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Is There A Uniform Trust Act in Your Future?

By David M. English

The National Conference of Commissioners on Uniform State Laws (NCCUSL) is close to completing the first comprehensive attempt at the national level to codify the law of trusts—the Uniform Trust Act (Act). This article describes the reasons for the Act and many of its provisions. The Act is scheduled for final reading and approval by NCCUSL during the summer of 2000, meaning that states may begin enacting the Act in its final form in their 2001 legislative sessions. This article is based on the draft discussed at NCCUSL's 1999 annual meeting.

Background

Although the Act will be the first comprehensive *uniform* act on the subject of trusts, comprehensive trust statutes are already in effect in several states. Notable examples include California, Georgia, Indiana and Texas. These comprehensive state statutes, as well as the trust statutes in many other states, influenced the drafters of the Act, who borrowed from these statutes in preparing the Act.

There are several reasons why the drafting of a uniform act on trusts is timely. The immediate stimulus for the drafting of the Act is the much greater use of trusts in recent years, both in family estate planning and commercial transactions in the United States and internationally. This greater use of trusts, and the consequent increase in the number of day-to-day questions involving trusts, led to a recognition that the trust law in many states is quite thin. It also led to a recognition that the existing uniform acts relating to trusts, although numerous, are incomplete. The primary source of trust law in most states is the Restatement (Second) of Trusts and the multi-volume treatises by Scott and Bogert. These sources, however, fail to address many practical issues and sometimes provide conflicting guidance. It is hoped that the Act will provide precise answers to these questions in an easily findable place. Thus, the Act will serve an important educational function. Lawyers in many states will for the first time be able actually to determine their state law on trusts.

Many uniform acts on trust law topics exist, but none provide comprehensive coverage. The Act incorporates certain of these smaller acts. Other uniform acts that address more specialized topics will continue to be available for enactment in freestanding form. Still others are now obsolete.

The Act incorporates, with many updates, the 1964 Uniform Trustee Powers Act, enacted in 16 states. The Act also incorporates without change the 1994 Uniform Prudent Investor Act enacted to date in 35 states. States enacting the Act should repeal their version of the Uniform Trustee Powers Act and recodify into the larger Act their version of the Uniform Prudent Investor Act. Existing uniform acts that the Act does not touch include the Uniform Principal and Income Act, Management of Institutional Funds Act, Custodial Trust Act, Common Trust Fund Act, Supervision of Trustees for Charitable Purposes Act and Testamentary Additions to Trusts Act.

Now obsolete, at least for states enacting the Act, is Article VII of the Uniform Probate Code. Article VII is a mini trust statute addressing only selected topics, focusing primarily on trust registration, jurisdiction and trustee liability to third persons. The 1937 Uniform Trusts Act is also obsolete, even though only six states enacted it and none within the past several decades. Despite its ambitious and similar title, the 1937 act was likewise a limited statute. Its principal focus was the duty of loyalty, the voting of securities by trustees and, similar to Uniform Probate Code Article VII, trustee liability to third persons.

The Act is being drafted in coordination with the revision of the Restatement of Trusts. The American Law Institute (ALI) approved the

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Restatement (Second) of Trusts, the last complete edition of this work, in 1957. Beginning in the late 1980s, work on the Restatement (Third) began under the leadership of Edward Halbach of the University of California at Berkeley; Halbach is the Restatement's reporter. The ALI completed and approved the portion of Restatement (Third) relating to the prudent investor rule and other investment topics in 1992. This portion formed the basis for the 1994 Uniform Prudent Investor Act.

In 1996, the ALI approved a tentative draft of the portion of Restatement (Third) relating to the rules on the creation and validity of trusts. In May 1999, the ALI also approved a tentative draft of the portion relating to the office of trustee, interpretation of trusts and spendthrift provisions and the rights of creditors. Because the ALI must approve at least two more tentative drafts before the Restatement (Third) is complete, work on it will continue well beyond the completion of the Act. As a result of the coordination between the two projects, many provisions of the Act track the concepts expressed in the Restatement (Third) and, for parts of the Restatement (Third) not yet completed, the relevant portions of the earlier Restatement (Second).

Although the Act is a comprehensive trust *statute*, it does not attempt to codify all trust law. Rather, the Act codifies only those portions of trust law that are most amenable to codification. The Act omits no major trust law topic but leaves much of the detail, particularly on topics such as interpretation of trust terms and remedies for breach of trust, to the common law of trusts and principles of equity. Nowhere is the common law more clearly stated than in the various Restatements of Trusts. Lawyers who require further explication on the meaning of one or more of the provisions of the Act will probably find it by consulting not only the comments to the Act, but also the Restatements.

Overview of the Act

The organization of the Act indicates its scope. The drafters organized the Act into 11 articles. In addition to providing definitions, Article 1 addresses topics such as the ability of a trust instrument to override the Act's provisions, the validity of choice of law provisions and the law to govern in the absence of a choice and the procedure for transferring the principal place of administration to another jurisdiction. Article 2 addresses selected topics involving judicial proceedings concerning trusts. This minimal coverage was deliberate because the drafting committee concluded that most issues relating to jurisdiction and procedure are best left to other bodies of law, such as the rules of civil procedure. Article 3 deals with the important topic of representation of beneficiaries, including principles of virtual representation, which apply whether the matter is to be resolved in or out of court.

Article 4, which begins the heart of the Act, specifies the requirements for creating, modifying and terminating trusts. The provisions on the creation of trusts largely track traditional doctrine; those relating to modification and termination liberalize the law, at least in most states. Article 5 covers spendthrift provisions and rights of creditors, both of the settlor and beneficiaries. Article 6 collects special rules relating to revocable trusts, including the standard of capacity, the procedure for revocation or modification and the statute of limitations on contests.

Article 7 turns to the office of trustee, specifying the rules, absent special provision in the trust, on a variety of topics. Included are the rules on trustee acceptance, rights and obligations of co-trustees, the procedure for resignation, the grounds for removal, the methods for appointing successors and trustee compensation.

Article 8, entitled "Fiduciary Administration," prescribes the duties and powers of the trustee. The powers listed are an updated version of the Uniform Trustee Powers Act, including coverage of such current topics as the power to deal with environmental hazards. The specified duties of the trustee, like the duty of loyalty, are not new, but the particulars have changed over the years. The Act reflects this trend. The drafters prepared Article 8 where possible to conform to the Uniform Prudent Investor Act. The Uniform Prudent Investor Act prescribes a trustee's responsibilities with regard to the management and investment of trust property. The Act expands on this by specifying the trustee's duties for distributions to beneficiaries.

Article 9 provides a place for the jurisdiction enacting the larger Uniform Trust Act to codify its version of the Uniform Prudent Investor Act. Although trustee investment is central to the law of trusts, due to the widespread enactment of the Uniform Prudent Investor Act, the drafters made no effort to integrate fully the Prudent Investor Act into the larger Act. The enacting jurisdiction may instead codify its version of the Uniform Prudent Investor Act in Article 9 without substantive change.

Article 10 addresses the liability of trustees and rights of beneficiaries. As to the rights of beneficiaries, Article 10:

- lists the equitable remedies for breach of trust;
- specifies how money damages are to be determined;
- provides that a court may award attorneys' fees against the trustee, the trust or even a beneficiary, as justice and equity may require; and
- specifies certain trustee defenses, including the addition of a statute of limitations for claims alleging breach of trust and a provision on the enforceability of exculpatory clauses.

As to liability of trustees to third persons, the Act emphasizes the need for trustees and others to engage in commercial transactions with trust property to the same extent as if the property were not held in trust. To protect the privacy of settlors, Article

10 concludes with a provision authorizing trustees to provide and for third parties to rely on a certification by the trustee as to the specific trust terms relevant to the transaction.

Article 11, which is still a work in progress, deals with the application of the Act to existing trusts. The intent is to give the Act the widest possible application consistent with constitutional limitations. Consequently, the Act generally applies not only to trusts created on or after the effective date, but also to existing trusts.

A complete analysis of all of the Act's provisions is beyond the scope of this article. What follows is a review of the topics and sections of the proposed Act that are the most innovative or that have generated the most discussion.

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Default Rules

Nearly all of the Act consists of default rules that are subject to variation in the terms of the trust. This is hardly news. Most statutory provisions on trust law have always been subject to override in the terms of the trust. What is innovative about the Act is the effort for the first time to collect the circumstances when the terms of the trust cannot override the statute. Included among the rules that a settlor cannot override are:

- the requirements for creating a trust;
- the rights of third parties in their dealings with the trustee;
- the power of the court to take certain actions, such as removing a trustee;
- a trustee's obligation to act as a fiduciary, in good faith and with regard to the purposes of the trust and the interests of the beneficiaries; and
- as described below, the trustee's duty to keep the beneficiaries informed.

Revocable Trusts

Recognizing the increasing use and importance of revocable trusts, the Act collects in one place most of the provisions relating to revocable trusts. Article 6 specifies a capacity standard for creating a revocable trust (the same standard as for a will), provides a procedure for revocation, adds a statute of limitations on contests and extends to revocable trusts the enacting jurisdiction's rules on the construction of wills. Eliminating a trap for the unwary, the Act follows the lead of California, Montana, Oklahoma and Texas in providing that a trust is presumed revocable unless stated otherwise. To avoid the unintentional rewriting of an existing trust, however, the Act limits the presumption of revocability to trusts executed after the Act's effective date.

The Act allows a revocable trust to be contested on the same basis as a will, including for lack of capacity, undue influence and fraud. The plaintiff must bring the contest no later than two years after the settlor's death, but the trustee may shorten the period to 120 days for a potential contestant by notifying the potential contestant of the trust's existence. Although the beneficiaries remain liable to return distributions made before the expiration of the contest period if the trust later turns out to have been invalid, the Act generally protects the trustee. To encourage expeditious distribution of trust property, a trustee may without liability begin distributions immediately following the settlor's death. The trustee loses this protection only if the trustee is aware that a contest has been brought or the trustee has been notified of a possible contest, followed by its actual filing within 30 days.

Modification and Termination of Trusts

Due to the increasing use in recent years of long-term trusts, there is a need for greater flexibility in the current restrictive rules on when a trust may be modified or terminated other than as provided in the trust's terms. The Act provides this increased flexibility without losing sight of the fact that the settlor's intent is paramount.

At common law, an irrevocable trust could be modified or terminated by agreement of the settlor and beneficiaries, or by agreement of the beneficiaries alone if the trust no longer served a material purpose. In addition, the administrative terms of a trust could be modified or terminated due to circumstances that the settlor did not anticipate, and a court could reform either the administrative or dispositive terms of a trust to correct for a mistake of law or fact. Modification of a trust to achieve desired tax results could be accomplished only if it fit within one of the already established categories.

The Act retains but builds on the common law rules. Among the provisions providing a liberalizing nudge are the following:

- Although a spendthrift provision can be a material purpose barring termination of a trust by the beneficiaries, this is not an automatic presumption.

- A court's ability to modify or terminate a trust because of circumstances not anticipated by the settlor is extended to the trust's dispositive provisions.
- A trust may be reformed due to the settlor's mistake of law or fact even if the terms of the trust, as originally but mistakenly created, are unambiguous.
- To achieve the settlor's tax objectives, a court may modify the terms of the trust as long as the modification does not violate the settlor's probable intention. The court may also give such a modification retroactive effect.

Not recognized at common law, but recognized in many state statutes and also in the Act, is the power in a trustee to combine trusts or divide a trust without court approval. The Act also authorizes a court to terminate an uneconomic trust, and permits a trustee, without court approval, to terminate a trust with a value of $50,000 or less.

Cy Pres

Responding to the suggestions of numerous commentators, the Act broadens a court's ability to apply cy pres to charitable trusts. A court may apply cy pres to modify or terminate a charitable trust not only when fulfilling the settlor's original charitable purpose would be impossible or unlawful but also when such effort would be impracticable or wasteful. The Act also abolishes the often artificial distinction between general and specific charitable intent. The Act instead creates a presumption of general charitable intent. Absent a contrary provision in the terms of the trust providing for disposition to the trust property, in applying cy pres, the court must apply or distribute the property in a manner consistent with the settlor's charitable purposes. Finally, the Act recognizes that default provisions in favor of noncharities that are remote in time can sometimes cause more mischief than help, necessitating detailed searches for heirs and the running of property through numerous estates. Consequently, although the settlor may direct that a trustee distribute trust property to a noncharitable beneficiary on the failure or impracticality of the original charitable scheme, such a default provision is effective for only 30 years from the date of the trust's creation.

Beneficiary Rights

The Act contains a series of provisions relating to the rights of beneficiaries. Some merely repeat the common law; others are new. Among the more significant are the provisions on trustee removal and the obligation to keep the beneficiaries informed. In addition to removal for committing a breach of trust, a court may remove a trustee in the following situations:

- if a lack of cooperation among co-trustees substantially impairs the trust's administration;
- if the investment decisions of the trustee, even though not constituting a breach of trust, have resulted in investment performance persistently and substantially below that of comparable trusts; or
- if, because of changed circumstances, unfitness or an unwillingness or inability to administer the trust, removal would be in the best interests of the beneficiaries. Removal of a corporate trustee because of changed circumstances might be appropriate, for example, if the trustee has totally changed its character due to a corporate merger or acquisition.

When in doubt, the Act favors disclosure to beneficiaries as the better policy. The Act imposes both a general obligation on the trustee to keep "qualified" beneficiaries reasonably informed of administration, as well as several specific notice requirements. The term "qualified beneficiaries," which is used with some frequency in the Act, excludes beneficiaries with remote remainder interests.

The Act requires a trustee to notify qualified beneficiaries of the trustee's acceptance of office and of any change in the method or rate of the trustee's compensation. In addition, the Act codifies the common law duty prescribed in cases such as *Allard v. Pacific National Bank*, 663 P.2d 104 (Wash. 1983), to inform qualified beneficiaries in advance of a sale or other disposition of real estate, tangible personal property or closely-held securities comprising a significant portion of the trust value. The Act waives disclosure only if forbidden by law, as can occur with certain securities transactions, or if disclosure would be detrimental to the interests of the beneficiaries, a standard that might apply if disclosure would result in the loss of the only serious buyer.

The Act requires trustees to make regular reports to a trust's qualified beneficiaries. In particular, the trustee must furnish the qualified beneficiaries at least annually with a report of the trust property, liabilities, receipts and disbursements, including the source and amount of the trustee's compensation.

The trustee must also promptly respond to any beneficiary's request for information, unless the request is unreasonable under the circumstances. This includes a requirement that the trustee furnish a beneficiary with a complete copy of the trust instrument. The drafting committee rejected the more limited approach of letting the trustee determine which provisions of the trust were material to the beneficiary's interests. The trustee's version of what is material could differ markedly from what the beneficiary believes is relevant.

A trust instrument generally cannot waive the trustee's duty to keep the beneficiaries informed. The Act, however, creates an exception for beneficiaries under age 25. The Act also allows "blind" trusts to waive some or all of the settlor's rights to be kept informed.

Trustee Defenses

The Act recognizes that a trustee is entitled to reasonable protection from liability. To allow a beneficiary adequate time in which to bring a claim yet enable the trustee to limit potential exposure, the Act includes a statute of limitations. Absent fraud or misrepresentation, a beneficiary who claims a breach of trust must commence a judicial proceeding within one year after the trustee sends the beneficiary a report adequately disclosing the facts constituting the claim. This statute of limitations, however, will not be triggered unless the report informs the beneficiary of the time bar. A beneficiary's consent, release or ratification of a transaction may also bar the beneficiary from bringing a claim.

A settlor may include an exculpatory clause in a trust instrument that limits a trustee's potential liability, and a trustee may rely on such a clause, but not without limit. Under traditional doctrine, an exculpatory clause is unenforceable (a) to the extent that it relieves a trustee from liability for breach of trust committed in bad faith or with reckless indifference to the trust purposes or the beneficiaries; or (b) if it was inserted as a result of the trustee's abuse of a fiduciary or confidential relationship between the trustee and settlor. Disapproving of cases such as *Marsman v. Nasca*, 573 N.E.2d 1025 (Mass. Ct. App. 1991), the Act subjects exculpatory clauses drafted by or on behalf of the trustee to special scrutiny. The Act presumes that the trustee inserted such exculpatory provisions as a result of an abuse of a fiduciary or confidential relationship unless the trustee establishes that the provision is fair under the circumstances and that the trustee adequately communicated its existence and contents to the settlor.

Although a trust instrument normally contains the entire terms of the trust, the Act allows a court to admit extrinsic evidence to clarify ambiguities, many of which are not necessarily apparent from a reading of an instrument. Alternatively, grounds may exist, such as a mistake of law or fact, resulting in the reformation of apparently unambiguous terms. To allow a trustee to administer a trust with some dispatch and without concern over misplaced reliance on the language of the trust instrument, the Act provides that a trustee is not liable for a breach of trust to the extent that the breach resulted from reasonable reliance on the written terms of the trust.

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Representation of Beneficiaries

Article 3 of the Act contains a comprehensive set of provisions on representation of beneficiaries. Article 3 addresses not only representation by fiduciaries such as guardians, conservators and personal representatives, but also what is known as virtual representation (the representation of minors, the incapacitated, the unborn and the unascertained) by beneficiaries who are legally competent and whose interests are substantially identical.

The representation provisions may be used whether a dispute is in court or is to be settled nonjudicially. The provisions are available for matters of ongoing trust administration, such as notice to the beneficiaries of a trustee's resignation or of an annual report. The provisions also apply to issues involving beneficiary consent, such as the appointment of successor trustees or the termination by the beneficiaries of a trust that no longer serves a material purpose.

The representation provisions are an added tool that can solve many practical problems. Lawyers, however, should not rely on them without thought. Representation is not binding if there is a conflict of interest between the representative and those ostensibly represented. In that event, the lawyer should consider the appointment of a guardian ad litem--termed a "special representative" under the Act--whose appointment is available whether the matter is to be resolved by the court or by nonjudicial settlement.

Principal Place of Administration

Determining a trust's principal place of administration is important for a variety of reasons, including determining which state's income tax, if any, applies to the trust's income. As trust administration has become more complex, determining a trust's principal place of administration has become more difficult. Co-trustees may be located in different states. A corporate trustee's personal trust officers may be located in one state, its investment division in another and its operations facilities in yet another. In addition, a variety of nontrustees, such as investment advisers and trust protectors, may play a role in a trust's administration. By defining the trust's principal place of administration as the usual place where the day-to-day activity of the trust is carried on by the trustee or cotrustee primarily responsible for its administration, the Act resolves some, but by no means all, of these difficulties. For this reason, the Act encourages settlors to address this issue in the trust provisions. A provision in a trust instrument that designates the principal place of administration is valid and controlling under the Act as long as a 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 trust's administration occurs in the designated place.

Frequently it becomes necessary to change a trust's principal place of administration. Ideally the trust instrument should address this issue. Absent such a provision, the Act specifies a procedure for transfer. The transfer must facilitate the trust's administration and not impair the beneficiaries' interests. Furthermore, the trustee must inform the qualified beneficiaries of the transfer at least 60 days in advance. If, however, the transfer involves the appointment of a new trustee, the requirements for the appointment of a successor trustee, either under the trust instrument or otherwise, must first be satisfied.

Environmental Liability

The Act contains a series of provisions designed to respond to trustee concerns about possible liability for accepting and holding property with environmental hazards. Although a trustee need not sign a formal acceptance and can accept the office of trustee by commencing to perform trustee duties, the Act clarifies that the inspection or investigation of trust property to determine potential environmental liability is not evidence of an implied acceptance. A trustee may also take action to prevent, abate or remedy any actual or potential violation of environmental law; decline to accept property or disclaim any power with respect to property; compromise claims over alleged violation of environmental law; and pay from trust property the expenses related to such actions. Finally, a trustee cannot be held personally liable under the Act merely because the trustee holds title to property containing environmental hazards. Liability attaches in such cases only against the trust property.

Proprietary Mutual Funds

Common trust funds have rapidly disappeared from corporate trustees' portfolios, replaced by "proprietary" mutual funds. The advantage of the proprietary fund is that capital gains taxation can be avoided on trust termination. Because they could not be held other than in trust, common trust funds holdings had to be liquidated. Proprietary mutual funds, on the other hand, can be distributed in kind.

Despite this seeming advantage, proprietary cause considerable controversy and litigation, implicating the trustee's duty of loyalty, the duty to invest with prudence and the right to receive only reasonable compensation. Because corporate trustees ordinarily provide advisory services to and receive compensation from the funds that they create, some critics argue that investing the assets of individual trusts in proprietary mutual funds is not necessarily a matter of prudence but is primarily a method for generating additional fee income. In addition, because a corporate trustee often will also charge its regular fee for administering the trust, critics charge that a corporate trustee's total compensation, both direct and indirect, is excessive.

Despite these concerns, nearly all states have passed statutes that authorize corporate trustees to invest in proprietary mutual funds, regardless of whether the trustee will receive additional fees. Recognizing this political reality, the Act does not prohibit investment in proprietary mutual funds but clarifies that these investments are subject to traditional fiduciary responsibilities. The investment in the proprietary fund must comply with the prudent investor rule of the enacting jurisdiction. Furthermore, only services actually performed for such compensation may be taken into account in determining a trustee's reasonable compensation. If by investing in proprietary funds the trustee in effect delegates functions it would have otherwise performed in its regular trustee capacity, the trustee's regular compensation should be reduced. Finally, the trustee must disclose at least annually to the persons entitled to receive the trustee's annual report the rate of extra compensation received for providing services to the fund and the method for determining this compensation.

Spendthrift Provisions and Rights of Beneficiaries' Creditors

Crafting the provisions of Article 5 on spendthrift protection and the rights of a beneficiary's creditors to reach the trust proved to be the most difficult task in drafting the Act. The area is controversial, and conflicting policy directions yield different results. The result was a compromise, responding at least in part to the concerns of the different factions.

The Act follows the law currently in force in all but a few states by providing that a trust is spendthrift only if the terms of the trust so provide. It then clarifies a point unclear in many states. To receive spendthrift treatment, the provision must restrain both voluntary and involuntary transfer of the beneficiary's interest. The drafting committee concluded that it was undesirable as a matter of policy for a beneficiary to be able to transfer the beneficiary's interest while at the same time denying the beneficiary's creditors the right to reach the trust to satisfy their claims.

The key public policy issue in the spendthrift area is determining which classes of creditors should be exempt from the spendthrift bar. In determining these exceptions, the drafting committee did not start from scratch, but rather paid particular attention to the exceptions listed in Restatement (Second) of Trusts § 157 and Restatement (Third) of Trusts § 59.

Both Restatements and many states' trust statutes, as well as other relevant statutes such as Federal Bankruptcy Code § 523(a)(5) and ERISA § 206(d)(3), grant special deference to the enforcement of court orders for support or maintenance of the beneficiary's child, current spouse and former spouse. Given this background and the important public policy concerns in making certain that those to whom legal obligations of support are owed actually receive such support, the Act provides that a beneficiary's child, current spouse or former spouse who has a judgment against the beneficiary for support or maintenance may obtain against the trust, in an appropriate judicial proceeding, an order attaching present or future distributions to or for the benefit of the beneficiary. In addition, if the trustee has abused a discretion or failed to comply with a standard of distribution, the court may direct the trustee to pay the child, current spouse or former spouse an amount that is equitable under the circumstances, but not more than what the trustee would have been obligated to pay the beneficiary had the trustee not abused the discretion or failed to comply with the standard.

The other public policy issue that engendered considerable debate was whether the Act should create an exception to the spendthrift bar for creditors who have furnished the beneficiary with so called "necessities." Even though the necessities doctrine was perhaps originally derived with the greengrocer in mind, today it is used almost exclusively by government agencies seeking reimbursement for the costs of providing care or to deny eligibility for Medicaid on the theory that the beneficiary's interest in trust is an available resource. Sophisticated drafting normally can protect a trust from government claims and result in the exclusion of the trust as an available resource. Absent such sophisticated counsel, however, a necessities exception would be largely a trap for the unwary. Recognizing the important role that third party trusts play in assuring an enhanced quality of life for individuals with disabilities, the drafting committee elected not to create an exception to the spendthrift bar for providers of necessities. If governmental agencies are to obtain reimbursement for the costs of care, they must rely on other law.

"[A] trustee cannot be held personally liable under the Act merely because the trustee holds title to property containing environmental hazards. Liability attaches in such cases only against the trust property."

Self-Settled Trusts

The Act treats rights of a settlor's creditor to reach the trust separately from the claims of a beneficiary's creditors because the issues are different. As to the rights of the settlor's creditors, the Act follows traditional doctrine, rejecting and questioning the wisdom of the recent Alaska, Delaware, Nevada and Rhode Island statutes. Under the Act, a settlor's creditor may reach whatever the trustee *could have* paid to the settlor, whether or not distributions to the settlor-beneficiary are subject to the trustee's discretion and whether or not the trust is irrevocable. Consistent with the law everywhere, the Act also provides that, during the lifetime of the settlor, the property of a revocable trust is subject to the claims of the settlor's creditors in the same manner as if no trust were created. Following the settlor's death, however, the now irrevocable trust is subject to creditor claims only to the extent that the settlor's probate estate is insufficient to satisfy such obligations.

Following a trend in the law, the Act treats holders of presently exercisable powers of withdrawal the same as if the holders, because of their power to obtain the trust property, were the settlors of revocable trusts. The result is that trust property subject to a power of withdrawal is fully subject to the claims of the holder's creditors and, following the power's lapse or release, remains liable to the extent of the power holder's beneficial interest in the trust. The Act, however, creates an important exception to this general rule. Conforming with the expectations of the settlors who create such arrangements, property subject to a Crummey or "5 x 5" power is not, following the lapse or release of the power, subject to the claims of the power holder's creditors.

Conclusion

This article only samples the Act's provisions. For more information, readers should consult the draft Act itself, which, with extensive comments, is available at **www.law.upenn.edu/bll/ulc/ulc.htm**. Comments are welcome. They may be most efficiently provided by e-mailing the author at **englishda@missouri.edu**.

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