary source of such payments is the probate estate. If the probate estate is insufficient to provide for such payments, then the personal representative of the estate, upon receiving a demand in writing from someone who would receive a benefit from the estate such as a creditor or surviving spouse, may commence a proceeding to assert the liability for claims against the estate and the statutory allowances. As with the current probate code, the personal representative cannot proceed without such a written demand. The proceeding to recover sums from the non-probate transfers must be commenced within one year after the death of the decedent.[230]

As with the other non-probate property recovery provisions, there is a contribution provision contained within the statute. This is not restricted to property recovered from trusts, but also includes property recovered from other recoverable non-probate transfers, such as a POD designation on a bank account. In any case, where the property passing by will may not be sufficient to provide for payment of the claims against the estate and the statutory allowances, the testator needs to consider providing in the will or trust agreement for an order as to which assets are to be used up to pay these items. In other words — whose inheritance is altered?

For example, if the trust is to be the primary instrument in the estate plan, then perhaps the testator may wish to provide an order of abatement such as the residuary under the will, then an order in which the specific bequests under the will abate, then POD bank accounts, then joint tenancy bank accounts, then TOD securities and finally the revocable trust. The trust agreement should provide its own

226. Payable on death.
227. NEB. REV. STAT. § 30-2726 (1995).
228. Transfer of death.
229. NEB. REV. STAT. § 30-2743 (1995).
230. NEB. REV. STAT. § 30-3850(a)(3).

internal abatement order. When there are numerous specific bequests, the person making the estate plan often has some preferred bequests that should be paid first; this needs to be considered by the drafter in the estate plan.

In drafting the estate plan when there is a relatively large dollar value of specific gifts under the trust or the will, it may be wise to include specific gifts to the primary beneficiaries as well. If they are in the same class, they will abate proportionately and the primary beneficiaries may get something as opposed to nothing. If the trustee is uncertain as to whether or not there will be sufficient assets to pay the debts of the probate estate, should the trustee hold the assets of the trust until the one year mark has passed? Until the trustee receives a written notice from the personal representative, the trustee is allowed to distribute assets to the beneficiaries and the trustee is released from liability with regard to those assets.[231]

What is the meaning of a "commencement of an action"? This is a matter of Nebraska civil procedure. The action is commenced on the date that the complaint is filed with the court.[232] The statute also gives up to six months to have service of process completed.[233] To be certain that there has been no action commenced, the trustee needs to check with the clerks of the courts (both county and district) which would have jurisdiction over the trustee.

If an action is commenced against the trustee and service is not completed within six months the case is automatically dismissed without any action by the court and the court does not have any jurisdiction to enter an order.[234] The operation of this statute is mandatory. If this type of situation occurs, an examination of the possible tolling of the statute of limitations becomes an important issue.[235]

C. Rights of Creditors During Lifetime of Settlor

During the lifetime of the settlor, whether or not the trust contains a spendthrift provision, the creditors of the settlor may reach the assets of the trust. In other words, the revocable trust is subject to the claims of the settlor's creditors when the settlor is living.[236] That is currently in Nebraska law. As a matter of public policy, a person cannot create a spendthrift trust for himself in order to enjoy the property

231. Neb. Rev. Stat. § 30-3850(a)(5).
232. Neb. Rev. Stat. § 25-217 (1995).
233. Neb. Rev. Stat. § 25-217.
234. Vopalka v. Abraham, 260 Neb. 737, 745, 619 N.W.2d 594, 599 (2000).
235. Such an examination of the statute of limitations is beyond the scope of this article.
236. Neb. Rev. Stat. § 30-3850(a)(1).

and at the same time prevent creditors from getting to it.[237] If the trust is instead an irrevocable trust, the creditor may reach the maximum amount that may be distributed to or for the settlor's benefit.[238]

D. Uniform Fraudulent Transfers Act; Bankruptcy

In dealing with an irrevocable trust, as we have discovered above, the creditor is limited under the Nebraska UTC to the assets or income which could be distributed to the settlor. However, that is not the only method of attacking such a trust because Nebraska has adopted the Uniform Fraudulent Transfers Act.[239] This act is available to set aside transfers of a trust if such transfers fall within the terms of the act. This act is unaffected by the adoption of the Nebraska UTC.

A transfer made by a debtor is fraudulent, in regards to a creditor, under certain circumstances if the debtor made the transfer with the actual intent to hinder, delay or defraud any creditor.[240] There are other possibilities for determining when a transfer is fraudulent under the Nebraska Uniform Fraudulent Transfers Act. When an irrevocable trust is being created for a client, it becomes important for counsel and the settlor to determine whether or not the transfer renders the settlor insolvent or is intended to defraud a creditor. Even if the creditor has limits under the Nebraska UTC in an irrevocable trust, the trustee in bankruptcy may not be so limited. For example, the bankruptcy code provides for its own fraudulent transfer provision.[241] A trustee in bankruptcy may also use the state law uniform fraudulent transfers act to set aside a transfer. If the trust is revocable, then the assets of the trust can become property of the estate.[242]

Bankruptcy also affects other parties to the trust. There are some unfortunate situations in which the trustee holding assets of the trust declares bankruptcy. If the trustee is liable for stealing trust funds, that liability is non-dischargeable in bankruptcy.[243]

XVII. REVOCABLE TRUSTS (ARTICLE 6)

The most major change in the Nebraska UTC is the reversal of the common law presumption that a trust is irrevocable unless the terms of the trust provide that it is revocable or that it may be

237. *First Cadco Corp.*, 189 Neb. at 738, 205 N.W.2d at 118.
238. Neb. Rev. Stat. § 30-3850(a)(2).
239. Neb. Rev. Stat. §§ 36-701 - 36-712 (1998).
240. Neb. Rev. Stat. § 36-705.
241. 11 U.S.C. § 548 (2000).
242. 11 U.S.C. § 541(a)(1).
243. 11 U.S.C. § 523(a)(4) (2000). However, for a Chapter 13 Plan, *see* 11 U.S.C. § 1328 (2000).

amended.[244] Most states, including Nebraska, follow the rule that the trust is presumed irrevocable absent evidence of contrary intent.[245] The UTC endorses a minority approach that has been adopted in several states. The comment to section 602 of the UTC states that the UTC presumes revocability when the instrument is silent because the instrument was likely drafted by a non-professional who intended the trust as a will substitute. The comment further states that a power of revocation includes the power to amend.

Current Nebraska law has no clear provisions to protect the trustee from making distributions even though the distributions are made without knowledge of a potential contest proceeding. If a revocable trust becomes irrevocable because of the death of a settlor, then current law would apply a four-year statute of limitation for the contest of such a trust.[246] This may be compared to the time to challenge an informally probated will, which is the later of twelve months from the informal probate or three years from the decedent's death.[247]

Revocable living trusts are often established by the settlor with the intention of speeding up the process of distribution at death. If a trustee is concerned about a trust concept, the trustee would hold onto the trust property until the four-year statute of limitations expires. The new law provides that the time period for commencing a judicial proceeding, to contest the validity of a trust that was revocable at the settlor's death, is the earlier of one year after the settlor's death or 120 days after the trustee sent that 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 the time allowed for commencement of a proceeding.[248]

The statute also gives the trustee protection in making distributions before the trustee knows that there is a potential contest. There is no liability unless the trustee knows of a pending judicial proceeding contesting the validity of the trust or a potential contestant has notified the trustee of a possible judicial proceeding to contest the trust and the judicial proceeding is in fact commenced within sixty days after the contestant has sent the notification.[249] The beneficiary who receives property from a trust that later is determined to be invalid is liable to return the property and its income since its distribution. The beneficiary of the disposition must return the property if it is still

244. NEB. REV. STAT. § 30-3854(a) (Supp. 2003).
245. UNIF. TRUST CODE § 602 cmt., 7C U.L.A. 183 (Supp. 2003); RESTATEMENT (SECOND) OF TRUSTS § 330 (1959).
246. NEB. REV. STAT. § 25-212 (1995).
247. NEB. REV. STAT. § 30-2408(3) (2003).
248. NEB. REV. STAT. § 30-3856(a) (Supp. 2003).
249. NEB. REV. STAT. § 30-3856(b).

in his possession. If the beneficiary has disposed of the property, the beneficiary is liable for the value of the property as of its date of disposition and income received from the property as well as any gain received by the beneficiary from use of the property.[250]

XVIII. OFFICE OF TRUSTEE (ARTICLE 7)

Article 7 of the UTC has been adopted in Nebraska.[251] With one exception,[252] all of the provisions of Article 7 are subject to modification in the terms of the trust.[253] Nebraska modified UTC section 701[254] to permit a trustee to accept the trust by registering the trust in accordance with the Nebraska registration procedures. The language use is established in statutory procedures. Thus a trust properly registered in another state would meet this requirement of Nebraska law.

The procedures for accepting or declining a trusteeship permit a person designated as a trustee who has not yet accepted the trust to reject the trust within a reasonable time. The failure to accept the trusteeship within a reasonable period of time is considered a rejection. The person designated as trustee may act to preserve the property if within a reasonable time the rejection of the trustee is sent. The Nebraska statute specifically permits an inspection or investigation of the trust property to determine potential liability under environmental or other laws or for any other purpose.[255] This could be particularly important for trusts involving real estate that has environmental problems or real estate which is in the vicinity of property that does have an environmental problem.

As with current law, the court has been given the authority to require a bond even if the trust does not require it. As noted above, this power may not be modified by the terms of the trust.[256] A bank or trust company qualified to do trust business in Nebraska does not need to give a bond even if it is required by the terms of the trust.[257]

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250. NEB. REV. STAT. § 30-3856(c).

251. NEB. REV. STAT. §§ 30-3857 - 30-3865 (Supp. 2003).

252. The exception is the power of the court to deal with the bond.

253. NEB. REV. STAT. § 30-3805(a) (Supp. 2003); NEB. UNICAMERAL, *Banking, Insurance and Commerce Committee: Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code*, LR 367, 195 (Dec. 2002) (discussing changes in Nebraska law under Article 7).

254. NEB. REV. STAT. § 30-3857.

255. NEB. REV. STAT. § 30-3857.

256. NEB. REV. STAT. § 30-3858 (Supp. 2003); NEB. REV. STAT. § 30-3805(b)(7) (Supp. 2003).

257. This was a minor change, from the Uniform Trust Code section 702, to reflect Nebraska terminology.

Guidance for the exercise of powers by co-trustees is given under section 30-3859. A majority decision of the trustees is sufficient to remit the trustees to act. Please remember that this provision is a default provision and may be overridden by the trust agreement.[258] It is appropriate for the drafter of the trust agreement to provide for the authority of each co-trustee. The default rules provide that a majority of the co-trustees must act on behalf of the trust. Because a majority is required, both trustees must act if there are only two trustees. This may be impractical for the client who is elderly. In that case, the power is often given by the trust agreement for either trustee to act alone without the signature of the other trustee. In snowy or icy weather, elderly people often do not like to travel or they may be out of state. Restricting the ability of a co-trustee to act (when the settlor is also acting as a co-trustee until incapacitation) can cause problems. One possible solution is to give a durable power of attorney to a trusted third-party who is permitted to sign a resignation on behalf of the settlor as a trustee or who is permitted to amend the trust to authorize the co-trustee to act alone without the signature of the settlor-co-trustee. In addition, a dissenting trustee who joins in an action at the direction of the majority of the trustees and who notified any co-trustee of the dissent at or before the time of the action is not liable for the action unless the action is a serious breach of trust.[259]

The Nebraska UTC also lists circumstances when a vacancy in the trusteeship occurs and also how a vacancy is filled.[260] If there are one or more remaining co-trustees, the vacancy need not be filled. This must be considered by the drafter when there are trustees who are members of different branches of the family. Often, if one person dies or resigns from a branch of the family, someone else from that same branch replaces the original trustee.

A vacancy in a non-charitable trust that needs to be filled is 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.[261] This is another example of where it is important to know who the qualified beneficiaries are.[262] These provisions may be altered by the terms of the trust. Authority to name

258. NEB. REV. STAT. § 30-3805(a).
259. NEB. REV. STAT. § 30-3859(h) (Supp. 2003).
260. NEB. REV. STAT. § 30-3860 (Supp. 2003).
261. NEB. REV. STAT. § 30-3860(c).
262. NEB. REV. STAT. § 30-3803(12) (Supp. 2003). Query: the mandatory provisions dealing with qualified beneficiaries under section 30-3805(b), for example a certain duty under subdivisions (b)(2) and (3) of section 30-3878 to notify qualified beneficiaries is a mandatory rule. However, section 30-3805(b) of the Revised Statutes of Nebraska does not seem to eliminate the ability of the settlor to modify the definition of a qualified

the successor trustee could be granted to one or more persons in the trust agreement. In establishing such a provision, a review of federal tax law is appropriate.

As with Nebraska law prior to the adoption of the Nebraska UTC, there is a statutory provision dealing with the resignation of a trustee.[263] Again, notice goes to the qualified beneficiaries rather than to all beneficiaries. Procedures for dealing with the resigning trustee are provided by the statute.

The Nebraska Probate Code provides provisions on how to deal with the removal of a trustee and the Nebraska UTC does as well.[264] However, there is a change in the Nebraska UTC in regard to an irrevocable trust; the settlor has been granted standing to request the court to remove a trustee of an irrevocable trust.[265] The trustee who resigned or has been removed may still have the duties of a trustee and the powers necessary to protect the trust property until the property is delivered to a successor trustee or to such other person who may be entitled to it. This would not apply if there is a co-trustee who remains in office or if the court otherwise orders. The trustee who has resigned or has been removed is to proceed expeditiously to deliver the trust property to the appropriate person.[266] If the former trustee has died, the UTC does not require that the trustee's personal representative wind up the deceased trustee's administration. The personal representative may submit a trustee's report on the former trustee's behalf.[267]

Please note that Nebraska modified section 707 of the UTC to add subsection (c). Subsection (c) make it clear that title to all trust property is owned by and vested in any successor trustee without any conveyance, transfer, or assignment by the prior trustee.[268] For example, if title to the real estate is in the name of a deceased trustee, a probate of the deceased trustee does not need to be opened for a personal representative to be appointed to transfer title to the successor trustee. Assuming the trustee can prove that he or she is the current trustee and that the office of trustee was vacant, the current trustee would be able to transfer property that is in the name of a prior trustee. It is

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beneficiary. Can the settlor name his or her own qualified beneficiaries or a formula for determining them?

263. NEB. REV. STAT. § 30-3861 (Supp. 2003).

264. NEB. REV. STAT. § 30-3862 (Supp. 2003).

265. NEB. REV. STAT. § 30-3862(a).

266. NEB. REV. STAT. § 30-3863 (Supp. 2003).

267. NEB. UNICAMERAL, *Banking, Insurance and Commerce Committee: Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code*, LR 367, 218 (Dec. 2002) (discussing changes in Nebraska law under section 707).

268. NEB. REV. STAT. § 30-3863(c).

possible that a new Nebraska title standard should be adopted as a result of this provision.

Compensation of the trustee and reimbursement of the trustee's expenses are also provided in the Nebraska UTC.[269] Advancement 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.[270]

XIX. DUTIES AND POWERS OF TRUSTEE (ARTICLE 8)

A. General Trustee Duties and Powers

Article 8 of the UTC, as adopted by Nebraska, deals with the duties and powers of a trustee.[271] Many of these provisions are currently part of Nebraska law. For example, the trustee is required to administer the trust in good faith, in accordance with its terms, in the interests of the beneficiaries and in accordance with the Nebraska UTC.[272] Furthermore, if a trust has two or more beneficiaries, the trustee is required to act impartially in investing, managing and distributing the trust property giving due regard to the beneficiaries' interest. This is a provision which must be considered when drafting a trust.

Article 8 of the UTC was adopted by Nebraska with the exception of section 807.[273] Nebraska did not adopt this section because it felt that the delegation by the trustee was governed by former section 8-2210[274] of the Nebraska Uniform Prudent Investor Act. The Nebraska study committee in its report to the legislature stated:

> The provisions of Section 8-2210 authorized delegation by the trustee, but in a more limited scope of investment and management functions. The provisions of U.T.C. Section 807 authorized delegation by the trustee in a more general scope of trust administration.[275]

As a result of this concern over the provisions of UTC section 807, that section was not adopted as part of the Nebraska Uniform Trust Code.

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269. Neb. Rev. Stat. § 30-3864 (Supp. 2003); Neb. Rev. Stat. § 30-3865 (Supp. 2003).

270. Neb. Rev. Stat. § 30-3865(b).

271. Neb. Rev. Stat. §§ 30-3866 - 30-3882 (Supp. 2003).

272. Neb. Rev. Stat. § 30-3866.

273. Neb. Rev. Stat. §§ 30-3866 - 30-3882.

274. This has been transferred to section 30-3888 of the Revised Statutes of Nebraska.

275. Neb. Unicameral, *Banking, Insurance and Commerce Committee: Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code*, LR 367, 250 (Dec. 2002) (discussing Nebraska law and section 807 of the Uniform Trust Code).

When dealing with a married couple who are estate planning with a goal of avoiding federal estate taxes, it is often found that they have two purposes: to provide for the surviving spouse and to avoid as much tax as possible. When we examine the purpose of providing for the surviving spouse, we must determine to what extent the trustee's duty of impartiality needs to be modified under the terms of the trust. Is the trustee to be more concerned with producing income or does the trustee need to invest in some blended fashion trying to produce income and capital gains? If the trust provides for a definition of income that does not include any component of capital gains, then the trustee may be caught on the horns of a dilemma. The surviving spouse may wish income-type investments (under the recent federal tax law that may be dividend-paying stocks instead of interest-bearing obligations) and the remainder beneficiaries may desire more growth-oriented stock that pays small or no dividend. The settlor should express his or her intentions in dealing with this issue within the instrument.

The settlor also needs to consider whether instructions should be given to the trustee concerning the preservation of principal. The provisions of the Uniform Prudent Investors Act, remaining in Nebraska,[276] also need to be considered when establishing the duties of a trustee. For example, a fairly common case involves a company or a farm that was owned by a deceased settlor that is now owned by a trust. Should the company or farm be retained? If the desire to retain the asset is present, then the trustee needs some relief from the requirement for diversification.[277]

If the trust is revocable, the trustee may follow written direction of the settlor that is contrary to the terms of the trust.[278] The concept is that the written direction of the settlor is in effect an amendment of the trust. In order to avoid the tremendous proof problems of an oral direction given to the trustee by the settlor, Nebraska requires that the direction be written.[279]

Another duty requires a trustee to take reasonable steps to take control of and to protect trust property.[280] The requirement that the trustee take possession of the property is subject to alteration by the terms of the trust. 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

276. NEB. REV. STAT. §§ 30-3883 - 30-3889 (Supp. 2003).
277. NEB. REV. STAT. § 30-3885.
278. NEB. REV. STAT. § 30-3873(a) (Supp. 2003).
279. *See* NEB. UNICAMERAL, *Banking, Insurance and Commerce Committee: Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code*, LR 367, 254 (Dec. 2002) (discussing changes in Nebraska law under section 809).
280. NEB. REV. STAT. § 30-3874.

possession.[281] If the settlor desires such an arrangement, the settlor could include language in the trust such as:

> The trustee may retain the residence of the settlor in which either the settlor or the settlor's spouse was residing (or to which either of them had an expressed intention to return) at the time of the settlor's death. This residence may be retained without regard to principles of diversification. The settlor's spouse, if the spouse survives the settlor, may occupy the residence without rent for so long as the spouse may live or until the spouse is no longer able to return to the residence. The trustee may continue to retain the residence while the settlor's spouse is in a nursing home for so long as the trustee, at the trustee's discretion, deems it appropriate to retain the residence for the possibility of the settlor's spouse return or for so long as the mental health of the settlor's spouse would be affected by the inability to return to the residence.

The words "absolute," "sole" or "uncontrolled," when used with discretion does not mean that the discretion is absolute.[282] The trustee is required to exercise the discretionary power in good faith and according to the terms and purposes of the trust and the interest of the beneficiaries.[283]

A savings provision has been added that can be modified by the settlor in the terms of the trust. One of the traditional tax concerns is that a person, who has a power as a trustee to make discretionary distributions to or for the trustee's own personal benefit, may end up with a general power of appointment that could result in the inclusion of all or part of the trust in the trustee's estate for federal estate tax purposes.[284] Nebraska has now made an attempt to avoid this problem by treating certain trustee discretionary powers as non-general if certain conditions are met.[285] The settlor can draft around these provisions if the intent of the settlor is to actually benefit the trustee. If the trustee is the primary beneficiary of the settlor's legacy, then the drafter should give consideration to modifying this default provision of state law in the terms of the trust agreement. If there is a co-trustee,

281. NEB. UNICAMERAL, *Banking, Insurance and Commerce Committee: Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code*, LR 367, 255 (Dec. 2002) (discussing changes in Nebraska law under section 809).

282. NEB. UNICAMERAL, *Banking, Insurance and Commerce Committee: Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code*, LR 367, 271 (Dec. 2002) (discussing changes in Nebraska law under section 814).

283. NEB. REV. STAT. § 30-3879(a).

284. 26 U.S.C. § 2041 (1976).

285. NEB. REV. STAT. § 30-3879(b).

the co-trustee is not limited by the limitations provided on the trustee for whose benefit the power may be exercised.[286]

This special power does not apply to a power held by the settlor's spouse who is trustee of a trust for which a federal estate tax, federal gift tax or marital deduction was previously allowed; to any trust during the period of time that the trust may be revoked or amended by its settlor; or to a trust if contributions to the trust qualify for the annual exclusion under section 2503(c) of the Internal Revenue Code of 1986.[287] These three exceptions are designed to allow minors' trusts, revocable trusts, and QTIP marital trusts to qualify under federal law. However, the exception with regard to the settlor's spouse is a little more complicated than it first appears. If no estate tax return is needed or filed, then the power held by the settlor's spouse who is the trustee is subject to the limitations of section 30-3879(b). This also applies to the extent that a QTIP election is not made.[288]

The trustee is granted powers in a general[289] as well as in a specific list.[290] The powers of the trustee may be limited or expanded by the trust agreement. The trustee has all powers over the trust property which an unmarried, competent owner has over individually owned property; any other powers appropriate to achieve the property investment, management and distribution of the trust property; and any other powers conferred by the Nebraska UTC.[291]

The Nebraska UTC also provides a section dealing with the duty of loyalty of a trustee to the beneficiaries. Please note that the Nebraska statute, section 30-3867's subsection lettering will be different from that of the UTC. Section 802(d) of the UTC was not adopted by the Nebraska Legislature.[292] Section 30-3867 should be studied carefully by all practitioners as there may be drafting issues involved as a result of this section.

B. TRUSTEE'S DUTY TO INFORM

When first looking at section 30-3878, which requires the trustee to keep qualified beneficiaries of the trust reasonably informed about the administration of the trust, some concerns arise about young qual-

286. NEB. REV. STAT. § 30-3879(c).
287. NEB. REV. STAT. § 30-3879(d).
288. NEB. UNICAMERAL, *Banking, Insurance and Commerce Committee: Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code*, LR 367, 273 (Dec. 2002) (discussing changes in Nebraska law under section 814).
289. NEB. REV. STAT. § 30-3880.
290. NEB. REV. STAT. § 30-3881.
291. NEB. REV. STAT. § 30-3880(a)(2).
292. *See* NEB. UNICAMERAL, *Banking, Insurance and Commerce Committee: Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code*, LR 367, 239 (Dec. 2002) (discussing changes in Nebraska law under section 802).

ified beneficiaries. You must remember that this requirement does not apply to a revocable trust while the settlor is alive and competent. While the settlor is alive and competent and the trust remains revocable, all of the duties of the trustee are owed exclusively to the settlor.[293] While the settlor remains alive and competent, there is no obligation on the trustee to report to anyone other than the settlor.[294]

However, there is a requirement to notify qualified beneficiaries after accepting a trusteeship. Until the trustee's duties are no longer owed to the settlor, the provisions of section 30-3878(b)(2) do not apply to the trustee. Section 30-3878 contains some mandatory provisions pursuant to section 30-3805(b)(8) and (9). The provisions of section 30-3805(b) need to be closely examined as they are not coextensive with the provisions of section 30-3878. In addition, trusts that were created and become irrevocable before January 1, 2005 are not subject to the requirements of section 30-3878(b)(2) and (3).[295] This was a modification made by Nebraska to the UTC provision.

The mandatory provision of section 30-3878(b)(3), which requires notification to certain qualified beneficiaries of a 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 section 30-3878,(c) is partially subject to the mandatory requirement under section 30-3805(b)(8). However, qualified beneficiaries who are not yet twenty-five years old do not have such rights if the trust so provides.[296]

If a beneficiary of an irrevocable trust requests a trustee's report and other information reasonably related to the administration of a trust, the trustee is under the obligation to report this to the beneficiary.[297] However, remember this applies only to an *irrevocable trust.* As with the other mandatory provision of section 30-3878, the trust must be irrevocable.[298] If the trust remains revocable, the trust agreement can control the operation of section 30-3878.

The lack of capacity in the settlor to revoke the trust does not mean that the trust has become irrevocable. The settlor may have granted the power to revoke to an agent under a durable power of attorney.[299] A conservator of the settlor, with approval of the court

293. NEB. REV. STAT. § 30-3855 (Supp. 2003). Nebraska modified section 30-3878 of the Nebraska Revised Statutes to add subsection (e) which reads "the duties of a trustee specified in this section are subject to the provisions of § 30-3855."

294. NEB. REV. STAT. § 30-3855(a).

295. NEB. REV. STAT. § 30-3878(f).

296. NEB. REV. STAT. § 30-3805(b)(8) (Supp. 2003).

297. NEB. REV. STAT. § 30-3878(a); NEB. REV. STAT. § 30-3805(b)(9).

298. NEB. REV. STAT. § 30-3805(b)(8) & (9).

299. NEB. REV. STAT. § 30-3854(e) (Supp. 2003).

supervising the conservatorship, may revoke the trust.[300] In addition, if a person has a power of withdrawal that applies while the settlor is incompetent but remains alive, that person has the rights of a settlor of a revocable trust including the right to benefit from all the duties of the trustee.[301]

XX. CONTESTED MATTERS (ARTICLE 10)

UTC Article 10 deals with contested matters.[302] This Article of the UTC also contained a trust certification provision. Nebraska did not adopt the UTC trust certification provisions, instead retaining its prior trust certification provisions.[303] There is now a list of statutory remedies for breach of a trust. The Nebraska UTC simply defines a breach of trust as a violation of a duty the trustee owes to the beneficiary.[304] This simplifies Nebraska law.[305] The list of remedies is similar to those under current Nebraska law. The list of remedies may be modified by the terms of the trust to the extent that it does not affect the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice[306] or the power of the court to review the action or the proposed action of the trustee for an abuse of discretion.[307] Damages may be awarded for a breach of trust. The amount awarded is the greater of the amount required to restore the value of the trust property and the trust distributions to what they would have been if the breach had not occurred or the profit made by the trustee as a result of the breach.[308]

In addition, if more than one trustee is liable to the beneficiaries, a right to contribution may be asserted by the trustee held liable against another trustee.[309] This right to contribution does not apply to a trustee who is substantially more at fault than another trustee or to a trustee who committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or to the interests of the beneficiaries. Also, a trustee who received a benefit from the breach of the trust is not entitled to contribution from another trustee to the extent of the benefit received.

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300. NEB. REV. STAT. § 30-3854(f).
301. NEB. REV. STAT. § 30-3855(c).
302. NEB. REV. STAT. §§ 30-3890 - 30-38,101 (Supp. 2003).
303. NEB. REV. STAT. §§ 30-38,102 - 30-38,107 (Supp. 2003).
304. NEB. REV. STAT. § 30-3890(a).
305. *See* NEB. UNICAMERAL, *Banking, Insurance and Commerce Committee: Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code*, LR 367, 302 (Dec. 2002).
306. NEB. REV. STAT. § 30-3805(b)(13) (Supp. 2003).
307. NEB. REV. STAT. § 30-3805(b)(16).
308. NEB. REV. STAT. § 30-3891(a).
309. NEB. REV. STAT. § 30-3891(b).

A trustee is accountable to the affected beneficiary for any profit made by the trustee arising from the administration of the trust, even absent a breach of the trust.[310] The comment to the UTC gives a typical example of such a profit which is a receipt by the trustee of a commission or bonus from a third-party for accidents relating to the trust's administration.[311] Without a breach of the trust, the trustee is not liable to a beneficiary for a loss or depreciation of the value of the trust property or for not having made a profit.[312]

Attorney's fees and costs in a judicial proceeding involving the administration of a trust may be awarded by the court.[313] The source of the funds may be from another party or from the trust itself. This provision would allow an award of attorney's fees from the trustee's personal assets rather than from the trust in an action in which the trustee is at fault. Because Nebraska law currently provides that attorney's fees may only be awarded where provided by statute or by case law, this appears to be a change in Nebraska law to the extent that a party may be required to pay attorney's fees from his or her own personal assets.

The limitation for breach of a trust is one year after the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding.[314] The report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary represented knows of a potential claim or should have inquired into its existence. If the one-year rule does not apply, then there is a four-year statute of limitations from the first to occur of the removal, resignation or death of the trustee; the termination of the beneficiary's interest in the trust; or the termination of the trust.[315] The periods of limitation for commencing a judicial proceeding cannot be drafted out by the terms of an instrument.[316]

Trusts often provide for exculpation of the trustee. The Nebraska UTC provides for a limitation on the ability of the terms of the trust to provide for an exculpation of the trustee.[317] These limitations are

310. NEB. REV. STAT. § 30-3892(a).

311. *See* NEB. UNICAMERAL, *Banking, Insurance and Commerce Committee: Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code*, LR 367, 308 (Dec. 2002) (discussing changes in Nebraska law under section 1003).

312. NEB. REV. STAT. § 30-3892(b).

313. NEB. REV. STAT. § 30-3893.

314. NEB. REV. STAT. § 30-3894(a).

315. NEB. REV. STAT. § 30-3894(c).

316. NEB. REV. STAT. § 30-3805(b)(12).

317. NEB. REV. STAT. § 30-3897.

mandatory and cannot be drafter around.[318] A term of a trust that tries to relieve a trustee of liability for breach of a trust is unenforceable to the extent it either relieves the trustee of liability when the breach was in bad faith or was with reckless indifference. It also does not apply to the extent that it was inserted as a result of abuse by the trustee of a fiduciary or confidential relationship with the settlor. If the trustee causes the term to be drafted or drafts it himself, the UTC presumes that it is invalid as an abuse of fiduciary or confidential relationship unless the trustee proves that the term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor.[319]

A trust beneficiary can ratify or consent to the conduct or transaction which is the breach.[320] However, this does not apply if we have improper conduct on the part of the trustee or if at the time involved the beneficiary did not know of the beneficiary's rights or the material facts relating to the breach.

XXI. ELECTRONIC DOCUMENTS AND SIGNATURES (ARTICLE 11)

Section 1102[321] of the UTC deals with the effect of electronic records and signatures. Nebraska has adopted the Uniform Electronic Transactions Act which became effective July 13, 2000.[322] It is also possible for the Electronic Signatures in Global and National Commerce Act[323] to apply to transactions involving the UTC. The rationale behind section 1102 of the UTC is that the Nebraska Uniform Electronic Transactions Act should be the primary set of applicable rules to determine the effect of an electronic document and an electronic signature. Both the Federal Electronic Signatures in Global and National Commerce Act and the Nebraska statutes in the Nebraska Uniform Electronics Transactions Act provide that they do not apply to "a law governing the creation and execution of wills, codicils or testamentary trust."[324]

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318. NEB. REV. STAT. § 30-3805(b)(10).

319. NEB. REV. STAT. § 30-3897(b). The comment to the Uniform Trust Code appearing on page 322 of the Report of the study committee to the Nebraska Legislature states that the requirements of proof are satisfied if the settlor is represented by independent counsel. If the settlor is represented by independent counsel the settlor's attorney is considered the drafter of the instrument even if the attorney uses the trustee's form. Disclosure of an exculpatory term to the settlor's attorney is disclosure to the settlor.

320. NEB. REV. STAT. § 30-3898.

321. NEB. REV. STAT. § 30-38,109 (Supp. 2003).

322. NEB. REV. STAT. §§ 86-616 - 86-643 (2003).

323. Act of June 30, 2000, Pub. L. No. 106-229.

324. NEB. REV. STAT. § 86-603(b)(1) (2003); 15 U.S.C. § 7003(a)(1) (2000).

Because a testamentary trust is created by a will, wills are not permitted to be in electronic form nor are they permitted to have an electronic signature. Testamentary trusts cannot be created in electronic documents; only paper documents are permitted. This would also be true to any amendment to a testamentary trust by the settlor made in a later will or codicil. What about a situation where a testamentary trust permits amendments to be made by someone else after the death of the settlor and after the testamentary trust has been established by the probate court? Although there may be some question, it appears that the Nebraska statute would prohibit such an amendment to be signed in electronic form.

The use of the Uniform Electronic Transactions Act is voluntary. Both parties must agree to the use of electronic means.[325] Whether or not an agreement occurs may be determined based on the circumstances. A record, signature or contract may not be denied solely because it is in electronic form.[326]

There is a common practice that trust documents are notarized. We must first determine whether or not trust agreements and amendments may be in electronic form and may be signed electronically. There is no exception contained in the UTC and there is no exception contained in the Uniform Electronic Transactions Act. If both the settlor and the trustee agree, the trust agreement and the trust amendment may be in electronic form and may be assigned electronically. Nebraska law provide for what happens if a document is to be notarized, which states:

> If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record.[327]

This leads to a practical problem that — if you have an electronic trust agreement and must record it with the Register of Deeds, how does it get accomplished? Is a printed copy of the trust agreement an "original" suitable for recording?

What other documents created under the UTC may be done in electronic form or may be signed electronically? These could include a non-judicial settlement agreement under section 111;[328] an exercise of a power withdrawal or a revocation of a trust other than by will; an

325. NEB. REV. STAT. § 86-605(b) (2003).
326. NEB. REV. STAT. § 86-607 (2003).
327. NEB. REV. STAT. § 86-611 (2003).
328. NEB. REV. STAT. § 30-3811 (Supp. 2003).

acceptance of a trust except for the testamentary trust's original trustee; a resignation of a trustee and the notice required; a beneficiary's consent; and a certification of trust. There may be other examples.

The revocable trust provisions of the UTC were designed because of the common use today of a revocable trust as a will substitute.[329] If these revocable trusts are to substitute for wills, should they not have the same requirement that there be a signed, paper original? The author recommends that the Legislature consider amending the Nebraska Uniform Electronic Transactions Act to require that trust agreements (either revocable or irrevocable) and their amendments be in paper format.

XXII. EFFECTIVE DATES (ARTICLE 11)

The Nebraska UTC, passed by the 2003 Nebraska Legislature, becomes operative on the second of January 1 following the effective date of the act.[330] The effective date of the act is three calendar months after the close the legislative session.[331] The second January 1 after the effective date is January 1, 2005. The act becomes operative on that date.

A. CURRENT TRUSTS

The Nebraska UTC also contains a statutory section dealing with the application of the UTC to existing relationships.[332] The UTC applies to all trusts created before, on or after January 1, 2005. There are some limitations contained within the UTC concerning the effect on existing trusts; that is, trusts created on or before January 1, 2005. For example, the presumption that a trust is revocable does not apply to a trust created under an instrument executed before January 1, 2005.[333] In this case, because the date that the instrument is signed is a determining factor, the issue of whether or not the trust was created before that date is immaterial.

Certain notice provisions apply only to trustees who accept the trusteeship or to trusts which become irrevocable on or after January 1, 2005.[334] The exact statutory language used in the effective date provisions is that the Nebraska UTC applies to "all trusts created before, on or after January 1, 2005." Constitutional issues may be in-

329. In general, the basic policy of the Uniform Trust Code is to treat the revocable trust as the functional equivalent of a will.
330. L.B. 140, Neb. Unicameral, 98th Leg., 1st Sess. (2003).
331. NEB. CONST. Art. III, § 27.
332. NEB. REV. STAT. § 30-38,110 (Supp. 2003).
333. NEB. REV. STAT. § 30-3854(a) (Supp. 2003).
334. NEB. REV. STAT. § 30-3878 (Supp. 2003).

volved in the applicability of the UTC to preexisting trusts. The Uniform Commissioner's comment to UTC section 1106 states:

> The Uniform Trust Code is intended to have the widest possible effect within constitutional limitation. . . . This code cannot be fully retroactive however. Constitutional limitations preclude retroactive application of rules of construction to alter property rights under trusts that are irrevocable prior to the effective date. The extent of the constitutional limitations is beyond the scope of this article.[335]

In order to determine whether or not the constitutional limitations apply, we must determine whether or not the trust is a preexisting trust. If the trust document was signed before 2005, but was not funded until 2005, a question arises as to whether or not it is a preexisting trust. Is a trust preexisting if it has not yet been created under Nebraska law?

For the applicability of some provisions of the UTC, it may become important to determine when the trust was created. Under current Nebraska law a trust is not created until property is transferred to it.[336] It is not necessarily required that the property interest be transferred to the trustee at the same time that the trust instrument is signed. As a comment to the UTC section 401 states, "[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."[337]

There are requirements for the creation of a trust other than funding under current Nebraska law. For example, if the trust does not name any beneficiary other than the settlor, no trust is created.[338]

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335. NEB. REV. STAT. § 30-38,110. For further discussion, see *Constitutional and Other Issues in the Application of the Nebraska Uniform Trust Code to Preexisting Trusts*, 82 NEB. L. REV. ___ (No. 2) (2003).

336. Whalen v. Swircin, 141 Neb. 650, 652, 4 N.W.2d 737, 739 (1942); RESTATEMENT (SECOND) OF TRUSTS § 2 (1959).

> In order to make a valid and effective gift inter vivos, there must be an intention to transfer title to the property, and a delivery by the donor and acceptance by the donee, and the transfer must be so complete that if the donor again resumes control over it without the consent of the donee he becomes liable in trespass.

First Trust Co. v. Hammond, 140 Neb. 330, 337, 299 N.W.2d 496, 500 (1941).

No trust can be created unless there exists some property interest that may be held by the trustee for the claimant. Kully v. Goldman, 208 Neb. 760, 764, 305 N.W.2d 800, 802 (1981). A mere expectancy cannot be held in trust. The ability to acquire future season Nebraska Cornhusker football tickets was a mere expectancy and a contract to make a trust in the future is not valid without consideration.

337. NEB. UNICAMERAL, *Banking, Insurance and Commerce Committee: Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code*, LR 367, 87 (Dec. 2002) (discussing changes in Nebraska law under section 401).

338. *In re* Estate of West, 252 Neb. 166, 169, 560 N.W.2d 810, 813 (1997).

Furthermore, just because a document says that it is a trust, does not mean that it qualifies under current Nebraska law as a trust. If the "trust" does not meet the pre-2005 requirements for the creation of a trust, a pre-2005 trust has not been created. Later funding could mean that the trust is a post-2004 trust and is fully subject to the Nebraska UTC.

Nebraska has adopted the Uniform Testamentary Additions to Trusts Act.[339] The Act permits a will to devise or bequeath property to the trustee of a trust established or to be established including a trust that is identified in the testator's will. The terms of the trust must be set forth in a written instrument other than a will executed before, concurrently with or after the execution of the testator's will. The trust can be amendable or revocable and the trust can be amended after the execution of the will or even after the testator's death.[340] The Uniform Testamentary Additions to Trusts Act applies to a will of a testator who dies on or after August 28, 1999.[341] A trust holding no property which is first funded under a will of a decedent who dies on January 2, 2005, would not be created until that date and is subject to the new law.

The Uniform Testamentary Additions to Trusts Act was adopted to authorize a will to name a trust (technically the trustee under the terms of the trust) as a beneficiary which technically had not yet been created because it had not yet been funded. For example, often when there are minor children and no federal estate tax, a trust is used. This trust may be unfunded, but the trust is often named as the beneficiary under a life insurance policy. The trust may also be named as the beneficiary under the will if both spouses have died. The trust is not technically created until it is funded, but the statute permits such a trust to be a beneficiary under a will.

B. PRIOR ACTS

Any act done before January 1, 2005 is not affected by the UTC.[342] If a right is acquired, extinguished or barred upon the expiration of a statute of limitations that commenced to run under any other statute before January 1, 2005, that statute continues to apply to that right even if it has been repealed or superceded.[343] An interim accounting, made under the old law, remains subject to the old law.

339. NEB. REV. STAT. §§ 30-3601 - 30-3604 (2002).
340. NEB. REV. STAT. § 30-3602(a).
341. NEB. REV. STAT. § 30-3603.
342. NEB. REV. STAT. § 30-38,110(a)(5).
343. NEB. REV. STAT. § 30-38,110(b).

C. JUDICIAL PROCEEDINGS

The Nebraska UTC applies to all judicial proceedings concerning trusts that are commenced on or after January 1, 2005.[344] The Nebraska UTC also applies to judicial proceedings concerning trusts that were commenced before January 1, 2005.[345] However, there is an exception for proceedings commenced before the effective date. If a court finds that the application of a particular provision of the Nebraska UTC would substantially interfere with the effective conduct of judicial proceedings or would prejudice the rights of the parties, the court can find that the UTC provision does not apply and the superseded law applies.

When the Nebraska Probate Code was adopted, similar provisions were part of the effective date provisions of the Nebraska Probate Code. Because some of the proceedings under the Nebraska Probate Code were less difficult than the proceedings under the former probate law, some matters were delayed until the effective date of the Nebraska Probate Code.

D. EXAMINING EXISTING TRUSTS

There is a savings provision contained in the Nebraska UTC effective date provisions. Any reference in an existing document to the powers authorized under the Nebraska Trustee's Powers Act, as such an act existed prior to January 1, 2005, is deemed to be a reference to the powers authorized under the Nebraska UTC. A trust drafter who has made a reference to the Nebraska statutory lists of trust powers rather than repeating the trust powers in the document has been given this protection under the statute. Any other references to the old Nebraska statutes need to be closely examined.

The constitutional issues described above apply to irrevocable trusts. Only in an irrevocable trust is someone's right actually created. If there is a revocable trust, those rights are not created until the trust becomes irrevocable. There may be issues in a few cases as to whether or not a trust has become irrevocable due to disability, but otherwise, the application of the Nebraska UTC to preexisting revocable trusts should not be subject to any constitutional limitations. For this reason, attorneys are well advised to examine existing trusts to see whether or not the trust needs to be amended due to the adoption of the Nebraska UTC.

344. NEB. REV. STAT. § 30-38,110(a)(2).
345. NEB. REV. STAT. § 30-38,110(a)(3).

XXIII. A NEBRASKA ADDITION: THE LAUNDRY LIST

Nebraska previously did not have a statute dealing with a "laundry list," which provides for the distribution of tangible personal property. Some attorneys provided a provision in their trust agreements that permitted the use of such a list. If the list existed at the time the trust was signed, it would be incorporated by reference. If a list did not yet exist, it could be treated as if it were an amendment to the trust. Effective January 1, 2005, a trust agreement may contain a reference to such a written statement or list.[346] This section was derived from the Nebraska Probate Code section providing for a similar type of list in a will.[347] Having such a provision in Nebraska law clarifies what may have been an issue under prior law.

The statute permits this list to dispose of items of tangible personal property not otherwise specifically disposed of by the trust. Money, evidences of indebtedness, documents of title and securities and property used in a trade or business cannot be transferred by such a list. This type of list can be used to transfer fairly valuable assets. For example, a painting could be worth hundreds of thousands of dollars, but its title could be transferred by this type of list. The wisdom of using such a list, rather than putting the disposition of such a valuable asset in the will or the trust, may be questioned but the legal authority to do so does exist. Title to very valuable art may be closely examined by a prospective purchaser.

A common practice has been to transfer tangible personal property to the trust by a bill of sale. If the title to the tangible personal property is held by the trustee, then the will of the settlor does not transfer those assets. As a result, a laundry list referred to in the will cannot transfer the assets because the will itself cannot transfer the assets.

However, people purchase new tangible personal property often. A bill of sale generally will not apply to property not yet owned unless specific provisions in it provide for such a transfer. Thus, some tangible personal property may be subject to a list contained in the will and some tangible personal property may be contained in a list subject to the trust. In order to avoid any problems, the list itself should specifically state that it applies regardless of the ownership of the property. For example, the list could state:

> I, Abraham Lincoln, now make this list of tangible personal property to be distributed at the time of my death or, if later, at the time of the death of my wife. This list is made by me as a list described in Article 2 of my will dated April 1, 1865 and

346. NEB. REV. STAT. § 30-3844 (Supp. 2003).
347. NEB. REV. STAT. § 30-2338 (1995).

> in paragraph 4.2 of the Abraham Lincoln Living Trust dated April 1, 1865. The personal representative of my estate or my trustee shall distribute the assets shown on this list to the person or persons shown on this list as receiving those assets. I recognize that I may have received ownership of such property from my wife. I direct that any list made by my wife be treated as if it was made by me. If I survive my wife and have received ownership of any of the assets on her list, then my trustee or my personal representative shall distribute the assets on my wife's list as if it was part of my list.

One of the problems that can come up when a laundry list is used is that drafters often fail to consider the effect on the surviving spouse. The surviving spouse may need time to grieve. Having the personal property of the deceased spouse within his or her control can help in this grief process. Gifts of the tangible personal property can later be made when he or she is capable of doing so. By using an incorporation by reference to the other spouse's list, we avoid the necessity of the surviving spouse making a new list after the death of the deceased spouse. Another possible method of dealing with this particular situation is to use a joint list which specifically provides that it is only to be followed after the death of both spouses. It should also provide that it is not a contract and that the surviving spouse has the ability to revoke or amend the list.

The will needs to provide a reference clause to activate the laundry list. Such a clause could be drafted as follows:

> I now refer to a list that my wife or I may have made or may make in the future providing for distributions of tangible personal property. This list may be made before or after this will. This list may be made by my wife or by me. If the tangible personal property described in the list is not otherwise disposed of by this will or by my trust agreement and if I survive my wife, I then direct my personal representative to distribute the assets shown on such a list made by myself or by my wife to the person or persons named in such a list. Distributions shall be made to the person or persons named in such a list regardless of whether the list refers to a trust established by my wife, by myself or by both of us or to my will or my wife's will.
>
> A similar provision could be created for the trust agreement.

XXIV. EXISTING TRUST LAW DOCTRINES UNCHANGED

A. REGISTRATION

The registration provisions contained in prior law have been retained. A trust may be registered in Nebraska but there is no duty to

register the trust.[348] The registration procedures remain the same.[349] There are provisions for the clerk of the court to maintain the documents.[350] In addition, by registering the trust, the trustee submits personally to the court of registration in any proceeding under section 30-3812.[351] Venue is also proper in the court in which the trust is registered.[352]

The registration is to occur, if it occurs, in the county court of this state, which includes the principal place administration.[353] The right to register does not apply to a trustee of a trust if the retained jurisdiction of a foreign court, from which the trustee cannot obtain release, would be affected by the registration.[354]

The procedures are that the registration is accomplished by filing in the county court, of the principal place of administration, a statement indicating the name and address of the trustee in which the trustee acknowledges the trusteeship. The statement must indicate whether the trust has been registered elsewhere and needs to identify the trust. Furthermore, if the trust is a testamentary trust, reference must be made to the name of the testator and the date and place of the domiciliary probate. If the trust is a written inter vivos trust,[355] it must be referenced by the name of each settlor, the original trustee and the date of the trust instrument. If there is an oral trust, information identifying the settlor or other source of funds; describing the time and place of the trust's creation; and the terms of the trust including the subject matter, beneficiaries and time of performance must be included in the registration statement.[356]

B. TRUST CERTIFICATION

UTC section 1013 allows a trust certificate to be given to interested persons who are not beneficiaries. Nebraska previously had its own trust certificate provisions.[357] These provisions were adopted by the 2000 Nebraska Legislature. Because there was already a procedure provided by law, the study committee determined that it was not

348. NEB. REV. STAT. § 30-3816 (Supp. 2003).
349. NEB. REV. STAT. § 30-3817 (Supp. 2003).
350. NEB. REV. STAT. § 30-3818 (Supp. 2003).
351. NEB. REV. STAT. § 30-3819 (Supp. 2003).
352. NEB. REV. STAT. § 30-3815(c) (Supp. 2003). This provision was added to the Nebraska Uniform Trust Code because Nebraska retained registration provisions which were not part of the Uniform Trust Code.
353. NEB. REV. STAT. § 30-3816.
354. *Id.*
355. These are often referred to as "living trusts."
356. NEB. REV. STAT. § 30-3817.
357. NEB. REV. STAT. §§ 30-3701 - 30-3706 (2002), recodified to NEB. REV. STAT. §§ 30-38,102 - 30-38,107.

necessary to change the procedure. Nebraska law and UTC section 1013 both provide protection for third-parties acting in reliance upon the trust certificate. The major change, which would have occurred if UTC section 1013 had been adopted by Nebraska, is that the person receiving the trust certificate would have been liable for damages if he, she or it demanded a copy of the trust instrument itself and the court found that the person demanding the trust instrument did not act in good faith.[358]

C. TRUST IS NOT AN ENTITY

Under current law, a trust is not a separate entity. In other words, it is not a separate legal person that can be sued or sue in its own name. The trustee is the proper person to sue or be sued on behalf of the trust.[359] Nothing in the UTC changes this principle. There is no authority given in the UTC for a trust to sue in its own name or be sued in its own name. This situation is different from the authority granted to a Nebraska business corporation. A Nebraska business corporation is a separate legal entity which has the capacity to be sued or to sue in its own name.[360]

Nebraska's current real estate title standards state "a conveyance to 'Joe Settlor Trust'. . .may be effective to convey equitable title; it does not convey legal title.[361] Any conveyance to a fiduciary should be to the named fiduciary, stating the fiduciary capacity."[362] In other words a conveyance must be to the trustee rather than to the trust.

The Nebraska Supreme Court has held that a declaration of trust, stating that real estate owned by the settlor is not held in trust, is permitted under Nebraska law.[363]

XXV. CONCLUSION

The adoption of the Nebraska UTC will not end all disputes over its terms. For example, nationally, there has been an ongoing concern over UTC section 813 and the notice requirements for irrevocable trusts. If the trust is revocable, then UTC section 105(b)(8) & (9) do not apply to the trust and the drafter can write around the UTC section 813 requirement for notice during the settlor's incompetency.

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358. UNIF. TRUST CODE § 1013(h), 7C U.L.A. 230 (Supp. 2003).
359. Back Acres Pure Trust v. Fahlander, 233 Neb. 28, 29, 443 N.W.2d 604, 605 (1989).
360. NEB. REV. STAT. § 21-2025(1) (1997).
361. NEBRASKA REAL ESTATE TITLE STANDARDS, § 4.8.
362. *Id.*
363. Wahrman v. Wahrman, 243 Neb. 673, 678, 502 N.W.2d 95, 98 (1993).

The Nebraska Uniform Trust Study Committee has continued to discuss the issues brought to it and has recommended several Nebraska UTC changes to the 2004 Nebraska Legislature. Among the changes, is a change to UTC section 813 as adopted in Nebraska. The reader is cautioned to watch for amendments to the Nebraska UTC that may be adopted in 2004.