

## THE VIRGINIA UNIFORM TRUST CODE

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### I. INTRODUCTION

In its 2005 Session, the Virginia General Assembly enacted Senate Bill 891,<sup>1</sup> thus adopting the Uniform Trust Code (“UTC”), with modifications considered appropriate to this state’s institutions, traditions, and jurisprudence. The Virginia Uniform Trust Code (“Virginia UTC”), set forth in new Chapter 31 of Title 55 of the Virginia Code, has an effective date of July 1, 2006, but, once in effect, it will be applicable (with some exceptions) to trusts created before, on, or after that date.<sup>2</sup>

The new Virginia UTC, which encompasses the great bulk of the principles and rules that comprise the law of trusts in Virginia, has great relevance and importance to lawyers who specialize in estate planning and to lawyers who represent trustees or trust beneficiaries. It also affects lawyers whose clients, as “third

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1. Act of April 6, 2005, ch. 935, 2005 Va. Acts 1793 (codified as amended at VA. CODE ANN. §§ 55-541.01 to -551.06 (Cum. Supp. 2005)). The full text of Senate Bill 891, as enacted, which includes both the UTC and conforming amendments to other portions of the Virginia Code, is set forth at <http://leg1.state.va.us/cgi-bin/legp504.exe?051+ful+CHAP0935> (last visited Oct. 1, 2005).

2. VA. CODE ANN. § 55-551.06 (Cum. Supp. 2005).

parties,” have transactional relationships with trustees. The legislation will also affect institutional fiduciaries, accountants, and other non-lawyer professionals whose activities involve administering trusts or advising settlors, trustees, and trust beneficiaries. This article is directed to all of those audiences, with the goal of informing them about the principal features of the legislation and its implications for their practices. In doing so, the article will identify most of the relatively small number of differences between the Virginia UTC and the official text of the UTC as adopted by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”).

Part II of the article begins with a summary of the reasons for adopting the UTC, both generally and in Virginia in particular. Part II then provides an overview of the development of the UTC leading up to its adoption by NCCUSL in 2000. Part II then describes the process leading to enactment of the UTC by the General Assembly. Part II also discusses the role of the official NCCUSL Comments in understanding and interpreting the Virginia UTC.

Part III of the article provides an overview of the Virginia UTC. It begins by describing the scope of the Virginia UTC, which applies exclusively to express trusts or trusts required to be administered as express trusts. Part III then describes the manner in which the statute implements the principle of effecting the express intent of the settlor. Part III also describes the few instances in which the terms of a trust instrument cannot override the rules set forth in the statute. Part III further describes the extent to which the common law and principles of equity will continue to govern certain matters concerning the administration of trusts. Part III then describes the function of each of the principal subdivisions of the statute and explains the principal ways in which the Virginia UTC varies from the original.

Part IV provides a detailed discussion of several key concepts utilized in the Virginia UTC, specifically the concepts of “knowledge,” “qualified beneficiaries,” and “representation,” each of which plays a significant role in resolving matters of trust administration.

This discussion is followed by Part V, in which the article examines the numerous ways in which the Virginia UTC facilitates trust administration without judicial intervention.

In Part VI, the article examines several key substantive elements of the Virginia UTC, including the rules concerning judicial modification of trusts, rules governing the liability of trustees, and rules governing the rights of creditors of trust beneficiaries.

Finally, Part VII of the article offers some concluding remarks.

## II. DEVELOPMENT OF THE UTC AND ITS ENACTMENT IN VIRGINIA

### A. *Reasons for the UTC*

The primary stimulus for the development of the UTC is the increased use of trusts over the last several decades. This increase in the use of trusts, and the accompanying rise in the number of questions concerning trust administration, have led to the recognition that the trust law in many jurisdictions is “thin.”<sup>3</sup> Case law in most jurisdictions fails to address numerous issues that arise on a day-to-day basis in trust administration. Secondary sources, such as the Restatements and treatises by Bogert and Scott, also fail to address many practical modern problems and provide insufficient guidance for the resolution of many issues. Moreover, although there are numerous uniform acts relating to trusts, none deals with the subject comprehensively.<sup>4</sup> The UTC thus arose out of a need to fill in the gaps left by both common law and statutory law developments.

An additional benefit of the UTC in Virginia and elsewhere will be to set forth the law of trusts in a single source, conveniently accessible to lawyers, fiduciaries, and others having the need to understand the law in this area. By contrast, the law of trusts in Virginia is presently set forth in fragmentary statutory schemes and in scattered case law spread among reported decisions going back centuries. Any lawyer who practices in this area knows how

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3. UNIF. TRUST CODE (amended 2005), 7C U.L.A. 177, 178 (Supp. 2005). Some readily apparent examples of questions for which the trust law in many jurisdictions fails to provide adequate or clear answers include: (1) to what extent may a settlor’s creditors reach the assets of a revocable trust following the settlor’s death?; (2) under what circumstances and to what extent may a trust be modified to correct a scrivener’s error?; and (3) to what extent is a trust for a pet enforceable?

4. See Lynn Foster, *The Arkansas Trust Code: Good Law for Arkansas*, 27 U. ARK. LITTLE ROCK L. REV. 191, 193 (2005).

difficult it is at present to find answers to routine matters of trust administration not addressed in the trust instrument.

There is also significant value in the *uniformity* of the UTC.<sup>5</sup> In our increasingly mobile society, lawyers and fiduciaries are regularly being called upon to deal with trusts that have contacts in multiple jurisdictions.<sup>6</sup> Uniformity of the laws across state borders can greatly simplify the process of trust administration.<sup>7</sup>

In many respects, the UTC simply codifies the existing common law of trusts. In other respects, the UTC replaces outmoded default rules and provides new rules to deal with today's practical needs in trust administration.<sup>8</sup> This modernizing of trust law is an essential attribute of the UTC.

### B. *Development of the UTC*

The UTC is the product of over a decade of study and drafting by NCCUSL. The process began in 1993 with the appointment of a study committee chaired by Maurice Hartnett, a judge of the Delaware Supreme Court and a former justice of the Delaware Chancery Court, with substantial experience in trust cases.<sup>9</sup> The function of the study committee was to decide whether the Uniform Law Commissioners should undertake the drafting of a comprehensive uniform law on trusts.<sup>10</sup> The study committee recommended the formation of a drafting committee, which was appointed in 1994, with Judge Hartnett serving as its chair.<sup>11</sup> David

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5. On this issue generally, consider the discussion below about the role of the official Comments, at notes 37–38 and accompanying text.

6. For example, a single trust may have assets in multiple states and thus, at least in part, be subject to the laws of multiple states. Also, a single trustee may administer trusts in multiple jurisdictions, and having the same or similar law apply to multiple trusts under administration should create greater efficiencies for fiduciaries.

7. Note that an adopting jurisdiction is free to omit provisions deemed unacceptable or to substitute approaches to particular issues that better align with customary practices, policies, or societal values of the particular jurisdiction. An adopting jurisdiction is also free to modify its trust code from time to time as experience may deem expedient.

8. For example, the UTC provides mechanisms to facilitate trust administration without judicial involvement, thereby promoting efficiency and economy for both trustees and beneficiaries, as well as third parties. *See* UNIF. TRUST CODE (amended 2005), 7C U.L.A. 177, 180–81 (Supp. 2005).

9. *See* David M. English, *Representing Estate and Trust Beneficiaries and Fiduciaries: The Uniform Trust Code (2000)*, SJ001 A.L.I.-A.B.A. 285, 287–88 (2003).

10. *Id.* at 288.

11. *Id.* at 287–88.

English, now the William Franklin Fratcher Professor of Law at the University of Missouri-Columbia, served as Reporter for the drafting committee.<sup>12</sup> The drafting committee was served by numerous advisors, which included representatives from the American Bar Association Section on Real Property, Probate, and Trust Law, the American Bankers Association, and the American College of Trust and Estate Counsel Committee on State Laws.<sup>13</sup> In drafting the UTC, the committee considered the comprehensive trust statutes that already existed in some states—most notably California, Georgia, Indiana, and Texas—and it used the 1986 California statute as its initial drafting model.<sup>14</sup> The drafters also drew heavily upon the common law as expressed in the American Law Institute's Restatement (Second) of the Law of Trusts, the emerging Restatement (Third) of the Law of Trusts, and the Restatement (Second) of Property (Wills and Other Donative Transfers).<sup>15</sup>

After approximately seven years of work in preparing the draft, the Uniform Law Commissioners approved the UTC on August 3, 2000.<sup>16</sup> Following a review by the NCCUSL Style Committee, the final text of the UTC was completed on October 9, 2000.<sup>17</sup> The Comments were completed on April 25, 2001.<sup>18</sup> The UTC was approved by the American Bar Association's House of Delegates at its mid-year meeting in February 2001.<sup>19</sup> Technical amendments to the UTC were approved by NCCUSL in 2001, 2003, and 2004.<sup>20</sup> The Virginia UTC is based on the 2004 version of the UTC.<sup>21</sup> NCCUSL approved further amendments to the UTC in 2005.<sup>22</sup>

As of August 2005, the UTC, with some state-to-state variations, has been adopted sequentially in Kansas, Nebraska, New Mexico, Wyoming, the District of Columbia, Utah, Tennessee, New Hampshire, Maine, Missouri, Arkansas, Virginia, South

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12. See UNIF. TRUST CODE (amended 2005), 7C U.L.A. 177 (Supp. 2005).

13. English, *supra* note 9, at 288.

14. UNIF. TRUST CODE (amended 2005), 7C U.L.A. 177, 178 (Supp. 2005).

15. Foster, *supra* note 4, at 193–94.

16. See English, *supra* note 9, at 287.

17. *Id.*

18. *Id.*

19. *Id.*

20. UTCproject.org Home Page, <http://www.utcproject.org> (last visited Oct. 1, 2005).

21. Compare UNIF. TRUST CODE (amended 2005), 7C U.L.A. 177 (Supp. 2005), with VA. CODE ANN. §§ 55-541.01 to -551.06 (Cum. Supp. 2005).

22. UTCproject.org Home Page, *supra* note 20.

Carolina, Oregon, and North Carolina.<sup>23</sup> It was adopted in Arizona in 2003 but was repealed (withdrawn for further study and refinement) in that state in 2004.<sup>24</sup> Studies of the UTC undertaken by bar associations and special commissions are complete or nearing completion in a number of additional states.<sup>25</sup> Legislative consideration of state versions of the UTC in late 2005 or early 2006 is expected in Alabama, Massachusetts, Ohio, and Pennsylvania.<sup>26</sup> In addition, bar association studies are underway in Colorado, Connecticut, Florida, Georgia, Idaho, Michigan, Montana, and Washington.<sup>27</sup>

### C. *Development of the Virginia UTC*

The Virginia UTC had its genesis in the Legislative Committee of the Section on Wills, Trusts and Estates (the "Section") of the Virginia Bar Association ("VBA"). The Legislative Committee undertook preliminary consideration of the UTC in April 2002 and reached a tentative conclusion in September 2002 that substantial adoption of the UTC was feasible and would be preferable to piecemeal consideration and enactment of selected portions. A subcommittee of five<sup>28</sup> (the "UTC Subcommittee" or "Subcommittee") was charged with the task of making a thorough study of the UTC and with identifying any needed modifications and conforming changes to other portions of the Virginia Code. On the recommendations of the UTC Subcommittee, the Legislative Committee, and the Section, the Executive Committee of the VBA approved introduction of a "pure" version of the UTC in the 2004 Session of the General Assembly, with a view to its being carried forward and serving as a vehicle for facilitating reaction and in-

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23. *See id.*

24. *See* ARIZ. REV. STAT. §§ 14-10101 to -10112 (2003) (repealed 2004).

25. UTCproject.org Home Page, *supra* note 20.

26. Michelle W. Clayton, *Uniform Trust Code 2005: Legislative Process, Enactment Prospects and Healthy Debates* UTC NOTES (Nat'l Conf. of Comm'rs on Unif. State Laws, Chicago, Ill.), Winter 2004, at 1-3, available at [http://www.utcproject.org/utc/uploads/UTCnotes\\_Dec04\\_print.pdf](http://www.utcproject.org/utc/uploads/UTCnotes_Dec04_print.pdf) (last visited Oct. 1, 2005).

27. *Id.* at 3.

28. Professor Donaldson served as Chair of the Subcommittee, and Professor Danforth served as a member. The other three members were I. Mark Cohen, of Cohen & Troxell, P.C., in McLean, Virginia; Suzanne W. Doggett, formerly of McGuireWoods L.L.P., in McLean, Virginia; and Peter M. Huber, of Willcox & Savage, P.C., in Norfolk, Virginia.

put from other interested groups and individuals.<sup>29</sup> Senator William Mims, also a member of the VBA Executive Committee, sponsored Senate Bill 506 to that end.<sup>30</sup> In the 2005 Session of the General Assembly, Senate Bill 506 was modified and reintroduced to become Senate Bill 891.<sup>31</sup>

In the course of its work, the UTC Subcommittee compared the NCCUSL version of the UTC to relevant provisions of Titles 26 and 55 and other portions of the Virginia Code and considered the approach of the UTC in relation to existing Virginia case law on particular issues. It also considered variations from the UTC enacted in other adopting states and variations under consideration in several states in which UTC studies had advanced to the drafting stage.

After approximately one and a half years of study, deliberation, and drafting, the UTC Subcommittee submitted recommendation for approval of a Virginia version of the UTC to the Section's Legislative Committee in April 2004. During the course of five full days of meeting over the following six-month period, the Legislative Committee prepared and eventually approved a final draft of the statute for introduction as a new bill in December 2004. The bill was prepared after consultation with and input from the Office of the Attorney General, the Virginia Department of Taxation, the Virginia Bankers Association, the Virginia Conference of Commissioners of Accounts, representatives of the real estate bar, and a title insurance company, and with able drafting assistance from Ellen Bowyer and Jescey D. French, staff attorneys with the Virginia Division of Legislative Services.

The Virginia UTC, approved in the 2005 Session of the General Assembly as Senate Bill 891 with amendments, adds a new Chapter 31 to Title 55 to house the Virginia UTC, consisting of ninety-eight sections.<sup>32</sup> The bill, in overlaying this new chapter on the Virginia Code, amends nine sections and repeals twenty-nine sections of the Virginia Code, most of which are in Titles 26 and

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29. See S.B. 506, Va. Gen. Assembly (Reg. Sess. 2004).

30. See *id.*

31. See S.B. 891, Va. Gen. Assembly (Reg. Sess. 2005).

32. See Act of Apr. 6, 2005, ch. 935, 2005 Va. Acts 1793 (codified at VA. CODE ANN. §§ 55-541.01 to -551.06 (Cum. Supp. 2005)).

55.<sup>33</sup> A number of the repealed sections have been incorporated as additional provisions in the new Chapter 31.<sup>34</sup>

Chapter 31 of Title 55 begins with Virginia Code section 55-541.01 and follows the sequence of the UTC.<sup>35</sup> The last three digits of the numbered sections conform to the corresponding section numbers of the original UTC. Thus, for example, Virginia Code section 55-541.01 conforms to UTC section 101, and Virginia Code section 55-550.03 conforms to UTC section 1003. The Virginia UTC has a general effective date of July 1, 2006.<sup>36</sup>

#### D. *The Role of the UTC Comments*

As discussed above, the process leading to the adoption of the UTC included the preparation of extensive official Comments, which were approved by NCCUSL, along with the legislative language itself. The Comments provide background information (such as the origin of a rule), make important cross-references, state certain assumptions upon which the statutory language is based, explain the rationale for differentiating between default and mandatory rules, and, more generally, elaborate on the intended meaning of certain statutory provisions. The Comments are inordinately helpful in understanding the UTC and should be consulted for such purpose as Virginians familiarize themselves with the new law.

Virginia Code section 55-551.01 of the Virginia UTC provides that, “[i]n applying and construing this Uniform Act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.”<sup>37</sup> To achieve uniformity, regular consultation of the Comments is essential. Moreover, it is reasonable to do so, especially in interpreting a statute of this complexity, which cannot have been drafted to anticipate every circumstance that may be encountered. Fur-

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33. *See id.*

34. *See id.*

35. *See* VA. CODE ANN. §§ 55.541.01 to -551.06 (Cum. Supp. 2005).

36. *See id.* § 55-551.06 (Cum. Supp. 2005).

37. *Id.* § 55-551.01 (Cum. Supp. 2005). This language differs slightly from the original, which uses the somewhat softer expression “consideration *must* be given.” UNIF. TRUST CODE § 1101, 7C U.L.A. 334 (Supp. 2005). In our view, the language in the Virginia statute is properly viewed as a directive, although the directive, of course, generally would not apply with respect to portions of the Virginia UTC that differ from the original.



thermore, in Virginia, where we are without the benefit of legislative history, the Comments constitute the only permanent explanation for the purpose of a provision or the manner in which it is intended to be interpreted. For these reasons, this article makes frequent reference to the Comments as an aid to understanding Virginia's version of the statute. The drafters of the UTC expressly contemplated this approach to interpreting the statute.<sup>38</sup>

### III. OVERVIEW OF THE VIRGINIA UTC

#### A. *Scope of the Virginia UTC*

As provided in Virginia Code section 55-541.02, the Virginia UTC applies to express charitable and noncharitable trusts, as well as trusts created by statute, judgment, or decree and required to be administered as express trusts.<sup>39</sup> The term "express trust" does not include constructive trusts and resulting trusts, which are equitable remedies in which a court imposes a duty to make a prescribed disposition of property.<sup>40</sup>

In an important variation from the original, the Virginia UTC preserves this state's traditional distinctions between inter vivos and testamentary trusts. By express language, the Virginia UTC "applies to testamentary trusts, except to the extent that specific provision is made for them in Title 26 or elsewhere in the Code of Virginia, or to the extent it is clearly inapplicable to them."<sup>41</sup> Thus, for example, Virginia trustees of testamentary trusts will

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38. As stated in the Comment to UTC section 106 (concerning the role of the common law and principles of equity):

The statutory text of the Uniform Trust Code is . . . supplemented by these Comments, which, like the Comments to any Uniform Act, may be relied on as a guide for interpretation. *See Acierno v. Worthy Bros. Pipeline Corp.*, 656 A.2d 1085, 1090 (Del. 1995) (interpreting Uniform Commercial Code); *Yale University v. Blumenthal*, 621 A.2d 1304, 1307 (Conn. 1993) (interpreting Uniform Management of Institutional Funds Act); 2 Norman Singer, *Statutory Construction* Section 52.05 (6th ed. 2000); Jack Davies, *Legislative Law and Process in a Nutshell* Section 55-4 (2d ed. 1986).

UNIF. TRUST CODE § 106 cmt. (amended 2005), 7C U.L.A. 204, 205 (Supp. 2005).

39. *See* VA. CODE ANN. § 55-541.02(A) (Cum. Supp. 2005). An example of a trust created by judgment or decree governed by the Virginia UTC would be a trust created to hold the proceeds of a personal injury lawsuit.

40. *See* RESTATEMENT (THIRD) OF TRUSTS §§ 1 cmt. e, 2, 7 (2003).

41. VA. CODE ANN. § 55-541.02(A) (Cum. Supp. 2005).

continue to be required to “qualify” before the clerk or court,<sup>42</sup> to furnish bond with surety unless surety is waived,<sup>43</sup> and to file annual accountings with the appropriate Commissioner of Accounts unless such requirement is waived by the instrument and other conditions are satisfied.<sup>44</sup>

Moreover, Virginia Code section 55-541.02 of the Virginia UTC, unlike the original, expressly excludes a number of special purpose trusts from the general scope of the statute, including Virginia land trusts, security interest deeds of trust, pension trusts, and trusts under Title 57 (church and cemetery trusts).<sup>45</sup> The Virginia UTC also provides, however, that in exercising jurisdiction over such trusts, a court may apply policies, procedures, and rules of the UTC to resolution of particular issues, as appropriate.<sup>46</sup>

The UTC does not affect or otherwise require amendment to Virginia’s Uniform Custodial Trust Act<sup>47</sup> or Uniform Management of Institutional Funds Act.<sup>48</sup>

#### B. *A Fundamental Principle: Effecting the Express Intent of the Settlor*

The Virginia UTC, like the original, implements a cardinal principle of the law of trusts: the policy of the law is to effectuate the known wishes of the settlor, unless contrary to public policy or fundamental principles of equity jurisprudence. Thus, in general, the “law of trusts” applicable to a particular matter involving the “duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary” is simply the intent of the settlor, as expressed in the terms of the instrument.<sup>49</sup> Accordingly, by far the vast majority of the rules contained in the Virginia UTC are default rules that apply only if the terms of the

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42. *Id.* § 26-1.1(a) (Repl. Vol. 2004).

43. *Id.* § 26-46.2 (Repl. Vol. 2004). Surety is not required of banks and trust companies. *See id.* § 6.1-18 (Repl. Vol. 1999).

44. *Id.* § 26-17.7 (Repl. Vol. 2004).

45. *Id.* § 55-541.02(A) (Cum. Supp. 2005).

46. *See id.* § 55-541.02(B) (Cum. Supp. 2005). *See generally id.* §§ 57-7.1, -22 (Repl. Vol. 2003).

47. *Id.* §§ 55-34.1 to -34.19 (Repl. Vol. 2003).

48. *See id.* §§ 55-268.1 to -268.10 (Repl. Vol. 2003).

49. *Id.* § 55-541.05 (Cum. Supp. 2005).

instrument fail to address a particular matter.<sup>50</sup> A settlor not wanting a default rule to apply may specify the preferred rule expressly in the terms of the instrument, and the terms of the instrument will govern.<sup>51</sup>

Notwithstanding this general principle, under the Virginia UTC the intent of the settlor will not be controlling in every instance. There are some matters of public policy that the law deems of greater importance than the desire of a particular settlor; with respect to these matters, the rules set forth in the Virginia UTC will override even the expressed intent of the settlor.<sup>52</sup> Thus, for example, under the Virginia UTC a settlor cannot use a trust to shelter assets from the claims of the settlor's creditors.<sup>53</sup> Moreover, there are certain essential attributes of trusts—attributes that have developed over generations of equity jurisprudence—the absence of which would be inconsistent with the very existence of a trust. For example, under the Virginia UTC a settlor cannot relieve the trustee from the duty to act in good faith—to do so would be inconsistent with establishing a fiduciary relationship between the trustee and the beneficiaries.<sup>54</sup>

Consistent with the notion that the settlor's intent cannot be controlling in every instance, subsection B of Virginia Code section 55-541.05 provides that the terms of the instrument cannot override the rules of the UTC with respect to:

1. The requirements for creating a trust;
2. The duty of a trustee to act in good faith and in accordance with the purposes of the trust;
3. The requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve;
4. The power of the court to modify or terminate a trust under §§ 55-544.10 through 55-544.16;
5. The effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in Article 5;
6. The power of the court under § 55-547.02 to require, dispense with, or modify or terminate a bond;
7. The power of the court under subsection B of § 55-547.08 to adjust a trustee's compensation specified in the terms of the trust which is unreasonably low or high;

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50. *See id.*

51. *See id.* § 55-541.05 (Cum. Supp. 2005).

52. *See id.* § 55-541.05(B) (Cum. Supp. 2005).

53. *Id.* § 55-541.05(B)(5) (Cum. Supp. 2005).

54. *Id.* § 55-541.05(B)(2) (Cum. Supp. 2005).

8. The effect of an exculpatory term under § 55-550.08;
9. The rights under §§ 55-550.10 through 55-550.13 of a person other than a trustee or beneficiary;
10. Periods of limitation for commencing a judicial proceeding; and
11. The power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice.<sup>55</sup>

With respect to each of these matters—which implicate either public policy concerns or long-established principles of trust law—the settlor’s desires must give way to the requirements of the statute.

### C. *The Role of the Common Law and Principles of Equity*

The Virginia UTC does not purport to address all matters that may arise in the administration of a trust. As to such unaddressed matters, the statute provides that “[t]he common law of trusts and principles of equity supplement this chapter, except to the extent modified by this chapter or another statute of the Commonwealth.”<sup>56</sup> Thus, for example, the Virginia UTC, in a variation from the original, omits “optional” UTC section 112, which would have applied to trusts, “as appropriate,” rules of construction applicable to the interpretation of and disposition of property by will.<sup>57</sup> As a consequence, and except as otherwise provided by statute, the construction and interpretation of trust instruments are governed by the common law and principles of equity and not by rules, such as those in the anti-lapse statute, expressly applicable to wills.<sup>58</sup>

### D. *Structure and Organization of the Virginia UTC*

#### 1. In General

The official NCCUSL text contains provisions expressly designated as “optional.”<sup>59</sup> Many provisions not formally designated as “optional” are, in fact, optional. If a specific provision is deleted

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55. *Id.* § 55-541.05(B) (Cum. Supp. 2005).

56. *Id.* § 55-541.06 (Cum. Supp. 2005).

57. UNIF. TRUST CODE § 112 (amended 2005), 7C U.L.A. 213 (Supp. 2005).

58. *See* VA. CODE ANN. § 55-541.06 (Cum. Supp. 2005).

59. In the official UTC, optional provisions are enclosed in brackets.

(i.e., not enacted) by an adopting jurisdiction, the statute is silent as to the matter omitted and, under UTC section 106 (Virginia Code section 55-541.06), common law and principles of equity will operate to resolve the matter.<sup>60</sup>

The UTC is organized under eleven articles.<sup>61</sup> Article 9 is intended by NCCUSL to house the adopting jurisdiction's version of the Uniform Prudent Investor Act.<sup>62</sup> Because Virginia's Uniform Prudent Investor Act is applicable to both trustees and other types of fiduciaries, it is left unchanged in its current location in Title 26.<sup>63</sup> A trustee's duties to invest in accordance with the Uniform Prudent Investor Act are addressed by added language in Virginia Code section 55-548.01.<sup>64</sup> This language has the effect of incorporating the Uniform Prudent Investor Act into the UTC without repeating its provisions.<sup>65</sup> As a consequence, Article 9 of the Virginia UTC has no text other than the word "reserved."

## 2. Functions of Particular Articles

### a. Article 1

Article 1 of the Virginia UTC, Virginia Code sections 55-541.01 through 55-541.11, provides definitions, specifies the role of default rules and mandatory rules,<sup>66</sup> addresses choice-of-law issues, provides a procedure for transferring the principal place of administration of a trust, and addresses miscellaneous matters not embraced in other articles.<sup>67</sup>

### b. Article 2

Article 2 addresses in a limited way the role of the court in the administration of trusts and provides for the exercise of jurisdic-

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60. See UNIF. TRUST CODE § 106 (amended 2005), 7C U.L.A. 204 (Supp. 2005); see also VA. CODE ANN. § 55-541.06 (Cum. Supp. 2005).

61. See UNIF. TRUST CODE (amended 2005), 7C U.L.A. 189 (Supp. 2005).

62. See *id.* art. 9 cmt. (amended 2005), 7C U.L.A. 318 (Supp. 2005).

63. See VA. CODE ANN. §§ 26-45.3 to -45.14 (Repl. Vol. 2004).

64. See *id.* § 55-548.01 (Cum. Supp. 2005).

65. See *id.*

66. That is, the circumstances in which the terms of the trust may not override the Virginia UTC.

67. See VA. CODE ANN. §§ 55-541.01 to -541.11 (Cum. Supp. 2005).

tion over trustees and beneficiaries.<sup>68</sup> Because of a belief that existing statutes deal adequately with the jurisdiction of circuit courts in matters of equity and provide adequately for proper venue in trust litigation settings, the Virginia UTC does not include optional provisions on particular court jurisdiction or on venue.<sup>69</sup> Moreover, the Virginia UTC adds a provision—Virginia Code section 55-542.05—not found in the original, to provide a simplified alternative to provisions in Title 26<sup>70</sup> concerning judicial procedures for the removal and appointment of trustees.<sup>71</sup> The principal benefit of the alternative procedure in Virginia Code section 55-542.05 is to limit the number of necessary parties to such proceedings.<sup>72</sup>

In the process of reviewing the original UTC and considering how best to adapt the statute to use in Virginia, the UTC Subcommittee became concerned about the extent to which the “representation” principles of Article 3 relating to “notice” and “consent,” discussed below, would be applicable to formal judicial proceedings; in the view of the Subcommittee, the original version of the statute was unclear in this respect.<sup>73</sup> Borrowing from the

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68. *See id.* §§ 55-542.01 to -542.06 (Cum. Supp. 2005).

69. *See id.*

70. *Id.* §§ 26-48, -50 (Repl. Vol. 2004). These provisions are narrowly focused. Specifically, Virginia Code section 26-48 provides for court appointment of a trustee under limited circumstances, on the motion of an interested party. *See id.* § 26-48 (Repl. Vol. 2004). Virginia Code section 26-50, which applies to motions brought under Virginia Code section 26-48, establishes the notice requirements for such proceedings, including the requirement that notice being given on behalf of a minor to a guardian ad litem, which the court or the clerk is directed to appoint. *See id.* § 26-50 (Repl. Vol. 2004).

71. *See id.* § 55-542.05 (Cum. Supp. 2005).

72. *See id.*

73. In the view of the UTC Subcommittee, the application of Article 3 to formal (and, especially, contested) judicial proceedings was vague. Although the Comments to Article 3 admit of an interpretation that it applies to judicial proceedings, the operative terms of Article 3 focus on the effect of “notice” to and “consent” of a “representative” of a beneficiary. UNIF. TRUST CODE art. 3 cmt. (amended 2005), 7C U.L.A. 220 (Supp. 2005). Article 3 does not address “appearances” by persons under a disability, nor does it address the subject of “parties” in pleadings. *See id.* Moreover, if Article 3 applied to judicial proceedings, in the view of the Subcommittee it would be in conflict with the guardian ad litem statute in Title 8.01 of the Virginia Code and would thus raise the following, essentially unanswerable questions: would a parent representing a minor appear in his or her capacity of parent or in the capacity of representative for the minor?; and would a parent appearing for a minor be subject to the duty of a guardian ad litem to be present at the taking of depositions under Part 4 of the Rules of Court? Given such unanswered questions regarding representation in litigation, express treatment of the matter through a statute patterned on the Uniform Probate Code seemed appropriate. An express statutory statement that a minor is bound by a judicial proceeding, as set forth in added Virginia Code section 55-542.06, removes uncertainty concerning the effect of notice and consent under Article 3.

approach of section 1-403 of the Uniform Probate Code, Virginia Code section 55-542.06 of the Virginia UTC provides statutory language (1) addressing “representation” in formal judicial proceedings involving trusts; (2) providing expressly for “virtual” representation of minors, incapacitated, unborn or unascertained persons in circumstances in which the interest of the person is “adequately represented by another party having a substantially identical interest in the proceedings;” (3) establishing rules for notice to parties; and (4) obviating the need to appoint guardians ad litem except where deemed necessary or appropriate by the court.<sup>74</sup> The representation principles of Virginia Code section 55-542.06, which apply in formal judicial proceedings, closely parallel those applicable under Article 3 involving the effects of notices and consents in other situations.<sup>75</sup>

### c. Article 3

Article 3 of the UTC provides rules dealing with representation of beneficiaries by others for purposes of determining whether notice has been received or consent given with respect to a particular matter.<sup>76</sup> The rules are important to the scheme of facilitating trust administration with little or no court involvement. Specific features of Article 3 are examined in greater detail below in Part IV.C (concerning the concept of representation) and Part V (concerning trust administration without judicial involvement).

Article 3 of the Virginia UTC includes two significant variations from the original NCCUSL version. First, borrowing from an approach used in the District of Columbia,<sup>77</sup> the Virginia statute includes a provision—Virginia Code section 55-543.03(7)—that in certain instances permits a grandparent or more remote ancestor to represent and bind a minor or unborn person.<sup>78</sup> Second, borrowing from the same source, the Virginia UTC specifies—under Virginia Code section 55-543.04—that a disqualifying conflict of interest between the representer and the represented

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*See* VA. CODE ANN. § 55-542.06 (Cum. Supp. 2005).

74. VA. CODE ANN. § 55-542.06 (Cum. Supp. 2005).

75. *Compare id.*, with *id.* §§ 55-543.01 to -543.05 (Cum. Supp. 2005).

76. *See id.* § 55-543.01 (Cum. Supp. 2005).

77. *See* D.C. CODE ANN. § 19-1303.03(7) (2005).

78. *See* VA. CODE ANN. § 55-543.03(7) (Cum. Supp. 2005).

having substantially identical interests be one “with respect to the particular question or dispute.”<sup>79</sup> The official NCCUSL text does not so limit a disqualifying conflict of interest.<sup>80</sup>

d. Article 4

Article 4 concerns the substantive law of trusts—that is, it concerns rules of law, which, for the most part, cannot be varied by the settlor.<sup>81</sup> Thus, for example, Article 4 establishes the requirements for creating, modifying, and terminating trusts.<sup>82</sup> With respect to creation of trusts, the rules largely track the common law, but modernize it to accommodate trusts for animals<sup>83</sup> and trusts for noncharitable purposes without ascertainable beneficiaries.<sup>84</sup> These topics are discussed in greater detail below in Part VI.F. Article 4 also substantially liberalizes the rules for modification and termination of trusts, as discussed in greater detail at Part VI.A.

The Virginia UTC relocates to Article 4 several provisions of current statutory law providing boilerplate rules of construction applicable to charitable trusts and designed to avoid the imposition of penalties under the Internal Revenue Code.<sup>85</sup>

e. Article 5

Article 5 deals extensively with spendthrift provisions, discretionary trusts, and rights of creditors with respect to both revocable and irrevocable trusts.<sup>86</sup> Important features are discussed below in Part VI.B.

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79. *Id.* § 55-543.04 (Cum. Supp. 2005).

80. *See* UNIF. TRUST CODE § 304 (amended 2005), 7C U.L.A. 224 (Supp. 2005).

81. *See* VA. CODE ANN. §§ 55-541.01 to -544.23 (Cum. Supp. 2005).

82. *See id.*

83. *See id.* § 55-544.08 (Cum. Supp. 2005).

84. *See id.* § 55-544.09 (Cum. Supp. 2005).

85. *See id.* §§ 55-544.18 to -544.23 (Cum. Supp. 2005).

86. *See id.* §§ 55-545.01 to -545.07 (Cum. Supp. 2005).



#### f. Article 6

Article 6 deals with revocable trusts, including the standard of capacity to create a revocable trust, the presumption of revocability, the procedures for revocation or modification, and the statute of limitations on contests.<sup>87</sup> Significant features of Article 6 are discussed in Part VI.C.

#### g. Article 7

Article 7 focuses on the office of trustee.<sup>88</sup> It provides a number of procedural rules relating to acceptance, resignation, removal, filling vacancies, the rights and obligations of co-trustees, and trustee compensation.<sup>89</sup> Except for rules dispensing with bond for corporate trustees and enabling courts to adjust compensation that is unreasonably high or low, the rules in Article 7 are default rules and can be changed by the terms of the instrument.<sup>90</sup> Several significant features of Article 7 are discussed in Part VI.G.

Article 7 includes some important Virginia variations. First, the UTC's default rule presuming waiver of bond and surety unless ordered by the court<sup>91</sup> is modified to retain current Virginia treatment of testamentary trusts, under which surety is presumed to be required unless expressly waived in the instrument.<sup>92</sup> Second, Virginia modifies the UTC rule permitting delegation of functions between co-trustees<sup>93</sup> to state the governing principles affirmatively rather than in terms of prohibitions.<sup>94</sup> Under the Virginia approach, any function can be delegated by one co-trustee to another other than a function expressly required to be performed by the trustees jointly.<sup>95</sup> Third, the function of current Virginia Code section 26-54 (repealed by the Virginia UTC legislation), which deals with a discarded judicial approach to discretionary powers and authorizes discretionary powers to be

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87. *See id.* §§ 55-546.01 to -546.04 (Cum. Supp. 2005).

88. *See id.* §§ 55-547.01 to -547.09 (Cum. Supp. 2005).

89. *See id.*

90. *See id.*

91. *See* UNIF. TRUST CODE § 702(a) (amended 2005), 7C U.L.A. 275 (Supp. 2005).

92. *See* VA. CODE ANN. § 55-547.02 (Cum. Supp. 2005).

93. *See* UNIF. TRUST CODE § 703(e) (amended 2005), 7C U.L.A. 276, 277 (Supp. 2005).

94. *See* VA. CODE ANN. § 55-547.03(E) (Cum. Supp. 2005).

95. *See id.*

exercised by successor trustees,<sup>96</sup> is performed by a new provision added to the Virginia UTC.<sup>97</sup> Finally, borrowing from a default rule adopted in Nebraska and using an approach often found in the express language of trust documents,<sup>98</sup> the Virginia UTC adds a default rule that title to all trust property is presumed owned and vested in any successor trustee upon acceptance of the office and without necessity of formal conveyance or assignment by the prior trustee.<sup>99</sup> Using a concept of shifting executory limitation, title to the successor passes upon the happening of an event.<sup>100</sup>

#### h. Article 8

Article 8 is concerned with the duties and powers of trustees.<sup>101</sup> Important reporting and disclosure duties are more fully discussed at Part VI.I. Except for the duty imposed on a trustee to act in good faith and in accordance with the purposes of the trust, the duties specified in this article are applicable only to the extent the trust instrument does not specify otherwise.<sup>102</sup> The provisions of Article 8 overcome the restrictive limitations of common law that presumed the powers of trustees to be limited and narrow unless expressly conferred or enlarged.<sup>103</sup> The model for this article is the Uniform Trustees' Powers Act, previously adopted in a number of states, but not in Virginia.<sup>104</sup> Virginia previously dealt with the restrictive limitations of the common law permissively by allowing a settlor or testator to incorporate by reference a listing of express and enlarged powers.<sup>105</sup> Well-drafted Virginia trust instruments and wills typically confer on fiduciaries all the powers contained in Virginia Code section 64.1-57.

Article 8 also includes several important variations from the original UTC. First, rather than setting out in a separate article

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96. *See id.* § 26-54 (Cum. Supp. 2005).

97. *See id.* § 55-547.04(F) (Cum. Supp. 2005).

98. NEB. REV. STAT. § 30-3863(C) (Cum. Supp. 2004).

99. *See* VA. CODE ANN. § 55-547.07(C) (Cum. Supp. 2005).

100. *See id.*

101. *See id.* §§ 55-548.01 to -548.17 (Cum. Supp. 2005).

102. *See id.*

103. *See* John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 640-43 (1995).

104. *See* UNIF. TRUSTEES' POWERS ACT, 7C U.L.A. 169 (Supp. 2005).

105. *See* VA. CODE ANN. § 64.1-57 (Cum. Supp. 2005).

in the UTC the provisions of the Uniform Prudent Investor Act, the Virginia UTC incorporates the act by adding to Virginia Code section 55-548.01 the following sentence: "In administering, managing and investing trust assets, the trustee shall comply with the provisions of the Uniform Prudent Investor Act (§ 26-45.3 et seq.) and the Uniform Principal and Income Act (§ 55-277.1 et seq.)."<sup>106</sup>

Second, borrowing from an approach in Wyoming,<sup>107</sup> the Virginia UTC provides that, for a transaction between a trustee and a beneficiary (not involving trust property) to be considered voidable by the beneficiary, the advantage flowing to the trustee must be "beyond the normal commercial advantage" from such transaction.<sup>108</sup> A loan made by a corporate trustee's commercial division to a trust beneficiary is an example of a transaction that does not involve trust property.

Third, Virginia expands the lists of investments permitted by the UTC to which the trustee or its affiliate may provide compensated services without a presumption of conflict of interest, if the investment otherwise complies with the Uniform Prudent Investor Act.<sup>109</sup> The expanded list includes a mutual fund or other investment or financial product that the trustee or an affiliate sponsors or sells or to which the trustee or an affiliate provides services, provided that information regarding any compensation that the trustee or affiliate receives from such fund or product be disclosed in annual reports required to be given to specified beneficiaries.<sup>110</sup>

Finally, because virtually all well-drafted Virginia trust instruments contain language conferring on fiduciaries by incorporation the powers listed in Virginia Code section 64.1-57, there will be, both now and in the future, duplication between the powers conferred in the instrument and those arising by application of default rules under the approach of the UTC. In the belief that virtually all well-advised settlors would desire their trustees to possess all the powers conferred by the UTC and to reduce the

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106. *See id.* § 55-548.01 (Cum. Supp. 2005).

107. WYO. STAT. ANN. § 4-10-802(d) (Michie 2005).

108. VA. CODE ANN. § 55-548.02(D) (Cum. Supp. 2005).

109. *Compare id.* § 55-548.02(F), with UNIF. TRUST CODE § 802(f) (amended 2005), 7C U.L.A. 290 (Supp. 2005).

110. *See* VA. CODE ANN. § 55-548.02(F) (Cum. Supp. 2005).

likelihood of conflict between express powers and those under default rules, the Virginia UTC includes the following language: "Any reference in a trust instrument incorporating the powers authorized under § 64.1-57 shall not be construed to limit powers a trustee may exercise pursuant to this section, unless the settlor expressly states in the trust instrument that such reference should be so construed."<sup>111</sup>

i. Article 9

As noted above, Article 9 is reserved; the Uniform Prudent Investor Act, applicable to both trustees and other fiduciaries,<sup>112</sup> is not set out as a formal part of the Virginia UTC. Reservation of this article permits Articles 10 and 11 to use numbering conventions that follow the sequence of the original UTC.

j. Article 10

Article 10 deals with liability of trustees, rights of beneficiaries, and relations with and the rights of third parties.<sup>113</sup> Among the topics addressed are (1) remedies for breach of trust, (2) the method of determining money damages, (3) allowance of attorneys' fees, (4) limitations of actions, (5) exculpatory clauses, (6) dealings with third persons (7) capacity in which trustees may be sued, and (8) furnishing of abbreviated certificates in lieu of providing copies of trust instruments to persons other than beneficiaries.<sup>114</sup> As to transactions between trustees and third persons, third persons are encouraged to deal with trustees as if no trust is involved and, if acting in good faith, are under no duty to inquire into the extent of a trustee's powers or the propriety of their exercise.<sup>115</sup> With the exception of rules relating to the power of the court to take such action and exercise such jurisdiction as is necessary in the interests of justice and rules relating to rights of

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111. *Id.* § 55-548.15(C) (Cum. Supp. 2005).

112. *See id.* §§ 26-45.3, -45.13 (Repl. Vol. 2004).

113. *See id.* §§ 55-550.01 to -550.13 (Cum. Supp. 2005).

114. *See id.*

115. *See id.* § 55-550.12 (Cum. Supp. 2005).

third persons, the rules in Article 10 are default rules which may be overridden by the terms of the instrument.<sup>116</sup>

With respect to limitations of actions by beneficiaries against trustees, the Virginia UTC varies from the original by adding (1) language dealing with the effect of fraud and (2) language excepting claims seeking to surcharge and falsify accountings which have been confirmed pursuant to Title 26 and are governed by Virginia Code section 8.01-245.<sup>117</sup>

#### k. Article 11

Article 11, among other things, addresses the application of the UTC to trusts already in existence.<sup>118</sup> It provides that the Virginia UTC applies to judicial proceedings commenced after July 1, 2006, and to those pending on such date, unless, as to the latter, application of a particular provision would disrupt the proceeding or prejudice the rights of parties.<sup>119</sup> Rules of construction or presumption under the Virginia UTC apply to pre-existing instruments unless there is a clear expression of contrary intent in the terms of the trust.<sup>120</sup> Acts done before July 1, 2006, however, are not affected by the Virginia UTC, nor does the Virginia UTC extinguish or revive a right or claim acquired or barred prior to July 1, 2006.<sup>121</sup>

### IV. SIGNIFICANT CONCEPTS EMPLOYED IN THE VIRGINIA UTC

This part of the article considers several definitions and concepts that are essential underpinnings of the operative provisions of the Virginia UTC.

#### A. *The Concept of "Knowledge"*

Under the Virginia UTC, the concept of "knowledge" is important because certain duties may arise and consequences flow

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116. *See id.* § 55-541.05 (Cum. Supp. 2005).

117. *See id.* § 55-550.05(D)-(E) (Cum. Supp. 2005).

118. *See id.* § 55-551.06(A)(1) (Cum. Supp. 2005).

119. *See id.* § 55-551.06(A)(2)-(3) (Cum. Supp. 2005).

120. *Id.* § 55-551.06(A)(4) (Cum. Supp. 2005).

121. *Id.* § 55-551.06(A)(5), (B) (Cum. Supp. 2005).

when there is knowledge or lack of knowledge of a particular matter. Thus, the Virginia UTC provides detailed rules for determining whether the requisite knowledge or lack of knowledge exists.<sup>122</sup> Under the Virginia UTC, a person has knowledge of a fact if he or she (1) has actual knowledge, (2) has received notice or notification of the fact, or (3) from all the facts and circumstances known to the person at the relevant time, has reason to know the fact.<sup>123</sup> Importantly, when the question is whether a corporate trustee or other entity acting through employees has “knowledge,” the rules liberally favor the trustee: the entity has “knowledge of a fact involving a trust only from the time the information was received by an employee having responsibility to act for the trust, or would have been brought to the employee’s attention if the organization had exercised reasonable diligence [as that term is defined].”<sup>124</sup>

The concept of “knowledge” is significant with respect to a number of important questions and circumstances. For example, are there persons whose locations or identities are unknown for purposes of representation under Article 3?<sup>125</sup> Does a trustee, following the death of a settlor of a revocable trust and contemplating a distribution, know of a proceeding contesting the validity of the trust?<sup>126</sup> Is a breach of trust by a former trustee “known” to a current trustee, thus giving rise to a duty to redress the breach?<sup>127</sup> Does a third person dealing with a trustee lack knowledge that the trustee is exceeding or improperly exercising the trustee’s powers?<sup>128</sup>

### B. *The Concept of “Qualified Beneficiary”*

A number of actions and decisions can be accomplished or affected by notice to, consent of, or actions taken by “qualified beneficiaries.”<sup>129</sup> The term embraces those living beneficiaries most

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122. *See id.* § 55-541.04 (Cum. Supp. 2005).

123. *Id.* § 55-541.04(A) (Cum. Supp. 2005).

124. *Id.* § 55-541.04(B) (Cum. Supp. 2005).

125. *See id.* §§ 55-543.04 to -543.05 (Cum. Supp. 2005).

126. *See id.* § 55-546.04 (Cum. Supp. 2005).

127. *See id.* § 55-548.12 (Cum. Supp. 2005).

128. *See id.* § 55-550.12 (Cum. Supp. 2005).

129. *See id.* § 55-541.10 (Cum. Supp. 2005).

likely to be affected by the matter at issue. Such a beneficiary is one who, on the date of qualification:

(i) is a distributee or permissible distributee of trust income or principal; (ii) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in (i) terminated on that date, but the termination of those interests would not cause the trust to terminate; or (iii) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.<sup>130</sup>

Note that the definition excludes beneficiaries with remote interests, although the statute also provides that, for purposes of giving a required notice, a trustee must treat as a qualified beneficiary any beneficiary who has sent the trustee a request for notice.<sup>131</sup> A charitable organization designated to receive distributions may be a qualified beneficiary, as may the Attorney General.<sup>132</sup>

### C. *The Concept of “Representation”*

The concept of “representation” is particularly important in facilitating the resolution of administrative issues without judicial involvement. Thus, to facilitate actions and decisions that can be accomplished or affected by notice to or consent of qualified beneficiaries or by all beneficiaries, beneficiaries can be represented and bound by others in accordance with the rules of Article 3.<sup>133</sup> Regarding the effect of representation, the Virginia UTC provides that “[n]otice to a person who may represent and bind another person . . . has the same effect as if notice were given directly to the other person.”<sup>134</sup> Also, the Virginia UTC notes that “[t]he consent of a person who may represent and bind another person . . . is binding on the person represented unless the person represented objects to the representation by notifying the trustee or

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130. *Id.* § 55-541.03 (Cum. Supp. 2005).

131. *See id.* § 55-541.10 (Cum. Supp. 2005).

132. *Id.*

133. *See id.* §§ 55-543.01 to -543.05 (Cum. Supp. 2005).

134. *Id.* § 55-543.01(A) (Cum. Supp. 2005).

the representative before the consent would otherwise have become effective.”<sup>135</sup>

What, then, are the essential representation rules? First, absent a conflict of interest, the holder of a testamentary general power of appointment may represent and bind permissible appointees and takers in default.<sup>136</sup> Second, absent a conflict between them or among represented persons, trustees and court-appointed fiduciaries can represent beneficiaries and wards, parents may represent a minor or unborn child if no guardian of the estate has been appointed, and in some instances (under a Virginia variation) a grandparent or more remote ancestor can represent a minor or unborn person.<sup>137</sup> Third, the Virginia UTC implements the principle of virtual representation, which provides that when not otherwise represented,

a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest with respect to the particular question or dispute between the representative and the person represented.<sup>138</sup>

Finally, whether or not a judicial proceeding is pending, a court, if it determines that an interest is not adequately represented, “may appoint a representative to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown.”<sup>139</sup> Significantly, a court-appointed representative in making decisions on behalf of the represented beneficiary “may consider general benefit accruing to the living members of the individual’s family.”<sup>140</sup>

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135. *Id.* § 55-543.01(B) (Cum. Supp. 2005).

136. *Id.* § 55-543.02 (Cum. Supp. 2005).

137. *Id.* § 55-543.03 (Cum. Supp. 2005).

138. *Id.* § 55-543.04 (Cum. Supp. 2005).

139. *Id.* § 55-543.05(A) (Cum. Supp. 2005).

140. *Id.* § 55-543.05(C) (Cum. Supp. 2005). This is a significant feature of the legislation, because it permits a court-appointed representative to consent to an action that disadvantages the represented person, but indirectly benefits the person by directly benefiting a member of the person’s family. For example, the representative of a remainder beneficiary might consent to an action that enlarges the interest of the income beneficiary, who is also the remainder beneficiary’s parent.



## V. FACILITATING TRUST ADMINISTRATION WITHOUT JUDICIAL INTERVENTION

The Virginia UTC implements a policy of facilitating nonjudicial resolution of administrative matters. A central feature of the statutory scheme is the concept of representation, as described in the immediately preceding section of the article.<sup>141</sup> The policy depends in significant part on the Virginia UTC's notice provision, which provides as follows:

Notice to a person who may represent and bind another person under this chapter has the same effect as if notice were given directly to the other person . . . . The consent of a person who may represent and bind another person . . . is binding on the person represented unless the person represented objects to the representation by notifying the trustee or the representative before the consent would otherwise have become effective.<sup>142</sup>

Under the default rules of the Virginia UTC, a number of administrative decisions and actions can be taken with consent of (or after notice to) qualified beneficiaries (or, in some cases, all beneficiaries). This part of the article summarizes the most important of these rules.

### A. *Transfer of Principal Place of Administration*

A trustee desiring to transfer the principal place of administration of a trust to another state or to a jurisdiction outside of the United States may do so by notifying the qualified beneficiaries of the proposed transfer at least sixty days before initiating the transfer by furnishing required information, including a date before which objection to the transfer must be made.<sup>143</sup> Authority to make the transfer without court order is dependent upon absence of objection given before the prescribed date.<sup>144</sup> The Virginia UTC continues Virginia's distinction between testamentary and inter vivos trusts by providing that, as to testamentary trusts, a court order is necessary to transfer the principal place of administra-

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141. See *supra* Part IV.C.

142. VA. CODE ANN. § 55-543.01 (Cum. Supp. 2005).

143. *Id.* § 55-541.08 (Cum. Supp. 2005).

144. See *id.* § 55-541.08(B)-(C) (Cum. Supp. 2005).

tion.<sup>145</sup> Under another Virginia variation, a corporate trustee that maintains a place of business in Virginia at which a trust officer is available for consultation with beneficiaries is not deemed to have transferred the principal place of administration outside of Virginia, even under circumstances in which all or significant portions of administration are performed outside of Virginia.<sup>146</sup>

### B. *Nonjudicial Termination of Uneconomic Trusts*

Under the Virginia UTC, a trustee, after giving notice to qualified beneficiaries, may terminate a trust having a total value of under \$100,000 if the trustee concludes that the value is insufficient to justify costs of administration.<sup>147</sup> Upon termination, the trustee is to distribute trust property “in a manner consistent with the purposes of the trust.”<sup>148</sup> According to the Comment to this section, this typically will mean distribution among “qualified beneficiaries in proportion to the actuarial value of their interests.”<sup>149</sup>

### C. *Combination and Division of Trusts*

The Virginia UTC authorizes a trustee to combine two or more trusts into a single trust and to divide a trust into separate trusts without court approval after giving notice to the qualified beneficiaries.<sup>150</sup> The only significant limitation on this authority is that the combination or division must not “materially impair rights of any beneficiary.”<sup>151</sup> Many well-drafted trust instruments include provisions granting such authority; the Virginia UTC extends the benefits of such provisions to all trusts, except as otherwise pro-

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145. *See id.* § 55-541.08(F) (Cum. Supp. 2005).

146. *Id.* § 55-541.08(C) (Cum. Supp. 2005).

147. *Id.* § 55-544.14(A) (Cum. Supp. 2005). The Virginia UTC also anticipates that an uneconomic trust can be terminated through court intervention; under those circumstances, the court must determine that “the value of the trust property is insufficient to justify the cost of administration,” and no specific dollar limitation applies. *Id.* § 55-544.14(B) (Cum. Supp. 2005). The same provision also authorizes the court, under the same circumstances, to remove and replace the trustee. *See id.*

148. *Id.* § 55-544.14(C) (Cum. Supp. 2005).

149. *See* UNIF. TRUST CODE § 414 cmt. (amended 2005), 7C U.L.A. 245 (Supp. 2005).

150. *See* VA. CODE ANN. § 55-544.17 (Cum. Supp. 2005). Note that, although notice to qualified beneficiaries is required, consent of the beneficiaries is not. *See id.*

151. *Id.*

vided in the trust instrument.<sup>152</sup> The Comment to this section points out that this provision authorizes the combining of multiple trusts even if their terms are not identical.<sup>153</sup> According to the Comment, “[c]ombining trusts may prompt more efficient trust administration and is sometimes an alternative to terminating an uneconomic trust.”<sup>154</sup> The Comment also points out that a combination or division under this section need not be approved, either by the court or by the beneficiaries.<sup>155</sup> On the other hand, if the terms of the trusts to be combined or the trusts that will result from a division differ substantially from each other, a prudent trustee may choose to seek court approval<sup>156</sup> under Virginia Code section 55-544.10<sup>157</sup> or the consent of the beneficiaries under Virginia Code section 55-550.09.<sup>158</sup>

#### D. *Acting to Preserve Assets Without Accepting Office of Trustee*

The Virginia UTC provides that a person designated as trustee may, without accepting the trusteeship, act to preserve trust property; although normally the exercise of powers over trust property by one designated a trustee is deemed an acceptance of the trust, acceptance does not occur under the Virginia UTC if within a reasonable time of acting to protect the property the person sends a notice of rejection of the trusteeship to the settlor, if living and competent, otherwise to a qualified beneficiary.<sup>159</sup> The Virginia UTC also permits a person designated as trustee to inspect trust property without accepting the trusteeship.<sup>160</sup> This option may be appropriate, for example, if the trust includes real property subject to potential environmental contamination.

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152. *See id.*

153. *See* UNIF. TRUST CODE § 417 cmt. (amended 2005), 7C U.L.A. 248 (Supp. 2005).

154. *Id.*

155. *See id.*

156. *See id.*

157. *See* VA. CODE ANN. § 55-544.10 (Cum. Supp. 2005).

158. *See id.* § 55-550.09 (Cum. Supp. 2005). Note that the representation provisions of Article 3 under certain circumstances allow a person to consent on behalf of another. *See id.* §§ 55-543.01, -543.05 (Cum. Supp. 2005). Thus, obtaining the consent of all beneficiaries often may be accomplished through their representatives.

159. *See id.* § 55-547.01(C) (Cum. Supp. 2005).

160. *See id.*

### E. *Resignation by Trustee*

Well-drafted trust instruments typically address the circumstances under which and the manner in which a trustee may resign the office. In circumstances in which the trust instrument failed to address this question, prior to enactment of the Virginia UTC, the law in Virginia was uncertain as to whether and under what circumstances a trustee could resign.<sup>161</sup> As a practical matter, if the trust instrument was silent on the issue, in most circumstances a trustee would not be willing to resign without first obtaining court approval, in order to protect the trustee from liability for acts or omissions following the date of resignation.

Under the Virginia UTC, if the trust instrument is silent, a trustee may resign by giving thirty days notice to the settlor, if living, to all co-trustees, and to the qualified beneficiaries (other than beneficiaries under a trust that the settlor has capacity to revoke).<sup>162</sup> The statute makes clear that the liability of a trustee or of the sureties, if any, on the trustee's bond for acts or omission is not discharged or affected by the trustee's resignation.<sup>163</sup> Moreover, a resigning trustee may have duties continuing beyond the effective date of resignation.<sup>164</sup> Under Virginia Code section 55-547.07, unless a co-trustee remains in office (or the court otherwise orders), a resigning trustee has the duties and powers of trustee until the trust property has been delivered to a successor trustee or other person entitled to receive it.<sup>165</sup> Thus, a unilateral resignation does not necessarily relieve a trustee from liability for all subsequent events.

### F. *Furnishing Certain Reports*

The Virginia UTC imposes on a trustee the duty to furnish at least annually to the distributees or permissible distributees of

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161. See, e.g., J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 35 U. RICH. L. REV. 845, 865 (2001).

162. See VA. CODE ANN. § 55-547.05(A)(1) (Cum. Supp. 2005). The statute also contemplates trustee resignation *with* court approval. See *id.* § 55-547.05(A)(2) (Cum. Supp. 2005).

163. See *id.* § 55-547.05(C) (Cum. Supp. 2005).

164. See *id.* § 55-547.07 (Cum. Supp. 2005).

165. See *id.* § 55-547.07(A) (Cum. Supp. 2005).

trust income (and to other qualified beneficiaries or nonqualified beneficiaries who request it) “a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee’s compensation, a listing of the trust assets and, if feasible, their respective market values.”<sup>166</sup> The Virginia UTC also imposes on the trustee certain notice requirements, such as notice of change in the method or rate of the trustee’s compensation.<sup>167</sup> Moreover, upon request of a beneficiary, the Virginia UTC requires a trustee to furnish a copy of the trust instrument to the beneficiary.<sup>168</sup> These aspects of trust administration all occur without judicial intervention. Note that the representation rules of Article 3 apply in this context; thus a trustee’s duty to furnish information and reports to distributees, permissible distributees, and other qualified beneficiaries may be satisfied as to minors and incapacitated persons by furnishing the report to a representative.<sup>169</sup> Moreover, information furnished to a representative may operate to shorten the period of limitations within which a represented beneficiary may assert claims for breach of trust.<sup>170</sup>

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166. *Id.* § 55-548.13(C) (Cum. Supp. 2005). Note that this is a default rule; thus, the settlor may relieve the trustee of this obligation by providing otherwise in the trust instrument. The Comments make clear that the trustee’s report need not be in any particular format:

The Uniform Trust Code employs the term “report” instead of “accounting” in order to negate any inference that the report must be prepared in any particular format or with a high degree of formality. The reporting requirement might even be satisfied by providing the beneficiaries with copies of the trust’s income tax returns and monthly brokerage statements if the information on those returns and statements is complete and sufficiently clear. The key factor is not the format chosen but whether the report provides the beneficiaries with the information necessary to protect their interests.

UNIF. TRUST CODE § 813 cmt. (amended 2004), 7C U.L.A. 302, 304 (Supp. 2005).

167. *See* VA. CODE ANN. § 55-548.13(B)(4) (Cum. Supp. 2005).

168. *See id.* § 55-548.13(B)(1) (Cum. Supp. 2005).

169. *See id.* § 55-543.01(A) (Cum. Supp. 2005).

170. *See id.* § 55-550.05(A) (Cum. Supp. 2005). Under this provision, a beneficiary: may not commence a proceeding against a trustee for breach of trust more than one year after the date the beneficiary or a representative of 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.

*Id.* If no report has been furnished (either to the beneficiary or to his or her representative), or if a furnished report does not adequately disclose the existence of a potential claim,

a judicial proceeding by a beneficiary against a trustee for breach of trust shall be commenced within five years after the first to occur of:

1. The removal, resignation, or death of the trustee;

### G. *Notice of Trustee's Plan of Distribution on Termination*

In anticipation of the termination or partial termination of a trust, a trustee may send a proposed plan of distribution to beneficiaries that notify them of their right to object and of the time allowed for objection.<sup>171</sup> If timely objection is not made to the plan, a beneficiary's right to object terminates.<sup>172</sup> Similar to other notices under the Virginia UTC, the right of a beneficiary to object may be barred by the delivery of the proposal to an Article 3 representative.<sup>173</sup>

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2. The termination of the beneficiary's interest in the trust; or
  3. The termination of the trust.

*Id.* § 55-550.05(A), (C) (Cum. Supp. 2005). In a variation from the original version of the UTC, the Virginia UTC makes explicit that the statute of limitations is tolled in the case of fraud:

Whenever fraud has been perpetrated in connection with any proceeding or in any statement filed under this chapter, or if fraud is used to avoid or circumvent the provisions or purposes of this chapter, any person injured thereby may obtain appropriate relief against the perpetrator of the fraud or restitution from any person benefiting from the fraud, whether innocent or not, except for a bona fide purchaser. Any proceeding shall be commenced within two years after the fraud is discovered, but no proceeding may be brought against one not a perpetrator of the fraud later than five years after the time the fraud is committed. This section does not apply to remedies for fraud practiced on a decedent during his lifetime which affects the succession of his estate.

*Id.* § 55-550.05(D) (Cum. Supp. 2005); *see* UNIF. TRUST CODE § 1005 cmt. (amended 2004), 7C U.L.A. 323, 324 (Supp. 2005) (indicating that the official text of the UTC "does not specifically provide that the statutes of limitations under this section are tolled for fraud or other misdeeds, the drafters preferring to leave the resolution of this question to other law of the State"). Moreover, the Virginia UTC expressly states that the provisions of Virginia Code section 55.550.05 "shall not operate to reduce the period of limitations applicable to actions and suits governed by § 8.01-245." VA. CODE ANN. § 55-550.05(E) (Cum. Supp. 2005). Virginia Code section 8.01-245 requires, first, that an action on the bond of a fiduciary be brought within ten years of the date on which the right to bring the action accrued and, second, that a suit to surcharge and falsify an accounting filed pursuant to Title 26 be brought within ten years after the account has been confirmed. *See id.* § 8.01-245 (Repl. Vol. 2000).

171. *See* VA. CODE ANN. § 55-548.17(A) (Cum. Supp. 2005). The principal purpose of this provision is apparently to facilitate non-pro rata distributions. *See* UNIF. TRUST CODE § 817 cmt. (amended 2005), 7C U.L.A. 316 (Supp. 2005).

172. VA. CODE ANN. § 55-548.17(A) (Cum. Supp. 2005). The right to object terminates "only if the proposal [for distribution] informed the beneficiary of the right to object and of the time allowed for objection." *Id.* Note also that a failure of a beneficiary to object "does not preclude the beneficiary from bringing an action with respect to matters not disclosed in the proposal for distribution." UNIF. TRUST CODE § 817 cmt. (amended 2004), 7C U.L.A. 316 (Supp. 2005).

173. *See supra* notes 133-40 and accompanying text.

#### H. *Filling Vacancies and Appointment of Successor Trustees by Consent*

If a vacancy in the office of trustee occurs and the instrument does not specify how a successor is to be selected, then, in the case of a noncharitable trust, the vacancy may be filled by a person appointed with the unanimous consent of qualified beneficiaries.<sup>174</sup> In the case of a charitable trust, the vacancy may be filled by a person selected by the charitable beneficiaries, subject in limited circumstances to the concurrence of the Attorney General.<sup>175</sup> Only if the beneficiaries are unable to reach agreement does it become necessary for the court to appoint a successor, and, under those circumstances, under a Virginia variation from the original UTC, the necessary parties to the proceeding may be limited to those who are qualified beneficiaries.<sup>176</sup> In another Virginia variation, the statute clarifies that a successor trustee succeeds to all powers and duties of his or her predecessor, “without regard to the nature of discretionary powers conferred by the instrument,” except to the extent the instrument expressly provides otherwise, or unless a court order provides otherwise.<sup>177</sup>

#### I. *Consent to Breach, Release, and Ratification*

The Virginia UTC expressly relieves a trustee from liability to a beneficiary for a breach of trust if the beneficiary “consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach.”<sup>178</sup> Moreover, the statute contemplates that such a consent, release, or ratification may be made by the representative of

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174. VA. CODE ANN. § 55-547.04(C)(1)-(2) (Cum. Supp. 2005).

175. *Id.* § 55-547.04(D)(2) (Cum. Supp. 2005). The Attorney General’s concurrence is required only if “he has previously requested of an organization [designated to receive trust distributions] that he be consulted regarding the selection of [a] successor.” *Id.*

176. *See id.* § 55-542.05(B) (Cum. Supp. 2005); *supra* notes 70–72 and accompanying text.

177. *See* VA. CODE ANN. § 55-547.04(F) (Cum. Supp. 2005). This provision replaces Virginia Code section 26-54, which the legislation repeals. Act of Apr. 6, 2005, ch. 935, 2005 Va. Acts 1793 (codified as amended at VA. CODE ANN. § 55-541.01 to -551.06 (Cum. Supp. 2005)).

178. VA. CODE ANN. § 55-550.09 (Cum. Supp. 2005). For comparable rules relating to releases in connection with distributions upon termination, see VA. CODE ANN. § 55-548.17 (Cum. Supp. 2005).

a beneficiary, as determined under Article 3.<sup>179</sup> The relief from liability is predicated on the consent, release, or ratification not being induced by improper conduct and the beneficiary (or the beneficiary's representative) knowing the material facts relating to the breach.<sup>180</sup>

### *J. Informal Settlements*

Most well-drafted trusts include potential beneficiaries who at a given time will be unborn or unascertained—for example, the “descendants” of a named beneficiary who will take if the named beneficiary dies before reaching the age at which the trust is scheduled to terminate. With respect to such trusts, achieving binding agreements between trustees and beneficiaries regarding trust administration or interpretation has been difficult; in many cases the parties are forced to resort to litigation. To address this problem, the Virginia UTC provides a mechanism, in part using the representation concept established under Article 3, to facilitate informal settlements among beneficiaries and trustees.<sup>181</sup> Subject to limited conditions, “interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust.”<sup>182</sup> An “interested person” is one “whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court.”<sup>183</sup> The statute provides the following (non-exclusive)<sup>184</sup> list of matters that may be resolved by a nonjudicial settlement agreement:

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179. *See id.* § 55-543.01(B) (Cum. Supp. 2005); *see also* UNIF. TRUST CODE § 1009 cmt. (amended 2004), 7C U.L.A. 326, 327 (Supp. 2005) (referring to a 2001 technical amendment, in which the drafters removed language limiting section 1009 to beneficiaries “having capacity”).

180. VA. CODE ANN. § 55-550.09 (Cum. Supp. 2005).

181. *See id.* § 55-541.11 (Cum. Supp. 2005).

182. *Id.* § 55-541.11(B) (Cum. Supp. 2005).

183. *Id.* § 55-541.11(A) (Cum. Supp. 2005).

184. *See* UNIF. TRUST CODE § 111 cmt. (amended 2005), 7C U.L.A. 212 (Supp. 2005). The Comment elaborates as follows:

Subsection (d) [of section 111] is a nonexclusive list of matters to which a nonjudicial settlement may pertain. Other matters which may be made the subject of a nonjudicial settlement are listed in the Article 3 General Comment. The fact that the trustee and beneficiaries may resolve a matter nonjudicially does not mean that beneficiary approval is required. For example, a trustee may resign pursuant to Section 705 solely by giving notice the qualified beneficiaries, a living settlor, and any cotrustees. But a nonjudicial settlement between the trustee and beneficiaries will frequently prove helpful in working out the terms of the resignation.



1. The interpretation or construction of the terms of the trust;
2. The approval of a trustee's report or accounting;
3. Direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power;
4. The resignation or appointment of a trustee and the determination of a trustee's compensation;
5. Transfer of a trust's principal place of administration; and
6. Liability of a trustee for an action relating to the trust.<sup>185</sup>

The Virginia UTC, however, establishes some modest limitations. First, the agreement must not violate a material purpose of the trust, and second, the agreement must have terms that could properly be approved by a court.<sup>186</sup> Thus, because of the latter requirement, a nonjudicial settlement cannot be used to terminate a trust in an impermissible manner.<sup>187</sup> If a party desires greater certainty that an agreement will be binding, he or she “may petition the court to approve a nonjudicial settlement agreement, to determine whether the representation as provided in Article 3 was adequate, and to determine whether the agreement contains terms and conditions the court could have properly approved.”<sup>188</sup>

## VI. KEY SUBSTANTIVE ELEMENTS OF THE VIRGINIA UTC

This part of the article considers some of the key substantive elements of the Virginia UTC.

### A. *Judicial Modifications of Trusts*

Under the Virginia UTC, a court may modify or terminate a noncharitable trust upon consent of the settlor and all beneficiar-

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*Id.*

185. VA. CODE ANN. § 55-541.11(D) (Cum. Supp. 2005).

186. *Id.* § 55-541.11(C) (Cum. Supp. 2005). Regarding the latter requirement, the statute specifically provides that a nonjudicial settlement agreement is valid only to the extent it “includes terms and conditions that could be properly approved by the court under this chapter or other applicable law.” *Id.* Notably, the statute does not require that a court *would* have approved the specified terms and conditions, only that the court *could* have done so. In other words, the matter must be one that a court would have been willing to address, but the parties to the settlement need not establish that a court necessarily would have approved its terms.

187. UNIF. TRUST CODE § 111 cmt. (amended 2005), 7C U.L.A. 212 (Supp. 2005).

188. VA. CODE ANN. § 55-541.11(E) (Cum. Supp. 2005).

ies, even if the modification would impair a material purpose of the trust.<sup>189</sup> The rule is based on the common law principle that, in such situations, deference to the earlier expressed purposes of the settlor is not required.<sup>190</sup> The Article 3 representation rules apply in this context, although the Comments make clear that there are important limits in their applicability, especially with respect to trust terminations.<sup>191</sup>

The original version of UTC section 411(a), prior to amendments in 2004, provided for the modification or termination of a noncharitable trust upon the consent of the settlor and the beneficiaries, without court approval.<sup>192</sup> UTC section 411(a) was amended in 2004 on the recommendation of the Estate and Gift Taxation Committee of the American College of Trust and Estate Counsel, to provide states with the option of making terminations and modifications without requiring court approval.<sup>193</sup> The concern of the Estate and Gift Taxation Committee was that the

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189. *Id.* § 55-544.11(A) (Cum. Supp. 2005).

190. As explained in the Comment concerning this provision:

Unlike termination by the beneficiaries alone under subsection (b) [of section 411], termination with the concurrence of the settlor does not require a finding that the trust no longer serves a material purpose. No finding of failure of material purpose is required because all parties with a possible interest in the trust's continuation, both the settlor and beneficiaries, agree there is no further need for the trust.

UNIF. TRUST CODE § 411 cmt. (amended 2004), 7C U.L.A. 237, 238 (Supp. 2005).

191. *See* UNIF. TRUST CODE § 411 cmt. (amended 2004), 7C U.L.A. 237-38 (Supp. 2005). As stated in the Comment to UTC section 411:

The provisions of Article 3 on representation, virtual representation and the appointment and approval of representatives appointed by the court apply to the determination of whether all beneficiaries have signified consent under this section. The authority to consent on behalf of another person, however, does not include authority to consent over the other person's objection. *See* Section 301(b). Regarding the persons who may consent on behalf of a beneficiary, *see* Sections 302 through 305. A consent given by a representative is invalid to the extent there is a conflict of interest between the representative and the person represented. Given this limitation, virtual representation of a beneficiary's interest by another beneficiary pursuant to Section 304 will rarely be available in a trust termination case, although it should be routinely available in cases involving trust modification, such as a grant to the trustee of additional powers. If virtual or other form of representation is unavailable, Section 305 of the Code permits the court to appoint a representative who may give the necessary consent to the proposed modification or termination on behalf of the minor, incapacitated, unborn, or unascertained beneficiary.

*Id.*

192. *See id.* § 411(a) (amended 2003).

193. *Id.* § 411 cmt. (amended 2004), 7C U.L.A. 239 (Supp. 2005).

original version of UTC section 411(a), if enacted in a jurisdiction whose law previously required court approval of terminations or modifications, could result in the settlor being deemed to hold a prohibited power under section 2038 of the Internal Revenue Code, thus triggering estate taxation at the settlor's death.<sup>194</sup> It is unclear whether pre-Virginia UTC law does or does not require judicial concurrence to such a "joint" termination or modification; thus, in an abundance of caution, the Virginia UTC elects the option of requiring court approval for termination or modification in this situation.<sup>195</sup>

The Virginia UTC also authorizes a court to modify or terminate a noncharitable trust upon consent of all beneficiaries (but *without* the consent of the settlor) if the action is not contrary to or inconsistent with a material purpose of the trust.<sup>196</sup> Again, the representation rules of Article 3 would apply, subject to conflict of interest limitations.<sup>197</sup>

In an important variation from the original, the Virginia UTC omits the suggested "optional" language that a spendthrift provision "is not presumed to constitute a material purpose of the trust."<sup>198</sup> By deleting this provision, the Virginia UTC negates any

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194. *Id.* § 411 cmt. (amended 2004), 7C U.L.A. 239–40 (Supp. 2005).

195. *See* VA. CODE ANN. § 55-544.11(A) (Cum. Supp. 2005).

196. *See id.* § 55-544.11(B) (Cum. Supp. 2005). The Virginia UTC permits a termination only "if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust." *Id.* In discussing this requirement, the Comment (quoting extensively from the Restatement (Third)), makes clear that not all trust purposes are "material":

The requirement that the trust no longer serve a material purpose before it can be terminated by the beneficiaries does not mean that the trust has no remaining function. In order to be material, the purpose remaining to be performed must be of some significance:

Material purposes are not readily to be inferred. A finding of such a purpose generally requires some showing of a particular concern or objective on the part of the settlor, such as concern with regard to the beneficiary's management skills, judgment, or level of maturity. Thus, a court may look for some circumstantial or other evidence indicating that the trust arrangement represented to the settlor more than a method of allocating the benefits of property among multiple beneficiaries, or a means of offering to the beneficiaries (but not imposing on them) a particular advantage. Sometimes, of course, the very nature or design of a trust suggests its protective nature or some other material purpose. Restatement (Third) of Trusts Section 65 cmt. d (Tentative Draft No. 3, approved 2001).

UNIF. TRUST CODE § 411 cmt. (amended 2004), 7C U.L.A. 239 (Supp. 2005).

197. *See supra* notes 76–80 and accompanying text.

198. UNIF. TRUST CODE § 411(c) (amended 2004), 7C U.L.A. 237 (Supp. 2005). The

suggestion that a spendthrift should not be considered material, although a court would presumably be free to make that determination in a particular case.<sup>199</sup>

The Virginia UTC also authorizes trust modifications or terminations in circumstances in which not all of the beneficiaries consent (either because a beneficiary objects or because the consent cannot be obtained), but only if the court determines that the interests of the nonconsenting beneficiary will be adequately protected.<sup>200</sup> The Comment to UTC section 411 elaborates on how a

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Comment explains this provision as follows:

Subsection (c) of this section deals with the effect of a spendthrift provision on the right of a beneficiary to concur in a trust termination or modification. . . . Spendthrift terms have sometimes been construed to constitute a material purpose without inquiry into the intention of the particular settlor. For examples, see Restatement (Second) of Trusts Section 337 (1959); George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* Section 1008 (Rev. 2d ed. 1983); and 4 Austin W. Scott & William F. Fratcher, *The Law of Trusts* Section 337 (4th ed. 1989). This result is troublesome because spendthrift provisions are often added to instruments with little thought. Subsection (c), similar to Restatement (Third) of Trusts Section 65 cmt. e (Tentative Draft No. 3, approved 2001), does not negate the possibility that continuation of a trust to assure spendthrift protection might have been a material purpose of the particular settlor. The question of whether that was the intent of a particular settlor is instead a matter of fact to be determined on the totality of the circumstances.

UNIF. TRUST CODE § 411 cmt. (amended 2004), 7C U.L.A. 239 (Supp. 2005). The UTC Subcommittee's decision to omit this provision was influenced, in part, by this Comment, with which the Subcommittee disagreed. In the Subcommittee's view, spendthrift provisions are not typically included with "little thought"; rather, they are often an essential element of the overall trust plan and reflect an important aspect of the settlor's intent.

199. Regarding terminations of trusts, the language of the Virginia UTC may constitute a mild change from current law. Virginia Code section 55-19.4(A), which is repealed by the Virginia UTC, provided in pertinent part as follows:

[T]ermination shall not be ordered if the creator of a trust has included a spendthrift or similar protective provision unless the costs of administration are such that the establishment or continuance of the trust would impair the trust purposes.

VA. CODE ANN. § 55-19.4(A) (Repl. Vol. 2003). Thus, in effect, under current Virginia law, there is a statutory rule prohibiting or limiting judicial modifications of trusts containing spendthrift provisions. The Virginia UTC, however, does not expressly address the matter, thus leaving the common law in effect. It is unclear whether, under current law, Virginia courts would permit the use of extrinsic evidence to show that a particular spendthrift provision does not reflect a material purpose of the trust. As noted in the immediately preceding footnote, courts in other jurisdictions have applied a presumption of "material purpose" to spendthrift language without inquiry into the actual intention of the settlor.

200. See *id.* § 55-544.11(D) (Cum. Supp. 2005). Under this section, the court must also determine that the trust could have been modified or terminated "[i]f all of the beneficiaries had consented." *Id.* § 55-544.11(D)(1) (Cum. Supp. 2005). Thus, if the consent of the settlor is not obtained, the court must conclude that "continuance of the trust is not necessary to achieve any material purpose." *Id.* § 55-544.11(B) (Cum. Supp. 2005).

court might fashion a remedy that protects a nonconsenting beneficiary's interests in the case of a trust termination:

Subsection (e), similar to Restatement (Third) of Trusts Section 65 cmt. c (Tentative Draft No. 3, approved 2001), and Restatement (Second) of Trusts Sections 338(2) & 340(2) (1959), addresses situations in which a termination or modification is requested by less than all the beneficiaries, either because a beneficiary objects, the consent of a beneficiary cannot be obtained, or representation is either unavailable or its application uncertain. Subsection (e) allows the court to fashion an appropriate order protecting the interests of the nonconsenting beneficiaries while at the same time permitting the remainder of the trust property to be distributed without restriction. The order of protection for the nonconsenting beneficiaries might include partial continuation of the trust, the purchase of an annuity, or the valuation and cashout of the interest.<sup>201</sup>

This is a far-reaching development in the law—under this rule, a trust conceivably could be modified or terminated even if a beneficiary objected. On the other hand, the need for flexibility in trust administration has increased dramatically over recent years; witness, for example, the recent change in Virginia law allowing perpetual trusts under certain circumstances.<sup>202</sup>

Under prescribed conditions, a court may also modify or terminate a noncharitable trust without the consent of any beneficiary: because of unanticipated circumstances,<sup>203</sup> because the trust is uneconomic to administer,<sup>204</sup> or to achieve the settlor's tax objectives.<sup>205</sup> Moreover, and perhaps most importantly, under the Virginia UTC, a court may reform the terms of a trust, even where the terms are facially unambiguous, to conform to the settlor's intention, provided that there is "clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or induce-

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201. UNIF. TRUST CODE § 411 cmt. (amended 2004), 7C U.L.A. 239 (Supp. 2005).

202. See VA. CODE ANN. § 55-13.3(C) (Repl. Vol. 2003 & Cum. Supp. 2005) (allowing a settlor to elect out of application of the rule against perpetuities with respect to trusts in personal property).

203. See *id.* § 55-544.12(A) (Cum. Supp. 2005). This is a notably more relaxed standard than the "for good cause shown" standard, which existed under Virginia Code section 55-19.4. See *id.* § 55-19.4(A) (Repl. Vol. 2003).

204. See *id.* § 55-544.14(B) (Cum. Supp. 2005). As discussed in Part V.B., Virginia Code section 55-544.14(A) also authorizes a trustee under certain circumstances to terminate uneconomic trusts without judicial involvement. See *id.* § 55-544.14(A) (Cum. Supp. 2005); *supra* note 147 and accompanying text.

205. See VA. CODE ANN. § 55-544.16 (Cum. Supp. 2005). This section expressly authorizes the court to give retroactive effect to the modification. See *id.*

ment.”<sup>206</sup> According to the Comment to UTC section 415, both inter vivos and testamentary trusts are capable of reformation under this standard.<sup>207</sup> One of the important purposes of this provision is to implement the known wishes of the settlor (or testator) notwithstanding the carelessness of the scrivener.<sup>208</sup> This provision offers courts an extraordinarily powerful tool to modify the terms of trusts to better effectuate the settlor’s clear intent.<sup>209</sup>

The Virginia UTC continues Virginia’s recognition of the cy pres doctrine applicable to charitable trusts,<sup>210</sup> but with language that eliminates the possibility of implied reversions to the grantor or grantor’s successors upon subsequent impossibility to achieve the specific charitable purpose.<sup>211</sup> Furthermore, the Virginia UTC expressly prohibits a shifting of trust property, in the event of

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206. *Id.* § 55-544.15 (Cum. Supp. 2005). The Comment that corresponds to this section explains the distinction between “expression” and “inducement” as follows:

A mistake of expression occurs when the terms of the trust misstate the settlor’s intention, fail to include a term that was intended to be included, or include a term that was not intended to be included. A mistake in the inducement occurs when the terms of the trust accurately reflect what the settlor intended to be included or excluded but this intention was based on a mistake of fact or law. *See* Restatement (Third) of Property: Donative Transfers Section 12.1 cmt. i (Tentative Draft No. 1, approved 1995). Mistakes of expression are frequently caused by scribes’ errors while mistakes of inducement often trace to errors of the settlor.

UNIF. TRUST CODE § 415 cmt. (amended 2004), 7C U.L.A. 246–47 (Supp. 2005).

207. *See* UNIF. TRUST CODE § 415 cmt. (amended 2004), 7C U.L.A. 246 (Supp. 2005).

208. *See id.* § 415 cmt. (amended 2004), 7C U.L.A. 246–47 (Supp. 2005).

209. *See id.* The Comment makes the following helpful point concerning the distinction between “reformation” and “resolving an ambiguity”:

Reformation is different from resolving an ambiguity. Resolving an ambiguity involves the interpretation of language already in the instrument. Reformation, on the other hand, may involve the addition of language not originally in the instrument, or the deletion of language originally included by mistake, if necessary to conform the instrument to the settlor’s intent. Because reformation may involve the addition of language to the instrument, or the deletion of language that may appear clear on its face, reliance on extrinsic evidence is essential. To guard against the possibility of unreliable or contrived evidence in such circumstance, the higher standard of clear and convincing proof is required. *See* Restatement (Third) of Property: Donative Transfers Section 12.1 cmt. e (Tentative Draft No. 1, approved 1995).

*Id.* § 415 cmt. (amended 2004), 7C U.L.A. 247 (Supp. 2005).

210. *See* VA. CODE ANN. § 55-544.13(A) (Cum. Supp. 2005).

211. *See id.* § 55-544.13(A)(2) (Cum. Supp. 2005). As the Comment explains, traditional cy pres doctrine allowed a court to modify a trust only upon first determining that the settlor had a *general* charitable intent (as contrasted with the *specific* charitable intent expressed in the instrument). *See* UNIF. TRUST CODE § 413 cmt. (amended 2004), 7C U.L.A. 243 (Supp. 2005). The UTC modifies the traditional rule “by presuming that the settlor had a general charitable intent when a particular charitable purpose becomes impossible or impracticable to achieve.” *Id.*

failure of the particular charitable purpose, to a noncharitable beneficiary unless the property is, by the trust terms, to revert to the settlor and the settlor is living, or fewer than twenty-one years have lapsed since the date of creation of the trust.<sup>212</sup> Thus, upon the failure of a specified charitable purpose, the property will be put to other charitable uses and will not be paid to a specified noncharitable taker unless the specified taker is a living settlor or the remainder interest in the noncharitable alternate taker vests within twenty-one years of creation of the trust.

The settlor of a charitable trust, as well as the Attorney General, has standing to enforce a charitable trust.<sup>213</sup> Under former jurisprudential notions, a settlor was merely a former owner, having no economic interest in the property given to charity, and lacking standing to complain of misapplication of property, absent possession of a reversionary interest.<sup>214</sup>

### B. Spendthrift Trusts and Creditors' Rights

The UTC provisions on spendthrift rules and creditors' rights, adopted in Virginia with a few variations, essentially preserve current Virginia statutory and case law concerning these issues. This section of the article summarizes the principal substantive rules, explains how the Virginia UTC differs from the original, and briefly responds to criticisms of the UTC concerning the creditors' rights issue.

A spendthrift provision, to be valid, must restrain both voluntary and involuntary alienation.<sup>215</sup> If a trust does not include a spendthrift provision,<sup>216</sup> a creditor or assignee of a beneficiary

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212. See VA. CODE ANN. § 55-544.13(B) (Cum. Supp. 2005).

213. See *id.* § 55-541.10(D) (Cum. Supp. 2005).

214. See, e.g., *Clark v. Oliver*, 91 Va. 421, 424–25, 22 S.E. 175, 176 (1895); see also *Penn v. Keller*, 178 Va. 131, 143–44, 16 S.E.2d 331, 334 (1941).

215. VA. CODE ANN. § 55-545.02(A) (Cum. Supp. 2005). The statute preserves the majority common law rule; there is no Virginia case law on point, but there is substantial case law from around the country.

216. The version of the UTC on which the Virginia UTC was based, which includes amendments through 2004, provides as follows:

To the extent a beneficiary's interest *is not protected by* a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means. The court may limit the award to such relief as is appropriate under the circumstances.

may reach the beneficiary's interest by attaching present or future distributions,<sup>217</sup> or by other means, which presumably would include a sale of a beneficiary's interest.<sup>218</sup> In these respects, the Virginia UTC does little more than restate the common law.<sup>219</sup> With respect to amounts that may be paid to a creditor, however, the statute also provides that the court "may limit the award to such relief as is appropriate under the circumstances."<sup>220</sup> Thus, the Virginia UTC makes clear that a court can equitably consider the needs of a beneficiary and the beneficiary's dependents in allowing creditor claims.

Under the Virginia UTC, spendthrift provisions are ineffective as to claims of "exception creditors," which include (i) a child of

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UNIF. TRUST CODE § 501 (amended 2004), 7C U.L.A. 199 (Supp. 2004) (emphasis added). In 2005, UTC section 501 was further amended to change the italicized phrase from "is not protected by" to "is not subject to"; the Comment accompanying the amendment explains this change as follows:

A 2005 amendment changes "protected by" to "subject to" in the first sentence of the section. No substantive change is intended. The amendment was made to negate an implication that this section allowed an exception creditor to reach a beneficiary's interest even though the trust contained a spendthrift provision. The list of exception creditors and their remedies are contained in [sic] Section 503. Clarifying changes are also made in the comments and unnecessary language on creditor remedies omitted.

UNIF. TRUST CODE § 501 & cmt. (amended 2004), 7C U.L.A. 251 (Supp. 2005) (discussing 2005 amendments). The Comment to UTC section 501, as amended in 2005, further states that "[t]his section applies only if the trust does not contain a spendthrift provision or the spendthrift provision does not apply to a particular beneficiary's interest." *Id.* § 501 cmt. (amended 2005), 7C U.L.A. 250 (Supp. 2005). Thus, Virginia Code section 55-545.01 is properly interpreted as applying only to such trusts, and not to claims by exception creditors against trusts that include spendthrift provisions; the remedies available to an exception creditor are described in Virginia Code section 55-545.03.

217. VA. CODE ANN. § 55-545.01 (Cum. Supp. 2005).

218. UNIF. TRUST CODE § 501 cmt. (amended 2004), 7C U.L.A. 199 (Supp. 2004).

219. See *Jackson v. Fid. and Deposit Co.*, 269 Va. 303, 308-09, 608 S.E.2d 901, 903-04 (2005) (stating that the trial court permitted garnishment of a trustee's assets because he was not included in the spendthrift provision).

220. See VA. CODE ANN. § 55-545.01 (Cum. Supp. 2005). See also the Comment to UTC section 501, which provides as follows:

Because proceedings to satisfy a claim are equitable in nature, the second sentence of this section ratifies the court's discretion to limit the award as appropriate under the circumstances. In exercising its discretion to limit relief, the court may appropriately consider the support needs of a beneficiary and the beneficiary's family. See Restatement (Third) of Trusts Section 56 cmt. e (Tentative Draft No. 2, approved 1999).

UNIF. TRUST CODE § 501 cmt. (amended 2004), 7C U.L.A. 199 (Supp. 2004). Thus, under this provision, with respect to a trust not containing a spendthrift provision, a creditor does not automatically become entitled to any amount distributed by the trustee. Rather, the court can order that a portion of such amount be diverted to or for the benefit of the beneficiary. This is a significant, notably pro-beneficiary feature of the statute.



the beneficiary who has a judgment or court order against the beneficiary for support and (ii) a judgment creditor who has provided services for the protection of the beneficiary's interest in the trust.<sup>221</sup> The Virginia UTC deviates from the official text by not including spouses or former spouses as exception creditors,<sup>222</sup> thus preserving current Virginia law.<sup>223</sup> Government entities—the United States, the Commonwealth, or any county, city, or town—are exception creditors in most cases.<sup>224</sup> In a significant variation from the original UTC, the Virginia UTC establishes an important exception to this rule: the statute adds new Virginia Code section 55-545.03:1, derived from current Virginia Code section 55-19(D), which preserves Virginia's protection of "special needs" or "supplemental needs" trusts (trusts for disabled beneficiaries, designed not to disqualify the beneficiary for need-based governmental benefits) from state claims against beneficiaries for reimbursement.<sup>225</sup>

In accord with the growing body of modern case law, the Virginia UTC eliminates formal distinctions for creditors' rights purposes between discretionary trusts subject to a standard (for

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221. See VA. CODE ANN. § 55-545.03(B) (Cum. Supp. 2005). The purpose of the latter exception is explained in the Comment: "This exception allows a beneficiary of modest means to overcome an obstacle preventing the beneficiary's obtaining services essential to the protection or enforcement of the beneficiary's rights under the trust." UNIF. TRUST CODE § 503 cmt. (amended 2005), 7C U.L.A. 253, 254 (Supp. 2005). For obvious reasons, the creditors typically relying on and benefitting from this exception will be lawyers.

222. Compare VA. CODE ANN. § 55-545.03(B) (Cum. Supp. 2005), with UNIF. TRUST CODE § 503(b) (amended 2005), 7C U.L.A. 253 (Supp. 2005).

223. See VA. CODE ANN. § 55-19(B) (Cum. Supp. 2005). The Virginia UTC also deviates from the original by excluding spouses and former spouses from a provision allowing a beneficiary's child (who holds a judgment or order for support) limited access to the assets of a discretionary trust, under circumstances in which the trustee has not complied with a standard of distribution or has abused a discretion. Compare *id.* § 55-545.04(C) (Cum. Supp. 2005), with UNIF. TRUST CODE § 504(c) (amended 2005), 7C U.L.A. 256 (Supp. 2005).

224. VA. CODE ANN. § 55-545.03(C) (Cum. Supp. 2005).

225. See *id.* § 55-545.03:1(D) (Cum. Supp. 2005). Virginia Code section 55-545.03:1 was added out of an abundance of caution, in part in response to some critics of the UTC, who have claimed that the official statutory language undermines settlors' ability to create supplemental needs trusts. See, e.g., Mark Merric & Douglas W. Stein, *A Threat to All SNTs*, 143 TR. & EST. 38 (Nov. 2004). The addition of Virginia Code section 55-545.03:1 removes all doubt that the statute would have that unintended effect. In fact, however, most commentators believe that the UTC in its original form adequately preserves the status of such trusts. See, e.g., Richard E. Davis, *UTC Is No Threat to SNTs*, 143 TR. & EST. 12 (Jan. 2005); Alan Newman, *The Rights of Creditors of Beneficiaries Under the Uniform Trust Code: An Examination of the Compromise*, 69 TENN. L. REV. 771, 791-98 (2002).

example, “support trusts”) and those not subject to a standard.<sup>226</sup> Creditors generally cannot compel distributions from discretionary trusts, but can, to the extent there are no effective spendthrift limitations and subject to equitable limitations, reach amounts the trustee chooses to distribute.<sup>227</sup> A special rule permits claims based on child support orders to be reached where the trustee has not complied with a standard or has abused its discretion.<sup>228</sup> Consistent with general common law principles, under the statute spendthrift protection is not available for “overdue distributions,” as that concept is defined.<sup>229</sup> An overdue distribution is a mandatory distribution, including a distribution at termination, if the trustee has not made the distribution within a reasonable time after the designated distribution date.<sup>230</sup> In other words, a distribution to which the beneficiary has become entitled is treated no longer as an asset of the trust, but rather an asset of the beneficiary, for creditors’ rights purposes.

The Virginia UTC clarifies existing law concerning the rights of creditors with respect to assets held in a revocable trust. During the lifetime of a settlor, a creditor may reach assets in a revocable trust regardless of whether the settlor happens to be a benefi-

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226. See VA. CODE ANN. § 55-545.04(B) (Cum. Supp. 2005); see also UNIF. TRUST CODE § 504 cmt. (amended 2005), 7C U.L.A. 256 (Supp. 2005). This point is elaborated on in the Comments as follows:

This section addresses the ability of a beneficiary’s creditor to reach the beneficiary’s discretionary trust interest, whether or not the exercise of the trustee’s discretion is subject to a standard. This section, similar to the Restatement, eliminates the distinction between discretionary and support trusts, unifying the rules for all trusts fitting within either of the former categories. See Restatement (Third) of Trusts Section 60 Reporter’s Notes to cmt. a (Tentative Draft No. 2, approved 1999). By eliminating this distinction, the rights of a creditor are the same whether the distribution standard is discretionary, subject to a standard, or both. Other than for a claim by a child, spouse or former spouse, a beneficiary’s creditor may not reach the beneficiary’s interest. Eliminating this distinction affects only the rights of creditors. The affect [sic] of this change is limited to the rights of creditors. It does not affect the rights of a beneficiary to compel a distribution. Whether the trustee has a duty in a given situation to make a distribution depends on factors such as the breadth of the discretion granted and whether the terms of the trust include a support or other standard.

UNIF. TRUST CODE § 504 cmt. (amended 2004), 7C U.L.A. 256 (Supp. 2005).

227. UNIF. TRUST CODE § 504 & cmt. (amended 2005), 7C U.L.A. 245, 255–56 (Supp. 2005).

228. See VA. CODE ANN. § 55-545.04(C) (Cum. Supp. 2005). As noted earlier, the Virginia UTC deviates from the original by not also applying this special rule to spouses and former spouses. See *supra* note 223 and accompanying text.

229. See VA. CODE ANN. § 55-545.06 (Cum. Supp. 2005).

230. See *id.*

ary.<sup>231</sup> The Virginia UTC thus recognizes the principle, reflected in the tax laws,<sup>232</sup> that a settlor should be treated as the owner of property over which he holds the power to vest title in himself. Following the settlor's death, assets in a revocable trust (other than certain insurance proceeds) are subject to the claims of the settlor's creditors, costs of settling the settlor's estate, and statutory allowances to survivors to the extent the probate estate is inadequate to satisfy such claims, costs, and allowances.<sup>233</sup> Under language added to the Virginia UTC, a trustee's right to make distributions permitted or required after the settlor's death continues unless and until a timely (within two years of death) proceeding is brought to reach the trust property.<sup>234</sup>

With respect to so-called self-settled trusts—that is, irrevocable trusts for the settlor's own benefit—the statute preserves the general common law rule that a creditor of the settlor may reach “the maximum amount that can be distributed to or for the settlor's benefit.”<sup>235</sup> For this purpose, a holder of a power of withdrawal is treated as a settlor to the extent of the property subject to the power, but a special rule provides that, upon a lapse, release, or waiver of the power, the holder is treated as a settlor only to the extent the value of the property subject to the power exceeds the greater of the amounts specified in section 2041(b)(2), 2514(e), or 2503(b) of the Internal Revenue Code.<sup>236</sup> Thus, a bene-

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231. *See id.* § 55-545.05(A)(1) (Cum. Supp. 2005).

232. *See* I.R.C. §§ 2036, 2038 (2000) (providing that the assets of a revocable trust are includible in the settlor's estate for estate tax purposes).

233. VA. CODE ANN. § 55-545.05(A)(3) (Cum. Supp. 2005).

234. *See id.*

235. *Id.* § 55.545.05(A)(2) (Cum. Supp. 2005). Notably, NCCUSL (and the General Assembly) followed traditional doctrine in this regard and did not follow the course of some recent statutory developments—such as those in Alaska and Delaware—permitting so-called asset protection trusts, i.e., irrevocable, discretionary self-settled trusts that are sheltered from the claims of most creditors. *See* UNIF. TRUST CODE § 505 cmt. (amended 2005), 7C U.L.A. 258–59 (Supp. 2005) (discussing section 505(a)(2)).

236. VA. CODE ANN. §55-545.05(B)(2) (Cum. Supp. 2005). Sections 2041(b)(2) and 2514(e) of the Internal Revenue Code establish special estate and gift tax rules, under which a lapse of a general power of appointment, which otherwise would trigger estate or gift tax consequences, is insulated from those consequences as long as the property that could have been appointed is less than or equal to the greater of (i) five thousand dollars or (ii) five percent of the aggregate value of the assets out of which the power could have been exercised. *See* I.R.C. §§ 2041(b)(2), 2514(e). Withdrawal powers subject to the “five or five” limitation, as well as withdrawal powers that lapse to the extent of that limitation, are routine aspects of estate planning for individuals with transfer tax concerns. Section 2503(b) of the Internal Revenue Code refers to the \$10,000 (as indexed for inflation) annual exclusion from the gift tax. *See* I.R.C. § 2503(b).

ficiary who holds a so-called *Crummey* withdrawal power<sup>237</sup> would be treated as the owner of trust property (in the amount of the withdrawal right) while the power is in effect, but would not be treated as owner after the power has lapsed, assuming that the amount that could be withdrawn was limited to the section 2514(e) amount.

Contrary to the suggestions of its critics,<sup>238</sup> the UTC's approach to creditors' rights does not impair the ability of settlors to protect trust assets from the claims of creditors of beneficiaries.<sup>239</sup> This is especially true in Virginia, where the common law, in the absence of valid spendthrift clauses, is very much pro-creditor.<sup>240</sup> The Virginia UTC continues the ability of grantors to defeat claims of beneficiary creditors by using spendthrift trusts and enlarges the ability of beneficiaries to resist claims of creditors under discretionary and support trusts lacking the protection of spendthrift clauses.<sup>241</sup> To the extent that the Virginia UTC changes the law in Virginia, it does so in a manner that *increases*—not *decreases*—the level of creditor protection available with trusts. Thus, the claims of the UTC critics are unwarranted.

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237. Named for the case *Crummey v. Commissioner*, which first approved the use of this technique for obtaining gift tax annual exclusion treatment for transfers to trusts. 397 F.2d 82 (9th Cir. 1968).

238. The most prominent of these critics is Mark Merric, who has co-authored a series of articles on the subject for Estate Planning magazine. See Mark Merric & Steven J. Oshins, *Effect of the UTC on the Asset Protection of Spendthrift Trusts*, 31 EST. PLAN. 375 (Aug. 2004); Mark Merric & Steven J. Oshins, *How Will Asset Protection of Spendthrift Trusts Be Affected by the UTC?*, 31 EST. PLAN. 478 (Oct. 2004); Mark Merric et al., *Malpractice Issues and the Uniform Trust Code*, 31 EST. PLAN. 586 (Dec. 2004); Mark Merric & Steven J. Oshins, *UTC May Reduce the Asset Protection of Non-Self-Settled Trusts*, 31 EST. PLAN. 411 (Sept. 2004).

239. See Suzanne Brown Walsh et al., *What Is the Status of Creditors under the Uniform Trust Code*, 32 EST. PLAN. 29 (Feb. 2005) (rebutting suggestions and misconceptions in articles by Mark Merric, Steven J. Oshins, and others critical of the UTC).

240. See *Dillard v. Dillard*, 97 Va. 434, 442–43, 34 S.E. 60, 63 (1899), and *Cochran v. Paris*, 52 Va. (11 Gratt.) 348, 359–62 (1854), as to rights of creditors after the exercise of discretion by trustees of discretionary trusts. See also *Hutchinson v. Maxwell*, 100 Va. 169, 181, 40 S.E. 655, 659 (1902), in which, as to a “support” trust, the court held that creditors “can claim from the trustee the amount which the debtor could have claimed should have been applied to his benefit.” The Virginia UTC prevents the application of *Hutchinson* and limits the application of *Cochran*. See VA. CODE ANN. §§ 55-545.01 to -545.02 (Cum. Supp. 2005).

241. See VA. CODE ANN. §§ 55-545.01 to -545.02 (Cum. Supp. 2005).

### C. *Revocable Trusts*

Due to the widespread use of revocable trusts as will substitutes, the provisions of the Virginia UTC addressing that subject are some of the most important of the new statute. This section of the article summarizes those provisions, with emphasis on the key Virginia variations.

Under the Virginia UTC, the “capacity” standard applicable to creation, amendment, and revocation of a revocable trust is that required to make a will.<sup>242</sup> Because the revocable trust is used primarily as a will substitute, the drafters of the UTC thought it appropriate to adopt the same standard as for a will, rather than the standard normally applicable to making lifetime gifts.<sup>243</sup> The Comment to this section makes clear that applying the capacity standards for wills to revocable trusts does not mean that a revocable trust must be executed with the formalities of a will.<sup>244</sup> Thus, for a trust not created by will, the statute establishes no execution requirements.

The Virginia UTC also provides that, if the trust instrument is silent on the matter of revocation, the trust is presumed to be revocable.<sup>245</sup> Because this is a departure from a widely followed common law rule of interpretation,<sup>246</sup> the rule is prospective only and does not apply to trust instruments executed prior to the effective date of the statute.<sup>247</sup> The rationale of the statutory approach is that, if the trust instrument fails to address the issue, it “was likely drafted by a nonprofessional, who intended the trust as a will substitute.”<sup>248</sup> As the Comment points out, most professional drafters routinely spell out whether or not a trust is revocable, so this provision will have limited application.<sup>249</sup> Lawyers drafting trust instruments would be well-advised to continue the current preferred practice of addressing this issue explicitly.

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242. *See id.* § 55-546.01 (Cum. Supp. 2005).

243. *See* UNIF. TRUST CODE § 601 cmt. (amended 2005), 7C U.L.A. 264 (Supp. 2005).

244. *See id.*

245. *See* VA. CODE ANN. § 55-546.02(A) (Cum. Supp. 2005).

246. *See* RESTATEMENT (SECOND) OF TRUSTS § 330 (1959).

247. *See id.*

248. UNIF. TRUST CODE § 602 cmt. (amended 2005), 7C U.L.A. 265 (Supp. 2005).

249. *Id.*

The Virginia UTC makes clear that, during the time that a trust is revocable, the rights of beneficiaries are subject to the control of the settlor,<sup>250</sup> the duties of the trustee are owed exclusively to the settlor,<sup>251</sup> and notices that would otherwise be required to be given to beneficiaries are given only to the settlor.<sup>252</sup> For this purpose, one holding a power of withdrawal is treated as the settlor of a revocable trust to the extent of the property subject to the power.<sup>253</sup> Thus, the holder of a presently exercisable general power of appointment is treated as an owner. The Virginia UTC also provides that a trustee who does not know that a trust has been revoked or amended is not liable for distributions made and other actions taken on the assumption that amendment or revocation has not occurred.<sup>254</sup>

The Virginia UTC includes several important variations from the original. First, selecting among optional time frames, the Virginia UTC permits a challenge to the validity of a revocable trust if the proceeding is brought within the earlier of two years after the settlor's death or six months after the trustee sends the potential contestant a copy of the trust and a notice of the time allowed for commencing a proceeding.<sup>255</sup> A trustee without knowledge of a pending contest proceeding may make distributions in accordance with the terms of the trust, but if the trust is subsequently declared invalid, beneficiaries are liable for distributions received.<sup>256</sup>

Second, Virginia departs from the original UTC by declining to provide a presumption that a revocable trust specifying a method of amendment or revocation can also be revoked by express language in a subsequent will or by language in a will making a contrary disposition of property.<sup>257</sup> Of course, a settlor of a revocable

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250. See VA. CODE ANN. § 55-546.03(A) (Cum. Supp. 2005).

251. *Id.*

252. See UNIF. TRUST CODE § 603 cmt. (amended 2005), 7C U.L.A. 269 (Supp. 2005) (indicating that the duty under UTC section 813 to inform and report to beneficiaries is owed to the settlor of a revocable trust).

253. VA. CODE ANN. § 55-546.03(B) (Cum. Supp. 2005).

254. See *id.* § 55-546.02(G) (Cum. Supp. 2005).

255. See *id.* § 55-546.04(A) (Cum. Supp. 2005).

256. *Id.* § 55-546.04(B) (Cum. Supp. 2005).

257. See *id.* § 55-546.02(C) (Cum. Supp. 2005). The Virginia UTC provides that:

C. The settlor may revoke or amend a revocable trust:

1. By substantial compliance with a method provided in the terms of the trust; or
2. If the terms of the trust do not provide a method, by any method manifest-

trust may expressly provide for revocation by later will, if that is what the settlor prefers.

Finally, Virginia is more restrictive than the original UTC in permitting agents under durable powers of attorney to revoke a principal's trust only to the extent expressly authorized by the terms of the trust or by a court.<sup>258</sup> Thus, the Virginia UTC does not permit nonjudicially approved revocation by an agent when language in the power of attorney grants authority, but the trust instrument does not.<sup>259</sup>

#### D. Provisions Protecting Trustees

Article 10 includes, among other things, a number of provisions designed to protect trustees from liability.<sup>260</sup> This section of the article summarizes the most important of these provisions.

The Virginia UTC includes important language limiting the liability of trustees with respect to contracts entered into on behalf of the trust and with respect to torts committed during trust administration.<sup>261</sup> Drawing heavily on section 7-306 of the Uniform Probate Code, the Virginia UTC provides that, except as other-

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ing clear and convincing evidence of the settlor's intent.

*Id.*

The NCCUSL version, by contrast, provides:

- (c) The settlor may revoke or amend a revocable trust:
  - (1) by substantial compliance with a method provided in the terms of the trust; or
  - (2) if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by:
    - (A) a later will or codicil that expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust; or
    - (B) any other method manifesting clear and convincing evidence of the settlor's intent.

UNIF. TRUST CODE § 602(c) (amended 2005), 7C U.L.A. 265 (Supp. 2005).

258. Compare VA. CODE ANN. § 55-546.02(E) (Cum. Supp. 2005), with UNIF. TRUST CODE § 602 (amended 2005), 7C U.L.A. 264 (Supp. 2005).

259. See VA. CODE ANN. § 55-546.02(E) (Cum. Supp. 2005). Under the official version of the UTC, "[a] settlor's powers with respect to revocation, amendment, or distribution of trust property may be exercised by an agent under a power of attorney only to the extent expressly authorized by the terms of the trust or the power." UNIF. TRUST CODE § 602(e) (amended 2005), 7C U.L.A. 265 (Supp. 2005). Thus, under the original UTC, an attorney-in-fact could exercise the settlor's powers if so authorized in the power of attorney, even if the trust instrument were silent. See *id.*

260. See VA. CODE ANN. §§ 55-550.01 to -550.13 (Cum. Supp. 2005).

261. See *id.* § 55-550.10 (Cum. Supp. 2005).

wise stated in the contract, a trustee properly entering into a contract in a fiduciary capacity while administering the trust is not personally liable if the contract discloses the fiduciary capacity.<sup>262</sup> Furthermore, a trustee is not personally liable for torts committed in the course of administration, or for obligations arising from ownership of trust property, including those arising from violation of environmental laws, unless the trustee is personally at fault.<sup>263</sup> The statute clarifies that tort and contract claims may be asserted in judicial proceedings against the trustee in his or her fiduciary capacity whether or not the trustee is personally liable for the claim.<sup>264</sup>

The Virginia UTC also addresses trustee liability with respect to investments in partnerships. Generally, unless the contract provides otherwise, a trustee holding an interest as general partner in a general or limited partnership is not personally liable to third parties on partnership contracts if the fiduciary capacity was disclosed in the contract or in a statement filed pursuant to the Uniform Partnership Act.<sup>265</sup> This immunity does not apply, however, if the trustee holds another interest in the partnership in a nontrustee capacity, or if a close relative holds an interest in the partnership.<sup>266</sup> Note, however, that if the trust is revocable and the trustee holds an interest as general partner, the settlor may be personally liable as if a general partner.<sup>267</sup>

An exculpation clause relieving a trustee of liability for breach of trust may provide limited protection.<sup>268</sup> Under the Virginia UTC, an exculpation clause is *unenforceable* to the extent that it (i) provides immunity for breaches committed in bad faith or with reckless indifference to trust purposes or the interests of the beneficiaries; (ii) was inserted as a result of trustee abuse of a fi-

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262. *See id.* § 55-550.10(A) (Cum. Supp. 2005). The Comment to this provision in the UTC adds some important clarifications:

The protection afforded the trustee by this section applies only to contracts that are properly entered into in the trustee's fiduciary capacity, meaning that the trustee is exercising an available power and is not violating a duty. This section does not excuse any liability the trustee may have for breach of trust.

UNIF. TRUST CODE § 1010 cmt. (amended 2005), 7C U.L.A. 327-28 (Supp. 2005); *see* UNIF. PROBATE CODE § 7-306 (1993).

263. VA. CODE ANN. § 55-550.10(B) (Cum. Supp. 2005).

264. *See id.* § 55-550.10(C) (Cum. Supp. 2005).

265. *Id.* § 55-550.11(A) (Cum. Supp. 2005).

266. *Id.* § 55-550.11(C) (Cum. Supp. 2005).

267. *Id.* § 55-550.11(D) (Cum. Supp. 2005).

268. *See id.* § 55-550.08 (Cum. Supp. 2005).



duciary or confidential relationship to the settlor; or (iii) was drafted or caused to be drafted by the trustees, unless, in situation (iii), the trustee proves that the existence and contents of the clause were adequately communicated to the settlor.<sup>269</sup> The Virginia UTC differs from the original UTC as to situation (iii) by *not* imposing a further requirement that the trustee prove the exculpatory clause to be “fair under the circumstances.”<sup>270</sup>

#### E. *Provisions Protecting Third Parties and Encouraging Commerce*

The Virginia UTC includes a number of rules that protect third parties dealing with the trust or trustee; these provisions are designed to encourage the flow of commerce by generally relieving third parties from any obligation to inquire into the duties and powers of trustees.<sup>271</sup> For example, third parties who, in good faith, assist a trustee or for value deal with a trustee without knowledge that the trustee is exceeding or improperly exercising powers, are protected from liability, as if the trustee properly exercised the power.<sup>272</sup> The Virginia UTC also provides that a third party dealing in good faith with a trustee is not required to inquire into the extent of the trustee’s powers or the propriety of their exercise.<sup>273</sup> With respect to the latter provision, the Comment to UTC section 1012 states that this provision:

confirms that a third party who is acting in good faith is not charged with a duty to inquire into the extent of a trustee’s powers or the propriety of their exercise. The third party may assume that the trustee has the necessary power. Consequently, there is no need to request or examine a copy of the trust instrument. A third party who wishes assurance that the trustee has the necessary authority instead should request a certification of trust as provided in Section 1013 [Virginia Code section 55-545.13]. . . . [This provision is] intended to negate the rule, followed by some courts, that a third party is charged with constructive notice of the trust instrument and its contents.<sup>274</sup>

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269. *Id.*

270. *See* UNIF. TRUST CODE § 1008(b) (amended 2005), 7C U.L.A. 325, 326 (Supp. 2005).

271. *See* VA. CODE ANN. § 55-550.12 (Cum. Supp. 2005).

272. *Id.* § 55-550.12(A) (Cum. Supp. 2005).

273. *Id.* § 55-550.12(B) (Cum. Supp. 2005).

274. UNIF. TRUST CODE § 1012 cmt. (amended 2005), 7C U.L.A. 329, 330 (Supp. 2005).

The codification of this rule will be a welcome change for Virginia trustees.

The Virginia UTC further provides that a third party delivering assets to a trustee need not see to their proper application.<sup>275</sup> Moreover, third parties, acting in good faith, assisting a former trustee or dealing for value with a former trustee without knowledge that the trusteeship has terminated, are protected from liability as if the former trustee still serves as trustee.<sup>276</sup> However, comparable protections provided in other laws relating to commercial transactions or transfers of securities by fiduciaries prevail over this section.<sup>277</sup> In elaborating on this notion, the Comment to this section refers to, among other statutes, various articles in the Uniform Commercial Code, including Article 8 on the transfer of securities.<sup>278</sup>

#### F. *Provisions Validating Certain Trusts*

Under traditional doctrine, the law of trusts fails to recognize as valid attempts to create certain types of trusts, including trusts with indefinite beneficiaries, trusts for animals, and trusts without ascertainable beneficiaries.<sup>279</sup> The Virginia UTC validates these arrangements under certain, limited circumstances.

First, the statute provides that a power in a trustee to select one or more beneficiaries from an indefinite class is valid.<sup>280</sup> A number of cases have held such provisions to be insufficient to create valid trusts because they entail “imperative powers” in favor of members of an “indefinite class” and are therefore incapable of enforcement by any beneficiary.<sup>281</sup> Viewed not as a duty, but as a power of appointment, the law could sustain such arrangements. The Virginia UTC validates such arrangements pro-

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275. See VA. CODE ANN. § 55-550.12(C) (Cum. Supp. 2005).

276. *Id.* § 55-550.12(D) (Cum. Supp. 2005).

277. *Id.* § 55-550.12(E) (Cum. Supp. 2005).

278. See UNIF. TRUST CODE § 1012 cmt. (amended 2005), 7C U.L.A. 330 (Supp. 2005).

279. See GEORGE GLEASON BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 161 (rev. 2d ed. 1979).

280. See VA. CODE ANN. § 55-544.02(C) (Cum. Supp. 2005). An example of an indefinite class is: “my trustee may distribute my fishing tackle among such of my friends and acquaintances as he deems appropriate.”

281. See, e.g., *In re Estate of Kradwell*, 170 N.W.2d 773 (Wis. 1969).

vided the “power” is exercised within a reasonable time.<sup>282</sup> If not so exercised, the property passes to those who would have taken had the power not been conferred.<sup>283</sup>

Second, the Virginia UTC validates certain trusts for the care of animals.<sup>284</sup> At early common law, trusts for the care of animals were totally void because they lacked a beneficiary having standing to enforce the trust.<sup>285</sup> Some courts permitted the trustee to care for the animal over the objection of alternate claimants<sup>286</sup> because of deference to the trustee’s “sense of honor”; hence, the term “honorary trusts.”<sup>287</sup> The Virginia UTC validates such trusts as to animals living during the settlor’s lifetime.<sup>288</sup> It confers standing on specified persons to seek enforcement and permits property having a value in excess of that required to care for the animal to be distributed to the settlor’s successor in interest.<sup>289</sup>

Finally, the Virginia UTC validates other noncharitable trusts lacking ascertainable beneficiaries. Except to the extent provided otherwise as to animal trusts or by other statutes, the Virginia UTC, contrary to limitations of common law, permits trusts for noncharitable purposes even though lacking a definite beneficiary or definite beneficiary class.<sup>290</sup> According to the Comment, examples of such trusts could include a trust for the maintenance of a cemetery plot or a trust to distribute funds in a benevolent, but noncharitable, manner.<sup>291</sup> However, such dispositions are en-

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282. See VA. CODE ANN. § 55-544.02(C) (Cum. Supp. 2005).

283. *Id.*

284. See *id.* § 55-544.08 (Cum. Supp. 2005).

285. See UNIF. TRUST CODE § 408 cmt. (amended 2005), 7C U.L.A. 233 (Supp. 2005); BOGERT, *supra* note 279, at § 165.

286. See UNIF. TRUST CODE § 408 cmt. (amended 2005), 7C U.L.A. 233 (Supp. 2005); BOGERT, *supra* note 279, at § 165. Pre-Virginia UTC law concerning this issue is unclear.

287. See UNIF. TRUST CODE § 408 cmt. (amended 2005), 7C U.L.A. 233, 234 (Supp. 2005).

288. See VA. CODE ANN. § 55-544.08(A) (Cum. Supp. 2005).

289. See *id.* § 55-544.08(B)-(C) (Cum. Supp. 2005).

290. See *id.* § 55.544.09 (Cum. Supp. 2005).

291. See UNIF. TRUST CODE § 409 cmt. (amended 2005), 7C U.L.A. 235 (Supp. 2005). A famous example of such a trust was the one established under the will of George Bernard Shaw for the purpose of developing a new alphabet, in which each letter would have only a single, consistent pronunciation. In *re Shaw*, [1957] 1 W.L.R. 729 (Ch.). The court held that the trust was not for the advancement of education nor beneficial to the community and thus was not a charitable trust. *Id.* at 737. Moreover, the trust could not be treated as a valid non-charitable trust because it was not in favor of an ascertainable person. *Id.* Thus, the court ruled that the trust was invalid and therefore failed. *Id.*

forceable only for a period of twenty-one years.<sup>292</sup> The Virginia UTC permits enforcement by one appointed in the instrument or one named by the court, and provision is made for distribution of excessive or unused funds to the settlor's successors.<sup>293</sup>

#### G. *Provisions Dealing with Trustee Removal*

The Virginia UTC recognizes the common law principles under which a court may remove a trustee for breach of trust, inability to cooperate with co-trustees, lack of fitness, or persistent failure to administer effectively.<sup>294</sup> The Virginia UTC also permits removal when there has been a substantial change in circumstances or when removal is requested by all of the qualified beneficiaries, provided that the court finds that removal (i) best serves the interests of all of the beneficiaries and (ii) is not inconsistent with a material purpose of the trust, and that (iii) a suitable co-trustee or successor trustee is available.<sup>295</sup>

#### H. *Choice of Law Governing Meaning and Effect of Trust Terms*

Under the Virginia UTC, the meaning and effect of trust terms may be determined by the law of the jurisdiction specified in the instrument unless such jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the particular matter.<sup>296</sup> If no governing law is specified, the law of the trust's principal place of administration typically governs administrative matters, and the law of the jurisdiction having the most significant relationship to the matter governs.<sup>297</sup>

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292. UNIF. TRUST CODE § 409(i)(b) cmt. (amended 2005), 7C U.L.A. 235 (Supp. 2005).

293. VA. CODE ANN. § 55-544.08 (Cum. Supp. 2005).

294. *Id.* § 55-547.06(B)(1)-(3) (Cum. Supp. 2005).

295. *See id.* § 55-547.06(B)(4) (Cum. Supp. 2005).

296. *See id.* § 55-541.07(1) (Cum. Supp. 2005).

297. *Id.* § 55-541.07 (Cum. Supp. 2005); UNIF. TRUST CODE § 107 cmt. (amended 2005), 7C U.L.A. 204, 205 (Supp. 2005).

### I. *Reporting and Disclosure Duties*

Among the more controversial provisions of the UTC as proposed by NCCUSL in 2000 were features mandating certain detailed reporting duties notwithstanding contrary treatment in the terms of the instrument.<sup>298</sup> Because of lack of acceptance by a number of adopting jurisdictions, these “non-waivable” features were designated “optional” in amendments adopted by NCCUSL in 2004.<sup>299</sup> The Virginia UTC elects the option, and all reporting and disclosure duties provided in the default rules are subject to override by the terms of the instrument.<sup>300</sup> Virginia also expands on the prospective application rules of the UTC to limit certain detailed reporting and disclosure duties to irrevocable trusts created or becoming irrevocable after the effective date of the Act.<sup>301</sup>

What are the significant reporting and disclosure duties imposed on a trustee, assuming that the settlor permits the default rules to apply? First, a trustee must keep qualified beneficiaries reasonably informed about the administration of the trust and material facts necessary to the protection of their interests; moreover, unless unreasonable under the circumstances, a trustee must respond promptly to requests from beneficiaries for information regarding administration matters.<sup>302</sup> Second, upon request of a beneficiary, the trustee must promptly furnish a copy of the trust instrument.<sup>303</sup> Third, a trustee must notify qualified

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298. See UNIF. TRUST CODE § 105 cmt. (amended 2005), 7C U.L.A. 201-03 (Supp. 2005).

299. See *id.* (discussing 2004 amendments).

300. See VA. CODE ANN. §§ 55-541.05, -548.13 (Cum. Supp. 2005).

301. See *id.* § 55-548.13(E) (Cum. Supp. 2005).

302. *Id.* § 55-548.13(A) (Cum. Supp. 2005). Note the distinction between the duties owed to beneficiaries and those owed to qualified beneficiaries. The Comment elaborates as follows:

Subsection (a) also requires that the trustee promptly respond to the request of any beneficiary, whether qualified or not, for information related to the administration of the trust. Performance is excused only if compliance is unreasonable under the circumstances. Within the bounds of the reasonableness limit, this provision allows the beneficiary to determine what information is relevant to protect the beneficiary's interest. Should a beneficiary so request, subsection (b)(1) also requires the trustee to furnish the beneficiary with a complete copy of the trust instrument and not merely with those portions the trustee deems relevant to the beneficiary's interest.

UNIF. TRUST CODE § 813 cmt. (amended 2005), 7C U.L.A. 303 (Supp. 2005).

303. VA. CODE ANN. § 55-548.13(B)(1) (Cum. Supp. 2005). Note that statute is consistent with current Virginia case law, which recognizes the duty of a trustee to furnish information, including relevant documents, when requested by a beneficiary. See *Fletcher v.*

beneficiaries of any change in the method or rate of the trustee's compensation.<sup>304</sup> Under the Virginia UTC, these first three rules apply both prospectively and to current trusts unless waived in the instrument.<sup>305</sup> The first two reflect current Virginia law; the third reflects current best practices.

Fourth, a trustee must, within sixty days of accepting a trusteeship, give notice to qualified beneficiaries of its acceptance and certain contact information.<sup>306</sup> Fifth, within sixty days of learning that an irrevocable trust has been created or that a formally revocable trust has become irrevocable, the trustee must notify the qualified beneficiaries of the trust's existence, the identity of the settlor, the right to request a copy of the trust instrument, and (as discussed below) the right to receive annual reports.<sup>307</sup> Finally, and most importantly, a trustee must furnish, at least annually, to distributees and permissible distributees (and to other qualified or nonqualified beneficiaries requesting the same) reports of receipts and disbursements, assets and liabilities, the amount of the trustee's compensation, and, if feasible, statements of the market value of assets on hand.<sup>308</sup> The rules described in this paragraph apply only as to trustees of irrevocable trusts created or revocable trusts becoming irrevocable after the Virginia

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Fletcher, 253 Va. 30, 480 S.E.2d 488 (1997). The fact that a grantor permits a trust beneficiary to enjoy the property only indirectly does not imply that the beneficiary is to be denied knowledge of the trust, the nature of the corpus, or information regarding trust information. The UTC drafters cited *Fletcher* in support of the statutory rule. See UNIF. TRUST CODE § 813 cmt. (amended 2005), 7C U.L.A. 303 (Supp. 2005).

304. VA. CODE ANN. § 55-548.13(B)(4) (Cum. Supp. 2005).

305. See *id.* §§ 55-548.13(E), -551.06(A)(1) (Cum. Supp. 2005).

306. *Id.* § 55-548.13(B)(2) (Cum. Supp. 2005).

307. *Id.* § 55-548.13(B)(3) (Cum. Supp. 2005).

308. *Id.* § 55-548.13(C) (Cum. Supp. 2005). As to the format and content of such reports, the Comment provides as follows:

The Uniform Trust Code employs the term "report" instead of "accounting" in order to negate any inference that the report must be prepared in any particular format or with a high degree of formality. The reporting requirement might even be satisfied by providing the beneficiaries with copies of the trust's income tax returns and monthly brokerage account statements if the information on those returns and statements is complete and sufficiently clear. The key factor is not the format chosen but whether the report provides the beneficiaries with the information necessary to protect their interests. For model account forms, together with practical advice on how to prepare reports, see Robert Whitman, *Fiduciary Accounting Guide* (2d ed. 1998).

UNIF. TRUST CODE § 813 cmt. (amended 2005), 7C U.L.A. 303, 304 (Supp. 2005).

UTC's effective date,<sup>309</sup> unless, of course, they are waived in the instrument.

The Virginia UTC also provides that a beneficiary may waive the right to a trustee's report or to any other information otherwise required to be furnished under Virginia Code section 55-548.13.<sup>310</sup> Moreover, as noted above, the reporting and disclosure rules of this section are applicable unless the instrument provides to the contrary.<sup>311</sup>

## VII. CONCLUSION

For several reasons, we view the Virginia UTC as a major advancement in Virginia's law of trusts. First, the Virginia UTC addresses the topic comprehensively, providing a compilation that makes the law more conveniently accessible; in so doing, the Virginia UTC serves the interests of judges, lawyers, and parties to trust relationships. Second, the Virginia UTC provides guidance and answers in many areas of law and procedure in which current statutory and case law is thin and inadequate; in so doing, the Virginia UTC facilitates advice and decision making with greater confidence and reduces the need for litigation. Regarding the latter point, the Virginia UTC provides needed mechanisms to facilitate trust administration without judicial involvement, thereby promoting efficiency and economy for trustees, beneficiaries, and third parties and relieving strains on the judicial system. Third, the Virginia UTC replaces superceded default rules and adds others to better deal with today's practical needs in trust administration. Fourth, the Virginia UTC serves as a useful tool for greater uniformity of laws in our increasingly mobile society. Finally, and of no less importance, the Virginia UTC serves as a useful mechanism and repository to accommodate further statutory development of the law of trusts, as experience may from time to time prove expedient.

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309. See VA. CODE ANN. § 55-548.13(E) (Cum. Supp. 2005). Including the last stated rule in the prospective-only category is a variation from the original UTC. See UNIF. TRUST CODE § 813(e) (amended 2005), 7C U.L.A. 303 (Supp. 2005).

310. See VA. CODE ANN. § 55-548.13(D) (Cum. Supp. 2005). Subsection D also provides that a beneficiary "may withdraw a waiver [of rights under Virginia Code section 55-548.13] previously given." *Id.*

311. See *id.* § 55-541.05 (Cum. Supp. 2005).