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# How Uniform Will the Uniform Trust Code Be: Vagaries of Missouri Trust Law Versus Desires for Conformity

*Scot Boulton\**

## I. INTRODUCTION

Unlike researching recent and rapidly developing areas of the law, such as securities regulations or Internet property issues, researching the law of trusts in Missouri can entail reading ancient cases from dusty, deteriorating, leather-bound case books that were rendered more than one-hundred years ago.<sup>1</sup> Trust law in Missouri has been developing for more than 180 years. In that process of development, approximately ninety-four statutes having some relationship to trusts and trustees have been codified in Chapter 456 of the Missouri Revised Statutes.<sup>2</sup> Other statutes located in odd corners of the Missouri Revised Statutes are relevant to trust issues to greater and lesser degrees.<sup>3</sup> While the term “Trust Code” is too dignified and structured a term to apply to the amalgamation of statutes in Chapter 456, that chapter covers a significant number of important topics. Those statutes and innumerable cases constitute a developed and, in some instances, unique body of law that is relied upon by practitioners both within and outside of the State of Missouri.

There is no doubt that the promulgation of the Uniform Trust Code (“UTC”)<sup>4</sup> by the National Conference of Commissioners on Uniform State Laws presents a real opportunity to replace the current hit-or-miss Missouri statutory scheme with a comprehensive, flexible body of trust statutes that is not overly exhaustive. The UTC could fill some important gaps in Missouri law and solve issues left open by current statutory provisions. Adoption of the UTC also

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1. *E.g.*, *Jamison v. Miss. Valley Trust Co.*, 207 S.W. 788 (Mo. 1918) (holding that a settlor cannot protect assets from creditors by utilizing a spendthrift clause); *McIlvaine v. Smith*, 42 Mo. 45 (1867) (same).

2. MO. REV. STAT. ch. 456 (2000).

3. *E.g.*, MO. REV. STAT. § 472.300 (2000) (governing representation rules on trust litigation matters); MO. REV. STAT. §§ 362.550.10-.11 (2000) (respectively covering trust company mergers and the power of trust companies to purchase proprietary mutual funds in trust accounts).

4. UNIF. TRUST CODE (2000) [hereinafter UTC].

would give Missouri access to authority that develops in the other jurisdictions. Missouri has recently adopted variations of two Uniform Acts in the trust and estate area, The Uniform Prudent Investor Act in 1996<sup>5</sup> and the 1997 Revised Uniform Principal and Income Act in 2001.<sup>6</sup>

On the other hand, trust law changes slowly and any body of law should be substantially changed only after full and careful consideration. After extensive analysis, it is clear that Missouri has adopted some unique statutes and combinations of statutes that express policy decisions that are much different than those made in corresponding provisions of the UTC. One such example is Section 456.590.2,<sup>7</sup> which provides that a court may vary the terms of a private trust in very specific manners, including terminating the trust earlier than specified, upon consent of all adult beneficiaries without regard to whether a

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5. MO. REV. STAT. §§ 456.900-.913 (2000).

6. MO. REV. STAT. §§ 469.401-.467 (Supp. 2001).

7. MO. REV. STAT. § 456.590.2 (2000). The full text of Section 456.590 reads as follows:

456.590. Power of court to permit deviations or vary terms.—

1. Where, in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorized to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.

2. When all of the adult beneficiaries who are not disabled consent, the court may, upon finding that such variation will benefit the disabled, minor, unborn and unascertained beneficiaries, vary the terms of a private trust so as to reduce or eliminate the interests of some beneficiaries and increase those of others, to change the times or amounts of payments and distributions to beneficiaries, or to provided for termination of the trust at a time earlier or later than that specified by the terms.

3. The court may, from time to time, rescind or vary any order made under this section, or may make any new or further order.

4. An application to the court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.

material purpose of the trust remains to be accomplished.<sup>8</sup> This statute is different from the rule of all other common law jurisdictions in the United States<sup>9</sup> and the rule set forth in the UTC.<sup>10</sup> In addition, the rights of a settlor's creditors to reach trust assets, both during the settlor's life and after the settlor's death, are dealt with in a comprehensive manner that is not inconsistent with the UTC.<sup>11</sup> It is very likely that, even if Missouri adopts a version of the UTC, it will lack uniformity at least in these two areas.

## II. MISSOURI'S PECULIARITIES

In 1983, Missouri adopted a unique approach to trust modification.<sup>12</sup> Rejecting the rule of *Clafin v. Clafin*,<sup>13</sup> then in force in Missouri<sup>14</sup> and in most other jurisdictions in the United States,<sup>15</sup> Missouri adopted a statute<sup>16</sup> based upon the English Variation of Trusts Act (1958).<sup>17</sup> The English and American approaches to whether the settlor or beneficiary should control the trust

8. MO. REV. STAT. § 456.590.2 (2000).

9. Peter J. Wiedenbeck, *Missouri's Repeal of the Clafin Doctrine—New View of the Policy Against Perpetuities*, 50 MO. L. REV. 805, 807 (1985).

10. UTC § 411 cmt.

11. See *infra* notes 90-103 and accompanying text. Compare MO. REV. STAT. § 456.080.3 (2000), with UTC § 505(a)(2).

12. MO. REV. STAT. § 456.590.2 (2000). It appears that few other states, if any, have rejected the *Clafin* doctrine so completely. However, the same effect has been achieved under non-judicial trust reformation statutes, such as WASH. REV. CODE ANN. § 11.96A (West Supp. 2002) in Washington State.

13. 20 N.E. 454 (Mass. 1889). There has been some speculation that Missouri courts still may be required to examine whether there is a material purpose left to be served by a trust where termination or modification has been consented to and the other provisions of Section 456.590.2 have been met. See Wiedenbeck, *supra* note 9, at 813; Robert J. Swift, Jr., *Modification, Revocation, and Termination of Trusts*, in 1 MISSOURI TRUSTS, POWERS OF ATTORNEY, CUSTODIANSHIPS, AND NONPROBATE MATTERS, TRUST AND ESTATE SERIES § 5.5 (MoBarCLE 1998). However, the only case to apply Section 456.590.2, *Hamerstrom v. Commerce Bank of Kansas City, N.A.*, 808 S.W.2d 434, 438 (Mo. Ct. App. 1991), did not undertake any analysis of the material purpose of the trust and ordered modification on finding that the statutory requirements had been met. It is hard to escape a conclusion that a material purpose analysis is not required in a Section 456.590.2 action. Wiedenbeck, *supra* note 9, at 817.

14. *Bennet v. Tower Grove Bank & Trust Co.*, 434 S.W.2d 560, 562-64 (Mo. 1968); *Thomson v. Union Nat'l Bank in Kan. City*, 291 S.W.2d 178, 182-84 (Mo. 1956).

15. Wiedenbeck, *supra* note 9, at 807.

16. MO. REV. STAT. § 456.590.2 (2000).

17. Variation of Trusts Act, 1958, 6 & 7 Eliz. 2, c. 53 (Eng.).

traditionally have been at odds.<sup>18</sup> A comprehensive analysis of the legal background of Section 456.590.2, however, is beyond the scope of this Article.<sup>19</sup>

Section 456.590.2 has been widely used in a variety of situations since its enactment. Trust distributions have been increased because of unforeseen changes in economic conditions and the beneficiary's personal circumstances.<sup>20</sup> Trusts have been terminated because of the administrative cost and the low yield earned on trust assets and because of the desires of all of the adult beneficiaries to benefit the life beneficiary.<sup>21</sup> Trusts also have been terminated because of their small size and the apparent failure of the line of a settlor's descendants.<sup>22</sup> Trust terminations and reformations also have been used to accomplish estate, gift, and generation skipping transfer tax planning, to effectuate settlements in trust and estate litigation, to change trustees, to change beneficiaries, and to alter almost every conceivable provision in irrevocable private trusts.<sup>23</sup>

The use made of this statute may be far beyond that anticipated by its drafters, who stated:

Since 1958 England has had legislation empowering the court to alter the distributive provisions of a trust when it finds that the change would benefit the beneficiaries and all sane adult beneficiaries concur. This is useful chiefly to meet changes in tax laws. A minor change in the distributive provision of a trust (e.g. eliminating the settlor as a possible contingent beneficiary) may effect tax savings which will benefit all of the beneficiaries.<sup>24</sup>

18. 4 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* § 337 (4th ed. 1989).

19. For an excellent analysis of the background of Section 456.590.2 and an analysis of the statute's ambiguities, see Wiedenbeck, *supra* note 9. For a good comparison of Section 456.590.2 and trust modification provisions of the UTC, see Julia Walker, Note, *Get Your Dead Hands Off Me: Termination and Modification Under the Uniform Trust Code*, 67 MO. L. REV. 443 (2002).

20. See *Hamerstrom v. Commerce Bank of Kan. City, N.A.*, 808 S.W.2d 434, 436-38 (Mo. Ct. App. 1991).

21. This was the stated reason for the termination sought in *In re Trust of Nitsche*, 46 S.W.3d 682, 686 (Mo. Ct. App. 2001), and, while not successful in that case, there is reason to believe that many trusts have been terminated for similar reasons.

22. Heywood H. Davis & Dan C. Sturdevant, *Litigation Settlements in Probate Matters*, in 2 MISSOURI ESTATE ADMINISTRATION, TRUST AND ESTATE SERIES § 25.12 (MoBarCLE Supp. 2001).

23. See *id.*; Swift, *supra* note 13, § 5.5.

24. MISSOURI BAR PROBATE & TRUST COMMITTEE, *MISSOURI PROBATE UPDATE AND NEW GUARDIAN AND TRUST CODES—1983*, § 456.590 cmt., at 164 (John A. Borron,

The drafters of the statute apparently believed that the requirement that a termination or modification be shown to “benefit the disabled, minor, unborn and unascertained beneficiaries”<sup>25</sup> would be a real limitation on the power to alter or terminate irrevocable trusts. This has not been the case. In *Hamerstrom v. Commerce Bank of Kansas City, N.A.*,<sup>26</sup> the Missouri Court of Appeals for the Western District of Missouri went to great lengths to find that the term “beneficiary,” as used in the statute, did not include persons who might take trust assets by operation of law. Under this analysis, only a beneficiary or classes of beneficiaries who are specifically identified in a trust document acquire the protection of the statute. Thus, an heir of the settlor is a beneficiary for purposes of Section 456.590.2 if the trust document contains an ultimate distribution provision providing for trust assets to pass to the “heirs” of the settlor, but the heir is not protected if he or she is not referred to by class, yet has the same right under a common law reverter or reversion.<sup>27</sup>

While the courts in the two reported cases dealing with the statute<sup>28</sup> both appointed a guardian ad litem (“GAL”) to represent the disabled, minor, unborn, and unascertained beneficiaries of the trusts in question, the statute does not require the appointment of a GAL.<sup>29</sup> The statute suggests that the court act as the GAL and make a determination of benefit to the unrepresented classes in a Section 456.590.2 action.<sup>30</sup> In practice, it is probably the exception—rather than the rule—that a GAL is appointed.

Terms of a trust that prevent the interest of a beneficiary from being either voluntarily or involuntarily transferred are valid in Missouri.<sup>31</sup> Prior to 1986, spendthrift clauses that protected assets from the settlor’s creditors were invalid in Missouri.<sup>32</sup> In 1986, Section 456.080.3 was completely changed. After enactment of a clarifying amendment in 1989, the Section now provides that a spendthrift provision protects a settlor’s retained interest in an irrevocable trust

25. MO. REV. STAT. § 456.590.2 (2000).

26. 808 S.W.2d 434 (Mo. Ct. App. 1991).

27. *Id.* at 438.

28. *Id.*; *In re Trust of Nitsche*, 46 S.W.3d 682, 683-86 (Mo. Ct. App. 2001).

29. MO. REV. STAT. § 456.590.2 (2000); *see also* Swift, *supra* note 13, § 5.9; Walker, *supra* note 19, at 453 n.65.

30. Walker, *supra* note 19, at 453.

31. MO. REV. STAT. § 456.080.2 (2000).

32. MO. REV. STAT. § 428.010 (repealed 1986); MO. REV. STAT. § 456.080.3 (repealed 1986); *Jamison v. Miss. Valley Trust Co.*, 207 S.W. 788, 789-90 (Mo. 1918); *McIlvaine v. Smith*, 42 Mo. 45, 58 (1867). Before it was amended in 1986, Section 456.080.3 stated: “If the settlor is also a beneficiary of the trust, a provision restraining the voluntary or involuntary transfer of his beneficial interest will not prevent his creditors from satisfying claims from his interest in the trust estate.” MO. REV. STAT. § 456.080.3 (repealed 1986).

to the extent that the settlor is one of a class of beneficiaries entitled to trust income or a principal in the trustee's discretion.<sup>33</sup> This exception is unusual among United States jurisdictions.<sup>34</sup>

Section 456.080.3 was not enacted to create an onshore/offshore jurisdiction for settlors to protect assets from creditors. Rather, the purpose of the 1986 amendment was to allow the settlor of an irrevocable trust to retain an interest in an irrevocable trust that would not result in the inclusion of the assets of that trust in the settlor's gross estate for federal estate tax purposes on the settlor's death.<sup>35</sup> It has been held that a discretionary interest retained by a

33. Section 456.080.3 states:

A provision restraining the voluntary or involuntary transfer of beneficial interests in a trust will prevent the settlor's creditors from satisfying claims from the trust assets except:

- (1) Where the conveyance of assets to the trust was intended to hinder, delay, or defraud creditors or purchasers, pursuant to section 428.020, RSMo; or
- (2) To the extent of the settlor's beneficial interest in the trust assets, if at the time the trust was established or amended:
  - (a) The settlor was the sole beneficiary of either the income or principal of the trust or retained the power to revoke or amend the trust; or
  - (b) The settlor was one of a class of beneficiaries and retained a right to receive a specific portion of the income or principal of the trust that was determinable solely from the provisions of the trust instrument.

MO. REV. STAT. § 456.080.3 (2000). Some courts have failed to recognize this change in the law. *In re* Markmueller 51 F.3d 775, 776 (8th Cir. 1995); *In re* Enfield, 133 B.R. 515, 519 (Bankr. W.D. Mo. 1991).

34. Alaska, Colorado, Delaware, Nevada, and Rhode Island now allow settlors to protect assets from creditors to some degree. See ALASKA STAT. § 34.40.110 (Michie 1997); COLO. REV. STAT. § 38-10-111 (2000); DEL. CODE ANN. tit. 12, § 3570 (2001); NEV. REV. STAT. ANN. § 166.110 (Michie 1999); R.I. GEN. LAWS § 18-9.2-1 to 18-9.2-7 (2000); *In re* Baum, 22 F.3d 1014, 1016 (10th Cir. 1994) (holding that the Colorado statute only applies to creditors who exist at the time assets are transferred to a spendthrift trust for the benefit of the settlor).

35. Missouri Bar Probate and Trust Committee, Proposed Amendment to Section 456.080 (Spendthrift Trusts) and Amendments to Principal and Income Act, § 456.080.3 cmt. (Sept. 19, 1985) (unpublished manuscript, on file with Missouri Bar Probate and Trust Committee). The full comment reads as follows:

Comments: The 1983 amendments to §456.080.3 create substantial doubt about the usefulness of certain estate planning devices now in common use. I.R.C. §§ 2036 and 2038 include in a decedent's estate trusts in which the decedent has transferred property and retained an interest. However, if a settlor can only receive distributions of income or principal pursuant to the absolute discretion of a trustee (other than the settlor) he has not retained such

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an interest and the trust assets are not included in his estate. *Estate of Giza Wells*, 42 T.C.M. 1305 (1981). Even the expectancy of receiving income in the absolute discretion of a trustee can result in the inclusion of the trust assets in the settlor's estate if the state law under which the trust was established allows the settlor's creditors to reach the trust assets. *Mary M. and Edson S. Outwin*, 76 T.C. 153, 168, n.5 (1981). The rationale for this result is that since the settlor can borrow money and subject the trust assets to his creditor's claims the settlor has retained control of the trust.

Several estate planning devices operate by the settlor transferring assets into an irrevocable spendthrift trust with his spouse appointed as trustee. The spouse/trustee is then given a general power of appointment, the potential beneficiaries of which include the settlor, or the spouse/trustee is given the power to make discretionary disbursements of principal or income to a class of beneficiaries of which the settlor is included. The 1983 amendments to §456.080 could well result in the settlor's creditors being able to levy on such trust assets with the result that the trust assets would be included in the settlor's estate for tax purposes pursuant to I.R.C. §§ 2036 and 2038 under the theory of the *Outwin* case.

Prior to the 1983 amendment of subsection 3 of §456.080, the validity of spendthrift trusts in which a settlor was also a beneficiary was governed by §428.010. See page 1 for the text. Pursuant to the statute, two Missouri cases allowed the creditors of the settlor to reach assets of trusts under which the settlor was the sole income beneficiary, *McIlvaine v. Smith*, 42 Mo. 45 (1867), and *Jamison v. Mississippi Valley Trust Company*, 207 S.W. 788 (Mo. 1918).

However, the issue of whether the creditors of the settlor can reach trust assets when the settlor has retained a right to receive income or principal as one of a class of potential beneficiaries at the discretion of the trustee has never been addressed by Missouri courts. Cases cited by the legislative committee on the 1983 amendments to §456.080, *Lampert v. Haydel*, 96 Mo. 439 (1888), and *Bixby v. St. Louis Union Trust Company*, 323 Mo. 1014, 22 S.W.2d 813 (1929), sustained the validity of spendthrift trusts in Missouri but did not address the issue of the validity in the context of a settlor's retention of rights in the trust assets. New York courts have consistently upheld the validity of spendthrift trusts in which the settlor is a permissible beneficiary within the discretion of a trustee and, consequently, such assets held in trusts created in New York are not includable in the settlor's estate for tax purposes. *Herzog v. Commissioner of Internal Revenue*, 116 F.2d 591, 596 (2d Cir. 1941).

Therefore, by allowing creditors to reach assets of trusts in which the "settlor is also a beneficiary . . .", §456.080.3 (emphasis added), the issue discussed above seems to be resolved. It would appear that according to this statute even if the settlor is one of a class of potential beneficiaries and his right to receive trust income or principal is within the sole discretion of the trustee, he is still "a beneficiary" of the trust. Consequentially, the trust assets are vulnerable to creditors and the trust assets would be included in the



settlor to receive income or principal in the discretion of an independent trustee is not an interest includable in a settlor's estate under Section 2036 or Section 2038 of the Internal Revenue Code ("IRC") (2001).<sup>36</sup> However, inclusion of such an interest in a settlor's estate for purposes of the federal estate tax still may occur if the retention of such power would allow the creditors of the settlor to reach the interest to satisfy claims.<sup>37</sup>

At the time of the amendment to Section 456.080.3, the main concern was the inclusion of an interest for federal estate tax purposes retained by a settlor that took effect after the death of that settlor's spouse who was the life beneficiary of an inter vivos qualified terminable interest property trust ("QTIP trust").<sup>38</sup> For estate planning purposes, a settlor would want to create a QTIP trust for the settlor's spouse for the spouse's life. However, if the spouse predeceased the settlor, the settlor would not want the trust assets to pass to others but, rather, would want the trust to continue for the settlor's benefit. It is now clear that any interest retained by a settlor following the death of his or her spouse in an inter vivos QTIP trust is not includable in the settlor's estate for

settlor's estate for tax purposes.

To eliminate the potential for destruction of the useful and common estate planning devices mentioned above, it is proposed that §456.080.3 be amended to exclude from the reach of creditors a settlor's interest in a trust under which the settlor is one of a class of potential beneficiaries and his right to disbursements from the trust are within the complete discretion of the trustee. The proposed amendment also gives adequate protection to potential creditors of the settlor. Most settlor created trusts are vulnerable to the settlor's creditors under subdivisions (1) and (2) of Subsection 3 of the proposed amendment. Additionally, any settlor created trust that falls outside the reach of creditors under paragraphs (1) and (2) can be reached if the trust was established with the intent to defraud the settlor's creditors under paragraph (3).

Additionally, it should be noted that prudent lenders can easily make themselves aware that the assets of the settlor are contained in a trust that is invulnerable to creditors under the proposed amendment to §456.080.3 by simply requesting a copy of the trust. Moreover, persons who make use of the estate planning devices allowed under the proposed amendment would rarely be in a position where their creditors would have to levy on assets held in trust.

Missouri Bar Probate and Trust Committee, Proposed Amendment to Section 456.080 (Spendthrift Trusts) and Amendments to Principal and Income Act § 456.080.3 cmt. (Sept. 19, 1985) (unpublished manuscript, on file with Missouri Bar Probate and Trust Committee).

36. *Estate of Wells v. C.I.R.*, 42 T.C.M. (CCH) 1305 (T.C. 1981).

37. *Mary M. & Edson S. Outwin*, 76 T.C. 153, 168 n.5 (1981).

38. I.R.C. § 2523(b) (2000).

federal estate tax purposes.<sup>39</sup> This is because IRC Section 2044(c) (2001) treats the full value of the trust assets includable in the deceased spouse's gross estate under IRC Section 2044(a) as a QTIP trust as being owned by that spouse for transfer tax purposes.<sup>40</sup> This effectively cuts off any retained interest a settlor may have in such a trust.

This does not mean that the amendment to Section 456.080.3 was rendered meaningless by the resolution of the issue of inclusion of a settlor's retained interest in a QTIP trust. Estate planning techniques that include the settlor's retention of an interest in a trust that is not included in his or her gross estate under Section 2036 or Section 2038 arise in a number of contexts. Recently, there has been discussion regarding the retention of an interest by a settlor in the event that the federal estate tax is repealed.<sup>41</sup> The technique discussed is whether a settlor can retain an interest in a trust that arises only in the event that the federal estate tax provisions do not apply. The issue here is whether the retention of a beneficial interest that arises only on the occurrence of an event results in estate tax inclusion if the settlor dies while the estate tax still applies and the interest has not arisen.<sup>42</sup> Even if estate tax inclusion does not occur in that context, inclusion still would occur if such an interest subjected the assets of the trust to the claims of the settlor's creditors.<sup>43</sup>

Missouri has two other statutes that apply to creditors' ability to reach trust assets that are more detailed than the UTC and cover issues not covered in that Code. Section 456.610 allows a trustee of a trust that confers power to pay the debts of a decedent to publish notice similar to the requirement for notice in a probate proceeding.<sup>44</sup> Creditors who are owed a debt are barred from collecting that debt if they have not received payment or initiated collection proceedings within six months of the date of publication. The provisions of this Section are significantly narrower than the probate non-claim statute because the trust non-claim statute bars only the settlor's debts, not judgment claims, trust contest

39. Priv. Ltr. Rul. 9140069 (Oct. 4, 1991).

40. I.R.C. § 2044(c) (2000) provides: "[f]or purposes of this chapter and chapter 13, property includable in the gross estate of the decedent under subsection (a) shall be treated as property passing from the decedent."

41. Federal law currently provides that the federal estate tax will not apply for decedents dying after December 31, 2009, and before January 1, 2010. I.R.C. § 2210 (a)-(b) (2000).

42. Lloyd Leva Plaine, Preliminary Consideration of Gift, Estate and Generation-skipping Transfer Tax Planning Issues After Enactment of the Economic Growth and Tax Relief Reconciliation Act of 2001, at 25 (June 27, 2001) (seminar outline, on file with The American College of Trust and Estate Counsel).

43. See *supra* note 37 and accompanying text.

44. MO. REV. STAT. § 473.360 (2000).

actions, or any other type of claim.<sup>45</sup> The statute probably does not violate the right to procedural due process<sup>46</sup> because there is no state action beyond the mere enactment of the statute.<sup>47</sup>

Another Missouri statute establishes a rather elaborate procedure for the satisfaction of claims from non-probate property when the assets in the probate estate are insufficient to cover such claims.<sup>48</sup> If an asset not subject to probate administration is subject to the satisfaction of a decedent's debts immediately prior to death it can be brought back into the probate estate to satisfy claims identified in the statute.<sup>49</sup> This is accomplished by a separate action filed against the person holding title to the non-probate property.<sup>50</sup> This statute clearly applies to assets in revocable trusts.<sup>51</sup> A probate estate can be opened where the only asset is the right to reach assets under this statute.<sup>52</sup> The action has to be filed

45. MISSOURI BAR PROBATE & TRUST COMMITTEE, *supra* note 24, § 456.590 cmt.

46. U.S. CONST. amend. XIV.

47. *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 484 (1988). Whether actual notice was due the claimant in *Pope* turned on whether the probate claim bar statute was a self-executing statute of limitations. According to the Court:

The State's interest in a self-executing statute of limitations is in providing repose for potential defendants and in avoiding stale claims. The State has no role to play beyond enactment of the limitations period. While this enactment obviously is state action, the State's limited involvement in the running of the time period generally falls short of constituting the type of state action required to implicate the protections of the due process clause.

*Id.* at 486-87. The Court concluded that the extensive involvement of the court in a probate non-claim statute constituted state action and invoked due process protection.

*Id.* Missouri's trust non-claim statute, Missouri Revised Statutes Section 456.610, certainly does not involve the court at all and, thus, should constitute a self-executing statute of limitations, as defined in *Pope*, which does not invoke procedural due process protection. See JOHN A. BORRON, JR., *PROBATE LAW AND PRACTICE, MISSOURI PRACTICE SB* § 909 (3d ed. 2001).

48. MO. REV. STAT. § 461.300 (2000). This statute is based on Section 6-107 of the Uniform Probate Code. MISSOURI BAR PROBATE & TRUST COMMITTEE, *MISSOURI PROBATE AND TRUST UPDATE—1989*, § 461.071 cmt. (Leo E. Eickhoff, Jr., ed., 1989). It was originally enacted as part of the Nonprobate Transfers Law in 1989 as Section 461.071. *Id.* In 1995, it was amended and moved out of the Nonprobate Transfers Law. MISSOURI BAR PROBATE & TRUST COMMITTEE, *NONPROBATE TRANSFER LAWS COMMENTS TO 1995 AMENDMENTS* § 461.300 cmt. (unpublished manuscript, on file with Missouri Bar Probate and Trust Committee).

49. MO. REV. STAT. § 461.300.1 (2000).

50. MO. REV. STAT. § 461.300.1 (2000).

51. MO. REV. STAT. § 461.300.8 (2000); *Fischer v. Fischer*, 901 S.W.2d 239, 240 (Mo. Ct. App. 1995).

52. *Fischer*, 901 S.W.2d at 240.

within eighteen months of the decedent's death.<sup>53</sup> The action, however, is completely derivative of a valid claim filed in the probate action. If a probate estate is not timely opened or a claim validly filed, then non-probate assets cannot be reached.<sup>54</sup>

### III. MOVING TOWARD A MISSOURI TRUST CODE

Adoption of the UTC in Missouri would provide clear rules in the absence of controlling statutes or case law in such areas as representation principles that apply outside of court proceedings,<sup>55</sup> rules governing revocable trusts (particularly statutes of limitations for contesting the validity of revocable trusts),<sup>56</sup> non-judicial settlement agreements,<sup>57</sup> and the power to change the situs of trust administration.<sup>58</sup> The UTC also would provide preferred alternatives to present Missouri statutes that are problematic, such as rules governing the

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53. MO. REV. STAT. § 461.300.2 (2000).

54. MO. REV. STAT. § 461.300.1 (2000).

55. UTC art. III. A present Missouri statute, MO. REV. STAT. § 472.300(2) (2000), establishes representation rules in trust litigation cases, while UTC Article 3 establishes elaborate representation rules applicable both in judicial and non-judicial contexts.

56. UTC art. VI. These rules have no parallel in either Missouri statutes or case law.

57. UTC § 111. While it may be possible under present Missouri law to enter into an agreement regarding trust matters without court approval or intervention, such agreements are not expressly authorized. This type of agreement is rarely entered into because there are invariably minor, unborn, or unascertainable beneficiaries who cannot be bound by such an agreement. Additionally, such an agreement may be in and of itself a breach of the trustee's fiduciary duty to follow and defend the trust instrument. *Murphey v. Dalton*, 314 S.W.2d 726, 730 (Mo. 1958). Thus, the agreement must meet the high standard for waiver of such a breach. *Scullin v. Clark*, 242 S.W.2d 542, 548 (Mo. 1951).

58. UTC § 108(c).

vacancy of trustees,<sup>59</sup> the statute of limitations for breach of trust actions,<sup>60</sup> and tax savings provisions.<sup>61</sup>

One of the areas where Missouri is likely to depart from the provision of the UTC is in its approach to the judicial termination and modification of trusts. Unlike Missouri's modification statute, the UTC closely adheres to the *Claflin* rule.<sup>62</sup> However, the severe restrictions that the *Claflin* rule places on trust termination and modifications are somewhat mitigated.<sup>63</sup> Modification upon consent of all beneficiaries is allowed if "not inconsistent" with a material purpose of the trust.<sup>64</sup> Modification and/or termination are also specifically allowed for change of circumstance,<sup>65</sup> uneconomical trusts,<sup>66</sup> tax reasons,<sup>67</sup> and mistakes of fact or law.<sup>68</sup>

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59. Missouri Revised Statutes Sections 456.180-.210 provide a contradictory and incomplete set of rules for filling trustee vacancies. MO. REV. STAT. §§ 456.180-.210 (2000 & Supp. 2001). While there is a non-judicial procedure for resignation and appointment, the procedure in Section 456.185 does not apply to declinations to act as a trustee, and there is no provision for appointment if the beneficiaries entitled to income are all minors.

60. Missouri Revised Statutes Section 456.220 provides for a five-year statute of limitations from the receipt of a final accounting on trust termination, or a twenty-two-year limitations period after the termination of the trust if there is no final accounting. MO. REV. STAT. § 456.220 (2000).

61. UTC Section 814 allows a co-trustee to exercise a broad discretionary power of distribution to himself or herself in accordance with an ascertainable standard, instead of prohibiting the exercise of a power of distribution that is not limited to an ascertainable standard. Additionally, UTC Section 814(a) provides that a discretionary power that is absolute, sole, or uncontrolled still can be reviewed by a court for good faith exercise in conformance with the trust document. There is not a similar provision in current Missouri law.

62. UTC § 411 cmt.

63. Interestingly enough, a spendthrift clause, which is often the prime motivation for establishment of trusts and, thus, a very important indicator of a trust's material purpose, is held by the UTC not presumptively to create a material purpose. UTC § 411(c); see Wiedenbeck, *supra* note 9, at 810.

64. UTC § 411(b).

65. UTC § 412.

66. UTC Section 414 creates a new exception for termination of small and uneconomical trusts unknown at common law, although such provisions are often drafted into trust documents.

67. UTC Section 416 also creates a new basis for modification of trusts, although such modifications presently can be made under Missouri Revised Statutes Section 456.590.2.

68. UTC § 415.

Missouri statutorily rejected the *Clafin* doctrine by its 1983 adoption of Section 456.590.2.<sup>69</sup> That adoption was based on the lack of flexibility thought to be inherent in the application of that doctrine, at least in Missouri in such cases as *Thomson v. Union National Bank in Kansas City*,<sup>70</sup> the first Missouri case openly to adopt the *Clafin* rule.<sup>71</sup> In that case, the court refused to allow a trust to be modified by removing a requirement of investment only in certain specified types of bonds, even though the yield on such bonds had fallen to half of that paid when the will that created the trust became irrevocable.<sup>72</sup> The court found:

Mr. Thomson [the settlor] not only had in mind the production of income for his wife for life but, evidently, one of his dominant concerns was safety of investment and certainty of income. For the first twenty-five years or more the specified investments have accomplished all the testator's primary purposes even in the face of inflation and changing notions as to the safety and desirability of other types of investments. The testator's primary purposes have not been defeated or so substantially impaired by changed economic conditions that the trustee should no longer be required to strictly conform to the directions of the trust and the settlor's explicit desires.<sup>73</sup>

It is interesting to contemplate whether a court, today, would find the modification requesting removal of the investment limitation in *Thomson* to be "not inconsistent with" the material purpose of the trust if UTC Section 411 were the law of Missouri. The comments to UTC Section 411 state that the finding of a material purpose "generally requires some showing of a particular concern or objective on the part of the settlor, such as concern with regard to the beneficiary's management skills, judgment, or level of maturity."<sup>74</sup> Section 412,

69. See *supra* note 12 and accompanying text.

70. 291 S.W.2d 178 (Mo. 1956).

71. *Id.* at 185.

72. *Id.* (citations omitted).

73. *Id.* at 184.

74. UTC § 411 cmt. (quoting the RESTATEMENT (THIRD) OF TRUSTS § 65 cmt. d (Tentative Draft No. 3, 2001)). The entire comment reads:

Material purposes are not readily to be inferred. A finding of such a purpose generally requires some showing of a particular concern or objective on the part of the settlor, such as concern with regard to the beneficiary's management skills, judgment, or level of maturity. Thus, a court may look for some circumstantial or other evidence indicating that the trust arrangement represented to the settlor more than a method of allocating the benefits of property among multiple beneficiaries, or a means of offering to the

perhaps, could change the result of *Thomson*, but that Section requires that the modification for changed circumstances be in furtherance of the trust purposes. Would removing the investment restrictions further the clear purpose of the settlor in protecting the value of the trust assets? It is not certain that a modern court would reach a conclusion different than that of the *Thomson* court where an explicit restriction to invest only in bonds was found to constitute a material purpose expressed by the settlor for the “safety of investment and certainty of income.”<sup>75</sup>

The return of a material purpose analysis to Missouri law could result in the return of the inflexibility associated with the *Clafin* rule, as expressed in *Thomas* and other cases.<sup>76</sup> In 1983, Missouri made a conscious choice to allow the beneficiaries to modify trusts by consent so long as the interest of beneficiaries that could not directly represent themselves was benefitted.<sup>77</sup> There has not been a groundswell of opposition to the statute or any suggestion that the *Clafin* rule should be restored.<sup>78</sup> While Section 456.590.2 has been widely used, it has produced only two reported cases in eighteen years.<sup>79</sup>

Experience with the statute has raised several practical concerns. First, Section 456.590.2 is silent as to the role of the trustee in an action brought under the statute. The trustee is a necessary, if not indispensable, party to any action involving a trust<sup>80</sup> and, thus, must be joined in any action under Section 456.590.2. By its terms, however, the statute does not require or even allow consideration of the trustee’s view on the decision to vary the trust terms or terminate the trust. Because trusts often involve family members, the trustee may be the only impartial party in the action to raise the issue whether the variation or termination really benefits the minor, unborn, or unascertained

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beneficiaries (but not imposing on them) a particular advantage. Sometimes, of course, the very nature or design of a trust suggests its protective nature or some other material purpose.

RESTATEMENT (THIRD) OF TRUSTS § 65 cmt. d (Tentative Draft No. 3, 2001).

75. *Thomson*, 291 S.W.2d at 183.

76. *See* First Nat’l Bank of Kan. City v. Christopher, 624 S.W.2d 474, 479-81 (Mo. Ct. App. 1981).

77. *See supra* note 12 and accompanying text.

78. *See* Wiendenbeck, *supra* note 9, at 824. In that article, Professor Wiendenbeck urged an expansive reading of the then-new Section 456.590 that did not rely upon an analysis of the settlor’s intent. Wiendenbeck, *supra* note 9, at 824.

79. *In re* Trust of Nitsche, 46 S.W.3d 682, 685-86 (Mo. Ct. App. 2001); *Hamerstrom v. Commerce Bank of Kan. City, N.A.*, 808 S.W.2d 434, 436-39 (Mo. Ct. App. 1991).

80. Clifford S. Brown & Douglas D. Lee, *Trust Contests in 1 MISSOURI TRUSTS, POWERS OF ATTORNEY, CUSTODIANSHIPS, AND NONPROBATE MATTERS, TRUST AND ESTATE SERIES* §§ 6.20, 6.24 (MoBarCLE 1998).

beneficiaries of the trust. While it is unlikely that a Section 456.590.2 action will be taken without joining the trustee, the lack of mention in the statute may lead some to conclude that the trustee's input into the variation or termination is not germane.

The real concern with actions brought under Section 456.590.2 is whether there is a true analysis of the benefit of the variation or termination to the minor, unborn, or unascertained beneficiaries. The consent of all adult beneficiaries is the only true statutory requirement. Faced with this consent, a judge, perhaps with little familiarity with the law of trusts, may view the matter as similar to the entry of a consent judgement. Thus, the parties' contention that some benefit will accrue to the minor, unborn, or unascertained beneficiaries by reason of the termination or variation may receive little independent analysis. Arguments by counsel for the parties advocating a variation or termination often rely on the fact that the minor, unborn, and unascertained beneficiaries are deemed represented under the present representation rules by adult beneficiaries who have consented to the proposed modification or termination.<sup>81</sup>

However, true benefit to the minor, unborn, and unascertained beneficiaries from a Section 456.590.2 action, especially if the trust is being terminated, is probably rare<sup>82</sup> by the very nature of the situation.<sup>83</sup> Those classes of beneficiaries who are either unrepresented or deemed represented by others will almost invariably be the remainder beneficiaries whose interests, in fact, will be extinguished by the termination. Perhaps, the problem is that the appointment of a GAL to represent the minor, unborn, and unascertained beneficiaries is the exception rather than the rule. It is probably not a coincidence that in the only two known cases involving a Section 456.590.2 termination to be appealed had an appointed GAL as a party.<sup>84</sup>

Thus, if the principles of present Section 456.590.2 are incorporated into Missouri's version of the UTC, serious consideration should be made to increasing the protection accorded the interests of the minor, unborn, and unascertained beneficiaries. Instead of requiring that the variation or termination "benefit"<sup>85</sup> the minor, unborn, and unascertained beneficiaries, perhaps the court should be required to find that the interests of those beneficiaries are adequately protected by any proposed variation or termination.<sup>86</sup> This would give parties to a Section 456.590.2 action and the court more flexibility in crafting remedies

81. MO. REV. STAT. § 472.300 (2000). This argument will become stronger if the UTC's more complete set of representation rules is enacted.

82. See *supra* note 25 and accompanying text.

83. See Davis & Sturdevant, *supra* note 22, § 25.12.

84. *Nitsche*, 46 S.W.3d at 682; *Hamerstrom*, 808 S.W.2d at 434.

85. MO. REV. STAT. § 456.590.2 (2000).

86. UTC Section 411(e)(2) presently uses this standard where the court terminates or modifies a trust and not all beneficiaries consent.



instead of applying a rigid yes-or-no solution to terminations or modifications.<sup>87</sup> For example, a court could refuse to terminate a trust but, rather, could commute the life beneficiary's interest with the trust continuing for the benefit of the minor, unborn, and unascertained beneficiaries. Protection of those classes of beneficiaries also could be enhanced by requirements that beneficiaries benefitting from the termination have to leave testamentary dispositions in favor of classes of beneficiaries that did not benefit from the termination.<sup>88</sup>

Another measure to improve the protection of minor, unborn, and unascertained beneficiaries would be to require the appointment of a GAL<sup>89</sup> upon the request of a party, unless the court finds good cause not to do so. Of course, a court always should have authority to appoint a GAL on its own motion. The appointment of a GAL would be presumed, unless the court specifically held there was not a reason for one to be appointed. Easier appointment of a GAL, coupled with a requirement that the court protect the interests of minor, unborn, and unascertained beneficiaries, could result in greater protection for these classes of beneficiaries.<sup>90</sup>

If Missouri's present approach to trust modification and termination by consent is incorporated into its version of the UTC, the impact of that approach on other provisions of the UTC must be analyzed. The UTC provides for non-judicial settlement agreements that can accomplish anything a court can accomplish so long as the agreement does not violate a material purpose of the trust.<sup>91</sup> Thus, such agreement can include termination or modifications. If the more liberal rules of Section 456.590.2 are incorporated into Missouri's version of UTC Section 411(b), the propriety of allowing a non-judicial agreement to terminate a trust must be questioned. Such agreements should be prohibited from terminating a trust pursuant to the more liberal standards.

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87. Some courts already perceive that they possess the power to craft creative requirements for protecting the interests of minor, unborn, and unascertained beneficiaries in Section 456.590.2 actions. Davis & Sturdevant, *supra* note 22, § 25.12. The English Variation of Trusts Act seems to allow the creation of protective arrangements when terminating trusts. See Wiedenbeck, *supra* note 9, at 818.

88. See Davis & Sturdevant, *supra* note 22, § 25.12.

89. Section 305 of the UTC allows a court to appoint a representative to represent an unrepresented interest or an interest that the court deems is not adequately represented. This Section could be used for this purpose if the UTC were adopted in Missouri.

90. Swift, *supra* note 13, § 5.6.

91. UTC Section 111 provides that: "[a] non-judicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this [Code] or other applicable law."

UTC Article 5 governs the validity of spendthrift clauses and governs creditor claims against trusts.<sup>92</sup> Section 502 provides that “[a] spendthrift provision is valid only if it restrains both the voluntary and involuntary transfer of a beneficiary’s interest.”<sup>93</sup> This is contrary to present Missouri law that allows a valid spendthrift provision to restrain either type of transfer.<sup>94</sup> The UTC provides that a settlor should not be able to allow a beneficiary freely to make assignments for the benefit of creditors while keeping the creditor from attaching trust assets.<sup>95</sup> Missouri has made the opposite choice, although few settlors take advantage of the flexibility. There does not seem to be a compelling reason to limit the freedom of the settlor in controlling the beneficial enjoyment of property. This might be a different situation if the settlor freely could protect his or her assets from the creditor by the use of a spendthrift clause.

Under the provisions of the UTC, a settlor cannot protect assets from creditors by the use of a spendthrift provision in a trust.<sup>96</sup> All assets of revocable trusts<sup>97</sup> are subject to the claims of the settlor.<sup>98</sup> The creditors of a settlor of an irrevocable trust can reach “the maximum amount that can be distributed to or for the settlor’s benefit.”<sup>99</sup> This stance is not in accord with Missouri’s present limited exception to that rule.<sup>100</sup> Missouri’s limited exception is designed to allow retention by a settlor of a discretionary interest as one of a class of beneficiaries. This exception should allow estate-planning techniques that would require a settlor to retain some interest in a trust that should not be included in the settlor’s gross estate for federal estate tax purposes.<sup>101</sup> This seems to be a valid purpose that, when weighed against the narrowness of the exception, tends to lean toward maintaining the exception in a Missouri version of the UTC.

Present Missouri legal precepts may control the satisfaction of a settlor’s debts from trust assets after death even if the UTC is adopted. The UTC provides that assets of a trust revocable immediately prior to the settlor’s death are subject to the claims of the settlor’s creditors.<sup>102</sup> Administration costs of the

92. UTC art. VI.

93. UTC § 502(a).

94. MO. REV. STAT. § 456.080.2 (2000).

95. UTC § 502(a) cmt.

96. UTC § 505.

97. The term “revocable” is defined in UTC Section 103(13) as revocable by the settlor without the consent of the trustee or a person holding an adverse interest.

98. UTC § 505(a)(1).

99. UTC § 505(a)(2).

100. Missouri Revised Statutes Section 456.080.3 provides a limited exception to a settlor’s ability to shield assets from creditors by use of a spendthrift clause. MO. REV. STAT. § 456.080.3 (2000); *see supra* notes 32–42 and accompanying text.

101. *See supra* notes 41–43 and accompanying text.

102. UTC § 505(a)(3).

settlor's estate, expenses of settlor's funeral and disposal of remains, and statutory allowances to spouses and minor children are also payable from the assets of a revocable trust.<sup>103</sup> These claims and other expenses, however, are only recoverable "to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and [allowances]."<sup>104</sup> This Section of the UTC raises many issues. If the trust is not revocable, but the settlor's debts could have been satisfied from that trust prior to the settlor's death, should those assets not be reachable by the settlor's creditors? Who has the right to recover trust assets—the creditor or the deceased settlor's personal representative? Is there a time limit on such recovery? Does the running of the claim period in the settlor's probate estate prevent a claim to be brought under this statute? Fortunately, all of these questions are answered by Missouri statutes,<sup>105</sup> and a reference to Section 461.300 should be inserted in this Section in lieu of the UTC language if the UTC is adopted.

However, an issue that exists in this area of Missouri law should be addressed. Missouri has a statute that allows a trustee that has the duty or power to pay a deceased settlor's debts to publish notice to creditors similar to publishing notice to creditors of a probate estate.<sup>106</sup> Section 461.300 provides that creditors can reach assets of revocable trusts through a proceeding authorized by that Section within eighteen months of the settlor's death, assuming a claim has been perfected in the settlor's probate proceedings. Both purport to cut off creditors, yet each has different procedures and claim periods. If the trust non-claim period has run after notice is published under Section 456.610, it is not clear whether a valid probate claim can be satisfied from trust assets through the procedure set forth in Section 461.300.<sup>107</sup> Assuming that the notice procedure of Section 456.610 passes constitutional muster,<sup>108</sup> it should either control, preventing a Section 456.300 action from being brought if the notice period has run, or it is meaningless and should be repealed.

Missouri trustees have relied upon the efficacy of this procedure since 1983, and it has facilitated the distribution of trusts.<sup>109</sup> Eighteen months is a long time for distributions to be delayed while the trustee awaits the expiration of all claims against the decedent. The concept of publication of notice and a claim

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103. UTC § 505(a)(3).

104. UTC § 505(a)(3).

105. See *supra* notes 48-54 and accompanying text.

106. See *supra* notes 44-47 and accompanying text.

107. See JOHN A. BORRON, JR., PROBATE LAW AND PRACTICE, 5 MISSOURI PRACTICE § 15 (1999).

108. See *supra* note 46 and accompanying text.

109. See BORRON, *supra* note 107, § 15.

bar period should be retained in a Missouri version of the UTC<sup>110</sup> and should control the barring of claims against trustees of certain trusts. The language of the two statutes<sup>111</sup> should be harmonized so that they apply to the same class of claims. Trusts against which claims are barred by publication of notice should be changed<sup>112</sup> to trusts, the property of which are “subject to the satisfaction of the decedent’s debts immediately prior to the decedent’s death.”<sup>113</sup>

#### IV. CONCLUSION

Adoption of the UTC in Missouri clearly will provide a lot of guidance in an area that is notoriously thin on controlling authority. There are, however, some areas of Missouri trust law that are well developed and unique to this jurisdiction. A judicious blending of current Missouri law and the UTC likely will provide a sound body of trust statutes as the next millennium commences.

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110. These existing Missouri provisions probably will be inserted into UTC Section 505(3).

111. MO. REV. STAT. §§ 456.610, 461.300 (2000 & Supp. 2001).

112. That class is presently a trust from which “[a]ny trustee has a duty or power to pay the debts of a decedent” to a trust. MO. REV. STAT. § 456.610 (2000).

113. MO. REV. STAT. § 461.300.8 (2000).

