

# IN THE CODE WE TRUST— SOME TRUST LAW FOR IOWA AT LAST\*

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The author has functioned for many years as Advisor and Resource Person to the Probate and Trust Law Section, and its predecessor, the Committee on Real Property, Probate and Trust Law, of The Iowa State Bar Association. This position is unofficial and has been done on invitation from the Chairs of the Section. In this capacity, the author was involved in the drafting of the Iowa Trust Code.

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## I. INTRODUCTION

The Iowa Probate Code was thoroughly revised in 1963.<sup>1</sup> However, the revision of the Probate Code did not attempt to systematically codify the rules for trusts.<sup>2</sup> Of course, the Probate Code covered testamentary trusts—to the extent that the Probate Code provided rules for wills which contained trusts.<sup>3</sup> Some statutes applicable to trusts were enacted over the years,<sup>4</sup> but no systematic effort was made to codify the law of trusts.<sup>5</sup> This changed thirty-six years later.

In the 1999 session, the legislature passed, and the Governor signed, legislation enacting an Iowa Trust Code based on a proposal developed by the Probate and Trust Law Section of The Iowa State Bar Association.<sup>6</sup> While the Iowa Trust Code does not attempt to legislate every aspect of trust law,<sup>7</sup> it does go much further than the 1963 legislation.

This Article attempts to explain and analyze the provisions of the new Iowa Trust Code. The analysis proceeds in accordance with the section order of the Iowa Trust Code except for the definitions section.<sup>8</sup> In discussing the definitions section, certain definitions are discussed at the beginning, while others are covered in conjunction with analysis of the sections applying the definition. Some sections

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1. IOWA PROBATE CODE, ch. 326, 1963 Iowa Acts 417; *see* Willard L. Boyd, *Forward to Symposium on the New Iowa Probate Code*, 49 IOWA L. REV. 633, 633 (1964) (discussing the 1963 Iowa Probate Code).

2. *See generally* Matthew J. Heartney, Jr., *Trusts Under the Iowa Probate Code*, 49 IOWA L. REV. 693, 695 (1964) ("The probate committee made much less of an effort to codify existing trust case law and practice than it did for estates of decedents").

3. For example, for a testamentary trust to be valid, the will creating the trust must be valid. The Probate Code does provide rules governing the validity of wills. *See, e.g.*, IOWA CODE § 633.279 (2001) (stating the formal execution requirements for a valid will).

4. *See, e.g.*, *id.* § 633.10 (jurisdiction over trusts); *id.* §§ 633.63-.72 (qualification, appointment, substitution and removal of fiduciaries—"fiduciary" includes trustees under subsection 633.3(17)); *id.* §§ 633.76-.89 (powers of fiduciaries); *id.* §§ 633.124-.125 (investments, nominees); *id.* §§ 633.126-.129 (common trust funds); *id.* §§ 633.155-.162 (liability of fiduciaries); *id.* §§ 633.168-.187 (oath and bond of fiduciaries); *id.* §§ 633.200-.204 (fees of fiduciaries and attorneys); *id.* § 633.303 (charitable trusts); *id.* §§ 633.535-.537 (felonious death); *id.* §§ 633.699-.703A (trust powers, modification or termination of uneconomical trusts, reports of trustees, creation of separate trusts); *id.* § 633.704 (disclaimers); *id.* §§ 633.707-.711 (medical assistance trusts); *id.* §§ 634.1-.6 (private foundations and charitable grants); *id.* § 634.7 (public grants by private foundations or trusts); *id.* §§ 636.1-.61 (surety bonds, investment of funds, estate and trust funds, federal securities, voluntary agreements, trusts not in probate court).

5. Heartney, *supra* note 2, at 695.

6. Iowa H. File 663, 78th Gen. Assemb., 1st Sess. (May 14, 1999), *amended by* Iowa H. File 2518, 78th Gen. Assemb., 2d Sess. (Apr. 26, 2000) (codified at IOWA CODE §§ 633.1101-.6307 (2001)).

7. *See infra* Part IV.C.

8. *See* IOWA CODE § 633.1102.

are not discussed, or are only briefly mentioned, either because the meaning is self-evident or because they are declaratory of existing law.<sup>9</sup> For the convenience of the readers, the Trust Code is reprinted in full as an Appendix to this Article. Before moving to a discussion of the substantive sections of the Trust Code, the development of the Code is briefly described.<sup>10</sup>

## II. HISTORY OF THE IOWA TRUST CODE<sup>11</sup>

In 1994, Barbara Barrett, then of the Dickinson, Mackaman, Tyler & Hagen, P.C. law firm,<sup>12</sup> became Chair of the Probate and Trust Law Section of The Iowa State Bar Association. Barbara decided the Section should take on the task of determining whether the Probate Code needed substantial revision. After discussion with the Section Council,<sup>13</sup> the Section determined such an inquiry should be pursued.<sup>14</sup> At the request of Ms. Barrett, the author developed a list of topics for examination.<sup>15</sup> One of these topics was the desirability of drafting an Iowa Trust Code. A Trust Code Committee was formed, chaired by J. Edward Power of the Bradshaw, Fowler, Procter & Fairgrave P.C. law firm.<sup>16</sup>

The suggestion of formulating a trust code was certainly not original with the author. In the early 1990s, a number of states were examining the same problem. For many years, New York had a statutory trust code, but it was combined with statutory law on decedent's estates, estate administration, wills, and procedure in the New York Codes handling these matters.<sup>17</sup> Texas created a Trust Code in

9. *See, e.g., id.* §§ 633.1101, .6104.

10. During the period of the development of the Trust Code, the author served as advisor and resource person to the Probate and Trust Law Section of The Iowa State Bar Association. *See supra* note \*\*. In that position, while he did not attend all meetings of the Trust Code Committee, he was involved in providing the Committee with materials and did attend some meetings of the Committee.

11. Citations to letters, minutes of the meetings of the Trust Code Committee and the Probate and Trust Law Section of The Iowa State Bar Association, and other materials are provided where possible. Other portions of this section are based on the recollection of the author and telephone conversations with others involved. *See also supra* note 10.

12. Ms. Barrett is now a shareholder of Bradley & Riley, P.C.

13. The Iowa State Bar Association Section on Probate and Trust Law, Minutes of the Meeting of July 15, 1994 (on file with the author).

14. The Iowa State Bar Association Section on Probate and Trust Law, Minutes of the Meeting of Sept. 2, 1994 (on file with the author).

15. *See id.* The listed topics were the Trust Code, creditors rights, uniform rules for non-probate transfers, spousal rights, intestacy rights of spouse and others, general rules of construction, apportionment of estate taxes, procedural matters, and execution, revocation and revival of wills. *Id.*

16. *Id.*

17. The law is contained in two codes: New York Estates, Powers and Trusts Law (EPTL) and New York Surrogate's Court Procedure Act (SCPA). New York has a separate court, called the Surrogate's Court, to handle probate and some trust matters, as well as guardianships and

1983.<sup>18</sup> California followed in 1986 and then thoroughly revised its Trust Code in 1990.<sup>19</sup> Other states were enacting trust codes, some of which were quite extensive<sup>20</sup> while others were less complete.<sup>21</sup> The National Conference of Commissioners on Uniform State Laws (NCCUSL) formed a committee to draft a Uniform Trust Act.<sup>22</sup> Other states also considered whether to draft Trust Codes.<sup>23</sup> Clearly, the desirability of enacting a trust code was a question worth examining.

I collected the trust codes of all states having complete codes,<sup>24</sup> the indices of those states having partial codes,<sup>25</sup> and several uniform acts,<sup>26</sup> and made them

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conservatorships, rather than handling such matters as a division of a court of general jurisdiction. While certain divisions of the two New York Codes cover trusts, the trust sections are not totally separate from those provisions dealing with wills, intestacy, and estate administration. *See* N.Y. EST. POWERS & TRUSTS LAW §§ 7-1.1 to - 5.7 (McKinney 1994); N.Y. SURR. CT. PROC. ACT LAW §§ 1501-08 (McKinney 1994). Trust law is often combined with other law or covered in general sections applicable to all fiduciaries—as was the case in Iowa prior to the enactment of the Trust Code. *See* N.Y. EST. POWERS & TRUSTS LAW §§ 7-1.1 to -5.7 (McKinney 1994); N.Y. SURR. CT. PROC. ACT LAW §§ 1501-08 (McKinney 1994).

18. Act of Jan. 1, 1984, ch. 567, act 2, § 2, 1983 Tex. Gen. Laws 3332.

19. Act of July 1, 1991, ch. 79, § 14, 1990 Cal. Legis. Serv. 79; *see also* CAL. PROB. CODE div. 9 cmt. (West 1991) (citing Recommendations Proposing the Trust Law, 18 Cal. L. Revision Comm'n Reports 501 (1986)). The revised California Trust Code is a separate part of the California Probate Code.

20. *See, e.g.*, MONT. CODE ANN. §§ 72-33-101 to -504 (1999). The Montana Code was based on the California Probate Code. MONT. CODE ANN. ANNOTATIONS §§ 72-33-101 to -504 (2000).

21. *See generally, e.g.*, FLA. STAT. ANN. §§ 737.101-627 (West 1995 & Supp. 2001) (discussing trust administration, duties, liabilities and powers of trustees, charitable trusts, and rules of construction); 760 ILL. COMP. STAT. ANN. §§ 5/3 - 5/20 (West 1992 & Supp. 2000) (discussing trustee powers and investments and incorporating certain uniform acts); MINN. STAT. ANN. § 501B (West 1990 & Supp. 2001) (discussing general provisions on trusts, court proceedings, charitable trusts, sales and leases of property, and incorporating uniform acts).

22. NCCUSL approved the Uniform Trust Code on August 3, 2000. Press Release, Uniform Law Commissioners, *New Uniform Trust Code Completed* <<http://www.nccusl.org/pressreleases/pr8-3-00-1.htm>> (accessed Jan. 3, 2001). Professor David English, then of the University of South Dakota Law School and now William Franklin Fratcher Professor of Law at the University of Missouri—Columbia School of Law, served as Reporter.

23. Georgia is one such state. *See infra* note 25.

24. *See supra* notes 17-20; *see also* Letter from Martin D. Begleiter, Professor of Law, Drake University Law School, to J. Edward Power, Attorney, Bradshaw, Fowler, Proctor & Fairgrave, P.C. (Feb. 21, 1995) (on file with the author) [hereinafter Letter, Begleiter to Power (Feb. 21, 1995)].

25. *See supra* note 21. During the writing of the Iowa Trust Code, Georgia enacted a Trust Code, which I also furnished to the Committee. Letter from Martin D. Begleiter, Professor of Law, Drake University Law School, to J. Edward Power, Attorney, Bradshaw, Fowler, Proctor & Fairgrave, P.C. (May 5, 1995) (on file with the author); *see also* GA. CODE ANN. §§ 108-101 to -1617 (Harrison Supp. 1993). The Committee at that time had some interest in how to treat trustee powers and duties. *Id.* The group drafting the Georgia statute had considered, but decided not to include, an extensive list of these powers and duties. *Compare* Letter from Anne S. Emanuel, Professor of Law,

available to the Committee.<sup>27</sup> The Chair sent the materials to the Committee, indicating the Committee's first step would be to develop an Iowa index.<sup>28</sup> Following completion of the Index, the Committee was to prioritize its work by subject and make assignments for initial drafting.<sup>29</sup> The Committee met on April 21, 1995.<sup>30</sup> Todd Buchanan, based on the indices I provided for eight states, prepared for the meeting a summary of topics covered by the trust codes.<sup>31</sup> In addition, drafting assignments were made and a schedule for the project was agreed on.<sup>32</sup>

Due to other commitments, Ed Power was forced to resign as Chair of the Iowa Trust Code Committee in 1996. Todd Buchanan of Buchanan, Bibler, Buchanan & Gabor in Algona assumed the responsibility of drafting the Iowa Trust

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Georgia State Law School, to Martin D. Begleiter, Professor of Law, Drake University Law School (Jan. 25, 1996) (containing proposed amendments to the Georgia Trust Code duties and powers section) (on file with the author), *with* Memo from Jeffrey N. Pennell, Richard H. Clark Professor of Law, Emory University Law School, to Trust Code Revision Committee (Anne S. Emanuel, Professor of Law, Georgia State Law School) (Nov. 27, 1995) (containing duties and powers provisions adopted by the Georgia Trust Code Committee) (on file with the author). Due to the good offices of Professor Anne S. Emanuel of Georgia State Law School, the Reporter for the Georgia Trust Code project, and Professor Jeffrey N. Pennell, Richard H. Clark Professor of Law at Emory University Law School, a member of the Committee and the primary drafter of the proposed, but not enacted, duties and powers section and an expert in this area, I was able to secure these materials and forward them to the Committee quite quickly. I wish to express my appreciation to Professors Emanuel and Pennell for their assistance in this regard.

26. *See* UNIF. TRUST ACT OF 1937, 7B U.L.A. 763 (1985); UNIF. SUPERVISION OF TRUSTEES FOR CHARITABLE PURPOSES ACT, 7B U.L.A. 730 (1985); UNIF. PRUDENT INVESTORS ACT, 7B U.L.A. 59 (Supp. 2000).

27. Letter from Martin D. Begleiter, Professor of Law, Drake University Law School, to Barbara G. Barrett, Attorney, Dickinson, Mackaman, Tyler & Hagen, P.C. (July 18, 1994) (enclosing a copy of the Uniform Trusts Act from 1937) (on file with the author); Letter, Begleiter to Power (Feb. 21, 1995), *supra* note 24 (enclosing table of contents of the trust codes of California, Texas, Minnesota, New York, Illinois, Florida, and Nevada) (on file with the author); Letter from Martin D. Begleiter, Professor of Law, Drake University Law School, to J. Edward Power, Attorney, Bradshaw, Fowler, Proctor & Fairgrave, P.C. (Mar. 3, 1995) (enclosing table of contents of Montana Trust Code) (on file with the author); Letter from Martin D. Begleiter, Professor of Law, Drake University Law School, to J. Edward Power, Attorney, Bradshaw, Fowler, Proctor & Fairgrave, P.C. (Apr. 6, 1995) (including Official Comments of the Montana Trust Code) (on file with the author); Letter from Martin D. Begleiter, Professor of Law, Drake University Law School, to J. Edward Power, Attorney, Bradshaw, Fowler, Proctor & Fairgrave, P.C. (May 30, 1995) (enclosing complete trust codes with annotations of Nevada, Florida, Texas, and California) (on file with the author).

28. Letter from J. Edward Power, Attorney, Bradshaw, Fowler, Proctor & Fairgrave, P.C., to Iowa Trust Code Committee (Mar. 29, 1995) (on file with the author).

29. *Id.*

30. Iowa Trust Code Committee, Minutes of the Meeting of Apr. 21, 1995 (on file with the author).

31. *See id.*

32. *Id.*

Code. The actual drafting of the Trust Code began when Todd became Chair of the Committee. In what can only be described as a prodigious and remarkable feat, working from a preliminary draft of the Uniform Trust Act<sup>33</sup> and the codes of the other states, Todd in approximately five months produced a first draft of the Iowa Trust Code and sent it to some Section members for review.<sup>34</sup> This draft was presented for discussion only at a meeting of the Probate and Trust Law Section on November 1, 1996.<sup>35</sup> Section members provided extensive comments, both orally at Section meetings and in writing.<sup>36</sup>

In the meantime, as previously mentioned, NCCUSL in 1993 had formed a study committee to investigate the potential for drafting a Uniform Trust Act (UTA).<sup>37</sup> After deciding to undertake the project, a drafting committee was formed in 1994<sup>38</sup> with Professor David M. English of the University of South Dakota

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33. UNIF. TRUST ACT (1996 Preliminary Draft) <<http://www.law.upenn.edu/bll/ulc/uta/calprob2.htm>> (accessed Jan. 18, 2001) [hereinafter U.T.A.]. All drafts are accessible through the Uniform Law Commissioners homepage. Uniform Law Commissioners <[http://www.law.upenn.edu/bll/ulc/ulc\\_frame.htm](http://www.law.upenn.edu/bll/ulc/ulc_frame.htm)> (accessed July 18, 2000). In March of 2000, the commissioners changed the name of the Uniform Trust Act to the Uniform Trust Code. *See* UNIF. TRUST CODE (Interim Draft Mar. 10, 2000) <<http://www.law.upenn.edu/bll/ulc/uta/trst300i.htm>> (accessed Jan. 4, 2001); *see also* Memorandum from David English, Reporter, to the Commissioners, Advisors, Observers, Drafting Committee on Uniform Trust Act (Oct. 21, 1999) (noting proposed name change to Uniform Trust Code <<http://www.law.upenn.edu/bll/ulc/uta/trst1018.htm>> (accessed Jan. 4, 2001)). The drafters submitted for approval the 2000 Annual Meeting Draft of the Uniform Trust Code. UNIF. TRUST CODE (2000 Annual Meeting Draft) <<http://www.law.upenn.edu/bll/ulc/uta/trst0612.htm>> (accessed Jan. 4, 2001) [hereinafter U.T.C. (2000 Annual Meeting Draft)]. In August of 2000, NCCUSL approved the Uniform Trust Code. UNIF. TRUST CODE (2000 Approved) [hereinafter U.T.C. (2000 Approved)]. The approved 2000 version does not contain comments; therefore, when the comments are helpful in elucidating the UTC provisions, the 2000 Annual Meeting Draft will be cited.

34. Letter from Todd R. Buchanan, Attorney, Buchanan, Bibler, Buchanan, Handsaker & Gabor, to Martin D. Begleiter, Professor of Law, Drake University Law School (Oct. 18, 1996) (on file with the author) [hereinafter Letter, Buchanan to Begleiter (Oct. 18, 1996)]. Todd Buchanan wishes to thank the following persons who, in addition to the author, reviewed and commented on the early drafts of the Iowa Trust Code: Barbara G. Barrett, Attorney; Steven W. Hendricks, Attorney; Robert C. Reimer, Attorney; Marlin M. Volz, Jr., Attorney; and Honorable Ruth B. Klotz, Associate Probate Judge, Polk County, Iowa. Letter from Todd R. Buchanan, Attorney, Buchanan, Bibler, Buchanan & Gabor, to Martin D. Begleiter, Professor of Law, Drake University Law School (Jan. 23, 2001) (on file with the author) [hereinafter Letter, Buchanan to Begleiter (Jan. 23, 2001)].

35. Letter, Buchanan to Begleiter (Oct. 18, 1996).

36. *See generally* The Iowa State Bar Association Section on Probate and Trust Law, Minutes of the Meeting of Nov. 1, 1996 (on file with the author).

37. E-mail from David English, William Franklin Fratcher Professor of Law, University of Missouri-Columbia School of Law, to Martin D. Begleiter, Professor of Law, Drake University Law School (July 17, 2000) (on file with the author).

38. *Id.*

School of Law as the Reporter.<sup>39</sup> In June of 1997, Professor English mailed the author a copy of the most recent draft of the Uniform Trust Act.<sup>40</sup> I immediately sent the draft to Todd Buchanan.<sup>41</sup>

Todd immediately began to review the draft of the Iowa Trust Code to determine if provisions in the draft of the Uniform Trust Act would improve the Iowa Trust Code. This review resulted in new drafts of the Iowa Trust Code in August, 1997, October, 1997, and November, 1997. The Iowa Trust Code was approved by the Probate and Trust Law Section at its November, 1997 meeting. The Iowa Trust Code was submitted as part of The Iowa State Bar Association's affirmative legislative package to the 1998 session of the Iowa Legislature. However, due to the length of the Trust Code, it could not be prepared in bill form in time to be considered in that session. The Trust Code was reaffirmed by the Section at its August, 1998 meeting, and submitted to the 1998 session of the legislature. The legislature approved the Trust Code, effective July 1, 2000.<sup>42</sup>

The legislature, when approving the Trust Code, made it effective on July 1, 2000, rather than the normal date of July 1, 1999.<sup>43</sup> Presumably, this was to provide lawyers with time to study and absorb its extensive new provisions. Iowa

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39. *Id.* Professor English was appointed as Reporter in 1994 based on his success as Reporter of the Uniform Health Care Decisions Act. *Id.* In 1995, Professor English became a professor of law at Santa Clara University School of Law and in 1999 he was appointed William Franklin Fratcher Professor of Law at the University of Missouri-Columbia School of Law. The drafting committee first met in the spring of 1995. *Id.*

40. Letter from David M. English, Professor of Law, Santa Clara University School of Law, to Martin D. Begleiter, Professor of Law, Drake University Law School (June 13, 1997) (on file with the author). Professor English has continued to send the author drafts of the Uniform Trust Act and memoranda concerning questions before the Drafting Committee for comments. I am greatly indebted to Professor English for making this material available to me and to the Iowa Trust Code Committee.

41. Letter from Martin D. Begleiter, Professor of Law, Drake University Law School, to Todd R. Buchanan, Attorney, Buchanan, Bibler, Buchanan, Handsaker & Gabor (June 16, 1997) (on file with the author).

42. Iowa H. File 663, 78th Gen. Assemb., 1st Sess. (May 14, 1999). It should be noted that, in reviewing the Code, certain minor but necessary changes to clarify the meaning or wording of some sections became apparent. These were approved by the Probate and Trust Law Section at its meeting on November 5, 1999. The Iowa State Bar Association Section on Probate and Trust Law, Minutes of the Meeting of Nov. 5, 1999 (on file with the author) [hereinafter Meeting Minutes, Nov. 5, 1999]. Iowa House File 2518 of April 26, 2000, which the legislature passed and the Governor signed, incorporated most of these changes. See Iowa H. File 2518, 78th Gen. Assemb., 2d Sess. (Apr. 26, 2000). These changes are the subject of further discussion in this Article where the relevant sections are presented. Members of the Probate and Trust Law Section are still discussing certain questions of a more substantive nature. These will be mentioned in this Article when the relevant sections are discussed. It should be noted that in a code this lengthy, covering such a variety of topics, some fine-tuning is almost always necessary after the statute is enacted.

43. See Iowa H. File 633, 78th Gen. Assemb., 1st Sess. (May 14, 1999).

lawyers have shown great interest in the Trust Code. Once again, Todd Buchanan took the lead. Todd has been tireless in giving speeches and seminars all around Iowa on the Trust Code, in forums both large and small, explaining the Trust Code and its provisions. Todd is owed a great debt for his efforts in developing and explaining the Iowa Trust Code.<sup>44</sup>

### III. DEFINITIONS

#### A. *Short Title: Section 633.1101*

There is nothing remarkable about section 633.1101, but it does provide authority for citing the Code as the "Iowa Trust Code" or "Trust Code."<sup>45</sup> This will make citation to the Trust Code easier both in future legislation and in informal writing.

#### B. *Beneficiary: Section 633.1102(1)*

The Code defines beneficiary broadly and limits the definition when necessary in other sections.<sup>46</sup> Any person having a present or future interest in the

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44. One of the most prestigious publications in the estate planning field recognized the Iowa Trust Code as "comprehensive" as well as "an excellent point of departure" for states considering a trust code. PRACTICAL DRAFTING 5897 (2000).

45. IOWA CODE § 633.1101 (2001).

46. *Id.* § 633.1102(1) (for the convenience of the reader, subsections in the Iowa Code will be indicated by parentheses, even though the Code does not contain the parentheses). The UTC, on the other hand, uses the term "qualified beneficiary," meaning that on the relevant date, such person is a person entitled to receive, or is a permissible distributee of, principal or income, and would be such a person if the interests of the current distributees terminated on the relevant date or if the trust terminated on the relevant date. U.T.C. § 103(14) (2000 Approved). This definition is useful only if agreement is possible that a limited group of beneficiaries are entitled to certain rights given in the Code—for example, to receive notices in certain situations, to receive accountings, to appoint a successor trustee, to petition the court, etc. If the groups entitled to these rights are different for each right, such a definition serves no purpose. Some commentators advocated such a definition. *See, e.g.*, Letter from Robert C. Reimer, Attorney, Reimer, Lohman, Reitz & Niblock, to Todd R. Buchanan, Attorney, Buchanan, Bibler, Buchanan & Gabor, (Sept. 13, 1999) (suggesting changes in the use of the definition within the Iowa Code) (on file with the author) [hereinafter Letter, Reimer to Buchanan (Sept. 13, 1999)]; Letter from Marlin M. Volz, Jr., Senior Vice President, Norwest Bank Iowa, to Todd R. Buchanan, Attorney, Buchanan, Bibler, Buchanan & Gabor (Nov. 2, 1999) (suggesting changes in the use of the definition within the Iowa Code) (on file with the author) [hereinafter Letter, Volz to Buchanan (Nov. 2, 1999)]. A group of beneficiaries comprised of those currently entitled to receive income or principal, and those who would receive principal or income if the trust terminated, is used in sections 633.2201-2205 (modification and termination of trusts) whereas some other limited group of beneficiaries is used in sections 633.4105 (filing vacancy, adult beneficiaries and representatives of minors with certain limitations); 633.4106 (resignation of trustee, same group as section 633.4105); 633.4111 (increase in fee, same group as in section 633.4213, plus those who

trust, whether vested or contingent, is a beneficiary.<sup>47</sup> The definition includes the owner of an interest by transfer, including by assignment.<sup>48</sup> The definition also includes takers in default of appointment, under both general and limited powers of appointment.<sup>49</sup>

### C. Competency: Section 633.1102(3)

This section changes, at least to some extent, prior law. A person had capacity to create a revocable trust if she had the capacity to convey the property.<sup>50</sup> However, in an attempt to recognize by statute the nature of the revocable trust as a will substitute,<sup>51</sup> the Trust Code requires only the capacity to execute a will in order to have the capacity to create a revocable trust.<sup>52</sup> This definition is consistent with

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received last account and those who request notice of increased fee) and 633.4213 (accounting, same group as section 633.4105, plus beneficiaries requesting accounting). IOWA CODE §§ 633.2201-.2205, .4105-.4106, .4111, .4213.

The Probate and Trust Law Section might wish to consider whether the same group of beneficiaries should possess the rights or receive the notices under all these sections. If so, perhaps a new definition should be proposed, such as qualified beneficiaries, and the new term substituted in the sections listed above in this footnote. If no agreement is reached, such a definition would appear not to be useful.

47. IOWA CODE § 633.1102(1).

48. *Id.*

49. *See id.* § 633.1102. However, such persons may not be necessary parties to all or indeed any trust proceedings. *See id.* Under the Trust Code, the donee (holder) of a presently exercisable general power of appointment may represent and bind persons subject to the power, which would include takers in default of appointment. *Id.* § 633.6302(1). Even though takers in default of appointment under limited (special) powers are not so treated, they may be represented by the power holder if there is no conflict of interest, if the power is a general testamentary power under section 633.6302(2), or, if there is no conflict of interest, by the trustee, personal representative, conservator, or the holder of a similar interest. *Id.* §§ 633.6302(2), .6303-.6304; *see RESTATEMENT OF PROPERTY §§ 181(c) & cmt. a, 184(dd) (1993).* In *Trust of Willcockson*, the decedent created a marital trust, giving the trustee the power to pay income and corpus to his wife for life and giving his wife a general testamentary power of appointment. *Trust of Willcockson*, 368 N.W.2d 198, 200 (Iowa Ct. App. 1988). In default of appointment, the trust was payable to the residuary trust under his will. *Id.* Decedent's daughter was a remainderman of the residuary trust. *Id.* The daughter was held not to have a sufficient interest in the marital trust to have standing to challenge its termination. *Id.* at 201. The court based its decision on its holding that the meaning of the term "interested party" in the Probate Code depends on how contingent the interest of the challenging party. *Id.* at 202.

50. GEORGE G. BOGERT & GEORGE T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 44, at 447 (2d rev. ed. 1984) [hereinafter BOGERT & BOGERT].

51. See *infra* Part VIII on revocable trusts for further instances of this treatment. It was a conscious objective of the drafter of the Trust Code to recognize revocable trusts as will substitutes. Telephone Interview with Todd R. Buchanan, Attorney, Buchanan, Bibler, Buchanan & Gabor (Jan. 5, 2000).

52. IOWA CODE § 633.1102(3)(a). The capacity to execute a will, though defined slightly differently by various courts, requires that the testator be able to understand the natural objects of his

the thinking reflected in the new Restatement (Third) of Trusts.<sup>53</sup> Capacity to create an irrevocable trust—defined as the capacity to enter into a contract—is also consistent with modern thinking,<sup>54</sup> as is the standard for other circumstances not clearly related to a revocable or irrevocable transfer.<sup>55</sup> The key change here is the change in the rule for revocable trusts from the higher gift or contract standard to the lower will standard.<sup>56</sup>

#### **D. Guardian: Section 633.1102(7)**

The first important point is that the definition of guardian excludes a guardian ad litem.<sup>57</sup> This is significant because of the different nature of the functions of the two offices.<sup>58</sup> Also significant is the unusual provision that the custodial parent of a minor is deemed to be the minor's guardian if a court has not appointed a guardian.<sup>59</sup> This allows the parent to represent the minor in trust proceedings without going through the expense of a proceeding to be appointed as guardian.

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or her bounty, and the nature and extent of his or her property, and to be able to make decisions about how he or she wishes to dispose of the property. RESTATEMENT (THIRD) OF TRUSTS § 11 cmt. a (Tentative Draft No. 1, 1996); *see also* Scanlan v. Scanlan, 67 N.W.2d 5, 9 (Iowa 1954).

53. *See* RESTATEMENT (THIRD) OF TRUSTS § 11(2) (Tentative Draft No. 1, 1996). For example, under traditional law, a person under a disability may be unable to enter into a contract or make a gift, but may be able to make a will. *Id.* § 11 cmt. c. It is stated the capacity to make a gift is a slightly higher standard than that for a will. *Id.* Iowa law is the same. *See, e.g.*, Costello v. Costello, 186 N.W.2d 651, 654 (Iowa 1971); Estate of Baessler, 561 N.W.2d 88, 92 (Iowa Ct. App. 1992).

54. Elsewhere it is stated that the standard of capacity for making a gift is similar to the standard of capacity for creating a contract. RESTATEMENT (THIRD) OF PROPERTY § 8.1 cmt. d (Preliminary Draft No. 7, 1999).

55. This standard—"the ability to make rational decisions regarding one's financial affairs," as provided in Iowa Code section 633.1102(2)(c)—incorporates the higher standard for gifts which requires that the donor have an ability to "understand the effect that the gift may have on the future financial security of the donor and of those who may be dependent on the donor." RESTATEMENT (THIRD) OF PROPERTY § 8.1 cmt. d. (Preliminary Draft No. 7, 1999); *see also* RESTATEMENT (THIRD) OF TRUSTS § 11 cmt. c. (Tentative Draft No. 1, 1996).

56. *See* RESTATEMENT (THIRD) OF TRUSTS § 11 cmt. c (Tentative Draft No. 1, 1996); RESTATEMENT (THIRD) OF PROPERTY § 8.1 cmts. c-d (Preliminary Draft No. 7, 1999).

57. IOWA CODE § 633.1102(7).

58. Briefly, a guardian is a fiduciary, court appointed, to be responsible for a minor or person under a disability. *See id.* A guardian ad litem is a person, almost always an attorney, appointed to represent a minor, a person under a disability, or an unborn with respect to a specific litigation, in order to confer jurisdiction on the court and to ensure the minor's interests are presented. *See* Martin D. Begleiter, *The Guardian Ad Litem in Estate Proceedings*, 20 WILLAMETTE L. REV. 643, 647 (1984) [hereinafter Begleiter, *Guardian Ad Litem*].

59. IOWA CODE § 633.1102(7); *see also id.* § 633.6303(4).

**E. Interested Person: Section 633.1102(9)**

A broad definition of interested person is given.<sup>60</sup> Discretionary recipients of income or principal, and persons who would receive corpus if the trust terminated at the relevant time, are included, as are acting trustees and fiduciaries representing interested persons.<sup>61</sup> The statutory provision permitting the meaning of the term to vary, depending on the purpose of and matters involved in the proceeding, gives the court discretion.<sup>62</sup> The definition is used to ensure the proper persons are parties so all positions are presented, and at the same time, to prevent vexatious litigation by those whose interests are not relevant to the matter involved.<sup>63</sup>

**F. Person: Section 633.1102(10)**

Legal and commercial entities are included in the definition of person.<sup>64</sup>

**G. Property: Section 633.1102(12)**

The statute provides the broadest possible definition of property, including all interests, legal or equitable, tangible or intangible.<sup>65</sup> Also included are claims, choses in action, and beneficiary designations under insurance policies.<sup>66</sup>

**H. Term or Terms: Section 633.1102(15)**

The statute includes more than simply the words of the trust.<sup>67</sup> It also involves the “manifestation of the settlor’s intent” at the time of the trust’s creation or amendment, including terms inferred from constructional rules.<sup>68</sup> One question not settled by the definition, as originally enacted, is whether extrinsic evidence may be used to determine the terms of a trust.<sup>69</sup> Provisions proven by extrinsic evidence are included as terms under the statutory amendment.<sup>70</sup>

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60. *Id.* § 633.1102(9).

61. *Id.*

62. *See id.*

63. *See id.*

64. *Id.* § 633.1102(10).

65. *Id.* § 633.1102(12).

66. *Id.*

67. *Id.* § 633.1102(15). Although the statute includes terms expressed in writing. *Id.*

68. *Id.*

69. *See id.* § 633.1102(9).

70. Iowa H. File 2518, 78th Gen. Assemb., 2d Sess. (Apr. 26, 2000). The Probate and Trust Law Section proposed this amendment. Meeting Minutes, Nov. 5, 1999, *supra* note 42.

### I. Trust: Section 633.1102(16)

The importance of the definition of trust is what the statute excludes. Several exclusions were made because other laws cover these issues, including Totten trusts,<sup>71</sup> Uniform Transfers to Minors Acts,<sup>72</sup> and common trust funds.<sup>73</sup> Other arrangements were excluded because, although commonly referred to as trusts, they do not serve the same purposes as personal trusts and the rules of the Trust Code would require substantial modification to apply to these arrangements.<sup>74</sup> Additional exclusions include a business trust taxed as a partnership or corporation,<sup>75</sup> an investment trust subject to regulation by the law of any jurisdiction,<sup>76</sup> a voting trust,<sup>77</sup> a security arrangement,<sup>78</sup> a trust created for a legal action or the enforcement of a claim or right,<sup>79</sup> a liquidation trust,<sup>80</sup> an employee benefit trust and trusts for paying debts, dividends, interests, salaries, wages, or profits.<sup>81</sup> In the interest of clarity, subsection k excludes escrows and nominee arrangements.<sup>82</sup>

The last exclusion is for constructive and resulting trusts.<sup>83</sup> This exclusion is unusual, but extremely beneficial.<sup>84</sup> A resulting trust is simply a reversionary

71. IOWA CODE § 633.1102(16)(a).

72. *Id.* § 633.1102(16)(b).

73. *Id.* § 633.1102(16)(e).

74. See *id.* § 633.1102(16); see also RESTATEMENT (THIRD) OF TRUSTS § 5 cmt. 1 (Tentative Draft No. 1, 1996).

75. IOWA CODE § 633.1102(16)(c). The business trust is also excluded from coverage under the Restatement. RESTATEMENT (THIRD) OF TRUSTS § 5 cmt. g (Tentative Draft No. 1, 1996).

76. IOWA CODE § 633.1102(16)(d).

77. *Id.* § 633.1102(16)(f).

78. *Id.* § 633.1102(16)(g).

79. *Id.* § 633.1102(16)(h). This is a corporation concept and is also excluded under the Restatement. RESTATEMENT (THIRD) OF TRUSTS § 5 cmt. k (Tentative Draft No. 1, 1996).

80. IOWA CODE § 633.1102(16)(i).

81. *Id.* § 633.1102(16)(j).

82. *Id.* § 633.1102(16)(k). Although not expressly excluded, the Iowa Trust Code presumably excludes trusts which are exclusively governed by another statute. For example, chapter 523A of the Iowa Code governs prepaid funeral contracts and refers to the seller of the contract as a trustee. *Id.* § 523A.3. The statute sets out a detailed scheme governing these contracts. *Id.* In *Cedar Memorial Park Cemetery Ass'n v. Personnel Associates, Inc.*, the Iowa Supreme Court held investment of funds paid under such a contract was prohibited and the funds must be deposited in a bank or trust company. *Cedar Mem'l Park Cemetery Ass'n v. Pers. Assocs., Inc.*, 178 N.W.2d 343, 352 (Iowa 1970). The Iowa Trust Code should not change the result of that case. Such trusts should be excluded from the coverage of the Trust Code either on the ground the more particular statute regulating it prevails over the Trust Code or on the basis the trust is not created for the same purposes as a personal trust and is, therefore, not of the type governed by the Code.

83. IOWA CODE § 633.1102(16)(l).

84. Even the Restatement includes resulting trusts in its coverage. See RESTATEMENT (THIRD) OF TRUSTS §§ 1(c), 7-9 (Tentative Draft No. 1, 1996). However, the Restatement, for the first

interest implied by law, most usually in two situations.<sup>85</sup> The most common resulting trust is the incomplete disposition,<sup>86</sup> in which some of the transferor's interests are not transferred<sup>87</sup> or in which an interest in trust fails, usually due to a rule of law.<sup>88</sup> Since these resulting trusts are simply reversionary interests, they are retained by the grantor and pass to his or her estate.<sup>89</sup> To subject them to the rules of a trust code, which is meant to govern active trusts created by the intent of the grantor, is neither necessary nor wise.<sup>90</sup> Moreover, courts have had a great deal of experience with resulting trusts and handle them quite well. Default rules are not necessary.

A constructive trust is a remedial device used by courts to subject a person holding property to a duty to convey the property to another, because the holder's acquisition or retention is wrongful and unjust enrichment would occur if the holder was permitted to retain the property.<sup>91</sup> Again, the intention of the grantor is not involved in a resulting trust.<sup>92</sup> It is a remedy created by judicial intervention.<sup>93</sup> The Trust Code rules are made for a different purpose and should not apply to constructive trusts. The decision to exclude both resulting trusts and constructive trusts from the Iowa Trust Code both simplifies the Code and excludes from its coverage arrangements having purposes different than the express trust.

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time, excludes constructive trusts. *Id.* § 1 cmt. e. The resulting trust, unlike the express trust, is implied by law. *Id.* § 1 cmt. d. Some rules of express trusts apply to resulting trusts and some do not, and there are some rules applicable to resulting trusts not applicable to express trusts. *Id.*

85. *Id.* §§ 7, 9.

86. *Id.* § 7. The other situation is the rarely encountered purchase money resulting trust. *See id.* § 9.

87. *Id.* § 7 cmt. a. A simple example would be a trust with income to A for life with corpus to A's surviving children. The grantor has not provided for the cases of A not having children or A having children, all of whom predecease him. These interests are said to be held in a resulting trust.

88. *Id.* § 8. The interest in trust fails, usually, although not always, due to a violation of the rule against perpetuities.

89. *See id.* § 7.

90. As stated previously, the rules applicable to resulting trusts are quite different than the rules governing express trusts. *See supra* note 84.

91. RESTATEMENT (THIRD) OF TRUSTS § 1 cmt. e (Tentative Draft No. 1, 1996); *see also* Benson v. Richardson, 537 N.W.2d 748, 760 (Iowa 1995) (holding plaintiffs were entitled to constructive trust remedy due to defendant's fraudulent intent).

92. RESTATEMENT (THIRD) OF TRUSTS § 1 cmt. e.

93. *Id.*

#### IV. GENERAL PROVISIONS

##### A. *Per Stirpes Rule Governs: Section 633.1103*

Section 633.1103 establishes the dominance of the per stirpes rule absent change by the trust instrument.<sup>94</sup> This is consistent with the rule in intestacy<sup>95</sup> and with the presumption regarding distributions of gifts to classes—such as heirs—under wills.<sup>96</sup>

##### B. *Trust Provisions Control: Section 633.1105*

We depart from the Code order briefly to consider section 633.1105.<sup>97</sup> The reason for considering this section first will become apparent when considering section 633.1104.

Section 633.1105 is perhaps the most significant section in the Iowa Trust Code. It provides that the provisions of the trust document—agreement, declaration, or will—take precedence over the provisions of the Code.<sup>98</sup> Stated otherwise, any provision of the Trust Code can be varied or negated by a provision in the governing instrument of the trust. In short, the Trust Code is a series of *default provisions*, to be used when the drafter has not included in the governing instrument language controlling the situation.

Of course, this makes the drafting of the instrument critically important. If the intention of the grantor, or testator, is clearly and completely stated as to the matter at issue, the Trust Code does not apply.<sup>99</sup> The drafters of wills and trust

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94. IOWA CODE § 633.1103 (2001); *see also* SHELDON F. KURTZ, KURTZ ON IOWA ESTATES § 3.8 (3d ed. 1995) (defining “per stirpes” in Iowa intestate law and giving examples).

95. See IOWA CODE § 633.219.

96. The presumption arises from the idea that heirs take under the intestacy statute. *See, e.g.*, Houts v. Jameson, 201 N.W.2d 466, 470 (Iowa 1972) (finding that it is inevitable under the statute then in effect governing intestate succession for heirs to take by per stirpes distribution); *In re Estate of Larson*, 131 N.W.2d 503, 506-07 (Iowa 1964) (stating that heirs are presumed to take under intestacy).

97. IOWA CODE § 633.1105.

98. *Id.*

99. *See* U.T.C. § 104 cmt. (2000 Annual Meeting Draft). If the grantor can alter or negate all the rules of the Code, the concern arises that the grantor can negate basic trust duties and, indeed, elements crucial to the very nature of the trust. One aspect of this problem is discussed in Part IV.C, *infra*, on the retention of the common law of trusts. Despite the common law, however, there was concern that a grantor could negate or severely restrict certain policy rules or mandatory duties of trustees. U.T.C. § 104 cmt. (2000 Annual Meeting Draft). The UTC includes a section stating certain provisions that may not be altered by the trust instrument. U.T.C. § 104 (2000 Approved). These unalterable rules include:

(1) the requirements for creating a trust;

agreements should clearly decide if they wish to change the rule which would be applicable under the Code, and if so, make the change in clear and explicit language in the trust instrument.

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- (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, its terms, and its administration must be for the benefit of its beneficiaries;
- (4) the power of the court to modify or terminate a trust pursuant to Sections 409 through 415;
- (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 Section 702 to require, dispense with, or modify, or terminate a bond;
- (7) the power of the court under Section 708(b) to adjust a trustee's compensation specified in the terms of the trust that is unreasonably low or high;
- (8) the duty to notify the qualified beneficiaries age 25 or older of the existence of the trust; and to notify them of their right to request, and to respond to a beneficiary's request for, trustee reports and information reasonably related to the administration of the trust;
- (9) the effect of an exculpatory term under Section 1008;
- (10) the rights under Sections 1010 through 1013 of a person other than a trustee or beneficiary;
- (11) periods of limitation for bringing a judicial proceeding; [and]
- (12) the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice [; and]
- (13) the subject-matter jurisdiction of the court and venue for commencing a proceeding as provided in Sections 203 and 204].

*Id.* § 104(b).

The inclusion of such a provision was carefully considered in Iowa when drafting the Iowa Trust Code. Letter from Martin D. Begleiter, Professor of Law, Drake University Law School, to Todd R. Buchanan, Attorney, Buchanan, Bibler, Buchanan & Gabor (Sept. 14, 1999) (on file with the author). The problem is that each provision is important to a different person. While much could be said for the UTC's list, many other provisions could easily be candidates. Moreover, arguments could arise over inclusion of some of the items on the UTC's list. The author believes that modifying the right of the beneficiaries to terminate the trust, if no material purpose remains, could reasonably be varied by the trust instrument—especially in light of the dispute over what is material and the liberal rules on virtual representation in the UTC. *See* U.T.C. Art. 3 general cmt. (2000 Annual Meeting Draft). Similarly, an argument may arise over whether the rights of some creditors, particularly under spendthrift clauses, should be a mandatory provision. Faced with these differences, the drafters decided not to include a section on mandatory provisions, leaving the common law and judicial discretion to determine whether an attempt to override the Trust Code provisions by agreement will be allowed. Letter from Martin D. Begleiter, Professor of Law, Drake University Law School, to Todd R. Buchanan, Attorney, Buchanan, Bibler, Buchanan & Gabor (Oct. 7, 1999) (on file with the author) [hereinafter Letter, Begleiter to Buchanan (Oct. 7, 1999)].

### C. Common Law Retained: Section 633.1104

Except to the extent modified by the Trust Code, the common law of trusts is retained.<sup>100</sup> This would, of course, appear obvious because the Trust Code does not attempt to cover every area of trust law nor provide for every situation.<sup>101</sup> However, section 633.1104 has an additional purpose: to limit the modification of the Trust Code potentially made by trust instruments.<sup>102</sup> For example, suppose a grantor in a trust instrument intended to completely insulate the trustee from any duty or responsibility to a court. Or suppose a trust agreement stated a trustee would have no duty to account or provide information about the trust to anybody, or the trustee should do exactly as the trustee wanted and distribute the trust property to anybody the trustee wished. Would these provisions be valid? The answer is no. The common law of trusts would not permit such provisions. As Judge Learned Hand stated:

[W]e agree that no language, however strong, will entirely remove any power held in trust from the reach of a court of equity. After allowance has been made for every possible factor which could rationally enter into a trustee's decision, if it appears that he has utterly disregarded the interests of the beneficiary, the court will intervene. Indeed, were that not true, the power would not be held in trust at all; the language would be no more than a precatory admonition.<sup>103</sup>

Thus, provisions of the governing instrument which are contrary to Iowa Trust Code rules, and which violate common law principles, can be voided by the judiciary under the common law of trusts.<sup>104</sup> Section 633.1104 was intended to act as a check on secrecy, giving too much power to trustees, and negating a trustee's duty.<sup>105</sup> It is the theory of the Trust Code that the common law of trusts will be a more effective check on such practices than a set of mandatory code provisions.<sup>106</sup>

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100. IOWA CODE § 633.1104.

101. See generally *id.* ch. 633. For example, only a few constructional rules are included in the Iowa Trust Code. See, e.g., *id.* §§ 633.2101, .2106-.2107, .4701. Common law will, and is intended to, fill in the gaps.

102. *Id.* § 633.1104; see also *id.* § 633.1105.

103. *Stix v. Comm'r*, 152 F.2d 562, 563 (2d Cir. 1945) (citations omitted); see also *Keating v. Keating*, 165 N.W. 74, 78 (Iowa 1917) (stating that no trust instrument provision can prevent an inquiry in equity to ensure a trustee is acting properly).

104. See *Keating v. Keating*, 165 N.W. at 78.

105. See IOWA CODE § 633.1104.

106. See *id.*

#### D. Applicability: Section 633.1106

The Trust Code applies to all trusts existing on the effective date of the Act.<sup>107</sup> This decision was made despite concerns of reliance on prior law, and was justified on the ground that the new rules of the Iowa Trust Code were beneficial to all trusts. To exempt existing trusts<sup>108</sup> from the rules would deprive beneficiaries of those trusts of the protections of the new Code, the liberal representation provisions contained in the new Code,<sup>109</sup> and the gap-filling provisions of the new Code.<sup>110</sup> The benefits of applying the new Code were deemed to outweigh any possible detriments to applying the Code to existing trusts.

#### E. Governing Law—Recommendation: Section To Be Added

When drafting the Iowa Trust Code, a section on the governing law of a trust was omitted.<sup>111</sup> Enacting a provision dealing with a trust's governing law should rectify this.<sup>112</sup> The Uniform Trust Code provision could be a starting point for consideration.<sup>113</sup>

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107. *Id.* § 633.1106(1). A significant exception is the rule in section 633.3102 that a trust is revocable unless stated to be irrevocable, which is expressly made inapplicable to trusts executed before the effective date of the Act. *Id.* § 633.3102.

108. Of course, some existing trusts are not subject to the Trust Code. *See id.* § 633.1102(16); *see also* discussion *supra* Part III.I.

109. *See, e.g.*, IOWA CODE §§ 633.6303-.6304 (describing who may represent and bind beneficiaries and other persons having interests in the trust).

110. *See, e.g., id.* § 633.4701 (describing survivorship interests in trust construction).

111. *See id.* ch. 633.

112. *See, e.g.*, U.T.C. § 109 (2000 Approved).

113. *See id.* The appropriate place for a governing law provision is in the general provisions part of the Trust Code as a new section 633.1108. UTC section 109 provides:

##### SECTION 109. GOVERNING LAW.

(a) A trust not created by will is validly created if its creation complies with the law of the place where the trust instrument was executed, or the law of the place where, at the time of creation;

- (1) the settlor was domiciled, had a place of abode, or was a national;
- (2) a trustee was domiciled or had a place of business; or
- (3) any trust property was located.

(b) The meaning and effect of the terms of a trust are determined by:

(1) the law of the State designated in the terms unless the designation of that State's law is contrary to a strong public policy of the State having the most significant relationship to the matter at issue; or

(2) in the absence of a controlling designation in the terms of the trust, the law of the State having the most significant relationship to the matter at issue.

*Id.*

## V. CREATION AND VALIDITY OF TRUSTS

### A. *Methods of Creating Trusts: Section 633.2101*

Trusts are normally created by transfer of property during life, by will, or by declaration of the owner that he holds property in trust.<sup>114</sup> These methods are sanctioned by the Iowa Trust Code.<sup>115</sup> The Code also makes explicit two other methods of creating trusts: by exercise of a power of appointment in favor of another as trustee and by a promise enforceable by the trustee to transfer property to the trustee.<sup>116</sup>

### B. *Requirements for Validity: Section 633.2102*<sup>117</sup>

The Trust Code lists four requirements for the creation of a valid trust:

- (1) The settlor was competent;
- (2) The settlor indicated an intention to create a trust;
- (3) The same person is not the sole trustee and sole beneficiary; and
- (4) The trust has definite beneficiaries, or beneficiaries who will be definitely ascertained within the period of the rule against perpetuities.<sup>118</sup>

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The major substantive question about this section is the provision in section (b)(1) negating the grantor's choice of law designation if that law is contrary to a strong public policy of the state having the most significant relationship to the matter. *Id.* § 109(b)(1). The question is whether such a provision gives the judiciary too much opportunity to create public policy. While a discussion of public policy is beyond the scope of this Article, the vagueness of the provision would give the judiciary unbridled opportunity to determine which public policies were "strong" and which were not. See *infra* Part V.D.

114. See RESTatement (THIRD) OF TRUSTS § 10(a)-(c) (Tentative Draft No. 1, 1996).

115. IOWA CODE § 633.2101(1), (2) (2001).

116. *Id.* § 633.2101(3), (4). This section is based on Restatement (Third) of Trusts section 10 (Tentative Draft No. 1, 1996).

117. Some minor modifications to this section could result in improvement. The Probate and Trust Law Section might consider:

1. Adding a new subsection 1(d) stating: "(d) The trustee has duties to perform." This addition eliminates the passive trust.

2. Reword subsection 1(c) in the positive as follows: "(c) The trust has a definite beneficiary or a beneficiary who will definitely be ascertained within the period of the applicable rule against perpetuities or is (1) a charitable trust; or (2) an honorary trust or a trust for pets under section 633.2105."

3. Add a sentence at the end of subsection 2 stating: "If the power is not exercised within a reasonable time, the power fails and the property passes to the persons who would have taken the property had the power not been conferred."

118. IOWA CODE § 633.2102.

The competency requirement has previously been discussed.<sup>119</sup> Furthermore, intent to create a trust is rarely in question.<sup>120</sup> The question of whether section 633.2102(1)(b)—mandating that the same person not be the sole trustee and sole beneficiary—conflicts with code section 636.60A has been raised.<sup>121</sup> The answer is there is no conflict between the two sections. Section 633.2102(1)(b) invalidates the trust only if the same person is the sole trustee and sole beneficiary.<sup>122</sup> If the settlor is a beneficiary during his lifetime, and there is a remainder provision, the settlor is not the sole beneficiary.<sup>123</sup> Alternatively, if there is a provision for discretionary distributions of income or principal to the settlor and others during his lifetime, the settlor is not the sole beneficiary.<sup>124</sup> Because section 636.60A does not invalidate a trust if the trustor is the sole trustee and a beneficiary,<sup>125</sup> invalidation of any properly drafted trust is avoided.

Subsections 1(c) and 2 of section 633.2102 deal with the problem of definiteness of beneficiaries.<sup>126</sup> According to traditional trust rules, a private trust will fail unless the beneficiary or class of beneficiaries are described with clarity at the time when the enjoyment of the beneficiary's interest is to begin.<sup>127</sup> The

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119. See *supra* Part III.C.

120. When the intent is questioned, the trust usually contains precatory language—words such as wish and desire. The tendency of modern courts is to uphold the trust even in such cases. See *RESTATEMENT (THIRD) OF TRUSTS* § 13 reporter's notes, cmt. d (Tentative Draft No. 1, 1996). But see *In re Hellman's Estate*, 266 N.W. 36, 40 (Iowa 1936) (upholding the view that precatory words, themselves, are insufficient to create an express trust); *Davenport v. Sandeman*, 216 N.W. 55, 57 (Iowa 1922) (holding provision of a will did not create a trust but was merely precatory).

121. See Fax from Ruth B. Klotz, Associate Probate Judge, Polk County, to Jack Holveck, Iowa State Representative (Mar. 19, 1999) (on file with the author) [hereinafter Fax, Klotz to Holveck (Mar. 19, 1999)]. "A voluntary trust is not invalid, merged, or terminated if the trustor is also the sole trustee or a cotrustee, and a beneficiary during the trustor's lifetime." *IOWA CODE* § 636.60A.

122. *IOWA CODE* § 633.2102(1)(b).

123. *RESTATEMENT (SECOND) OF TRUSTS* § 127 cmt. b (1959) (stating the remainderman is also a beneficiary).

124. *Id.* § 339 cmt. b. One person has raised the question of whether the interests in a trust, naming the settlor's estate as beneficiary after the settlor-trustee's death, will be merged. Fax from Marlin M. Volz, Senior Vice President, Norwest Banks, to David Millage, Iowa State Representative (Mar. 3, 1999) (on file with the author) [hereinafter Fax, Volz to Millage (Mar. 3, 1999)]. This is a close case. It could be argued the settlor's estate, because it is payable to others—the beneficiaries under settlor's will or intestate distributees—is not the same as the settlor. On the other hand, because the settlor controls who takes his estate by executing or refusing to execute a will, it could be argued the settlor's estate is the same as the settlor. The question does not appear to have been decided in Iowa. Given the desire of courts to avoid invalidity, the first interpretation might well be favored.

125. *IOWA CODE* § 636.60A.

126. *Id.* § 633.2102(1)(c), (2).

127. BOGERT & BOGERT, *supra* note 50, § 161, at 125-26 (2d rev. ed. 1979).

leading case on this subject in American law is *Nichols v. Allen*.<sup>128</sup> In *Nichols*, the testator bequeathed the residue of her estate to her executors "to be distributed to such persons, societies or institutions as they may think most deserving."<sup>129</sup> The court held the trust failed because, not being charitable, it did not define the beneficiaries by name or by class description sufficient for the court to determine who came within the class.<sup>130</sup>

The Trust Code makes two changes in the common law rule. Subsection 1(c) of section 633.2102 upholds the validity of a trust when the beneficiary is not definitely ascertained at the time of the trust's creation, but will be definitely ascertained within the period of the rule against perpetuities.<sup>131</sup> Subsection 2, making a much greater change, allows the beneficiaries designated under a selection power granted by the trust instrument to the trustee or another person, to qualify as definite beneficiaries.<sup>132</sup> This would change the result in *Nichols v. Allen* and in other cases following the rule it states,<sup>133</sup> but is consistent with the views of modern commentators and the new Restatement.<sup>134</sup>

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128. *Nichols v. Allen*, 130 Mass. 211 (1881); *see also* RESTATEMENT (SECOND) OF TRUSTS § 112 (1959).

129. *Nichols v. Allen*, 130 Mass. at 211.

130. *Id.*

131. IOWA CODE § 633.2102(1)(c). This modest extension is in accord with both the Restatement (Second) of Trusts, section 112 and the Restatement (Third) of Trusts, section 44. *See* RESTATEMENT (SECOND) OF TRUSTS § 112 (1959); RESTATEMENT (THIRD) OF TRUSTS § 44 reporter's notes, cmts. a-c (Tentative Draft No. 2, 1999). It should be noted that the Probate and Trust Law Section has recommended repeal of the rule against perpetuities in Iowa. Meeting Minutes, Nov. 5, 1999, *supra* note 42. This proposal has not been accepted by the Board of Governors of The Iowa State Bar Association. If the rule against perpetuities is repealed by the legislature, subsection 1(c) will need to be changed.

132. IOWA CODE § 633.2102(2).

133. *Nichols v. Allen*, 130 Mass. at 211.

134. Actually, the case for upholding such descriptions was made long ago. *See* James Barr Ames, *The Failure of the "Tilden Trust,"* 5 HARV. L. REV. 389, 395-99 (1892). Although a detailed description of the reasons for upholding trusts when the trustee may select beneficiaries from an indefinite class is beyond the scope of this Article, it has been noted that a sophisticated drafter may accomplish the same objective by giving the trustee a power of appointment. Therefore, to deny the validity of such designations becomes merely a trap for the unwary. This rationale is described in more detail in the Restatement (Third) of Trusts, section 46. RESTATEMENT (THIRD) OF TRUSTS § 46 reporter's notes, cmt. b (Tentative Draft No. 2, 1999). The rule in Iowa Code section 633.2101(2) parallels the Restatement. *See id.* § 46.

### C. *Statute of Frauds: Section 633.2103*

This subject is beyond the scope of this Article. The significant point here is that the methods of satisfying the statute of frauds are greatly expanded by the Trust Code in several ways. Section 633.2103 permits satisfaction of the statute of frauds by:

- (1) A writing signed by the trustee or by an agent of the trustee authorized in writing.
- (2) A written instrument conveying the trust property signed by the settlor or by the settlor's agent if authorized in writing.
- (3) A declaration of trust consisting of property requiring a written instrument may not only be signed before or at the time of the declaration but after the declaration (but before transfer of the property by the settlor).
- (4) For trusts created by transfer to another (trust agreements) where the transfer requires a writing, instead of the settlor signing before or concurrently with the transfer, the trustee may sign either before or at the time of the transfer, or after the transfer but before the trustee has transferred the property to a third person.<sup>135</sup>

### D. *Trust Purposes: Section 633.2104*

Section 633.2104 states the traditional rule that a trust may not be created for any purpose that is unlawful or against public policy, and must be administered for the benefit of the beneficiaries.<sup>136</sup> The Trust Code leaves the determination of what is an unlawful purpose or what is against public policy to the determination of the courts.<sup>137</sup>

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135. IOWA CODE § 633.2103. This section is consistent with the Restatement (Third) of Trusts, section 23. RESTATEMENT (THIRD) OF TRUSTS § 23 (Tentative Draft No. 1, 1996). The Iowa Supreme Court approved the execution of a trust agreement subsequent to the transfer of title and creation of the trust. *Vogt v. Miller*, 285 N.W.2d 1, 5 (Iowa 1979).

136. IOWA CODE § 633.2104.

137. The Restatement goes into a great deal more detail on this subject. See RESTATEMENT (THIRD) OF TRUSTS §§ 28-29 (Tentative Draft No. 2, 1999) (providing extensive notes and commentary explaining the meaning and application of Restatement sections 28 and 29 dealing with unlawful purposes and provisions against public policy respectively). Some court decisions in this area are questionable. For example, the courts hold conditions in a testamentary trust to pay the corpus to a person upon divorce from her present husband invalid as a matter of public policy against encouraging divorce. See, e.g., *Fineman v. Cent. Nat'l Bank*, 161 N.E.2d 557, 559-60 (Ohio Prob. Ct. 1959). However, in the event of divorce, a provision worded to indicate an increase in income or

### E. Honorary Trusts: Section 633.2105

In recent years, pet owners have become concerned over the care of their pet after the owner's death.<sup>138</sup> This concern is reflected in statutes permitting trusts with limited duration for pets.<sup>139</sup> Section 633.2105(2) validates trusts for animals, terminating the trust when no living animal is covered by the terms of the trust.<sup>140</sup>

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payment of corpus because of the increased needs for funds by the beneficiary due to the divorce would be valid. *Id.* Further, even a condition encouraging divorce might be upheld if the condition is attached to an outright bequest in a will rather than a trust—for example, all my estate to my daughter if she is not married at the time of my death—because an outright bequest in a will, which is not effective until the testator dies, cannot provide any continuing inducement for a divorce. *See, e.g., In re Estate of Heller*, 159 N.W.2d 82, 84 (Wis. 1968) (upholding a share to the testator's daughter only if she was married to her present husband at the time of the testator's death as not providing a restraint). All these decisions remain valid despite the fact that most states now allow divorce without fault. *See also Colonial Trust Co. v. Brown*, 135 A. 555 (Conn. 1926) (rejecting admittedly peculiar restrictions on length of leases and height of buildings on trust property because they hindered the "proper growth and development" of Waterbury, Connecticut); *In re Estate of Sage*, 412 N.Y.S.2d 764, 765 (Sur. Ct. 1979) (considering a trust providing for trustees, in their discretion, to invade principal to meet the "expenses of any . . . sickness, injury or disability, accident or other emergency affecting health or welfare" of the beneficiary, his spouse, or his issue). In *In re Estate of Sage*, the beneficiary's son and his wife were charged with illegal possession of drugs in Brazil and were put in jail under "horrible and often barbaric conditions," subjecting them to "a real and immediate threat to their physical and mental well-being and safety." *In re Estate of Sage*, 412 N.Y.S.2d at 765. Their father, the trustee, bribed Brazilian officials to transfer the son and his wife to a hospital—apparently an accepted practice in Brazil. *See id.* at 766. The court denied reimbursement from the trust because these payments violated New York—though apparently not Brazilian—public policy. *See id.* at 767.

To its credit, the Restatement attempts to develop a rationale for its public policy test and admits that "simple and precise rules of validity or invalidity frequently cannot be stated." RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. d (Tentative Draft No. 2, 1999). However, as brought out by discussion on the floor of the 1999 American Law Institute (ALI) Annual Meeting, the formulation of the Restatement often provides no guide for lawyers attempting to draft trusts consistent with their client's desires. *See* Proceedings of the 76th Annual Meeting of the American Law Institute 233-36 (1999). For example, at the 1999 ALI Annual Meeting, the author asked the Reporter if he could say whether a trust provision would be valid or invalid under the following circumstance: Testator, a dedicated pacifist, wanted to create a trust with income to his son for life, but if the son ever worked for a company that manufactured weapons, or any of their components, the trust would terminate and the corpus paid to Amnesty, International. *Id.* The Reporter answered that under the Restatement formulation, he could not state whether the provision would be valid or invalid as against public policy. *Id.* A number of other comments from the floor supported the author's objection and questioned the desirability of the Restatement formulation. *Id.* This matter has also been the subject of discussion between the author and the Reporter. *See* Letter from Martin D. Begleiter, Professor of Law, Drake University Law School, to Edward C. Halbach, Jr., Professor of Law, University of California School of Law (June 10, 1997) (on file with the author).

138. UNIF. PROBATE CODE § 2-907(b) cmt., 8 U.L.A. 239 (amended 1993).

139. *See, e.g., id.* § 2-907 (providing for ability to create a trust for care of a designated domestic or pet animal).

140. IOWA CODE § 633.2105(2).

Under subsection 1 of section 633.2105, other trusts for purposes, with indefinite noncharitable purposes and no definite beneficiaries, are treated as honorary trusts.<sup>141</sup> Such trusts are valid, but limited in duration to twenty-one years.<sup>142</sup> Moreover, other restrictions are placed on these trusts.<sup>143</sup> The Trust Code permits the grantor to specify a person to enforce the trust or, if none is designated, the court to appoint one.<sup>144</sup>

#### F. Resulting and Constructive Trusts: Sections 633.2106 and 633.2107

As previously noted, both resulting trusts and constructive trusts are correctly excluded from the Trust Code.<sup>145</sup> Sections 633.2106 and 633.2107 merely define situations in which a resulting trust or a constructive trust will arise.<sup>146</sup> The resulting trust arises when the trust fails unless one<sup>147</sup> of the following is true:

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141. *Id.* § 633.2105(1).

142. *Id.* § 633.2105. The section as currently worded is unclear as to whether a trust for animals is limited to twenty-one years. *See id.* This could be corrected by switching the order of subsections 1 and 2 so that subsection 1 (present subsection 2) would cover trusts for the care of animals, making present subsection 1 subsection 2, and adding to the beginning of new subsection 2 the words "Except as provided in subsection 1." *See id.* § 633.2105(1), (2).

143. Subsection 3 provides that no "portion of such a trust shall be used for any other purpose unless the trust so provides or the court determines that the trust's value substantially exceeds the amount required for the use specified." *Id.* § 633.2105(3).

144. *Id.* § 633.2105(4). This section is similar to, and was apparently based on, UPC section 2-907 and the similar provision of the UTC. *Id.*; UNIF. PROBATE CODE § 2-907, 8 U.L.A. 239 (amended 1993); U.T.C. § 408 (2000 Approved). The Restatement treats such a trust for lawful noncharitable purposes with indefinite beneficiaries as a trust with a power in the trustee. RESTATEMENT (THIRD) OF TRUSTS § 47 (Tentative Draft No. 2, 1999). Professor Adam J. Hirsch, of Florida State University Law School, has made a cogent and convincing argument that trusts for purposes should be treated in the same manner as other trusts—and, more generally, bequests for purposes should be treated in the same manner as bequests to persons. Adam J. Hirsch, *Trusts for Purposes: Policy, Ambiguity, and Anomaly in the Uniform Laws*, 26 FLA. ST. U. L. REV. 913, 950-51 (1999); Adam J. Hirsch, *Bequests for Purposes: A Uniform Theory*, 56 WASH. & LEE L. REV. 33, 109 (1999) (noting that the law of purpose bequests has become unnecessarily and unhelpfully balkanized and these bequests ought to be subsumed within a single doctrinal entity, preferably the one now regulating charitable bequests). Such treatment would simplify the law and make a great deal of sense.

145. IOWA CODE § 633.1102(16)(l). The case law definition of constructive trust is similar to that given in section 633.2107. *See, e.g.*, Slocum v. Hammond, 346 N.W.2d 485, 491, 493 (Iowa 1984) (stating that a constructive trust arises from a court and is applied to prevent unjust enrichment); Loschen v. Clark, 127 N.W.2d 600, 602-03 (Iowa 1964) (stating that a constructive trust is an appropriate tool when there is a threat of unjust enrichment) (citing Homolka v. Drahos, 74 N.W.2d 589 (Iowa 1956)). Therefore, the legal title holder holds the property for the benefit of the one entitled to the beneficial interest. Loschen v. Clark, 127 N.W.2d at 602-03 (citing 89 C.J.S. *Trusts* § 138).

146. IOWA CODE §§ 633.2106-2107.

- (1) The trust instrument shows that no resulting trust was intended; or
- (2) The trust fails for illegality, and the unjust enrichment of the transferee is outweighed by the policy against providing relief to a person entering into an illegal transaction.<sup>148</sup>

A resulting trust also arises when the trust has been fully performed and trust corpus remains, unless the trust instrument manifests a contrary intention.<sup>149</sup>

Subsection 3 of section 633.2106 makes a change in the law by foregoing the reopening of a settlor's estate when the estate is the beneficiary of a resulting trust and the beneficiaries of the estate are clear.<sup>150</sup> This should save the expense of reopening the estate.<sup>151</sup>

## VI. MODIFICATION AND TERMINATION OF TRUSTS<sup>152</sup>

### A. *Termination of Trust: Section 633.2201*

For the most part, section 633.2201 requires no comment. It lists the obvious occasions when a trust is terminated—expiration of the trust term,

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147. Section 633.2106(1), as originally enacted, stated "unless all of the following is true." Iowa H. File 663, 78th Gen. Assemb., 1st Sess. (May 14, 1999). This was an error. House File 2518 changed the wording to read "unless either of the following is true." Iowa H. File 2518, 78th Gen. Assemb., 2d Sess. (Apr. 26, 2000). House File 2518 also changed the first clause of section 633.2106(2) to read, "Where the owner of property gratuitously transfers the property subject to a trust which *has been* . . ." *Id.*

148. IOWA CODE § 633.2106(1)(a), (b). Presumably, this case would arise where the transferor knew the trust was illegal and the beneficiary was not involved in and had no knowledge of the transaction.

149. *Id.* § 633.2106(2).

150. *Id.* § 633.2106(3). An interesting problem arises when there is no question of who takes the settlor's estate, but federal estate—or perhaps Iowa estate or inheritance—taxes have not been paid on the property, or it cannot be readily determined if the taxes have been paid. Presumably, reopening of the estate will be required in this case.

151. Associate Probate Judge Ruth B. Klotz of Polk County, Iowa, noted that this provision might conflict with Iowa Code section 633.489, providing for the reopening of an estate when other property is discovered. Fax, Klotz to Holbeck (Mar. 19, 1999), *supra* note 121. Judge Klotz may be correct, although the reopening of the estate under that section is discretionary with the court. In light of the saving of time and expense if the estate is not reopened, it would probably be beneficial to amend Iowa Code section 633.489 to exempt the situations covered by section 633.2106(3) from its operation. See IOWA CODE §§ 633.489, .2106(3).

152. This division originally did not contain a section giving the court power to modify the provisions of a trust on the occurrence of changed circumstances neither known to nor anticipated by the settlor or testator. Such a section—section 633.2203A—was added by House File 2518 and codified as Iowa Code section 633.2204. See IOWA CODE § 633.2204; Iowa H. File 2518, 78th Gen. Assemb., 2d Sess. (Apr. 26, 2000); *see also infra* Part VLD.

fulfillment of the trust purpose, the purpose becomes unlawful or impossible, and revocation of the trust.<sup>153</sup> The section also makes explicit what has long been recognized—that on termination, the trustee has the powers necessary to wind up the trust and distribute the property to the beneficiaries.<sup>154</sup> Subsection 3 notes that for sections 633.2202 through 633.2206 the term “beneficiary” is limited to a current recipient of income or principal, a permissible recipient of income or principal, or a person who would receive income or principal of the trust if it were terminated.<sup>155</sup>

**B. Modification by Consent of the Settlor and All Beneficiaries:  
Section 633.2202**

Subsection 1 of 633.2202 states the traditional rule that an irrevocable trust may be modified or terminated on consent of all the beneficiaries.<sup>156</sup> The subsections that follow elaborate on two problems in this situation: to whom is the property distributed on termination, and whether consent by representation is allowed.<sup>157</sup> As to the first problem, the statute, in subsection 2, quite properly states that the property shall be distributed as agreed on by the settlor and all beneficiaries, or, in the absence of agreement, as ordered by the court.<sup>158</sup> This is so because, regardless of whom the trust is distributed to, the settlor and beneficiaries could distribute the property among themselves as they wish following the distribution from the trust.<sup>159</sup>

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153. IOWA CODE § 633.2201.

154. *Id.*; *see also* BOGERT & BOGERT, *supra* note 50, § 1010, at 448-50 (2d rev. ed. 1983) (discussing the power of trustees at termination). The Iowa Supreme Court has adopted this rule, holding that a probate court continues to control trust property after the termination event established by the trust instrument, and the court may authorize the trustee, as an officer of the court, to take actions necessary to the proper administration of the trust, even after the termination date. *Noe v. Hawkeye Bank*, 570 N.W.2d 114, 116 (Iowa 1997) (citing RESTATEMENT (SECOND) OF TRUSTS § 344 (1959)).

155. IOWA CODE § 633.2201(3). Several persons have proposed deletion of the reference to persons receiving income on the termination of a trust. *See* Letter, Volz to Buchanan (Nov. 2, 1999), *supra* note 46; Letter from Barbara G. Barrett, Dickinson, Mackaman, Tyler, & Hagen, P.C., to Todd R. Buchanan, Attorney, Buchanan, Bibler, Buchanan & Gabor (Oct. 5, 1999) (on file with the author) [hereinafter Letter, Barrett to Buchanan (Oct. 5, 1999)]. The answer is that sections 633.2202-2206 apply to numerous situations wherein a person could receive income on termination. *See* IOWA CODE §§ 633.2202-2206. The most obvious examples are if a trust is terminated between income distribution dates and if income is discretionary with the trustee.

156. IOWA CODE § 633.2202(1); *see also* AUSTIN WAKEMAN SCOTT, ABRIDGMENT OF THE LAW OF TRUSTS § 338 (1960).

157. IOWA CODE § 633.2202(2), (3).

158. *Id.* § 633.2202(2).

159. *See id.*

The second problem is addressed in subsection 3, which allows consent by a person who may represent a beneficiary to be considered as consent by the beneficiary.<sup>160</sup> This rule is far more controversial. The common law rule required that all beneficiaries be competent and *sui juris* to consent.<sup>161</sup> Virtual representation and the appointment of a guardian *ad litem* for minors and unborns were concepts for conferring jurisdiction on the court, since all beneficiaries were required to be parties for trust litigation to proceed.<sup>162</sup> These were litigation doctrines.<sup>163</sup> They had no applicability to transactions, such as consenting to the termination of a trust.<sup>164</sup> However, an early California case, reasoning that a court had power to approve of a settlement of pending litigation, approved a consent agreement modifying the terms of a trust and allowed the guardian *ad litem* to consent to the agreement.<sup>165</sup> The correctness of this ruling is questionable.<sup>166</sup> However, the Uniform Probate Code (UPC), expanding on this rationale, allows representatives of beneficiaries to consent on behalf of minors and does not require agreement by unborns.<sup>167</sup> Other states have enacted similar statutes.<sup>168</sup> Therefore, despite the statute's departure from virtual representation as a litigation concept, allowing representors to consent to modification on behalf of those they represent appears to be well accepted today.<sup>169</sup>

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160. *Id.* § 633.2202(3); *see also id.* §§ 633.6301-6307 (stating the Trust Code's provisions on representation). It should be noted that under section 633.1102(7), the law considers a minor's custodial parent the child's guardian if the court has not appointed a guardian. *Id.* § 633.1102(7).

161. SCOTT, *supra* note 156, § 337.4.

162. See Begleiter, *Guardian Ad Litem*, *supra* note 58, at 721. The concept of virtual representation and the role of the guardian *ad litem* in estate proceedings are, generally, beyond the scope of this Article. For a brief discussion, however, *see infra* Parts XIX.D, F.

163. See Begleiter, *Guardian Ad Litem*, *supra* note 58, at 721.

164. *Id.* at 721-36.

165. *Mabry v. Scott*, 124 P.2d 659, 665 (Cal. Dist. Ct. App. 1942).

166. See Begleiter, *Guardian Ad Litem*, *supra* note 58, at 692-713. An early Iowa case refused to allow a guardian *ad litem* to agree to a settlement on behalf of his wards because the guardian *ad litem* was appointed solely to defend the minor in litigation. *Nothem v. Vondeharr*, 175 N.W. 967, 975 (Iowa 1920).

167. UNIF. PROBATE CODE §§ 3-1101 to -1102, 8 U.L.A. 303-05 (amended 1993).

168. See Begleiter, *Guardian Ad Litem*, *supra* note 58, at 693 n.242 (providing a partial list of such statutes).

169. *Id.* On another matter, some have questioned whether allowing modification by the settlor and all beneficiaries could have adverse tax consequences. This is covered by Treasury Regulation section 20.2038-1(a)(2), which provides that section 2038 of the Internal Revenue Code does not apply to a power to revoke by consent of all beneficiaries and which adds nothing to the rights of the parties under state law. Treas. Reg. § 20.2038-1(a)(2); *see also* I.R.C. § 2038 (1994); *Helvering v. Helmholtz*, 296 U.S. 93, 97 (1935). The only remaining question is whether consent by the representors would change the tax result. This question is still unanswered. However, virtual representation is a sufficiently well-established concept to justify a belief that the IRS would have already argued a statute such as Iowa Code section 633.2202(3) caused adverse tax results if the IRS

### C. Modification and Termination of Irrevocable Trust: Section 633.2203

First, it should be noted that this section was extensively amended by House File 2518. The amendments were as follows:

- (1) Subsection 1 was changed to require court approval for modification.<sup>170</sup>
- (2) Former subsection 2 was deleted.<sup>171</sup>
- (3) Former subsection 3 was renumbered as subsection 2 and changed to reflect the court determination of the termination or modification.<sup>172</sup>
- (4) Former subsection 4 was renumbered as subsection 3.<sup>173</sup>

The objective of the amendments was to greatly reduce the opportunity for abuse by mandating court approval.<sup>174</sup>

Section 633.2203 is basically the Trust Code's version of the *Claflin* doctrine.<sup>175</sup> The *Claflin* doctrine states that an irrevocable trust can be terminated or modified only if all the beneficiaries consent and no material purpose of the trust remains to be completed.<sup>176</sup> It should be noted that this rule, as given in the Restatement, does not mention whether a court proceeding is required to

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was interested in making that argument. In other contexts, Iowa case law allows a guardian of a minor to settle litigation on behalf of his ward if the settlement is approved by the probate court. *See, e.g.*, *Bennett v. Ryan*, 222 N.W. 16, 18 (Iowa 1928) ("The intent of the statute is that when such a contract is presented to, and approved by, the probate court, it shall thereby become effective and binding upon the minor . . ."). In one case, a conservator, termed a guardian of the property at the time, was allowed to compromise a probate contest. *Kreamer v. Wendel*, 214 N.W. 712, 716 (Iowa 1927).

170. Iowa H. File 2518, 78th Gen. Assemb., 2d Sess. (Apr. 26, 2000). The change in subsection 1 is as follows—underlines indicate new matter, and strikeouts indicate deleted matter: "1. An irrevocable trust may be terminated or modified either by the court or upon with the consent of all of the beneficiaries if continuance of the trust on the same or different terms is not necessary to carry out a material purpose." *Id.*

171. Iowa H. File 2518, 78th Gen. Assemb., 2d Sess. (Apr. 26, 2000). Subsection 2 formerly provided: "2. Upon petition to the court by the settlor, trustee, or other interested person, the court may set aside an improper termination or modification by the beneficiaries." Iowa H. File 663, 78th Gen. Assemb., 1st Sess. (May 14, 1999).

172. Iowa H. File 2518, 78th Gen. Assemb., 2d Sess. (Apr. 26, 2000). Subsection 3 was amended as follows—underlines indicate new matter, and strikeouts indicate deleted matter: "3-2. Upon termination of the trust, the trustee court shall distribute order the distribution of trust property in accordance with the probable intention of the settlor or as agreed by the beneficiaries." *Id.*

173. Iowa H. File 2518, 78th Gen. Assemb., 2d Sess. (Apr. 26, 2000). Subsection 4 has not been changed other than being renumbered to subsection 3. *Id.*

174. *See* Meeting Minutes, Nov. 5, 1999, *supra* note 42.

175. *See Claflin v. Claflin*, 20 N.E. 454 (Mass. 1889). Iowa has accepted the *Claflin* doctrine. *See Hopp v. Rain*, 88 N.W.2d 39, 45 (Iowa 1958).

176. *RESTATEMENT (SECOND) OF TRUSTS* § 337 (1957).

accomplish the termination.<sup>177</sup> However, as amended, the Trust Code mandates a court proceeding.<sup>178</sup> In any event, because one of the two requirements of the *Clafin* doctrine is often in question, a court proceeding appears to be usual in this type of case.

Of course, the main issues in a request for modification are whether all the beneficiaries consent and whether a material purpose of the trust remains to be accomplished. Consent of all the beneficiaries was often impossible under the common law because in most trusts many of the beneficiaries are not born.<sup>179</sup> The Iowa Trust Code makes termination easier, in this regard, by deeming consent of a person able to bind a beneficiary to be consent of the beneficiary.<sup>180</sup>

As to what constitutes a material purpose of a trust,<sup>181</sup> the Restatement offers some guidance. The following are considered material purposes remaining to be accomplished:

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177. *Id.*

178. IOWA CODE § 633.2203 (2001).

179. EUGENE F. SCOLES & EDWARD C. HALBACH, JR., PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 481 (5th ed. 1993). For example, a trust with income to grantor's daughter for life, on her death to the daughter's issue then living could generally not be terminated because all the daughter's issue—meaning every descendant of the daughter—are not yet born.

180. IOWA CODE §§ 633.6302-6307. Under sections 633.6302 through 633.6307, the following rules apply:

1. The holders of a power of revocation or a presently exercisable general power of appointment may bind the objects and take in default whose interests are subject to the power. *Id.*

2. The holder of a general testamentary power of appointment may bind the takers in default if there is no conflict of interest between them. *Id.*

3. Absent conflict of interest, a conservator may bind his ward. *Id.*

4. Absent conflict of interest, a trustee may bind the trust beneficiaries. *Id.*

5. Absent conflict of interest, a personal representative may bind the persons interested in a decedent's estate. *Id.*

6. Absent conflict of interest, if no conservator has been appointed, a parent may bind a minor child. *Id.*

7. A minor, incompetent, unborn, or unascertained person may be bound by a person having a "substantially identical interest" if the representee's interest is adequately represented—virtual representation. *Id.*

8. A guardian ad litem may bind his ward and may approve a settlement on behalf of the ward and may consider general family benefit. *Id.*; see also *infra* Part XIX.

181. Iowa courts have been quite receptive to arguments that a material purpose remains to be completed. In *Windsor v. Barnett*, a testamentary trust provided that income was to be paid to testator's wife and several other relatives until the wife's death, when the trust was to terminate. *Windsor v. Barnett*, 207 N.W. 362, 363 (Iowa 1926). The widow elected against the will. *Id.* The court held that a material purpose remained, stating:

The testator does not state his reasons for [postponing enjoyment of corpus until the wife's death]. He may not have contemplated the widow's renunciation of the will, but we cannot assume that he was inadvertent to that contingency, or that if he had thought about it he would have made a different provision. He had the right to

- (1) A trust for successive beneficiaries, if the purpose was to deprive the income beneficiary of the management of the trust property while he is receiving income;<sup>182</sup>
- (2) When the payment of income or corpus is subject to a standard, such as need;<sup>183</sup>
- (3) A trust to protect a beneficiary under disability as long as the disability exists;<sup>184</sup>
- (4) Postponement of the enjoyment of interest of a sole beneficiary—for example, a trust to pay income to the beneficiary and to pay corpus to that beneficiary when he graduates from college, or attains age 40;<sup>185</sup>
- (5) Trusts for support of the beneficiary;<sup>186</sup>
- (6) Discretionary trusts;<sup>187</sup> and
- (7) Spendthrift trusts.<sup>188</sup>

The latest draft of the Uniform Trust Code (UTC) states that a spendthrift clause does not necessarily indicate a material purpose remaining to be completed.<sup>189</sup> The

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determine for himself when the objects of his bounty should enter upon its full enjoyment. It is not for the court to conjecture his purpose or to rewrite the will.

*Id.* at 364.

In *In re Work Family Trust*, a stated purpose of the trust was to acquire control of a certain bank that had ceased operation. *In re Work Family Trust*, 151 N.W.2d 490, 492 (Iowa 1967). The court held that even though this particular purpose of the trust had failed, another purpose, which was to prevent any interest in the trust from returning to the grantor's estate, was also material and would prevent termination. *Id.* at 494.

182. RESTATEMENT (SECOND) OF TRUSTS § 337 cmt. d (1959). However, the mere creation of a trust for successive beneficiaries is not enough to so indicate. *Id.* § 337 cmt. f.

183. *Id.* § 337 cmt. g, illus. 13.

184. *Id.* § 337 cmt. h.

185. *Id.* § 337 cmt. j. This comment has been deleted from a preliminary draft of the latest Restatement, although Illustration 5 to proposed section 65 indicates the rule is retained. RESTATEMENT (THIRD) OF TRUSTS § 65 illus. 5 (Preliminary Draft No. 5, 2000). This draft has not yet been submitted to the ALI for approval.

186. RESTATEMENT (SECOND) OF TRUSTS § 337 cmt. m (1959).

187. *Id.* § 337 cmt. n. Iowa case law agrees. See *Sawyer v. Sawyer*, 152 N.W.2d 605, 611-12 (Iowa 1967). This rule was changed by the preliminary draft of the new Restatement, but, on the objection of many advisers, the Reporter agreed to change the tone of the comment. RESTATEMENT (THIRD) OF TRUSTS § 65 cmt. e (Preliminary Draft No. 5, 2000). Therefore, at this time, the position of the new Restatement on when a material purpose remains to be accomplished in discretionary trusts is still being formulated.

188. This rule is reversed in the new Restatement. RESTATEMENT (SECOND) OF TRUSTS § 337 cmt. 1 (1959); RESTATEMENT (THIRD) OF TRUSTS § 65 cmt. e (Preliminary Draft No. 5, 2000). This draft has not been submitted to the ALI for approval.

drafters of the Iowa Trust Code, however, chose not to follow the UTC on this provision.<sup>190</sup>

Tax savings could easily be added to the list of material purposes.<sup>191</sup> An example would be the termination of a credit shelter trust with the property being paid to the surviving spouse.<sup>192</sup> Because this would violate the settlor's purpose—

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189. U.T.C. § 410(c) (2000 Annual Meeting Draft). UTC section 410(c) provides: "A spendthrift provision in the terms of the trust is not presumed to constitute a material purpose of the trust." *Id.* The comment states, in part:

While the inquiry on whether continuation of a trust is necessary to achieve a material purpose should focus on the material purpose or purposes of the particular settlor, certain courts have tended to preclude termination based on whether the trust contains particular language without examining its context. The insertion of a spendthrift provision, which is often added to instruments with little thought, has been a particular problem. Subsection (c) does not negate the possibility that continuation of a trust to assure spendthrift protection might have been a material purpose of the particular settlor. It instead negates the assumption that inserting such a clause is always a bar to termination or modification. Whether a spendthrift provision bars termination or modification of a particular trust is a question of fact to be determined based on the totality of the circumstances.

*Id.* § 410 cmt. (citations omitted). The Restatement (Third) of Trusts draft section 65 comment e is similar. RESTatement (THIRD) OF TRUSTS § 65 cmt. e (Preliminary Draft No. 5, 2000).

190. See IOWA CODE § 633.2203 (2001). The UTC's stated reason for changing the rules as to spendthrift trusts contain two very questionable assumptions. See U.T.C. § 410 cmt. a (2000 Annual Meeting Draft). The first is that courts preclude termination when a trust contains spendthrift language without looking at the context. *See id.* The second is that a spendthrift provision is often added to trusts with little thought. *See id.* No proof or authority is offered for either of these statements. Moreover, either or both may be true for the other provisions the Restatement says constitute material purposes. Yet, the UTC does not change the rule on postponed enjoyment, or discretionary trusts, or any of the other purposes. The comment then goes on to state that spendthrift provisions have "been a particular problem." *Id.* A problem for whom? Clearly, for those who wish to terminate the trust, but clearly not for the settlor. Had the settlor wanted the beneficiaries to be able to terminate a trust, he would have inserted a provision allowing the current beneficiaries to do so. The provision of UTC section 410(a) clearly reflects the bias of the drafters in favor of the beneficiaries over the settlor's intent. See U.T.C. § 410(a) (2000 Annual Meeting Draft). It is doubtful whether most settlors would agree. *See, e.g.*, Olsen v. Youngerman, 113 N.W. 938, 941 (Iowa 1907).

[T]rusts are usually created for the purpose of withholding from the beneficiaries . . . the control and disposition of the principal of the fund for reasons which appear sufficient to the trustor, and they are not usually regarded with satisfaction by the persons who are deprived of the possession of the estate. This, however, furnishes no ground for disregarding the conditions on which the bounty is to be bestowed, nor for refusing to carry out the expressed design of the party creating the trust.

*Id.* (citing *Cuthbert v. Cuthbert*, 32 N.E. 1088, 1090 (N.Y. 1893)). The Iowa Trust Code drafters, true to the intent of settlors, wisely rejected this change. See IOWA CODE § 633.2203.

191. See IOWA CODE § 633.2203.

192. *See id.*

keeping the trust from being included in the surviving spouse's estate—termination should be denied.<sup>193</sup>

Even with representation provisions, the Iowa Trust Code requires consent of all the beneficiaries for termination.<sup>194</sup> Termination cannot be ordered if a beneficiary objects.<sup>195</sup>

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193. *See id.*

194. *Id.* § 633.2202.

195. *See id.* Partial termination of the interests of the consenting beneficiaries might be possible. *See id.* The UTC permits modification or termination, over the objection of a beneficiary, only if the court determines certain requirements have been satisfied. U.T.C. § 410 cmt. (2000 Annual Meeting Draft). For instance, the court must find that if the objecting beneficiary had consented, the trust could have been terminated according to the law and that the interests of nonconsenting beneficiaries will be "adequately protected." *Id.* No real justification of this position is presented in the comment. *See id.* § 410 cmt. This is surprising given the departure of the provision from the *Claflin* doctrine. *See* *Claflin v. Claflin*, 20 N.E. 454, 456 (Mass. 1889) (requiring consent of all the beneficiaries to terminate a trust). Moreover, "adequately protected" is not defined, although the comment proposes "partial continuation of the trust, the purchase of an annuity, or the valuation and cashout of the interest." U.T.C. § 410 cmt. (2000 Annual Meeting Draft). This provision again reflects the UTC's bias favoring beneficiaries over a grantor's intent. *See id.* Normally, the provisions of the trust are to be carried out as written in accordance with the grantor's intention. *See* *Claflin v. Claflin*, 20 N.E. at 456. The *Claflin* doctrine makes an exception in cases in which there is no purpose of the trust remaining and all the beneficiaries agree on termination. *Id.* Presumably, neither the settlor nor the beneficiaries would object to termination if continuing the trust served no purpose. In short, since all of the beneficiaries agree and no material purpose remains unfulfilled, there is no real reason to continue the trust. The basis for termination is destroyed when a beneficiary objects to termination.

The UTC suggests its rule is based on section 338(2) of the Restatement (Second) of Trusts. U.T.C. § 410 cmt. (2000 Annual Meeting Draft); *see also* RESTATEMENT (SECOND) OF TRUSTS § 338(2) (1959). However, UTC section 410(e) is much broader than the Restatement provision. *Compare* U.T.C. § 410 (2000 Annual Meeting Draft), *with* RESTATEMENT (SECOND) OF TRUSTS § 338(2) (1959). The Restatement provision applies only when the settlor consents and does not apply at all to a testamentary trust. RESTATEMENT (SECOND) OF TRUSTS § 338 cmt. a (1959). Although the Restatement does not provide a reason for the exception, it appears to be based on the argument that there is no reason to hold the settlor to his original purpose if he no longer believes it to be important and consents to modification or termination. This is the basis behind the rule: a trust may be terminated or modified on consent of the settlor and all the beneficiaries, even if a material purpose remains to be completed. *See id.* at § 338 cmt. g. While some might quarrel with the wisdom of extending this rule to a situation when a beneficiary objects, the rationale at least for such an extension is evident. The rationale does not apply when the settlor does not consent. The UTC rule allows the majority of beneficiaries to steamroll the unwilling beneficiary and the settlor's intent, relying on the court to guarantee adequate protection of the objecting beneficiary's interest. *See* U.T.C. § 410(e) (2000 Annual Meeting Draft). The absence of the settlor's consent makes all the difference.

The drafters of the Iowa Trust Code were unwilling to so cavalierly dispense with the settlor's directions. *See, e.g.*, IOWA CODE § 633.2202 (allowing modification or termination of trust by settlor and all beneficiaries). Moreover, accepting the UTC provision would have marked a major change in Iowa law. In *In re Work Family Trust*, the Iowa Supreme Court stated: "If a settlor does not by the terms of the trust reserve a power to modify the trust, he cannot modify it after its creation

**D. Modification of Administrative Provisions by Court for Change of Circumstances: Section 633.2204**

Section 633.2204 was added in the year 2000 by House File 2518.<sup>196</sup> The section allows a court to change the administrative provisions of a trust if, due to circumstances neither known to nor anticipated by the settlor, failure to change the provision would defeat or substantially impair the accomplishment of the trust purposes.<sup>197</sup> The court in this process may authorize the trustee to do acts that the instrument forbids the trustee to do.<sup>198</sup>

Iowa Code section 633.2204 is based on the Restatement.<sup>199</sup> Although there is argument over the lengths the court should go to in finding changed circumstances,<sup>200</sup> the necessity to alter administrative provisions is clearly

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by either cutting down or taking away the interest of any beneficiary without the consent of the beneficiary, or by changing the duties or powers of the trustee, or otherwise."<sup>199</sup> *In re Work Family Trust*, 151 N.W.2d 490, 495 (Iowa 1967) (quoting RESTATEMENT (SECOND) OF TRUSTS § 331 cmt. a (1959)).

196. See Iowa H. File 2518, 78th Gen. Assemb., 2d Sess. (Apr. 26, 2000) (adding section 633.2203A which was codified as section 633.2204).

197. IOWA CODE § 633.2204.

198. *Id.*

199. Compare IOWA CODE § 633.2204 (2001), with RESTATEMENT (SECOND) OF TRUSTS § 167 (1959).

200. Compare *Stanton v. Wells Fargo Bank & Union Trust Co.*, 310 P.2d 1010, 1015 (Cal. 1957) (discussing a situation in which income had grown; no beneficiary was in want; no emergency existed; the court denied a petition to liberalize an investment restriction despite World War II; a decline in purchasing power of the dollar; the great depression; the cold war; the increase in income taxes and in the defense programs; no modification granted), with *In re Mayo*, 105 N.W.2d 900, 906 (Minn. 1960) (involving a situation in which under the same events, the court granted beneficiary's petition to liberalize investment restriction).

In *In re Pulitzer's Estate*, Joseph Pulitzer's will contained the following clause prohibiting the sale of Press Publishing Company:

I particularly enjoin upon my sons and my descendants the duty of preserving, perfecting and perpetuating "The World" newspaper (to the maintenance and upbuilding of which I have sacrificed my health and strength) in the same spirit I have striven to create and conduct it as a public institution, from motives higher than mere gain, it having been my desire that it should be at all times conducted in a spirit of independence and with a view to inculcating high standards and public spirit among the people and their official representatives, and it is my earnest wish that said newspaper shall hereafter be conducted upon the same principles.

*In re Pulitzer's Estate*, 249 N.Y.S. 87, 92 (Sur. Ct. 1931), *aff'd mem.*, 260 N.Y.S. 975 (App. Div. 1932). The will, however, permitted sale of the Pulitzer Publishing Company of St. Louis. *Id.* The court ordered the sale of Press Publishing Company without any attempt to sell Pulitzer Publishing Company and with no proof of any financial distress by any beneficiary, because the purpose of the trust, according to the court, was to provide a basic income for testator's children and the receipt of an unimpaired corpus by the remaindermen. *Id.* at 93-95.

beneficial in certain cases.<sup>201</sup> Even though the deviation from administrative provisions doctrine has been greatly expanded from its original scope,<sup>202</sup> it is well recognized and approved.<sup>203</sup>

However, the power of the court to deviate from administrative provisions does not apply to dispositive provisions that take property from one beneficiary designated by the settlor and give that property to another beneficiary.<sup>204</sup>

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201. See, e.g., *In re Pinkerton*, 630 N.Y.S.2d 481, 483 (Sur. Ct. 1995) (concerning the court waiver of a requirement that one of three trustees be the President of Pinkerton Company, in which the trust formerly had owned a large number of shares in the company, but had sold the shares); see also RESTATEMENT (THIRD) OF TRUSTS § 66 reporter's notes, cmt. b (Preliminary Draft No. 5, 2000).

202. See Martin D. Begleiter, *Administrative and Dispositive Powers in Trust and Tax Law: Toward a Realistic Approach*, 36 FLA. L. REV. 957, 963 (1984) (recognizing that the deviation from administrative provisions doctrine was originally limited to cases of absolute necessity in which beneficiaries were in dire straits).

203. See *id.* at 959-69.

204. *In re Van Deusen's Estate*, 182 P.2d 565, 572 (Cal. 1947). This is the invariable rule in the United States, the only exception being an admitted extraordinary case decided more than 50 years ago. See *In re Wolcott*, 56 A.2d 641, 644 (N.H. 1948) (recognizing that due to the unforeseen circumstances of the widow's extreme infirmity, powers of the trustees to provide the widow a liberal income should not be restricted by the technical rules). For the general rule, see RESTATEMENT (THIRD) OF TRUSTS § 66 reporter's notes, cmt. b (Preliminary Draft No. 5, 2000).

UTC section 411(a) allows modification of the dispositive terms of the trust if the modification will further the purposes of the trust. U.T.C. § 411(a) (2000 Annual Meeting Draft). This in effect allows the court to rewrite the trust, taking what the testator gave to one beneficiary and giving it to another beneficiary. Courts have never been willing to do this. See, e.g., *In re Van Deusen's Estate*, 182 P.2d at 565 (holding that there is no invasion of the corpus or of accumulated income in the absence of a clear express statement to the contrary in the trust instrument); *Church v. Morgan*, 685 N.E.2d 809, 811 (Ohio Ct. App. 1996) (stating that the most fundamental tenet for the construction of a will mandates that the court ascertain and carry out, within the bounds of the law, the intent of the testator). The drafters of the Iowa Trust Code were unwilling to allow the court to alter dispositive provisions of a trust, heeding the wise admonition of an earlier California court:

On the other hand, the considered conclusions of the settlor regarding what should constitute appropriate investments cannot be lightly disregarded. . . . These matters [the increase in income of the trust, the division of economists on future economic progress] are mentioned to indicate that, while the settlor might not have been omniscient, *neither are the beneficiaries nor the courts, omniscient*. No one can forecast, with any certainty, future events. Certainly, it is true that misguided restrictions imposed by a settlor should not be permitted to defeat his fundamental trust purpose, but *it is equally true that the court should not try to guess what economic conditions may be in a few years by permitting deviations when no real emergency exists or is threatened*.

*Stanton v. Wells Fargo Bank & Union Trust Co.*, 310 P.2d 1010, 1015-16 (Cal. 1957) (emphasis added).

Like the UTC, the Restatement (Third) has, over the vehement objection of a significant segment of the advisers, proposed to allow the court to deviate from the dispositive provision of a trust, if deviation will further the trust purposes on a showing of circumstances

**E. Noncharitable Trust with Economically Low Value:  
Section 633.2205**

Section 633.2205 is a reformulated and shortened version of current Iowa Code section 633.699A.<sup>205</sup> It permits the court to modify or terminate<sup>206</sup> a private trust if the value of the property is not sufficient to justify the trust's continuation.<sup>207</sup> If the trust is terminated, it is distributed in accordance with the settlor's probable intention under the circumstances.<sup>208</sup> No indication is given as to how the settlor's intention is ascertained, but it is likely extrinsic evidence would be admissible.<sup>209</sup> However, no decisions have been rendered interpreting current Code section 633.699A since its enactment in 1996.

**F. Reformation—Tax Objectives: Section 633.2206**

Section 633.2206, which is new, allows two types of reformation.<sup>210</sup> The first subsection allows reformation of the terms of a trust to conform to settlor's intent, if the failure was due to a mistake of fact or law.<sup>211</sup> The second allows modification or construction of the terms to achieve the settlor's tax objectives.<sup>212</sup>

**1. Reformation to Rectify a Mistake of Fact or Law**

Subsection 1 codifies the acceptance of a proposition that has been fought over for the past twenty-five years in the law of wills.<sup>213</sup> Although the debate and the arguments on both sides are far too long to be detailed here,<sup>214</sup> some background is probably necessary to understand the scope of the provision. While

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unanticipated by the settlor. RESTATEMENT (THIRD) OF TRUSTS § 66 (Preliminary Draft No. 5, 2000). This draft has not been approved by the ALI.

205. Compare IOWA CODE § 633.699A (2001), with IOWA CODE § 633.2205 (2001).

206. Or appoint a new trustee.

207. IOWA CODE § 633.2205.

208. *Id.*

209. *See id.*

210. *Id.* § 633.2206.

211. *Id.* § 633.2206(1).

212. *Id.* § 633.2206(2).

213. See RESTATEMENT (THIRD) OF PROP.: DONATIVE TRANSFERS § 11.2, reporter's note 1 (Tentative Draft No. 1, 1995) (discussing support for proposition that the text of a will or other donative document can be altered to conform to intention).

214. See *id.* § 11.2, reporter's note 2, § 12.1, reporter's note 3 (discussing historical background of the ambiguity of donative documents); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3, reporter's note 2 (Tentative Draft No. 2, 1998) (discussing excuse for harmless errors in wills not satisfying formal will requirements); John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521, 521 (1982) (advocating a remedy for mistakes in will documents).

the Restatement asserts the authority to correct mistakes in expression or inducement in *inter vivos* trusts—and other donative documents—is well established,<sup>215</sup> until recently, it was clearly understood that courts would not correct such errors in the text of a will.<sup>216</sup> Statutes in certain foreign countries allowed admission of wills to probate without full compliance with the Wills Act,<sup>217</sup> and also allowed modification of wills to carry out testator's intent.<sup>218</sup> The position that a remedy should exist for failure to completely comply with execution formalities, and to correct mistakes in wills and testamentary trusts, was forcefully advocated by Professors Langbein and Waggoner,<sup>219</sup> accepted by a few cases,<sup>220</sup> adopted as to will formalities in the UPC,<sup>221</sup> and finally extended in the Restatement to all donative documents.<sup>222</sup> The provision in the Iowa Trust Code is quite similar to the position of the Restatement.<sup>223</sup> The major difference is that the Restatement requires clear and convincing evidence of both the mistake and the donor's intention, whereas the Iowa Trust Code does not state a required level of

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215. RESTatement (THIRD) OF PROP.: DONATIVE TRANSFERS § 11.2, reporter's note 2, § 12.1, reporter's note 3 (Tentative Draft No. 1, 1995). Although there is some argument over this proposition. *See id.* § 12.1, reporter's note 3 (discussing both sides of argument).

216. *Id.* § 11.2, reporter's notes 1, 2. It should be noted that certain cases in the 1970s and 1980s used a process something like reformation, but termed it construction. *See id.*, reporter's note 2.

217. *See* RESTatement (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 12.1, statutory note (Tentative Draft No. 2, 1998).

218. *See* RESTatement (THIRD) OF PROP.: DONATIVE TRANSFERS § 12.1, statutory note (Tentative Draft No. 1, 1995). *See generally* Langbein & Waggoner, *supra* note 214, at 527-28 (discussing foreign courts allowing intent to predominate over literal meaning in wills).

219. Langbein & Waggoner, *supra* note 214, at 590.

220. RESTatement (THIRD) OF PROP.: DONATIVE TRANSFERS § 12.1, reporter's note 3 (Tentative Draft No. 1, 1995).

221. UNIF. PROBATE CODE § 2-503, 8 U.L.A. 146 (amended 1993).

222. RESTatement (THIRD) OF PROP.: DONATIVE TRANSFERS § 12.1 (Tentative Draft No. 1, 1995).

223. *See* IOWA CODE § 633.2206(1) (2001). Tentative Draft No. 1 of the Restatement (Third) of Property: Donative Transfers section 12.1 provides:

### 12.1 Reforming Donative Documents to Correct Mistakes

A donative document, though unambiguous, may be reformed to conform the text to the donor's intention if the following are established by clear and convincing evidence:

(1) that a mistake of fact or law, whether in expression or inducement, affected specific terms of the document; and

(2) what the donor's intention was.

Direct evidence of intention contradicting the plain meaning of the text as well as other evidence of intention may be considered in determining whether elements (1) and (2) have been established by clear and convincing evidence.

RESTATEMENT (THIRD) OF PROP.: DONATIVE TRANSFERS § 12.1 (Tentative Draft No. 1, 1995).

evidence.<sup>224</sup> It is suggested in interpreting the statute, Iowa courts adopt the Restatement requirement of clear and convincing evidence.<sup>225</sup>

Perhaps an example, taken from the Restatement, will illustrate what this section is trying to accomplish.

G created an inter-vivos trust. The trust document did not contain a clause reserving to G a power to revoke the trust. Controlling law provides that a trust is irrevocable in the absence of an expressly retained power to revoke. After G signed the document, G's financial condition changed and G sought to revoke the trust.

Extrinsic evidence shows that G intended to create a revocable trust and so instructed her attorney; and shows that G's attorney mistakenly failed to include the revocation clause.

If this evidence satisfies the clear-and-convincing-evidence standard of proof, the trust document is reformed to insert the mistakenly omitted power to revoke.<sup>226</sup>

## 2. *Reformation to Achieve Grantor's Tax Objectives*

The second part of the rule is similar to Restatement section 12.2<sup>227</sup> and has substantial support in both statutory authority<sup>228</sup> and case law.<sup>229</sup> As in the

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224. RESTatement (THIRD) OF PROP.: DONATIVE TRANSFERS § 12.1 (Tentative Draft No. 1, 1995); IOWA CODE § 633.2206.

225. Such a standard is proper because there is no ambiguity in the instrument. RESTAMENT (THIRD) OF PROP.: DONATIVE TRANSFERS § 12.1 cmt. c (Tentative Draft No. 1, 1995). This improvement might be made by rewording subsection 1 as follows: "1. The court may reform the terms of the trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement." The improvements in this formulation, taken from UTC section 415, are twofold. *See* U.T.C. § 415 (2000 Approved). First, the clear and convincing evidence standard is expressly stated. *Id.* Second, the so-called "plain meaning" rule is eliminated. *See* RESTAMENT (THIRD) OF PROP.: DONATIVE TRANSFERS § 12.1 cmt. c (Tentative Draft No. 1, 1995).

226. *See* RESTAMENT (THIRD) OF PROP.: DONATIVE TRANSFERS § 12.1 cmt. i, illus. 5 (Tentative Draft No. 1, 1995). The Iowa Trust Code reverses the rule of law on the revocability of a trust that is silent on the question. *See infra* VIII.C.

227. *See* RESTAMENT (THIRD) OF PROP.: DONATIVE TRANSFERS § 12.2 (Tentative Draft No. 1, 1995). Section 12.2 provides: "A donative document may be modified, in a manner that does not violate the donor's probable intention, to achieve the donor's tax objectives." *Id.*

228. *See id.* § 12.2, statutory notes 1-3. Statutory Note 1 provides a listing of several state statutes that authorize the division of trusts, either by the trustee or by the court. *Id.* Statutory Note 2 provides a listing of several state statutes that authorize a trustee or court to modify split-interest charitable trusts in order to qualify for federal tax deduction. *Id.* Statutory Note 2 also lists state statutes that mandate the powers of trustees of split-interest charitable trusts and restricts them from

Restatement, the words "construed or modified" rather than "reformed"—as used in subsection 1—are used because the donor's probable intention is implied in these situations, whereas in the situations covered by subsection 1, the trust instrument fails to express the donor's original intention.<sup>230</sup>

Reformation has been employed primarily in three situations:

- (1) Modifying charitable split-interest trusts to qualify for the income, estate, or gift tax charitable deduction;
- (2) Qualifying trusts for noncitizen spouses as qualified domestic trusts; and
- (3) Most frequently, dividing trusts for generation-skipping tax purposes, either to obtain inclusion ratios of zero or one, or to allocate exemption to a trust more likely to experience a generation-skipping transfer.<sup>231</sup> Courts will generally try to grant the modification, but it remains unclear whether the Internal Revenue Service will recognize it for federal tax purposes.<sup>232</sup>

Lastly, it should be noted that section 633.2206(2) is a much shorter version of the current section 633.703A, at least in part.<sup>233</sup> The current Code section permits amendments of a trust to divide the trust into separate trusts or to consolidate with other trusts to form a single trust.<sup>234</sup> While this type of modification is also the subject of sections 633.2207 and 633.2208, to be discussed next,<sup>235</sup> section 633.2206(2) appears to be broader and should permit actions in addition to combination and division, such as adding terms necessary for qualification, and perhaps, if necessary, modifying the dispositive terms of the trust.

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taking actions that would jeopardize the federal tax status of the trust. *Id.* Statutory Note 3 provides the conditions under which a court may reform a trust upon petition from a trustee, beneficiary, or personal representative. *Id.*

229. See *id.* § 12.2, reporter's notes 1, 3, 5-7.

230. *Id.* § 12.2 cmt. a.

231. *Id.* § 12.2, reporter's notes 1, 3, 5-7, cmt. d. For a discussion of the division of trusts for generation-skipping tax, see Treas. Reg. § 26.2654-1(b) (2000).

232. See RESTatement (THIRD) OF PROP.: DONATIVE TRANSFERS § 12.2, reporter's notes 1, 3, 5-7, cmt. d (discussing case law that establishes a basis for the donor's tax objectives).

233. Compare IOWA CODE § 633.2206(2) (2001), with IOWA CODE § 633.703A (2001).

234. IOWA CODE § 633.703A.

235. See *infra* Part VI.G.

**G. Combination and Division of Trusts:  
Sections 633.2207 and 633.2208<sup>236</sup>**

As stated above, the combination of two or more trusts into a single trust, and the division of one trust into separate trusts, is presently allowed by statute in order to qualify for federal tax benefits or to facilitate the administration of the trust.<sup>237</sup> The new sections are broader in several respects. First, for all trusts that are not court reporting, the trustee may combine two or more similar trusts, or divide a trust into separate trusts with similar terms, without approval by the court or any beneficiary.<sup>238</sup> Of course, it would behoove the trustee to inform the beneficiaries of the proposed combination or division, if for no other reason than continuing good relations with the beneficiaries.

Combining or dividing trusts may be beneficial for several reasons. A primary reason, already discussed, may be to qualify for federal gift, estate or generation skipping tax advantages.<sup>239</sup> However, non-tax advantages may also prompt such action.<sup>240</sup> For example, two similar trusts could be combined to reduce administration expenses, to realize economies, such as reduced commissions on buying securities, or to meet minimum purchase requirements for mutual funds. One trust for several beneficiaries could be divided into separate trusts for different beneficiaries to pursue different investment policies based on the differing needs of the beneficiaries.

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236. Based on comments from Associate Probate Judge Ruth B. Klotz, noting that these sections allow combining and dividing trusts without court approval even if the trust is a court reporting trust, and the suggestion of Barbara Barrett that non-pro rata language is necessary in section 633.2307 to avoid possible recognition of capital gains in the event of a non-pro rata distribution on a trust division, both sections were amended by House File 2518. Fax, Klotz to Holveck (Mar. 19, 1999), *supra* note 121; Letter, Barrett to Buchanan (Oct. 5, 1999), *supra* note 155. The amendments were:

1. In subsection 1 of both section 633.2206 (codified at section 633.2207(1)) and 633.2207 (codified at section 633.2208(1)), the following words were added to the end of the subsection: "unless the trust is a court reporting trust." Iowa H. File 2518, 78th Gen. Assemb., 2d Sess. (Apr. 26, 2000).

2. A new sentence was added at the end of subsection 2 of section 633.2207 (codified at section 633.2208), which states: "To facilitate the division, the trustee may divide the trust assets in kind, by pro rata or non-pro rata division, or by any combination of the methods." *Id.*

237. IOWA CODE § 633.703A. There have been no reported decisions under this statute since it was enacted in 1994.

238. *Id.* § 633.2207.

239. *See supra* Part VI.F.

240. *See* EDWARD F. KOREN, 3 ESTATE AND PERSONAL FINANCING PLANNING § 26:33 (2000) (discussing non-tax benefits of combining and dividing trusts).

Combination and division are limited to trusts having similar beneficial interests in the case of combination, or similar terms in the case of division.<sup>241</sup> Although not stated, presumably a dissatisfied beneficiary could challenge the combination or division on the ground that the interest or terms are not substantially similar.

When dividing a trust into separate trusts without court approval, the division cannot defeat or substantially impair either the accomplishment of the trust purposes or the rights of the beneficiaries.<sup>242</sup> This limitation would provide another potential challenge for a dissatisfied beneficiary.

Combination or division of trusts may also be ordered by a court.<sup>243</sup> The court is not limited to trusts with substantially similar terms or beneficial interests.<sup>244</sup> The court may order combination if it determines administration as a single trust will not defeat, or significantly impair, the rights of the beneficiaries or the accomplishment of the trust purposes.<sup>245</sup> The court ordering the combination must determine which trust provisions will control the combined trusts if the terms of the two trusts are not "essentially identical."<sup>246</sup> A court may divide a trust into separate trusts if doing so is in the best interests of the beneficiaries, and if the accomplishment of the trust purposes and the interests of the beneficiaries will not be defeated or substantially impaired.<sup>247</sup>

## VII. SPENDTHRIFT PROTECTION

Spendthrift trusts have long been recognized in most states,<sup>248</sup> including Iowa.<sup>249</sup> The Iowa Trust Code imports into statutory law the recognition of spendthrift trusts and certain exceptions.<sup>250</sup>

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241. IOWA CODE §§ 633.2207-2208. Note that similar does not mean identical. Todd Buchanan reports that combining trusts need not be a difficult process and that, as long as fidelity to the grantor's intent is maintained, a new document may be created and the new combined trust does not need to be perfectly identical to either of the former trusts. Letter, Buchanan to Begleiter (Jan. 23, 2001), *supra* note 34.

242. IOWA CODE § 633.2208.

243. *Id.*

244. *Id.*

245. *Id.* § 633.2207.

246. *Id.*

247. *Id.* § 633.2208.

248. BOGERT & BOGERT, *supra* note 50, § 222, at 381-404 (2d rev. ed. 1992).

249. See, e.g., Sawyer v. Sawyer, 152 N.W.2d 605, 611 (Iowa 1967) (holding trust to be a spendthrift trust in part); *In re Bucklin's Estate*, 51 N.W.2d 412, 414 (Iowa 1952) (recognizing validity of spendthrift trust); *In re Tone's Estates*, 39 N.W.2d 401, 407 (Iowa 1949) (defining spendthrift trust); Standard Chem. Co. v. Weed, 285 N.W. 175, 176 (Iowa 1939) (holding intent to form spendthrift trust must be found in words, not circumstances, of trust); Kiffner v. Kiffner, 171 N.W. 590, 590 (Iowa 1919) (recognizing validity of spendthrift trust).

### *A. Spendthrift Protection Recognized: Section 633.2301*

A spendthrift trust—or more properly, a spendthrift clause—is a trust containing a clause prohibiting the beneficiary's creditors from subjecting the beneficiary's interest in the trust to the payment of their claims.<sup>251</sup> The clause also prohibits the beneficiary from selling, or otherwise transferring, the beneficiary's interest in the trust.<sup>252</sup> More particularly, the beneficiary cannot transfer her right to future payments from the trust, nor can the beneficiary's creditors collect future trust payments due to the beneficiary.<sup>253</sup> The creditors can only collect after the trust has paid or distributed property to the beneficiary.<sup>254</sup> Section 633.2301 simply states the definition in the form of a rule validating spendthrift clauses contained in a trust.<sup>255</sup>

### *B. Exceptions to Spendthrift Provisions: Section 633.2302*

Section 633.2302 states two situations in which creditors of a beneficiary may assert claims against a beneficiary's interest.<sup>256</sup> The first is the situation in which the beneficiary is also the settlor.<sup>257</sup> This reflects a well-established rule of law previously recognized by case law in Iowa.<sup>258</sup> The second involves a situation in which a creditor of a beneficiary attempts to assert his claims to a distribution on a termination or partial termination of a trust.<sup>259</sup> Such an exception has no discovered precedent in Iowa law or the Restatement.<sup>260</sup> One possible explanation is that a creditor of the beneficiary could assert his claim if the trust specifically provides for partial or complete termination at a specific time or on the occurrence

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250. IOWA CODE § 633.2301.

251. BOGERT & BOGERT, *supra* note 50, § 221, at 374 (2d rev. ed. 1992).

252. *Id.* at 486.

253. *Id.* at 499.

254. *Id.*

255. IOWA CODE § 633.2301.

256. *Id.* § 633.2302.

257. *Id.*

258. *Coster v. Crookham*, 468 N.W.2d 802, 808-09 (Iowa 1991); *Hanson v. Minette*, 461 N.W.2d 592, 596 (Iowa 1990); *see also* RESTATEMENT (THIRD) OF TRUSTS § 58(2) reporter's notes, cmt. e (Tentative Draft No. 2, 1999) (discussing acceptance of the rule in various jurisdictions including Iowa).

259. IOWA CODE § 633.2302(2). The Trust Code states: "Any creditor of the beneficiary as to a distribution to be made upon *an event* terminating or partially terminating the trust." *Id.* § 633.2302 (emphasis added). What the emphasized words refer to is unclear. Perhaps the most logical explanation is anything resulting in a partial or full termination of the trust, including a court order or termination by the beneficiaries.

260. *See* RESTATEMENT (SECOND) OF TRUSTS § 157 (1959); RESTATEMENT (THIRD) OF TRUSTS § 59 (Tentative Draft No. 2, 1999).

of a particular event along with a distribution to a beneficiary at that time. However, such an explanation appears unlikely. There is no apparent reason why creditors should be preferred in such a case; nor is anything apparent from such a provision indicating a reason to except it from the normal operation of a spendthrift clause. A more likely explanation is the provision refers to an overdue distribution—when an event has *already occurred*, terminating or partially terminating a trust and the trust has delayed distributing the property to the beneficiary. In such a case, the creditor, or transferee, of a beneficiary should be able to satisfy its claim against the beneficiary's interest in the trust.<sup>261</sup> If this was the intent, section 633.2302 needs to be amended to clarify its operation.

Perhaps more significant is what the exception section omits. An almost universal common law exception to the operation of a spendthrift clause is for necessary goods or services furnished to the beneficiary.<sup>262</sup> This exception is recognized in the Restatement.<sup>263</sup> However, the UTC refused to include such an exception. This position is stated, but not explained in the comments to the UTC.<sup>264</sup>

The UTC explicitly excepts from the operation of spendthrift clauses claims of the state or the United States to the extent federal or state law provides.<sup>265</sup> The black letter of the Restatement does not state this, but a comment states such an

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261. If this is correct, it would be analogous to the approved 2000 version of UTC section 506, which provides:

Whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a distribution mandated to be made to the beneficiary by the terms of the trust, including a required distribution of income or distribution upon termination of the trust, if the trustee has not made the distribution within a reasonable time after the mandated distribution date.

U.T.C. § 506 (2000 Approved).

262. See GEORGE T. BOGERT, TRUSTS § 40, at 155-58 (6th ed. 1987) [hereinafter BOGERT]; see also Estate of Dodge v. Scott, 281 N.W.2d 447, 450 (Iowa 1979). Even in such cases, Iowa requires a showing the claim is "for necessary goods and services, not officially rendered" that the settlor intended to provide to the beneficiary by the trust and the withholding of payment is not within the trustee's discretion. Estate of Dodge v. Scott, 218 N.W.2d at 451. One may speculate an exception for necessities would enable the state to recover nursing home expenses from "special needs" trusts. See RESTATEMENT (THIRD) OF TRUSTS § 50 reporter's notes, cmt. e (Tentative Draft No. 2, 1999) (dealing with this question as one of the construction of discretionary trusts).

263. RESTATEMENT (THIRD) OF TRUSTS § 59(b) (Tentative Draft No. 2, 1999). A recent Iowa case attempts to define a "discretionary support trust" as a trust containing both discretionary and support language, and only allowing creditors to reach the portion necessary for the core needs of the beneficiary. Strojek v. Hardin County Bd. of Supervisors, 602 N.W.2d 566, 569-71 (Iowa Ct. App. 1999).

264. U.T.C. § 503 cmt. (2000 Annual Meeting Draft).

265. *Id.* § 503(b).

exception is implicit as a matter of common law.<sup>266</sup> Presumably, the Restatement rule will also be the law in Iowa under the Trust Code. The statute does not provide that the stated exceptions are exclusive, and the Trust Code retains the common law except as modified by the Trust Code.<sup>267</sup>

Perhaps the most significant—and certainly most controversial—omission is the lack of an exception for claims against the beneficiary for support of a child, spouse, or former spouse.<sup>268</sup> Both the Restatement<sup>269</sup> and the Uniform Trust Act<sup>270</sup> include such an exception. The Trust Code drafters decided not to include such an exception for several reasons. First and foremost, the drafters believed the only way to get such an extensive statute approved was to avoid controversy.<sup>271</sup> They knew the entire Code could be delayed and rejected if controversy developed over any particular section.<sup>272</sup> They believed that including an exception for child and former spousal support was likely to generate such a controversy.<sup>273</sup> Many drafters of trusts included spendthrift provisions to protect the trust against such claims.<sup>274</sup> These drafters would strongly object to excepting claims for child support and alimony in the operation of spendthrift clauses.<sup>275</sup> Second, these exceptions were

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266. RESTatement (THIRD) OF TRUSTS § 59 cmt. a (Tentative Draft No. 2, 1999).

267. IOWA CODE § 633.1104 (2001).

268. Compare IOWA TRUST ACT § 2-302(1) (1996 Draft) (including an exception for child support or alimony) (on file with the author), with IOWA CODE § 633.2302 (2001) (excluding an exception for child support or alimony). The 1996 draft of the Iowa Trust Act was the name used for the early draft of the Iowa Trust Code.

269. RESTatement (THIRD) OF TRUSTS § 59(a) (Tentative Draft No. 2, 1999).

270. U.T.A. § 503(a) (1996 Preliminary Draft).

271. Handwritten notes on IOWA TRUST ACT § 2-302(1) (1996 Draft) (on file with the author). Both the author and Todd Buchanan were convinced that the exceptions to spendthrift trust recognition were purely political decisions and that the Trust Code was intended to be politically neutral. *Id.*; see also Letter, Buchanan to Begleiter (Jan. 23, 2001), *supra* note 34.

272. *Id.*

273. *Id.*

274. BOGERT & BOGERT, *supra* note 50, § 224, at 465 (2d rev. ed. 1992).

275. Author's handwritten notes on IOWA TRUST ACT § 2-302(1) (1996 Draft) (on file with author). It should be noted the question of including an exception for claims for child and former spousal support has been the most controversial subject so far discussed in the meetings of the Advisers on the Restatement (Third) of Trusts. The topic was discussed extensively among the Advisers at a meeting in Philadelphia on September 12, 1998. A significant number of Advisers strongly opposed section 59(a) of the Restatement and argued extensively for deletion of the provision. The Reporter mentioned the opposition to the ALI Council. RESTatement (THIRD) OF TRUSTS (Council Draft No. 2, 1998) (stating, to the recollection of the author incorrectly, the opponents were few in number, but correctly noting vocal opposition to the provision from probate and trust practitioners and their organizations to the inclusion of a similar exception in the Uniform Trust Act).

generally not recognized at common law, particularly in Iowa.<sup>276</sup> The Code drafters believed that the Probate and Trust Law Section, the Board of Governors of The Iowa State Bar Association, and the legislature were generally resistant to changes in the common law.<sup>277</sup> The Committee was wary of the Trust Code being held hostage to this type of debate.<sup>278</sup>

### C. Self-Settled Trusts: Section 633.2303

Section 633.2303 applies to trusts in which the settlor is a beneficiary.<sup>279</sup> A spendthrift clause is invalid as to claims by the settlor's creditors when the settlor is a beneficiary under section 633.2302(1).<sup>280</sup> Section 633.2303, reflecting a well-

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276. See EUGENE F. SCOLES & EDWARD C. HALBACH, JR., PROBLEMS AND MATERIALS ON DECEASED'S ESTATES AND TRUSTS 453 (5th ed. 1993); see also BOGERT & BOGERT, *supra* note 50, § 224, at 456 (2d rev. ed. 1992) (discussing exceptions to the validity of spendthrift trusts based upon public policy); M.L. Cross, Annotation, *Trust Income or Assets as Subject to Claim Against Beneficiary for Alimony, Maintenance or Child Support*, 91 A.L.R.2d 262 (1963). Ignoring the cases involving self-settled trusts and the cases involving only accrued income otherwise payable to a beneficiary, a majority of the cases decided without the aid of a statute rejected an exception for alimony or support of a former spouse. See BOGERT & BOGERT, *supra* note 50, § 224, at 465 (2d rev. ed. 1992). The cases on child support were about evenly split. Compare *In re Bucklin's Estate*, 51 N.W.2d 412, 417 (Iowa 1952) (holding that the payment of support money for a child of the beneficiary was not an exception to the validity of a spendthrift trust); *Moore v. Moore*, 44 A.2d 639, 645 (N.J. Ch. 1945) (holding the court had no jurisdiction to order husband's trustee to pay over income of the trust for future support of child of the marriage), with *Bacardi v. White*, 463 So. 2d 218, 223 (Fla. 1985) (stating payments from a spendthrift trust may be garnished to enforce decrees for child support). The Iowa cases clearly rejected claims of both children and former spouses. *Estate of Dodge v. Scott*, 281 N.W.2d 447, 451 (Iowa 1979); *In re Bucklin's Estate*, 51 N.W.2d 412, 417 (Iowa 1952); *Wagner v. Wagner*, 38 N.W.2d 609, 611 (Iowa 1949); *Roorda v. Roorda*, 300 N.W. 294, 296-97 (Iowa 1941); *De Rousse v. Williams*, 164 N.W. 896, 898-99 (Iowa 1917).

277. See Handwritten notes on IOWA TRUST ACT § 2-102(b), (c) (1996 Draft) (on file with the author).

278. *Id.* § 2-302(1). As noted above, there is debate concerning the wisdom of an exception to spendthrift clauses for child support claims, and support and alimony claims by former spouses. Many states have created such an exception by statute. See RESTATEMENT (THIRD) OF TRUSTS § 59 reporter's notes (Tentative Draft No. 2, 1999); see also Cross, *supra* note 276. One might ask whether, assuming such an exception was desired, why it would not be appropriate to include it in the Iowa Trust Code. Admittedly, that would be one possibility. However, in the author's view, a more appropriate and thoughtful approach would be for the legislature, should it desire to do so, to consider an overall statute governing claims for child support and support of former spouses. In the course of formulating such a statute, the legislature could unify the treatment of all forms of income—for example, wages, dividends, interest, tax refunds, trust interests—and consider whether the differing treatment in certain instances found in current law was justifiable. The legislature could also consider what weight, if any, should be given to the fact that most other sources of income or assets are earned or owned by the father/spouse, whereas the spendthrift trust is created by a third party.

279. IOWA CODE § 633.2303 (2001).

280. *Id.* § 633.2302(1).

established proposition,<sup>281</sup> provides that when a settlor is also a beneficiary of the trust, a creditor, or transferee, of the settlor may reach the maximum amount payable by the trustee to the settlor or for the settlor's benefit.<sup>282</sup> This section, of course, applies only to irrevocable trusts, because revocable trusts are expressly covered elsewhere in the Trust Code.<sup>283</sup> Section 633.2303(2) states a special rule for the case of a trust with more than one settlor, providing that creditors may reach only that part of the trust proportionate to the debtor's contribution.<sup>284</sup>

## VIII. REVOCABLE TRUSTS

### A. *Preliminary Note*

The provisions of the Trust Code applicable to revocable trusts contain some of the more radical changes to the common law of trusts. Nevertheless, these changes are required to recognize a central fact about the use of revocable trusts in practice: revocable trusts are used primarily as will substitutes.<sup>285</sup> The intention of this portion of the Trust Code is, quite simply, to recognize the formal validity of revocable trusts despite the fact that they are not executed with will formalities, and otherwise to conform the rules regarding revocable trusts as far as possible to the rules for wills.<sup>286</sup> Recognition of this purpose explains many of the provisions of this portion of the Trust Code.

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281. RESTatement (THIRD) OF TRUSTS § 60 reporter's notes, cmt. f (Tentative Draft No. 2, 1999). Note, however, recent legislation to the contrary has been enacted in Alaska and Delaware. *See id.*

282. IOWA CODE § 633.2303. Notice that this is not always the entire amount of the trust. If the trustee was authorized in its discretion to distribute to the settlor up to one-half of the income each year, a creditor of the settlor could reach one-half of the income interest of the trust.

283. *See id.* § 633.3104.

284. *Id.* § 633.2303(2). As to when a person is a settlor, *see* RESTatement (THIRD) OF TRUSTS § 60 cmt. f, § 58 cmt. f (Tentative Draft No. 2, 1999).

285. The Restatement and the UTC both recognize this fact. *See* RESTatement (THIRD) OF TRUSTS § 25 cmt. (Tentative Draft No. 1, 1996); U.T.C. art. 6 cmt. (2000 Annual Meeting Draft).

286. *See* RESTatement (THIRD) OF TRUSTS § 25 cmt. (Tentative Draft No. 1, 1996); U.T.C. art. 6 cmt. (2000 Annual Meeting Draft). It should be noted that neither the drafters of the UTC nor the Restatement had drafted the revocable trust provisions when Todd Buchanan developed the Iowa Trust Code. His interest in correctly drafting these provisions was Todd's main purpose in becoming involved in the Trust Code, and it is these sections in which he has the greatest pride. Letter, Buchanan to Begleiter (Jan. 23, 2001), *supra* note 34.

B. *Competency to Create, Revoke, or Modify a Revocable Trust:*  
*Section 633.3101*<sup>287</sup>

In addition to requiring competency to create a revocable trust,<sup>288</sup> section 633.3101 provides for a challenge to the creation, modification, or revocation of a revocable trust.<sup>289</sup> The causes of actions and remedies of an “aggrieved person” are stated to be the same as those of a person attacking the execution of a will.<sup>290</sup> This provision is new, and is intended as part of the effort to bring the law of revocable trusts as close to the law of wills as possible, in recognition that the major use of the revocable trust is as a will substitute.

C. *Revocation and Modification: Section 633.3102*

1. *Presumption of Revocability*

Section 633.3102(1) states that a trust is revocable unless the terms of the trust expressly provide otherwise.<sup>291</sup> This is one of the major changes to the common law made by the Trust Code.<sup>292</sup> It is, however, consistent with common sense. If a trust is irrevocable unless the power to revoke is expressly reserved—the common law rule—a settlor who in error fails to reserve the power is relegated to an action for mistake or reformation.<sup>293</sup> Under the new rule that a trust is revocable unless otherwise stated in the trust instrument, a grantor who in error fails to state anything in the trust instrument, and who wishes an irrevocable trust, may simply amend the trust to add a clause making the trust irrevocable.<sup>294</sup> In

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287. House File 2518 reworded subsection one without substantive change. *See* Iowa H. File 2518, 78th Gen. Assemb., 2d Sess. (Apr. 26, 2000).

288. The competency requirement to create a revocable trust is the same as the competency requirement to execute a will. *See* IOWA CODE § 633.1102(3)(a).

289. *Id.* § 633.3101.

290. *See id.* Presumably, this includes more than simply an attack based on lack of due execution. An attack on the validity of a will could rest upon an assertion of lack of competency, fraud, mistake, undue influence, insane delusion, or any other ground. A challenge for lack of due execution would not be in the same sense as required by Iowa Code section 633.279 for wills. *See id.* § 633.279. The execution formalities required for wills are not required for trusts under the Trust Code. The execution requirements subject to challenge are the method of creation—such as, whether a transfer or declaration was made under section 633.2101; intent, and definitely ascertainable beneficiaries under section 633.2102; and a written and signed instrument under section 633.2103. *Id.* §§ 633.2101-2103. “Aggrieved person” is not defined in the Trust Code.

291. *Id.* § 633.3102.

292. RESTATEMENT (SECOND) OF TRUSTS § 330 (1959). Likewise, under Iowa common law a trust is irrevocable unless power to revoke is expressly reserved in the instrument. *See* Dunn v. Dunn, 258 N.W. 695, 697-98 (Iowa 1935).

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

294. IOWA CODE § 633.3102.

short, under the Trust Code rule, accomplishing the settlor's intent in the case of error is made easy rather than difficult. This is clearly the correct rule.

However, it was recognized some settlors may have relied on the old rule in creating trusts and application of the new rule to previously created trusts could upset the tax or non-tax planning of some settlors. Therefore, this rule applies only to trusts created under instruments executed on or after July 1, 2000, the effective date of the Act.<sup>295</sup>

## 2. *Methods of Revocation or Modification*

The Trust Code gives the settlor several choices regarding the method to be used to revoke or modify the trust. The trust instrument may specify a method and may also specify the stated method is the exclusive method of revocation or modification.<sup>296</sup> If the trust instrument does both, the method specified in the instrument is the exclusive method of revocation or modification.<sup>297</sup> On the other hand, if the trust instrument specifies a method of revocation, but does not specify that the stated method is exclusive, or if the trust instrument specifies no particular method of revocation, any of the following methods may be used:

- (1) Any method specified in the trust instrument;
- (2) A writing, except a will, signed by the settlor and delivered to the trustee during the settlor's lifetime; or
- (3) A will or codicil executed after the creation of the trust that expressly refers to the trust and bequeaths property that would otherwise have passed by the terms of the trust.<sup>298</sup>

Note the trustee need not concur in the modification or revocation.<sup>299</sup> The only recourse of a trustee disagreeing with modification would be to resign.<sup>300</sup>

## 3. *Distribution*

The statute provides that on termination of a revocable trust, the trust property is to be distributed as the settlor directs.<sup>301</sup> Presumably, this rule would

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295. *Id.* § 633.3102(1).

296. *Id.* § 633.3102(3).

297. *Id.* § 633.3102(3)(b).

298. *Id.* § 633.3102. The UTC is more general, allowing revocation by a subsequent will or by "any other method manifesting clear and convincing evidence of the settlor's intent." U.T.C. § 602(c)(2)(B) (2000 Approved).

299. IOWA CODE § 633.3102.

300. See *id.* § 633.4106 (discussing methods of resignation of a trustee).

control even if the trust, which functions as a will substitute, contained a provision directing a different distribution on termination because the settlor of a revocable trust maintains all rights and interests in a revocable trust.<sup>302</sup>

#### 4. *Revocation by Attorney in Fact and Conservator*

Subsection 5 provides revocation or modification may be exercised by an agent under a power of attorney only if the power of attorney contains express authorization to revoke or modify the trust.<sup>303</sup> Subsection 6 allows a conservator to exercise the modification power "with the approval of the court supervising the conservatorship."<sup>304</sup> Both provisions are consistent with the UTC.<sup>305</sup> The power of attorney provision engendered some criticism that it would make litigation more likely.<sup>306</sup>

#### D. *Other Rights of Settlor: Section 633.3103*

Section 633.3103 is another attempt to conform the rules on revocable trusts to the rules on wills. It states three rules, all of which change the common law to some extent.<sup>307</sup> The first rule of section 633.3103 is that the holder of the power to revoke—usually the settlor—and not the beneficiary has the rights given to the beneficiaries under the trust instrument or by law.<sup>308</sup> In early revocable trust cases, revocable trusts were upheld by stating that the trust was created by transferring certain rights from the settlor to the beneficiaries, even though the beneficiaries'

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301. *Id.* § 633.3102(4).

302. *See id.* § 633.3103. Such a clause in the trust instrument might be construed as a provision contradicting this section under section 633.1105. *See id.* § 633.1105. Such a result would be incorrect. There would appear to be no reason to hold a settlor of a revocable trust to his former intention that he has abandoned.

303. *Id.* § 633.3102(5).

304. *Id.* § 633.3102(6).

305. *See* U.T.C. § 602(e), (f) (2000 Annual Meeting Draft). The comments indicate express authorization in the power of attorney is required because most settlors intend the power of attorney to be used as a backup for assets not transferred to the revocable trusts, or for specific actions, such as the signing of tax returns or applying for government benefits that may be beyond a trustee's authority. *Id.* § 602 cmt. The primary property management device is intended to be the revocable trust. *Id.* Therefore, express authority should be required for the agent to terminate the primary property management device and make the power of attorney primary. *Id.* This explanation makes a good deal of sense. The conservator's power to revoke with court approval is becoming a common statutory inclusion. *Id.*

306. Fax, Klotz to Holbeck (Mar. 19, 1999), *supra* note 121. Judge Klotz's fax notes that many acts under a power of attorney lend themselves to potential litigation. *Id.* Judge Klotz is undoubtedly correct.

307. *See* IOWA CODE § 633.3103.

308. *Id.* § 633.3103(1).

rights were subject to divestment by exercise of the power to revoke.<sup>309</sup> This theory was necessary to constitute the requisite transfer to create the trust.<sup>310</sup> With the new recognition that revocable trusts are will substitutes that can be treated as wills—except they are valid without being executed with will formalities<sup>311</sup>—this rationale can be dispensed with. Giving the settlor the rights of beneficiaries makes the theory consistent with the reality of revocable trusts and corrects the artificiality of the earlier view.

The second rule—the duties of the trustee are owed to the holder of the power to revoke—is a corollary of, and follows from, the first rule.<sup>312</sup> This rule covers all the trustee duties provided in the Iowa Trust Code including the duty to provide notices,<sup>313</sup> and the duties of loyalty and confidentiality.<sup>314</sup>

The last rule is that the trustee must follow the directions of the holder of the power or of a person to whom the power has been delegated in writing.<sup>315</sup> The trustee will not be liable for following the power holder's directions, even if the directions are contrary to the terms of the trust.<sup>316</sup> Written delegation of the power is controlling only if the trust authorizes the donee's act.<sup>317</sup> It should be noted the authority of a power holder's donee is less than that of the power holder himself.<sup>318</sup> The power holder may give directions to the trustee which are contrary to the terms of the trust, and the trustee may follow these directions without liability.<sup>319</sup> However, the trust must authorize the donee's directed actions in order for the trustee to follow them and avoid liability.<sup>320</sup>

#### *E. Creditor Claims Against Revocable Trust: Section 633.3104*

The Iowa Supreme Court held in *Phillips v. Roe*<sup>321</sup> that a revocable trust is subject to claims against the settlor arising before settlor's death or, if the claim is not brought until after the settlor's death, to claims when the facts precipitating the

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309. See, e.g., *Investors Stock Fund, Inc. v. Roberts*, 179 F. Supp. 185, 192 (D. Mont. 1959), *aff'd*, 286 F.2d 647 (9th Cir. 1961).

310. *Id.* at 194.

311. *See supra* Part VIII.A.

312. *See Iowa Code § 633.3103(2).*

313. *See id.* § 633.4213.

314. *See id.* § 633.4202.

315. *Id.* § 633.3103(3).

316. *Id.*

317. *Id.* § 633.4206.

318. *Id.* For example, the power holder must periodically review the donee's performance. *Id.* § 633.4206(2)(c).

319. *Id.* § 633.3103(3).

320. *Id.*; *see also id.* § 633.4207(1).

321. *Phillips v. Roe (In re Estate of Nagel)*, 580 N.W.2d 810 (Iowa 1998).

claim occurred during the settlor's lifetime.<sup>322</sup> Section 633.3104 codifies the *Phillips* decision and the near universal rule that during a settlor's lifetime the trust property is subject to the claims of the settlor's creditors to the extent of the power to revoke.<sup>323</sup> However, the section introduces two new elements. First, the trust is subject to the costs of administration of the settlor's estate.<sup>324</sup> Second, the trust is subject to claims and costs of administration only to the extent of the property over which the settlor had power to revoke and, more importantly, only to the extent the settlor's estate is inadequate to pay the claims and costs.<sup>325</sup> This means the settlor's estate remains primarily liable for creditors' claims and the costs of administration. The trust becomes liable only when the estate is exhausted.

A significant question is whether this section by implication makes revocable trusts subject to a spouse's election against the will.<sup>326</sup> The drafters did not intend section 633.3104 to answer this particular question. In other words, this section is not intended in any way to affect the spousal share or to answer the question of whether a revocable trust is subject to a spousal election.<sup>327</sup>

#### *F. Rights of and Creditor Claims Against Holder of General Power of Appointment: Section 633.3105*

Section 633.3105 applies the rules of sections 633.3103 and 633.3104 to the holder of a presently exercisable general power of appointment.<sup>328</sup> A presently exercisable general power of appointment indicates the holder has the immediate right to acquire the property subject to the power of appointment for himself.<sup>329</sup>

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322. *Id.* at 812.

323. *See id.* at 811; IOWA CODE § 633.3104.

324. *See Iowa Code § 633.3104(2).* Although the Trust Code does not explicitly so state, this presumably would be interpreted to mean the "costs of administration" as defined in Iowa Code section 633.3, including:

[C]ourt costs, fiduciary's fees, attorney fees, all appraiser's fees, premiums on corporate surety bonds, statutory allowance for support of surviving spouse and children, cost of continuation of abstracts of title, recording fees, transfer fees, transfer taxes, agents' fees allowed by order of court, interest expense, including, but not limited to, interest payable on extension of federal estate tax, and all other fees and expenses allowed by order of court in connection with the administration of the estate. Court costs shall include expenses of selling property.

*Id.* § 633.3.

325. *See id.* § 633.3104(2).

326. Spousal elections against a will are governed by Iowa Code sections 633.238-246.

327. *See id.* § 633.3104 (noting this section applies solely to creditors' claims).

328. *Id.* §§ 633.3103-3105.

329. RESTATEMENT (SECOND) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.1 cmt. c (1986). A power of appointment is "authority, other than as an incident of the beneficial ownership of property, to designate recipients of beneficial interests in property." *Id.* § 11.1. "A

This right is the functional equivalent of a power to revoke the trust<sup>330</sup> and should therefore be treated in the same manner as a power to revoke.<sup>331</sup> Section 633.3105 applies only to holders of presently exercisable powers of appointment, not to holders of general *testamentary* powers of appointment.<sup>332</sup>

#### *G. Extension of Wills Doctrines to Revocable Trusts: Pretermitted Heirs and Divorce: Sections 633.3106 and 633.3107*

Sections 633.3106 and 633.3107 apply some of the substantive statutory law of wills to revocable trusts.<sup>333</sup> These sections are further attempts to coordinate the law of revocable trusts and the law of wills.<sup>334</sup> The pretermitted heir provision, which tracks current Iowa Code section 633.267, provides that children born to or adopted by the settlor after the making of a revocable trust take their intestate share of the trust when the trust fails to provide for such children, unless it appears from the terms of the trust the omission is intentional.<sup>335</sup>

The divorce provision, which tracks current Iowa Code section 633.271, states that a divorce or dissolution of the settlor's marriage following the execution of a revocable trust revokes all provisions of the trust in favor of settlor's spouse.<sup>336</sup> Remarriage of the settlor and the spouse reinstates the provisions unless the settlor modifies them.<sup>337</sup>

One uncertainty under section 633.271 and section 633.3107, as originally enacted, was whether the phrase "all provisions" was limited to dispositive

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power of appointment is general if it is exercisable in favor of any one or more of the following: the donee of the power, the donee's creditors, the donee's estate, or the creditors of the donee's estate." *Id.* § 11.4(1). "A power of appointment . . . is presently exercisable if the donee at the time in question by an exercise of the power can create an interest, present or future, in an object of the power." *Id.* § 11.5(1). Objects of a power are the persons in whose favor the power can be exercised. *Id.* § 11.2(3).

330. Because the holder, by exercising the general power, can become the owner of the property outright and then dispose of it in any manner he desires, the holder can effectively revoke the trust. *Id.* § 11.1 cmt. c.

331. *Id.*

332. IOWA CODE § 633.3105. This section applies only to holders of presently exercisable powers of appointment because the holders of general *testamentary* powers of appointment may only exercise the power in favor of their estate, which is viewed as a lesser power than the power to revoke. *See, e.g., Levy v. Crocker-Citizens Nat'l Bank*, 94 Cal. Rptr. 1, 3-4 (Ct. App. 1971).

333. IOWA CODE §§ 633.3106-3107. The divorce section applicable to wills is Iowa Code section 633.271. The pretermitted heir statute is Iowa Code section 633.267.

334. Other substantive law sections arguably may be amenable to this treatment. One possibility is the antilapse statute. *See id.* §§ 633.273-274.

335. *Id.* § 633.3106; *see also id.* § 633.267.

336. *Id.* § 633.3107; *see also id.* § 633.271.

337. *Id.* § 633.3107.

provisions or included appointments of a trustee or successor trustee and powers granted to the surviving spouse.<sup>338</sup> This question does not appear to have arisen in Iowa courts. In order to clarify both sections, House File 2518 amended both section 633.271 and 633.3107 by explicitly extending the provisions revoked to include all provisions in favor of the spouse, including nominations to serve in a fiduciary capacity and appointments of property.<sup>339</sup>

**H. Limitation on Contest and Notice to Creditors and Others:  
Sections 633.3108 and 633.3109**

Again, if a revocable trust is to be treated like a will, there should be a statutory provision limiting the time period in which contests concerning the validity of the trust should be brought.<sup>340</sup> Similarly, there should be a provision providing notice to creditors, heirs, and beneficiaries similar to that provided for wills.<sup>341</sup>

The Trust Code contains alternative provisions. Section 633.3108 applies only to contests of the validity of a revocable trust.<sup>342</sup> It provides for a one year statute of limitations on contests, measured from the date of settlor's death.<sup>343</sup> Whether one year is a sufficient length of time to satisfy a court has not been determined.<sup>344</sup> The statute is specifically inapplicable when notice under section

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338. See *id.* § 633.271; see also *id.* § 633.3107.

339. See Iowa H. File 2518, 78th Gen. Assemb., 2d Sess. (Apr. 26, 2000). An issue still remaining under this statute is whether the revocation should extend to the spouse's relatives. Iowa appears to have decided this question in the negative. See *Porter v. Porter*, 286 N.W.2d 649, 652-53 (Iowa 1979) (focusing solely on testator's intent rather than attempting to discern legislative intent or to broadly construe section 633.271). Arguably, the intent of most testators would be to revoke provisions in favor of the spouse's relatives, although that is not free from doubt. The Probate and Trust Law Section decided not to recommend a provision revoking provisions in favor of the relatives of a spouse. The Iowa State Bar Association Section on Probate and Trust Law, Agenda of the Meeting of Nov. 5, 1999 Exhibit M (on file with author) [hereinafter *Draftsman's Comments*]. Another question is whether the statute is mandatory or whether a court in a divorce proceeding could order otherwise. *Id.* To the author's knowledge, this question has not arisen in the wills context.

340. See, e.g., IOWA CODE § 633.3108(1).

341. See, e.g., *id.* § 633.304 (setting forth the form and process of providing creditors with notice of probate of will with administration); *id.* § 633.305 (setting forth the form and process of providing heirs and creditors with notice of probate of will with no administration).

342. *Id.* § 633.3108(1).

343. *Id.* Presumably, this is a so-called "self-executing" statute of limitations, not involving state action—and therefore due process restrictions—under *Tulsa Professional Collection Services v. Pope*. See *Tulsa Prof'l Collection Servs. v. Pope*, 485 U.S. 478, 483 (1988). *Pope* did not pass on the validity of such a clause. *Id.*

344. In *Pope*, the Supreme Court expressly did not decide the question. *Id.* at 488.

Our conclusion that the Oklahoma nonclaim statute is not a self-executing statute of limitations makes it unnecessary to consider appellant's argument that a 2-month

633.3109 is given.<sup>345</sup> Lastly, unless there is an action contesting the validity of the trust pending six months after the death of the settlor, the trustee is entitled to presume the trust is valid and to distribute the trust property in accordance with the trust terms without liability for an improper distribution.<sup>346</sup> All such liability is specifically placed on the beneficiaries.<sup>347</sup> This final provision is new and is intended to facilitate early distribution of the trust.<sup>348</sup> It puts a premium on contestants to bring the action quickly. Otherwise, the only recourse is against the beneficiaries.<sup>349</sup>

Section 633.3109 probably deserves an article all its own, since it has been subject to more discussion and criticism than any other section of the Trust Code. Perhaps it is best referred to as a work in progress.<sup>350</sup> I will first try to summarize the statute, then discuss some of the criticisms.

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period is somehow unconstitutionally short. We also have no occasion to consider the proper characterization of nonclaim statutes that run from the date of death, and which generally provide for longer time periods, ranging from one to five years.

*Id.* (citations omitted).

345. IOWA CODE § 633.3108.

346. *Id.* § 633.3108(2).

347. *Id.*

348. *See id.*

349. *Id.* The UTC has a similar provision, but with several significant differences. U.T.C. § 604 (2000 Annual Meeting Draft). A contest is barred after the earlier of three years from the settlor's death or 120 days after notice of the trust and various information, including a copy of the trust instrument and of the time allowed for a contest, are sent to the person. *Id.* § 604(a). The trustee may distribute the trust property immediately on the death of the settlor without liability, unless the trustee knows of a proceeding contesting the trust's validity or is notified of a possible contest that is actually instituted within sixty days of the notice. *Id.* § 604(b). The beneficiaries are liable to return the distribution if the trust is later ruled invalid. *Id.* § 604(c). The comment states that this section does not address the trustee's liability to creditors of the deceased settlor for distributing the trust assets. *Id.* § 604 cmt.

350. The major restructuring of House File 2518 suggests the Trust Code is still a work in progress. Iowa H. File 2518, 78th Gen. Assemb., 2d Sess. (Apr. 26, 2000). The amendment changed the section to read as follows—underlines indicate new matter, and strikeouts indicate deleted matter:

#### **633.3109 NOTICE TO CREDITORS, HEIRS, SPOUSE, AND BENEFICIARIES**

1. As used in this section, "intestate heir" means only such person as would, in an intestate estate, be entitled to a share under section 633.219, subsection 1, 2, or 3, or 4.

2. A creditor of a deceased settlor of a revocable trust must bring suit to enforce its claim against the assets of the decedent's trust within one year of the decedent's death or be forever barred from collection against the trust assets. If a probate administration is commenced for the decedent and notice is properly given pursuant to section 633.230 or 633.304, a creditor's rights shall be determined under those sections and section 633.3104.

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3. If no notice is given to creditors and heirs pursuant to subsection 4-2, creditor's rights may be established or terminated if the trustee gives notice as follows:

a. The trustee shall publish a notice once each week for two consecutive weeks in a daily or weekly newspaper of general circulation published in the county in which the settlor was domiciled decedent was a resident at the time of his death, and in any country of which the decedent was a nonresident but in which some real estate of the trust is located. If the decedent was not a resident of Iowa, but the principal place of administration is in Iowa, the trustee shall publish notice in the county that is the principal place of administration pursuant to section 633.6102.

b. If the decedent was a nonresident of the county in which some real estate of the trust is located, and at any time during the pendency of the trust administration the trustee has knowledge of the name and address of a person believed to own or possess a claim which will not, or may not, be paid or otherwise satisfied during administration, the trustee shall provide a notice by ordinary mail to each such claimant at the claimant's last known address.

c. As soon as practicable, the trustee shall give a notice by ordinary mail to the surviving spouse, the intestate heirs of the decedent, and each beneficiary under the trust whose identities are reasonably ascertainable, at such person's last known addresses.

d. The notice in paragraphs "a", "b", and "c" shall include notification of the decedent's death, and the fact that any action to contest the validity of the trust must be brought within the later to occur of sixty days from the date of the second publication of the notice made pursuant to paragraph "a" or thirty days from the date of mailing of the notice pursuant to paragraph "b" or "c". A person who does not make a claim within the appropriate period is forever barred.

e. The trustee shall give notice to debtors to make payment, and to creditors having claims against the trust assets to mail proof of their claim to the trustee via certified mail, return receipt requested, within the later to occur of sixty days from the second publication of the notice or thirty days from the date of mailing of the notice, or thereafter be forever barred.

4. The notice described in subsection 3 shall be substantially in the following form:

To all persons regarding \_\_\_\_\_, deceased, who died on or about \_\_\_, (year) \_\_\_. You are hereby notified that \_\_\_ is the trustee of the \_\_\_ Trust. At this time, no probate administration is contemplated with regard to the above-referenced decedent's estate.

Any action to contest the validity of the trust must be brought in the District Court of \_\_\_\_\_ County, Iowa, within the later to occur of sixty days from the date of second publication of this notice, or thirty days from the date of mailing this notice to all heirs of the decedent, spouse of the decedent, and beneficiaries under the trust whose identities are reasonably ascertainable. Any claim not filed within this period shall be forever barred.

Notice is further given that all persons indebted to the decedent or to the trust are requested to make immediate payment to the undersigned trustee. Creditors having claims against the trust must mail them to the trustee at the address listed below via certified mail, return receipt requested. Unless creditor claims are mailed by the

The statute provides that a creditor of a settlor must sue on the claim within one year of the settlor's death.<sup>351</sup> If administration is commenced and notice is given under section 633.230—intestate estate—or section 633.304—testate estate—the creditor's rights are determined under those sections rather than under the Trust Code.<sup>352</sup>

Intestate heirs under section 633.219<sup>353</sup> and creditors are entitled to notice.<sup>354</sup> Notice is by publication<sup>355</sup> and by ordinary mail to the decedent's surviving spouse and heirs and to the trust beneficiaries who "are reasonably ascertainable" at their last known addresses.<sup>356</sup> Any claimant whose address is known by the trustee, and who will not or may not be paid, is entitled to mailed notice.<sup>357</sup> The notice shall

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later to occur of sixty days from the second publication of this notice or thirty days from the date of mailing this notice, a claim shall be forever barred, unless otherwise allowed or paid.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, (year) \_\_\_\_\_.

\_\_\_\_\_  
Trust

\_\_\_\_\_  
Trustee

Address: \_\_\_\_\_

Date of second publication \_\_\_\_\_ day of \_\_\_\_\_, (year) \_\_\_\_\_.

5. The claimant either must receive satisfaction of its claim within sixty days of mailing its claim to the trustee, or must file suit against the trust to enforce collection of the creditor's claim within sixty days of mailing its claim to the trustee. The trustee and creditor may agree to extend the limitations period for filing an action to enforce the claim. If the claimant fails to properly file its claim within the established time period or bring an action to enforce its claim within the established time period, the creditor's claim shall be forever barred.

*Id.*; *see also* IOWA CODE § 633.3109 (2001).

351. IOWA CODE § 633.3109(2).

352. *Id.*; *see also id.* §§ 633.230, .304.

353. *Id.* § 633.219. The current statute specifies only subsections 1, 2, and 3. *Id.* The amendment adds subsection 4 to conform to a recent amendment to section 633.304. *See id.* § 633.304; *Draftsman's Comments*, *supra* note 339 (highlighting amendments to the Iowa Trust Code § 633.3109).

354. IOWA CODE § 633.3109(3).

355. *Id.* § 633.3109(3)(a). Section 633.3109(3)(a) requires publication once a week for two consecutive weeks in a daily or weekly newspaper of general circulation in the county where the settlor was domiciled. *Id.* This parallels the notice required by sections 633.230 and 633.304. *See id.* §§ 633.230, .304.

356. *Id.* § 633.3109(3)(c). For a nonresident settlor of a trust owning real estate or whose principal place of administration is in Iowa, publication is in the county in which the real estate or in which principal place of administration, as defined in section 633.6102, is located. *Id.* §§ 633.6102, .3109(3)(a). The contents of the notice are specified in section 633.3109(3)(d). *Id.* § 633.3109(3)(d).

357. *Id.* § 633.3109(3).

direct creditors to mail claims to the trustee by certified mail, return receipt requested, by the later of sixty days from the second publication or thirty days from the date of mailing.<sup>358</sup> Creditors who do not comply are barred from claiming against the trust assets.<sup>359</sup> A sample form of notice is provided.<sup>360</sup> Finally, if the claimant fails to receive satisfaction within sixty days of mailing the claim, suit must be filed against the trustee or is barred.<sup>361</sup> The limitation period for filing the claim may be extended by agreement between the trustee and creditor.<sup>362</sup>

The criticisms of the Trust Code seem to involve two separate questions. The first is the differences between the Trust Code and the Probate Code.<sup>363</sup> The drafter argues the differences are intentional and result from two factors: making trust settlements more expeditious, and, given the developments in information technology, four months is no longer necessary.<sup>364</sup> The draftsman makes cogent arguments for the shorter period in the Trust Code.<sup>365</sup>

The second problem concerns whether the provisions are complete. For example, paragraph 3 of section 633.3109 states that "a creditor's rights may be

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358. *Id.* § 633.3109(3)(e).

359. *Id.* § 633.3109(3)(d).

360. *Id.* § 633.3109(4).

361. *Id.* § 633.3109(5).

362. *Id.*

363. *See, e.g.*, Fax, Klotz to Holveck (Mar. 19, 1999), *supra* note 121. Judge Klotz notes, for example, the one year period for a creditor to bring suit under the Trust Code, section 633.3109(2), differs from the period under the Probate Code, section 633.304. *See id.* Compare IOWA CODE § 633.304 (2001), with IOWA CODE 633.3109(2) (2001). Section 633.3109(3)(d) of the Trust Code provides for the claim to be brought within sixty days rather than four months from the second publication, as in the Probate Code, section 633.304. IOWA CODE §§ 633.304, .3109(3)(d).

364. *Draftsman's Comments*, *supra* note 339. The comments state:

As for the limited time periods that do not correspond with the probate time periods, it is based upon several premises. First, to extend the time period would run contrary to the information our clients have received that trust settlements will be more expeditious. The drafter does not intend to allow poor information given to the public to control wise decision making. However, in today's age of information, one must ask whether it is still necessary to require four months time for creditors to become aware of a death. Is it not true that most claims are known or reasonably ascertainable? Is the peril of two months versus four months sufficient to extend the period by which trustees are placed at risk for making distributions to beneficiaries? In general, it is the intent of the Trust Code to provide for the efficient, expeditious settlement of trusts primarily for the benefit of the beneficiaries. With that said, the Trust Code, at a minimum, clarifies the creditor's rights with regard to a trust, but it is probably more accurate to say that the Trust Code enhances the rights of creditors. By "reducing" the time period from four months to two months, creditors are not losing any rights that they once had. To the contrary, they are gaining much more.

*Id.*

365. *See Draftsman's Comments*, *supra* note 339.

established or terminated" if a trustee gives notice as provided in that section.<sup>366</sup> Questions were raised as to whether the right of the surviving spouse, heirs, and beneficiaries may also be terminated if appropriate notice is given, suggesting that this paragraph specifically state that the rights of these persons may be terminated in accordance with the section, and noting that the section contained no information concerning what the creditor should mail to the trustee.<sup>367</sup> Similarly, paragraph 5 uses the term "creditor," but also uses "claim."<sup>368</sup> The question remains whether this paragraph applies only to creditors or also to heirs, beneficiaries, and the surviving spouse.

The question appears to boil down to whether the spouse, heirs, and beneficiaries are "claimants." If they are claimants, all the provisions barring claims apply to the classes equally.<sup>369</sup> If not, gaps exist in the provision.<sup>370</sup> The draftsman believes, and drafted the statute in accordance with his belief, that the spouse and heirs are claimants against a trust because they do not have the same rights as they do with reference to a will.<sup>371</sup> Indeed, as the draftsman correctly states, prior to the enactment of the Iowa Trust Code, the spouse and heirs had "almost no rights."<sup>372</sup> If the courts give any weight to this history, the spouse and heirs ought to be included as claimants.

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366. IOWA CODE § 633.3109.

367. See Letter, Reimer to Buchanan (Sept. 13, 1999), *supra* note 46; Letter, Volz to Buchanan (Nov. 2, 1999), *supra* note 46; Fax, Volz to Millage (Mar. 3, 1999), *supra* note 124. Note section 633.3109(d) refers, by reference to paragraph (c), to the notice to the surviving spouse, heirs, and beneficiaries and states that claims not made in time are forever barred. IOWA CODE § 633.3109(d).

368. IOWA CODE § 633.3109(5).

369. *Id.*

370. *See id.*

371. *Draftsman's Comments*, *supra* note 339. The draftsman states:

Lastly, there is a fundamental disagreement between myself and others with regard to the status of a spouse and heirs in relation to a trust versus a will. A spouse and heirs do not have the same rights in relationship to a trust as they do a will. Prior to enactment of the trust code, I would say they had almost no rights. As it is now, it is the drafter's opinion (which you are free to disagree with) that the status of a spouse and heirs is as claimants. Therefore, the term "claimant" should be read to include these people and to state spouse and heirs after claimant is redundant and possibly misleading. Certainly, a sentence could be added that states that a spouse and heirs have the status of a claimant, but I do not think it is necessary.

*Id.*

372. *Id.*

**I. Rights of Trustee Regarding Claims in a Probate Administration:  
Section 633.3110**

Section 633.3110 is a procedural adjunct to section 633.3104. If the trust is to be subject to claims of the settlor's creditors, the trustee should have a forum to have those claims decided as well as be informed of the probate proceeding. Section 633.3110 makes the trustee an interested party to the probate administration of the settlor's estate if the "revocable trust could be held responsible for claims, expenses, or taxes."<sup>373</sup> This section also provides that the trustee "receive notice of all potential charges against the trust."<sup>374</sup> Furthermore, the trustee "must either authorize payments for which the trust may be found liable or be given the opportunity to dispute or defend any such payment."<sup>375</sup>

**J. Trustee's Liability for Distributions: Section 633.3111**

It has been noted that unless the trustee is a party to a pending proceeding to contest the validity of the trust, the trustee may distribute the trust property without liability.<sup>376</sup> If the trustee distributes trust assets without "making adequate provisions" for payment of known or reasonably ascertainable creditors' claims, the trustee is jointly and severally liable with the beneficiaries to the extent of the distributions.<sup>377</sup> However, the trustee is entitled to indemnification from the beneficiaries for amounts paid to creditors to the extent of distributions made.<sup>378</sup>

Several questions arise under section 633.3111. Does it apply only to creditors, or to the spouse and heirs also? The answer would appear to be only to creditors. First, the section uses the term "creditor."<sup>379</sup> Second, a trustee would not pay a contesting spouse or heir without a court order determining the trust's invalidity following a contest. Thus the only logical reading is that the section applies solely to creditors.

Second, assuming this is correct, can the trustee distribute the trust property if there is no contest six months following the settlor's death? Again, the answer should be no. A creditor's claim is not a contest, and a creditor has until thirty days after mailed notice—or, if later, sixty days after the second publication of notice—

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373. Iowa Code § 633.3110(1).

374. *Id.* § 633.3110(2).

375. *Id.*

376. *Id.* § 633.3108(2).

377. *Id.* § 633.3111(1).

378. *Id.* § 633.3111(2).

379. *Id.* § 633.3111(1)-(2).

to file a claim.<sup>380</sup> These time periods may occur more than six months after the death of the settlor.<sup>381</sup>

Third, is indemnification mandatory? Section 633.3111 appears to say indemnification is mandatory to the extent of the distributions made.<sup>382</sup> Suppose, however, the beneficiaries have no knowledge that the trustee did not reserve enough to pay creditors and the beneficiaries spend the distribution. How is the indemnification provision to be interpreted?<sup>383</sup>

#### *K. Conclusion*

The revocable trust provisions are some of the most significant and innovative in the Trust Code. The attempt to coordinate the law of wills and revocable trusts is a laudable effort that will hopefully bear fruit.

The procedural provisions are more difficult to understand, so case development and interpretation can be expected. A significant question is how often the procedures of sections 633.3109-3111 will be used. This has been recognized by the draftsman, who notes the public expects a minimum of formality and procedure regarding revocable trusts.<sup>384</sup>

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380. *Id.* § 633.3109(3)(e).

381. See *id.* § 633.3109(2) (specifying that a creditor has one year from the decedent's death in which to bring an action against the assets of a trust). Todd Buchanan disagrees with the author's conclusion on this point. Letter, Buchanan to Begleiter (Jan. 23, 2001), *supra* note 34.

382. IOWA CODE § 633.3111. Todd Buchanan believes that indemnification is mandatory, but the trustee may be responsible for any shortfall that cannot be recovered from the beneficiary. Letter, Buchanan to Begleiter (Jan. 23, 2001), *supra* note 34.

383. The subject of indemnification by the beneficiaries to the trustees is beyond the scope of this Article. In general, the trustee has a right of indemnity against the trust property in many contract situations, and in certain tort situations, but there is a conflict in the cases as to whether he has a similar right of indemnity against the beneficiaries. See BOGERT & BOGERT, *supra* note 50, § 718, at 73-75 (2d rev. ed. 1981).

384. *Draftsman's Comments*, *supra* note 339. The comments state:

It would seem that a known creditor should receive some sort of notice without being barred after one year. However, where a trustee chooses to not send notice, it is undesirable to open opportunities for either frivolous or late claims or allow someone who sat on their rights an opportunity to enforce their claim after one year. Should a trustee have an additional duty imposed upon them with regard to known creditors?

Keep in mind that this statute is not intended to be used in every trust settlement. The law does not require such a procedure now and only one state (Florida) has a provision such as this. It is the drafter's opinion that it is undesirable for trust settlements to become a new form of probate. It is our duty as attorneys to be protectors of the public interest. However, the public has spoken loudly and clearly that many desire to avoid the formal process of a probate proceeding.

## IX. TRUST ADMINISTRATION—OFFICE OF TRUSTEE

Part 4 of the Trust Code contains three major components.<sup>385</sup> Because each component contains a number of provisions, each is treated as a separate section. The first component covers the trustee.

### A. *Acceptance or Rejection of Trust by Trustee: Section 633.4101*

Section 633.4101 covers the basic rules for acceptance of the nomination as trustee or declination to serve.<sup>386</sup> Acceptance is indicated by the trustee by signing the trust instrument, a separate written acceptance, accepting delivery of the trust property, exercising trust powers, or performing trust duties.<sup>387</sup> To summarize, the trustee may accept by a writing or by actions.<sup>388</sup> Subsection 2 allows a trustee who has not accepted to decline to serve as trustee.<sup>389</sup> This merely restates traditional common law and none of it is controversial.<sup>390</sup>

It should be noted that delivery of the written acceptance or declination is not required by section 633.4101.<sup>391</sup> One reason is that often the circumstances dictate the person to whom the trustee should deliver the instrument. In the case of a revocable trust, delivery would normally be to the settlor. If a judicial proceeding were pending, the acceptance or declination would be appropriately filed with the court. In other cases, delivery to others—such as the adult beneficiaries or the other acting trustees—might be appropriate. Given this, statutory silence may be the better course. Regardless, clear and early communication of acceptance and declination to serve, especially of the latter, are to be strongly encouraged.

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385. *See generally* IOWA CODE §§ 633.4101-4701.

386. *Id.* § 633.4101. In response to several comments, the Probate and Trust Law Section proposed, and House File 2518 enacted, changes in the wording of the title of this section from “rejection of trust by” to “declination to serve as.” Iowa H. File 2518, 78th Gen. Assemb., 2d Sess. (Apr. 26, 2000). The words “reject the trust” in subsection 2 are changed to “decline to serve as trustee” and the words “rejection of the trust” in subsection 3 are changed to “declination to serve.” *Id.*

387. IOWA CODE § 633.4101. Under the common law, acceptance of trust duties as trustee made manual delivery of the deed of the trust property to the trustee unnecessary. *Ewing v. Buckner*, 41 N.W. 164, 166 (Iowa 1889). Preserving the trust property if there is a risk of damage to the property permits the named trustee to act without acceptance. IOWA CODE § 633.4101(3); *see also infra* notes 393-95 and accompanying text.

388. IOWA CODE § 633.4101.

389. *Id.* § 633.4101(2).

390. *See BOGERT & BOGERT, supra* note 50, § 150, at 81-82 (2d rev. ed. 1979).

391. *See* IOWA CODE § 633.4101.

Traditionally, taking possession of the trust property or controlling it shows an acceptance of the office.<sup>392</sup> However, it was recognized by the drafters of the Iowa Trust Code that, in exceptional cases, harm may come to the property unless the named trustee protects it.<sup>393</sup> If such action by the named trustee was held to be acceptance, and the trustee was undecided or wished to decline to serve, the trustee might refuse delivery of the property—for fear of being held to accept the office—and, as a result of that action, the trust property could be damaged or destroyed. It was believed to be the wiser course to permit the named trustee to protect the property in such cases without implying acceptance from that act. Subsection 3, thus, permits the named trustee to take action intended to preserve the trust property in case of an immediate risk of damage to the property.<sup>394</sup> To avoid acceptance of the office, the person named must only deliver a written declination to serve to the settlor within a reasonable time following the action.<sup>395</sup>

#### B. *Trustee's Bond: Section 633.4102*

Section 633.4102 collects the provisions on the trustee's bond together in one section.<sup>396</sup> Prior Iowa law provided that a bond was required unless the trust instrument provides otherwise.<sup>397</sup> Section 633.4102 reverses Iowa Code section 633.169.<sup>398</sup> The new basic rule is that no bond is required, except in two cases:

- (1) The trust instrument requires it; or
- (2) A court requires it to protect the beneficiaries.<sup>399</sup>

Importantly, subsection 5 provides that only the second reason applies to banks and trust companies.<sup>400</sup> The trust instrument cannot require a bank or a trust company to give a bond.<sup>401</sup> A provision in the trust instrument so providing will be ignored.<sup>402</sup> The remaining provisions give the court authority to determine the

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392. BOGERT & BOGERT, *supra* note 50, § 150, at 82. The Trust Code did not adopt the rule that failure to accept within a reasonable time operates as a declination of the office. *See* U.T.C. § 701(b)(1) (2000 Approved); BOGERT, *supra* note 262, § 31, at 103.

393. *See* IOWA CODE § 633.4101; *see also* U.T.C. § 701 cmt. (2000 Annual Meeting Draft).

394. *See* IOWA CODE § 633.4101(3).

395. *See id.* Or, if the settlor is dead or incompetent, then written declination must be delivered to the beneficiaries of income and principal. *Id.*

396. *Id.* § 633.4102.

397. *See id.* § 633.169. A fiduciary under section 633.169 includes a trustee. *See id.* § 633.3(17).

398. *See id.* § 633.4102; *see also id.* § 633.169.

399. *See id.* § 633.4102(1).

400. *Id.* § 633.4102(5).

401. *Id.*

402. *Id.* This is one of the few instances in which the terms of the trust do not control.

amount and sureties of a bond if one is required, and in general to excuse, reduce, and increase a bond and modify the surety provisions,<sup>403</sup> and provide that the cost of the bond is charged to the trust unless the trust instrument or the court orders otherwise.<sup>404</sup> Courts are further permitted to reduce the bond by the value of trust property deposited with a financial institution so as to prevent unauthorized disposition.<sup>405</sup>

### C. Actions by Co-Trustees: Section 633.4103

At common law, if a trust had multiple trustees, all had to agree to act.<sup>406</sup> In some situations, this could not only be cumbersome, resulting in lost opportunities, but could also harm the beneficiaries due to disagreements among the trustees.<sup>407</sup> An attempt by one or a majority of trustees to act at common law was void as to the trust.<sup>408</sup> Recent statutes have changed that rule,<sup>409</sup> and the Restatement has recommended changing to a rule allowing a majority of trustees to act in multiple trust situations.<sup>410</sup> The Iowa Trust Code wisely adopts the rule permitting a majority of co-trustees to exercise trust powers.<sup>411</sup> In case of an impasse, a petition to the court is authorized.<sup>412</sup> In a new provision, a majority of the trustees may authorize an alternative method of resolving the dispute.<sup>413</sup> Use of an alternative method of decision-making has much to commend it, including the saving of the time and cost involved in a court proceeding. It will be interesting to see the extent to which this innovative provision is employed.

Subsection 3 states the traditional rule that, in the case of multiple trustees, the remaining trustees may act in case there is a vacancy in the office of one co-trustee.<sup>414</sup> The beneficial effect of such a rule is obvious.

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403. *Id.* § 633.4102(2).

404. *Id.* § 633.4102(4).

405. *Id.* § 633.4102(3). The bond is also reduced by the value of real property that the trust instrument provides cannot be sold without court authority. *Id.*

406. BOGERT & BOGERT, *supra* note 50, § 554, at 93 (2d rev. ed. 1980). Iowa law followed this rule. *In re Will of Spilka*, 97 N.W.2d 625, 627 (Iowa 1959).

407. BOGERT & BOGERT, *supra* note 50, § 121, at 360 (2d rev. ed. 1984).

408. *Id.* § 554, at 95 (2d rev. ed. 1980). However, this does not include ministerial acts. *Id.*

409. *Id.* § 554, at 103-04.

410. RESTATEMENT (THIRD) OF TRUSTS § 39 (Tentative Draft No. 2, 1999). Of course, if the trust has two trustees, both must agree.

411. See IOWA CODE § 633.4103(1) (2001).

412. *Id.* § 633.4103(2).

413. *Id.* Arbitration and mediation come to mind.

414. *Id.* § 633.4103(3).

Subsection 4, covering the situation of temporary unavailability of a co-trustee to act, is new and covers a problem much more likely to occur today.<sup>415</sup> It states that in case a co-trustee, due to absence, illness, or other temporary incapacity, is unavailable, the remaining co-trustees may act as if they were the only trustees, but only if such action is necessary to avoid "irreparable injury to the trust property" or to accomplish the trust purposes.<sup>416</sup> Notice this is more restrictive than in the case in which a vacancy exists in the office of co-trustee under subsection 3.<sup>417</sup> Presumably, the thought was that major decisions should await the availability of all trustees and only in emergency situations should action by less than all be permitted. However, the section contains words that may well involve judicial construction.<sup>418</sup> Another question that occurs is the reason for the differing treatment between the vacancy in the office of co-trustee and the temporary unavailability of a co-trustee.<sup>419</sup> While there is some obvious justification for the difference, is it not just as likely for the trust to miss an investment opportunity or a beneficiary to be in need in one case as in the other?

#### *D. Vacancy in Office of Trustee: Section 633.4104*

Section 633.4104 is self-explanatory. It lists five cases in which a vacancy in the office of trustee exists.<sup>420</sup> The first situation, declination to serve as trustee, is most common. Resignation, removal, or death of the trustee is also common. The appointment of a guardian or conservator for the trustee or his estate was rarely stated as a reason for a vacancy, but is clearly a beneficial addition. The importance of this provision is that the appointment of the guardian or conservator automatically removes the trustee, rather than requiring an additional court

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415. *Id.* § 633.4103(4).

416. *Id.*

417. Compare IOWA CODE § 633.4103(3) (2001), with IOWA CODE § 633.4103(4) (2001).

418. See IOWA CODE § 633.4103(4). For example, how long is temporary? Suppose a trustee is on a one-month safari to Africa. What if a trustee is in an accident? Moreover, what is irreparable injury to the trust property? Does it mean the property will become valueless? What if the injury concerns only one asset of the trust, but the effect on that asset is severe? Does the decision depend on the significance of the value of the asset to the trust as a whole? Most trusts have several purposes, none of which are stated in the trust instrument. Are the remaining trustees to determine the purposes? What if the temporarily unavailable trustee disagrees when she does become available? Is the remaining trustee's decision subject to being second-guessed by a court?

419. See *id.* § 633.4103(3), (4).

420. *Id.* § 633.4104. In subsection 1, House File 2518 changed "rejects the trust" to "declines to serve as trustee." Iowa H. File 2518, 78th Gen. Assemb., 2d Sess. (Apr. 26, 2000). It should be noted the reasons listed in this section are probably not exclusive. In *In re Carson's Estate*, the court held the provisions in the Code for removal of a trustee were directory, and when a trustee became insolvent and a receiver was appointed, a vacancy in the office of trustee existed. *In re Carson's Estate*, 265 N.W. 648, 652 (Iowa 1936).

proceeding.<sup>421</sup> The last reason is failure to identify, or non-existence of, the person named as trustee. This will probably rarely be invoked. Filling the vacancy is covered in the next section.

#### E. Filling Vacancy: Section 633.4105<sup>422</sup>

First, it should be stated that good drafting practice suggests filling vacancies by name, or at least by prescribing a method in the trust instrument itself.

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421. *See* IOWA CODE § 633.4104(5).

422. A technical amendment to this section was made by House File 2518. Iowa H. File 2518, 78th Gen. Assemb., 2d Sess. (Apr. 26, 2000). Subsections 1 and 1(a) were deleted. *See id.* Subsections 2 and 3 were renumbered as 1 and 2. *See id.* Former subsection 3(b)(1) was deleted, and former 3(b)(2) and (3) are renumbered as 3(b)(1) and (2). *See id.* Former section 1(b) is renumbered as subsection 3. *See id.* In addition, changes in wording are made. The revised section reads as follows—underlines indicate new matter, and strikeouts indicate deleted matter:

##### 633.4105 FILLING VACANCY

1. ~~For purposes of this section, "adult beneficiaries" shall not include either of the following:~~

~~a. Beneficiaries who are not competent and are not represented by a guardian, conservator, or agent.~~

~~b. Beneficiaries who are not entitled or eligible to receive trust income or a distribution of principal were the trust to terminate at the time the agreement is made.~~

2.1. A trustee must be appointed to fill a vacancy in the office of the trustee only if the trust has no trustee or the terms of the trust require a vacancy in the office of cotrustee to be filled.

3.2. A vacancy in the office of trustee shall be filled according to the following:

a. By the person named in or nominated pursuant to the method specified by the terms of the trust.

b. If the terms of the trust do not name a person or specify a method for filling the vacancy, or if the person named or nominated pursuant to the method specified fails to accept, one of the following methods shall be used:

~~(1) By a trust company designated by agreement of the adult beneficiaries specified in subsection 1.~~

~~(2)(1) By majority vote of all adult beneficiaries and the parent or legal guardian representative of any minor or incompetent beneficiary, as defined by section 633.6303.~~

~~(2)(2) By a person appointed by the court on petition of an interested person or of a person named as trustee by the terms of the trust. The court, in selecting a trustee, shall consider any nomination made by the adult beneficiaries and representatives.~~

~~3. Beneficiaries entitled to vote are those who are currently entitled or eligible to receive trust income or a distribution of principal if the trust were to terminate at the time of the vote.~~

Therefore, section 633.4105 would govern only if the trust contained no provision on the subject, or if for some reason the procedure specified by the trust was unusable.<sup>423</sup>

The first significant point is that a vacancy need not be filled unless the trust terms require filling the vacancy or there is no serving trustee.<sup>424</sup> This was not necessarily the case at common law under which filling the vacancy was discretionary with the court of equity.<sup>425</sup> The Trust Code provision is far more beneficial to trust administration than was the common law. If one or more trustees remain, why should an additional trustee be appointed unless the settlor so specified? The remaining trustee or trustees are capable of and available to perform the trust.

Second, priority in filling the vacancy is given to the person named in the trust or nominated under the method specified in the trust instrument.<sup>426</sup> This is consistent with common law.<sup>427</sup> If no method is specified, one of two methods may be used, with no priority between them:

- (1) A person<sup>428</sup> may be approved by majority vote of the adult beneficiaries and the representatives of minor and incompetent beneficiaries;<sup>429</sup> or

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423. See IOWA CODE § 633.4105. This could occur if all the nominated successor trustees declined to act, or if the procedure did not produce a nomination—for example, if the trust instrument provided that a majority of the adult income beneficiaries could nominate a successor trustee, but a majority could not agree on a candidate.

424. See *id.*

425. See BOGERT & BOGERT, *supra* note 50, § 532, at 131 (2d rev. ed. 1993). The probate court or division in the case of testamentary trusts also had the discretion to fill the vacancy. *Id.*

426. IOWA CODE § 633.4105(2)(a).

427. See BOGERT & BOGERT, *supra* note 50, § 532, at 131 (2d rev. ed. 1993). Under the common law, the court could ignore the person or method specified in the trust if it found that method prejudicial. See, e.g., *Hodgen's Ex'rs v. Sproul*, 267 N.W. 692, 695 (Iowa 1936). Presumably, this would still be the case. It should be noted that Iowa, perhaps, gives more deference to testator's choice of trustees than do many jurisdictions, though the cases concern initial appointments. See *id.* (recognizing that as a general rule, courts give deference to an interested party's choice unless the court finds him or her unsuited for the position).

428. Note the term "person" includes a legal or commercial entity. IOWA CODE § 633.1102(10).

429. *Id.* § 633.4105(2)(b)(1). This was followed at common law only if it was the method specified in the trust instrument. See BOGERT & BOGERT, *supra* note 50, § 532, at 131-32 (2d rev. ed. 1993) (stating all vacancies should be filled by the court at common law unless there is a governing statute). Under the Trust Code, the method can be used even if it is not specified in the trust instrument. IOWA CODE § 633.4105(2)(b)(1). The addition of representatives replaces the legal guardian or parent of a minor or incompetent in the current version of the Trust Code. *Id.* § 633.4105(2)(b)(1).

In making nominations, the beneficiaries should be careful not to nominate a person who may make discretionary payments to herself. Such a situation will cause the trustee to have a

(2) A person can be appointed by a court, which must consider nominations made by adult beneficiaries and representatives of other beneficiaries.<sup>430</sup>

Not all beneficiaries are entitled to vote under the first method.<sup>431</sup> Only those beneficiaries who are currently entitled to receive, or are discretionary beneficiaries of, income, or those who would receive corpus if the trust terminated at the time of the vote, may vote.<sup>432</sup>

#### *F. Resignation of Trustee: Section 633.4106*

Section 633.4106 provides several methods of resignation.<sup>433</sup> Some of the methods are new and others make changes in the common law.

##### *1. In Accordance with the Trust Terms*

The first method of resignation is by following the terms of the trust.<sup>434</sup> Note that court approval of the resignation is not required unless the terms of the trust require it.<sup>435</sup> It is also important to state that resignation does not affect liability of the resigning trustee or of sureties on the trustee's bond.<sup>436</sup>

##### *2. Revocable Trusts*

If the holder of the power to revoke the trust, usually but not always the settlor, is competent, the trustee may resign with the settlor's consent.<sup>437</sup> No court approval of the resignation is required. Subsection 1(b) appears to state that if the holder of the power is represented, the representative can consent to the resignation, but the section is not totally clear.<sup>438</sup> If this interpretation of the

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general power of appointment, and the trust property can be included in her estate under Internal Revenue Code § 2041. I.R.C. § 2041 (1994).

430. Iowa Code § 633.4105(2)(b)(2).

431. *Id.* § 633.4105(3).

432. *Id.*

433. *Id.* § 633.4106.

434. *Id.* § 633.4106(1)(a).

435. *See id.*

436. *Id.* § 633.4106(2).

437. *See id.* § 633.4106(1)(b).

438. *See id.* § 633.4106(2). Subsection 1(b) states: "With the consent of the person holding the power to revoke the trust if the holder is competent or is represented by a guardian, conservator, or agent." *Id.* § 633.4106(1)(b). This subsection could mean that only the consent of the holder of the power to revoke is required, even if a guardian or conservator has been appointed for the holder. Such a reading would, however, not make sense. Presumably, the drafter meant the consent of the representative would be required. Query: If the representative were an agent, would the power of attorney have to specifically authorize consent to resignation? Also, even if an agent was acting,

section is correct, the question occurs whether the representative—if a guardian or conservator—requires court approval to consent. The statute does not answer this question.

If the holder of the power to revoke substantially changes the trustee's duties, the trustee may resign by written notice to the holder if the trustee does not agree to the change.<sup>439</sup> No court approval is required.

### 3. *Irrevocable Trusts*

The trustee of an irrevocable trust may resign with the approval of the adult beneficiaries, specified in section 633.4105(1),<sup>440</sup> as can the trustee of a revocable trust, if the holder of the power to revoke is incompetent and is not represented by a guardian, conservator, or agent.<sup>441</sup> Again, court approval is not necessary.<sup>442</sup> The trustee may also resign by filing a petition under section 633.6202.<sup>443</sup> If the trustee files a petition, the court must accept the resignation, but may impose conditions necessary to protect the trust property.<sup>444</sup> The resignation takes effect ninety days after the filing of the petition or on court approval of the petition, whichever occurs first.<sup>445</sup>

The required court approval of the petition is new and marks a change in the law.<sup>446</sup> Under the common law, the court of equity had power to accept or reject the resignation.<sup>447</sup> Moreover, under common law, the filing of the petition did not constitute a resignation.<sup>448</sup> The Trust Code moves quite far towards the view that a

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would the settlor—who may not have been declared incompetent—still retain the ability to consent to the resignation?

439. *Id.* § 633.4106(d).

440. *Id.* § 633.4106(c); *see* IOWA CODE § 633.4105(1) (1999) (defining adult beneficiaries). Due to the amendment of section 633.4105, subsection 1(c) of section 633.4106 will need to be amended. *See* IOWA CODE § 633.4105(1) (2001). The reference to “adult beneficiaries” will need to be changed to “beneficiaries” and the section reference changed from “section 633.4105, subsection 1” to “section 633.4105, subsections 2b1 and 3.” *See id.*

441. *Id.* § 633.4106(1)(c).

442. *But see supra* note 427.

443. IOWA CODE § 633.4106(e); *see also* *id.* § 633.6202 (Petitions—Purposes of Proceedings); *infra* Part XVIII (discussing judicial proceedings concerning trusts).

444. IOWA CODE § 633.4106(e).

445. *Id.*

446. *See id.*

447. BOGERT & BOGERT, *supra* note 50, § 515, at 16 (2d rev. ed. 1993).

448. *Id.* § 515, at 16. The court did not accept the resignation as a matter of course and normally required the trustee to provide a reason for a resignation. *Id.* The court could reject a resignation if, due to pending actions by the trustee or other unsettled matters, the resignation at that time was disadvantageous to the beneficiaries. *Id.* Of course, a court does not desire to force an unwilling trustee to continue and will often accept the slightest reason for resignation. *Id.* § 515, at 17.

trustee not desiring to continue should not be forced to do so.<sup>449</sup> Apparently, the court can no longer postpone acceptance of the resignation beyond ninety days from the filing of the petition, but may instead appoint a temporary trustee as a receiver.<sup>450</sup> In rare instances, this may result in inconvenience or postponement of trust proceedings. For example, if the trustee has brought actions against others and then resigns, it is reasonable that the temporary trustee, receiver, or successor trustee have time to review the proceeding to determine if he wishes to continue the action or perhaps hire a new attorney to pursue it. This may result in delay and additional expense. Perhaps the ability to impose conditions on the resignation—such as payment by the resigning trustee for any loss caused by the delay—can ameliorate this problem.

#### G. *Removal of Trustee: Section 633.4107*<sup>451</sup>

Section 633.4107 states the basic rule that a trustee may be removed in three ways:

- (1) In accordance with the trust terms;
- (2) On petition by a settlor, co-trustee, or beneficiary under section 633.6202,<sup>452</sup> or
- (3) By the court for a variety of reasons.<sup>453</sup>

The new and unique contribution of this section is the list of reasons for removal—or other appropriate relief—by the court.<sup>454</sup> In general, the reasons contemplate a situation in which the trustee is not acting in the best interests of the beneficiaries or as the settlor contemplated.<sup>455</sup> However, the listing of the reasons

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449. IOWA CODE § 633.4106.

450. *Id.* § 633.4106(1)(e).

451. House File 2518 eliminated the words “by the court on its own motion” in subsection 1, presumably on the ground that this almost never happens, but is done on petition by an interested party. *See* Iowa H. File 2518, 78th Gen. Assemb., 2d Sess. (Apr. 26, 2000). At any rate, the court has extensive power to remove a trustee under subsection 2. IOWA CODE § 633.4107(2).

452. IOWA CODE § 633.4107; *see also* discussion *infra* Part XVIII. Section 633.4107, unlike the Restatement, gives the settlor of an irrevocable trust the right to petition for the removal of the trustee. IOWA CODE § 633.4107(1); *see also* RESTATEMENT (THIRD) OF TRUSTS § 37 (Tentative Draft No. 2, 1999).

453. IOWA CODE § 633.4107(1). Iowa case law, prior to the 2001 Iowa Trust Code, stated the same rule as Iowa Code section 633.4107(1): a trustee may be removed in accordance with the trust terms or by the court. *See, e.g.*, Schildberg v. Schildberg, 461 N.W.2d 186, 191 (Iowa 1990).

454. IOWA CODE § 633.4107(2)(a)-(f).

455. *Id.* § 633.4107(2).

provides a great deal of guidance for beneficiaries and trustees. The listed reasons are:

- (1) Commission of a material breach of trust by the trustee;
- (2) Unfitness to administer the trust;
- (3) Hostility or lack of cooperation among co-trustees that impairs the administration of the trust;
- (4) Consistent and substantial substandard investment performance;
- (5) Excessive trustee compensation; and
- (6) Other good cause.<sup>456</sup>

Several of these listed reasons deserve comment. Investment performance is of great significance to the beneficiaries. In addition to other remedies, removal of the trustee for continuous and substantial substandard investment performance is justified. Why should the beneficiaries be burdened with a trustee who consistently underperforms? It should be noted the new prudent investor rule is incorporated into the Iowa Trust Code,<sup>457</sup> so investment performance will be tested under a different standard than was applicable in the past.<sup>458</sup>

Although section 633.4107 mentions removal for hostility among co-trustees,<sup>459</sup> it does not mention hostility among beneficiaries or between beneficiaries and the trustee, although the latter could be a ground for removal for "other good cause."<sup>460</sup> Removal for taking unauthorized compensation has been recognized under the common law.<sup>461</sup> While this could include excessive compensation, the Trust Code provision appears to contemplate the compensation be higher than normal in the circumstances, whether authorized or not.<sup>462</sup> Removal for other good cause, of course, includes many things. Among the more significant reasons would be failure to keep the beneficiaries informed of trust affairs and failure to comply with a beneficiary's request for information. Such failures make it difficult, if not impossible, for beneficiaries to protect their interests and may

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456. *Id.* § 633.4107(2)(a)-(f).

457. See *id.* §§ 633.4301-4309; see also discussion *infra* Part XI (discussing the Uniform Prudent Investor Act).

458. Compare IOWA CODE §§ 633.4301-4309 (2001), with IOWA CODE § 633.123 (1999).

459. IOWA CODE § 633.4107(c) (2001).

460. See *id.* § 633.4107(2)(f); *Keating v. Keating*, 165 N.W. 74, 79 (Iowa 1917) (holding that trustee may be removed when relations with beneficiary become hostile and detrimental to the trust).

461. BOGERT & BOGERT, *supra* note 50, § 527, at 85 (2d rev. ed. 1993).

462. IOWA CODE § 633.4107(e) (stating removal of a trustee if the trustee's compensation is excessive under the circumstances).

cover up other serious problems in trust administration.<sup>463</sup> Others might include failure to follow directions in the trust instrument,<sup>464</sup> breaches of the duties of loyalty and impartiality,<sup>465</sup> failure or delay in accounting,<sup>466</sup> and hostile relations between the trustee and beneficiary that seriously impair the administration of the trust.<sup>467</sup> Lastly, the court may suspend the trustee's powers, compel the surrender of trust property, or order other relief prior to a decision in a removal proceeding if the beneficiary or the trust property could suffer a loss or injury if relief is withheld until a decision.<sup>468</sup>

Perhaps the most significant portion of this section is something on which it is silent. In this era of bank mergers, the corporate trustee selected by the settlor, and known to the beneficiaries, is often merged with another bank. Administration of the trust may be moved within the city, to another city, or to another state. A different account officer may be assigned to supervise the account. Should the beneficiaries have the right to remove the corporate trustee on any of these occurrences? Proposals have ranged from the beneficiary's right to remove the corporate trustee and appoint a successor corporate trustee on a change in ownership of the corporate trustee, to authorizing removal on a change in location of trust administration of twenty, fifty, or one-hundred miles or to another state, or even on change or resignation of the account officer. Some believe this should be handled in the drafting of the trust agreement by the settlor and the statute should have no provision on this topic. A proposal to the Probate and Trust Law Section was made suggesting that change in ownership of the corporate trustee would permit removal of the corporate trustee without cause and the appointment of a successor corporate trustee, if the petition for removal was brought within one year of the ownership change. The proposal was not accepted and the question was returned to the Trust Code Committee for further study. Views on this issue are strongly held and the matter will be controversial.

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463. U.T.C. § 706 cmt. (2000 Annual Meeting Draft); *see also* IOWA CODE § 633.4213.

464. BOGERT & BOGERT, *supra* note 50, § 527, at 63 (2d rev. ed. 1993).

465. *See* IOWA CODE § 633.4202.

466. BOGERT & BOGERT, *supra* note 50, § 527, at 73 (2d rev. ed. 1993).

467. *Id.* § 527, at 88. In *Schildberg*, the Iowa Supreme Court held the hostility between the trustee and a beneficiary should not result in the trustee's removal unless the friction interferes with proper trust administration. *Schildberg v. Schildberg*, 461 N.W.2d 186, 194 (Iowa 1990). The Iowa Supreme Court made a similar holding as to a "technical breach of trust"—failure to account to beneficiaries. *Id.* at 191.

468. IOWA CODE § 633.4107(3).

#### *H. Delivery of Property by Former Trustee: Section 633.4108*

Section 633.4108 provides that a former trustee<sup>469</sup> or the former trustee's personal representative, or guardian, or conservator<sup>470</sup> is responsible for the trust property until it is delivered to the successor trustee or a person appointed by the court to receive the property.<sup>471</sup> The former trustee or his representative also possesses the powers necessary to protect the trust property and to administer the trust.<sup>472</sup> The purpose of this provision is to protect the trust property and the interest of the beneficiaries.<sup>473</sup> However, this continuing authority is not necessary, and is therefore not granted, when a co-trustee remains in office.<sup>474</sup>

#### *I. Compensation of Trustee: Section 633.4109*

Section 633.4109 continues the current rule and expands on it. First, if the trust instrument does not specify compensation, the trustee is entitled to reasonable compensation.<sup>475</sup> Second, the terms of the trust may specify the trustee's compensation.<sup>476</sup> The terms of the trust govern, except that the court may override the trust terms in the following three situations:

- (1) If the duties of the trustee are substantially different from those contemplated when the trust was created.<sup>477</sup>
- (2) If the stated compensation would be inequitable, or unreasonably high or low.<sup>478</sup>

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469. See *id.* § 633.4108.

470. See *id.*

471. *Id.*

472. *Id.*

473. *Id.*

474. *Id.*

475. This rule is currently stated in Iowa Code section 633.200, requiring the court to fix compensation. *Id.* § 633.200. Although section 633.4109(1) does not specifically require the court to pass on the trustee's fee, a dissatisfied beneficiary could always challenge the compensation in court. See *id.* § 633.6202(2)(i) (allowing a petition to determine the trustee's compensation or review its reasonableness). The advance of section 633.4109 appears to be that if the trustee and the beneficiaries agree on the compensation, court approval does not appear to be required. For a list of factors relevant in determining reasonable compensation, see *RESTATEMENT (THIRD) OF TRUSTS* § 38 cmt. c (Tentative Draft No. 2, 1999).

476. IOWA CODE § 633.4109(2).

477. *Id.* § 633.4109(2)(a).

478. *Id.* § 633.4109(2)(b).

(3) In extraordinary circumstances in which equitable relief should be granted.<sup>479</sup>

The first reason does not appear to require much comment. However, there seems to be a great deal of overlap between reason two—the stated compensation would be inequitable—and reason three—extraordinary situation calling for equitable relief.<sup>480</sup> It appears a court will have a great deal of latitude under this section.<sup>481</sup>

#### *J. Repayment for Expenditures: Section 633.4110*

Section 633.4110 provides reimbursement to the trustee from the trust property, with appropriate interest, for proper expenses incurred in the administration of the trust.<sup>482</sup> The trustee may withhold reimbursement for expenses prior to distribution to the beneficiaries.<sup>483</sup> The trustee should also be reimbursed for expenditures not properly incurred, if and to the extent that the trust was benefited by the expenditure.<sup>484</sup> Nothing in this section is extraordinary or changes current law.<sup>485</sup>

#### *K. Notice of Increased Trustee's Fee: Section 633.4111*<sup>486</sup>

Section 633.4111 has no counterpart in the common law. It provides that if the trustee wishes to increase its fee,<sup>487</sup> it must give thirty days written notice to

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479. *Id.* § 633.4109(2)(c).

480. *Compare* IOWA CODE § 633.4109(2)(b) (2001), *with* IOWA CODE § 633.4109(2)(c) (2001).

481. This section is based on California Probate Code section 15680, which is discussed in the Restatement. *See* CAL. PROB. CODE § 15680 (West 1999); RESTATEMENT (THIRD) OF TRUSTS § 38 reporter's notes, cmt. e (Tentative Draft No. 2, 1999); *see also* U.T.C. § 708 (2000 Approved).

482. IOWA CODE § 633.4110.

483. RESTATEMENT (THIRD) OF TRUSTS § 38 cmt. b (Tentative Draft No. 2, 1999).

484. IOWA CODE § 633.4110(2). The purpose of this provision is not to ratify the trustee's unauthorized conduct, but to prevent the unjust enrichment of the trust. U.T.C. § 709 cmt. (2000 Annual Meeting Draft). The UTC comment provides that a court may delay or deny reimbursement for expenses which benefit the trust. *Id.* (citing RESTATEMENT (SECOND) OF TRUSTS § 245 cmt. g (1959)). Given the use of the word "entitled," the author believes it would take an extraordinary case for a court to deny reimbursement for an expense that benefited the trust. It would appear that other remedies, such as reducing the trustee's compensation, would be more appropriate.

485. *Compare* IOWA CODE § 633.200 (2001), *with* IOWA CODE § 633.4110 (2001). *See also* Booth v. Bradford, 87 N.W. 685 (Iowa 1901).

486. House File 2518 changed the last word in subsection 2(b), "account," to "accounting." Iowa H. File 2518, 78th Gen. Assemb., 2d Sess. (Apr. 26, 2000).

487. Subsection 1 defines "trustee's fee" as "periodic base fee, rate of percentage [computation for fees], minimum fee, hourly rate, [or] transaction charge." IOWA CODE

certain beneficiaries.<sup>488</sup> The beneficiaries who receive notice include those entitled to an accounting,<sup>489</sup> those who were given the preceding account, and those beneficiaries who request written notice of a fee increase.<sup>490</sup> A petition for review of the increase, filed within thirty days, prevents the increased fee from taking effect until either ordered by the court or the petition is dismissed.<sup>491</sup>

This section provides increased protection for beneficiaries, but increased expense to the trustee.<sup>492</sup> On balance, the protection for the beneficiaries should prevail. Most beneficiaries are quite concerned with fees. The notice is quite easy to comply with and the trustee should possess the addresses of the persons required to receive notice. The procedure also provides a method to determine the validity of the fee increase at the time it is proposed, rather than postponing it until an accounting is required.<sup>493</sup> Certainty for both the trustee and the beneficiaries is provided before collection of the increased fee.<sup>494</sup> This appears to be a salutary addition to trust law.

#### X. FIDUCIARY DUTIES OF TRUSTEE

Subpart B of Part 4 of the Iowa Trust Code restates and expands on the common law duties of trustees. An extended discussion of these duties would be well beyond the scope of this Article.<sup>495</sup> Therefore, for most of this discussion I will merely state the substance of each section and any significant expansion of, or change in, the common law. However, certain provisions of this subpart are new and significant and deserve extensive commentary.

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§ 633.4111(1). Fees for extraordinary services are not included. *Id.* One might question the exclusion if the fee for extraordinary services is based on an hourly rate or a percentage of the trust. A change in the *rate base* for the computation of extraordinary services would appear to be cause for notice.

488. *Id.* § 633.4111(3).

489. *See id.* § 633.4213(6); *see also* discussion *infra* Part X.M. (discussing the duty to inform and account).

490. IOWA CODE § 633.4111(2)(c). Such beneficiaries must provide a mailing address. *Id.*

491. *Id.* § 633.4111(3). The thirty-day period is presumably measured from the notice of increased fee given by the trustee under subsection 2 of this section. *See id.* § 633.4111(2).

492. *Id.* § 633.4111.

493. *Id.* § 633.4111(2)(a)-(c).

494. *Id.*

495. *See* BOGERT & BOGERT, *supra* note 50, § 541, at 159 (2d rev. ed. 1993).

**A. Duty to Administer Trust—Alteration by Terms of Trust:  
Section 633.4201**

Section 633.4201 reiterates the trust instrument may modify the rules of the Trust Code,<sup>496</sup> and a trustee must administer the trust according to its terms.<sup>497</sup> The Code states default rules which are to be followed in the absence of provisions in the trust instrument.<sup>498</sup>

Subsection 2 allows the trustee to “reasonably rely” on trust terms varying the duties imposed by the Code, but prohibits a trust provision insulating the trustee from actions in bad faith or contrary to the trust purposes or the interests of the beneficiaries.<sup>499</sup> While there has been some disagreement in the case law over the scope of such exculpatory clauses,<sup>500</sup> the vast majority of decisions are in accord with this section in invalidating clauses permitting a trustee to act in bad faith, dishonestly, or recklessly.<sup>501</sup>

**B. Duty of Loyalty—Impartiality—Confidential Relationship:  
Section 633.4202**

Section 633.4202 states the traditional duties of trusts. Subsection 1 states the duty of loyalty—that the trustee is to act solely in the interests of the beneficiaries.<sup>502</sup> This duty has been recognized in Iowa.<sup>503</sup> Transactions involving a substantial conflict of interest are voidable by the beneficiaries unless one of five exceptions applies.<sup>504</sup> The word substantial is not defined by the section.<sup>505</sup> The exceptions to the voidability rule are:

(1) The trust expressly authorizes the transaction.<sup>506</sup>

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496. Thus reinforcing Iowa Code section 633.1105 (2001).

497. See IOWA CODE § 633.4201.

498. Compare IOWA CODE § 633.4201(1) (2001), with U.T.C. § 801 (2000 Approved).

499. See IOWA CODE § 633.4201(2).

500. See BOGERT & BOGERT, *supra* note 50, § 542, at 187 (2d rev. ed. 1993). A discussion of the case law is beyond the scope of this Article. In general, exculpatory clauses are given effect, although sometimes narrowed by construction. See, e.g., *Hanson v. Minette*, 461 N.W.2d 592, 597-98 (Iowa 1990); see also BOGERT & BOGERT, *supra* note 50, § 542, at 188 (2d rev. ed. 1993).

501. See BOGERT & BOGERT, *supra* note 50, § 542, at 187-91 (2d rev. ed. 1993).

502. IOWA CODE § 633.4202(1).

503. See, e.g., *Schildberg v. Schildberg*, 461 N.W.2d 186, 191-92 (Iowa 1990); *Harvey v. Leonard*, 268 N.W.2d 504, 512 (Iowa 1978); see also RESTATEMENT (SECOND) OF TRUSTS § 170 (1959).

504. IOWA CODE § 633.4202(2).

505. The UTC does not use the word substantial and makes all such transactions voidable unless covered by an exception. See U.T.C. § 802 (2000 Approved).

506. IOWA CODE § 633.4202(2)(a).

- (2) The beneficiary consented to the transaction, affirmed the transaction, or released the trustee from liability under section 633.4506.<sup>507</sup>
- (3) After notice to interested persons, the transaction is approved by the court.<sup>508</sup>

These fairly limited exceptions would appear to be easily determined and administered by a court.

This section also contains two subsidiary rules and three instances where the section does not apply.<sup>509</sup> The first subsidiary rule, in subsection 633.4202(3), states that any sale, encumbrance, or other transaction involving the trust property between the trust and

- (1) A trustee;
- (2) The spouse, a descendant, an agent, or an attorney of a trustee; or
- (3) A business in which the trustee has a substantial beneficial interest;

is included as “[a] transaction affected by a substantial conflict between personal and fiduciary interests.”<sup>510</sup> There could be a question of interpretation as to whether the transaction involved had to create a substantial conflict between the trustee’s fiduciary and personal interests or whether *any* such self-dealing transaction, regardless of the significance, would be considered a substantial conflict. The traditional rule is that in self-dealing cases, the court will not consider the fairness of the transaction, but will void the transaction on request of the beneficiary.<sup>511</sup> Therefore, the better interpretation would be that all transactions covered under section 633.4202(3) create a substantial conflict between the trustee’s own interests and that of the trust, regardless of the importance of the transaction or the amount involved.

The other subsidiary rule provides that transactions between the trustee and a beneficiary not involving trust property, but from which the trustee obtains an advantage—either while the trust exists, or before the trust begins, or after it ends while the trustee has “significant influence” over the beneficiary—are also voidable unless the trustee proves the fairness of the transaction.<sup>512</sup> This rule is

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507. *Id.* § 633.4202(2)(b). Presumably, consent refers to approval occurring before the transaction was entered into. Iowa has recognized a beneficiary who consents to a trustee’s act prior to, or during the commission of the act, has waived any action against the trustee. *Hanson v. Minette*, 461 N.W.2d 592, 596 (Iowa 1990). Affirmance would cover approval following the transaction.

508. IOWA CODE § 633.4202(2)(c).

509. *See id.* § 633.4202(3)-(4).

510. *Id.* § 633.4202(3).

511. BOGERT & BOGERT, *supra* note 50, § 543(E), at 322 (2d rev. ed. 1993); *see* Gregory S. Alexander, *A Cognitive Theory of Fiduciary Relationships*, 85 CORNELL L. REV. 767, 776 (2000).

512. IOWA CODE § 633.4202(4).

similar to UTC section 802(d), in which it is said to have a limited scope.<sup>513</sup> It requires proof of an advantage to the trustee and, if the trust has terminated, proof that the trustee's influence over the beneficiary still exists.<sup>514</sup>

Lastly, section 633.4202 is stated to not apply to:

- (1) Agreements between the trustee and beneficiaries, relating to the appointment of the trustee;<sup>515</sup>
- (2) Negotiations and agreements regarding the trustee's compensation, whether the terms are set by the trust, the Trust Code, or by separate agreement;<sup>516</sup> and
- (3) Transactions between the trust and other trusts, the conservatorship of the grantor, or his or her estate, when the trustee is a fiduciary of the other trust or estate, if the transaction is fair to the beneficiaries.<sup>517</sup>

Regarding the duty of loyalty, two matters frequently raised are whether a corporate trustee may deposit trust funds with its own banking department<sup>518</sup> and the use of a trustee's proprietary fund. While conflicting decisions on the former question exist,<sup>519</sup> the deposit of trust funds in the bank has been increasingly validated by statute in recent years.<sup>520</sup> Presumably, the word substantial in subsections 633.4202(2) and (3) was intended to cover this problem.<sup>521</sup> Perhaps an amendment making this explicit would be beneficial. Similar explicit treatment might be considered for the relatively recent innovation of trust company proprietary funds.<sup>522</sup>

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513. U.T.C. § 802 cmt. (2000 Annual Meeting Draft).

514. *Id.*

515. IOWA CODE § 633.4202(5)(a).

516. *Id.* § 633.4202(5)(b).

517. *Id.* § 633.4202(5)(c). The UTC requires such transactions be fair to the beneficiaries.  
U.T.C. § 802(h)(3) (2000 Approved).

518. See BOGERT, *supra* note 262, § 95, at 345-46.

519. *Id.*

520. *Id.*

521. IOWA CODE § 633.4202(2)-(3); see IOWA TRUST ACT § 4-202(c) cmt. (1996 Draft) (on file with the author). The rule favored by Mr. Buchanan was that such use of the trustee's banking department should be allowed if the terms are fair, reasonable, and in the best interests of the trust, with the burden on the trustee to prove the transaction was fair.

522. See U.T.C. § 802(f) (2000 Approved). Section 802(f) provides:

An investment by a trustee in securities of an investment company or investment trust to which the trustee, or its affiliate, provides services in a capacity other than as trustee and which complies with the prudent investor rule of [Article] 9 is not presumed to be affected by a conflict between personal and fiduciary interests. The trustee may be compensated by the investment company or investment trust for providing those services out of fees charged to the trust if the trustee at least annually

### C. Standard of Prudence: Section 633.4203

Section 633.4203 restates the traditional rule that the trustee administer the trust as a prudent person.<sup>523</sup> It should be noted, as to investments, the standard has been changed to that of a prudent investor.<sup>524</sup>

### D. Costs of Administration: Section 633.4204

Section 633.4204 merely requires the costs incurred by the trustee be reasonable in light of the purposes and circumstances of the trust and the nature of the trust property.<sup>525</sup>

### E. Special Skills: Section 633.4205

Section 633.4205 reflects a relatively recent trend, requiring a trustee to use any special skills or expertise possessed by the trustee. It also requires a trustee who is named trustee in reliance on its representation that it has such special skills to use those skills.<sup>526</sup>

### F. Delegation: Section 633.4206

Section 633.4206, reversing the traditional trust law rule, allows the trustee to delegate all functions a prudent trustee would delegate as long as the entire administration of the trust is not delegated.<sup>527</sup> Coupled with the permission to

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notifies the persons entitled under Section 813 to receive a copy of the trustee's annual report of the rate and method by which the compensation was determined.

*Id.*

523. The section includes the duties of reasonable care, skill, and caution, and directs the trustee to consider the "purposes, terms, distribution requirements and other circumstances of the trust." IOWA CODE § 633.4203.

524. See *infra* Part XI (discussing the Uniform Prudent Investor Act).

525. IOWA CODE § 633.4204; *see also* RESTATEMENT (THIRD) OF TRUSTS—PRUDENT INVESTOR RULE § 227(c)(3) (1992) (stating that a trustee must only incur reasonable and appropriate costs). *See generally* RESTATEMENT (SECOND) OF TRUSTS § 188 (1959).

526. IOWA CODE § 633.4205; *see also* RESTATEMENT (SECOND) OF TRUSTS § 174 (1959); UNIF. PRUDENT INVESTOR ACT § 2(f), 7B U.L.A. 290 (2000).

527. IOWA CODE § 633.4206. The traditional rule is that a trustee could delegate ministerial or non-discretionary powers, but not discretionary powers. *See* BOGERT & BOGERT, *supra* note 50, § 555, at 114 (2d rev. ed. 1980). A later developed and preferred standard was that delegation was permissible if usual business practice indicated the power could be delegated. *Id.* § 555, at 116; *see also* RESTATEMENT (THIRD) OF TRUSTS—PRUDENT INVESTOR RULE § 171 (1992) (stating a trustee may delegate responsibilities to the extent "a prudent person might delegate those responsibilities to others").

delegate is the duty to exercise care, skill, and caution in:

- (1) Selecting the agent;
- (2) Establishing the scope and terms of the agent's authority;
- (3) Reviewing the performance of the agent and the agent's compliance with the terms of the delegation periodically; and
- (4) Rectifying an agent's act or decision if it would have constituted a breach of trust if done by the trustee.<sup>528</sup>

The agent is required to exercise reasonable care to comply with the terms of the delegation, and the agent's acceptance subjects the agent to the jurisdiction of Iowa courts.<sup>529</sup> Significantly, by complying with the delegation rules, the trustee is protected from liability to the beneficiaries for the decisions or acts of the agent.<sup>530</sup>

This section makes one of the most far-reaching changes in trust law. Permission to delegate requires the trustee to exercise care, skill, and caution in selection and supervision of the agent and in crafting the terms of the delegation.<sup>531</sup> It is quite likely that the courts will hold the trustee to strict standards in the selection and control of the agent before relieving the trustee of liability for the agent's acts and decisions.<sup>532</sup>

#### G. Directory Powers: Section 633.4207

Section 633.4207 is designed to address the situation in which a trust gives certain powers to a person other than the trustee. Such powers usually involve the designated person having the ability to direct the trustee in at least some aspects of the trust.<sup>533</sup> Though such powers have been used infrequently in the past, their use has been increasing in recent years, particularly in so-called "offshore trusts."<sup>534</sup> The section provides that where the trust terms create such a power, the

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528. IOWA CODE § 633.4206. Presumably, this means making the trust whole by whatever means possible, including action against the agent. This could include dismissing the agent, although it is doubtful if such dismissal would be required in every case.

529. *Id.* § 633.4206(5).

530. *Id.* § 633.4206.

531. BOGERT, *supra* note 262, § 92, at 330.

532. *Id.*

533. IOWA CODE § 633.4207.

534. The "trust protector" in an offshore trust is a non-trustee who has a power to direct certain actions of the trustee and is thus an example of the type of person to whom this section applies. For a discussion of offshore trusts and trust protectors, see Elena Marty-Nelson, *Offshore Asset Protection Trusts: Having Your Cake and Eating It Too*, 47 RUTGERS L. REV. 11, 13 (1994). Settlers "typically reserve[] some measure of control over the trust . . . as a self-designated 'protector' of the trust." Elena Marty-Nelson, *Offshore Asset Protection Trusts: Having Your Cake and Eating It Too*,

trustee is to act in accordance with the directions of the person exercising the power, unless the exercise violates the trust terms, or if the trustee knows of a fiduciary duty owed to the trust beneficiaries by the holder of the directory power that would be violated by the exercise.<sup>535</sup> Similarly, the trustee need not follow the direction of the power holder if the trustee believes or has reason to know that the power holder is incompetent.<sup>536</sup> Subsection 2 makes the holder of a directory power, who violates a fiduciary duty to the beneficiaries, liable for any resulting loss.<sup>537</sup> Outside of the trust protector in offshore trusts, the most common instance of such powers would appear to be either in the choice of investments or in the management of a closely held business in which the trust holds interest or shares.<sup>538</sup> For example, the grantor may wish one of his children or a gifted employee to run a business while the majority of shares or interests are held by the trust. This section permits the trustee to follow the instructions of the manager without liability for so doing.<sup>539</sup>

#### H. Co-Trustees: Section 633.4208

Section 633.4208 requires each trustee to participate in the management of the trust, to do what is reasonable to require a co-trustee to remedy a breach of trust, and to prevent a co-trustee from committing a breach of trust.<sup>540</sup> Basically, the section requires a co-trustee to be active and vigilant, and not turn all activities over to a co-trustee and have nothing further to do with the trust.<sup>541</sup> A trustee complying with the requirements of this section is protected from liability to the beneficiaries or to the trust for the actions or decisions of the co-trustee.<sup>542</sup>

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47 RUTGERS L. REV. 11, 13 (1994). "Generally, [Offshore Asset Protection Trusts] [(OAPTs)] are trusts created under the laws of certain foreign jurisdictions in order to shield the assets transferred to the trust from future creditors." *Id.*; see also Barry S. Engel, *Integrated Estate Planning With Foreign-Situs Trusts*, 31 TAX ADVISER 102, 102-06 (Feb. 2000) (discussing the use of asset protection trusts that put assets safely out of creditors' reach and why and when integrated estate planning trusts should be used); Ritchie W. Taylor, Note, *Domestic Asset Protection Trusts: The "Estate Planning Tool of the Decade" or a Charlatan*, 13 BYU J. PUB. L. 163, 166-67 (1998).

535. IOWA CODE § 633.4207(1).

536. *Id.*

537. *Id.* § 633.4207(2); see also RESTatement (SECOND) OF TRUSTS § 185 (1959); accord U.T.C. § 808 (2000 Approved).

538. U.T.C. § 808 cmt. (2000 Annual Meeting Draft).

539. IOWA CODE § 633.4207.

540. *Id.* § 633.4208.

541. *Id.*

542. *Id.*

*I. Control and Safeguarding of Trust Property:  
Section 633.4209*

Section 633.4209 states the traditional duty of the trustee to take control of and safeguard the trust property. Modernizing the rule, the Code only requires the trustee take reasonable steps to control the property, and it permits abandonment of or refusal to accept the property if that is in the best interests of the trust.<sup>543</sup>

*J. Separation and Identification of Trust Property:  
Section 633.4210*

Section 633.4210 codifies another traditional duty of trustees: to keep trust property separate from the trustee's individual property and to "earmark" the trust property so that it can be identified as trust property.<sup>544</sup>

*K. Enforcement and Defense of Claims and Actions:  
Section 633.4211*

Section 633.4211 requires the trustee to take reasonable steps to enforce claims "that are part of the trust property" and to defend actions that could result in losses to the trust.<sup>545</sup> The use of the quoted words might lead to an interpretation that the duty to enforce claims was limited to the rare case in which a claim was trust property, rather than applying also to the more general case in which the trustee had a claim involving trust property. This was not the intention of the section and the broader interpretation, imposing a duty to reasonably enforce claims involving the trust property, should be adopted.<sup>546</sup>

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543. *Id.* § 633.4209. This section is derived from Restatement (Second) of Trusts sections 175-176 (1959) and is similar to, but more detailed than, UTC section 809. *See* U.T.C. § 809 cmt. (2000 Annual Meeting Draft).

544. *See* IOWA CODE § 633.4210. The UTC goes a bit further than section 633.4210. *See* U.T.C. § 810 cmt. (2000 Annual Meeting Draft). The UTC requires that the "interest of the trust, to the extent feasible, appears in records [of trust property] maintained by a third party. *Id.* § 810(c); *see also* IOWA CODE §§ 633.124-.125 (permitting nominee registration of most trusts and requiring that bank records show the investment). The UTC also provides that a trustee may invest the property of two or more separate trusts together as long as records indicating the interests of each trust in the property are kept. U.T.C. § 810(d) (2000 Annual Meeting Draft). Such investments are desirable in certain cases and probably should be permitted.

545. IOWA CODE § 633.4211.

546. *Id.* The final version of the UTC has reworded this section to provide: "A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust." U.T.C. § 811 (2000 Approved).

#### *L. Prior Fiduciaries: Section 633.4212*

Section 633.4212 requires that a trustee take reasonable steps to compel a former trustee or other fiduciary to deliver trust property to the trustee and to redress a breach of trust the trustee knows was committed by the former trustee.<sup>547</sup> This is a specific application of the duty to enforce claims,<sup>548</sup> and extends the duty to include other fiduciaries—such as executors or administrators and conservators—from whom the trustee receives property.<sup>549</sup>

#### *M. Duty to Inform and Account: Section 633.4213*

The duty to keep beneficiaries informed is a duty of a trustee under common law.<sup>550</sup> However, very little case law has developed to define the scope of the duty to keep beneficiaries informed. Iowa has recognized the duty, but has excused a technical breach of the duty in the absence of detriment to the trust or the beneficiaries or a motive on the part of the trustee to take advantage of the beneficiaries.<sup>551</sup>

Because this statute is far more specific than the common law, the statute will be discussed by subsection. Following a discussion of each of the subsections, the discussions in the Probate and Trust Law Section of The Iowa State Bar Association will be presented.

##### *1. Duty to Inform: Section 633.4213(1)*

Section 633.4213(1) states the common law duty of the trustee to keep the trust beneficiary reasonably informed of the administration of the trust.<sup>552</sup> The trustee is under a duty to communicate to the beneficiaries such information as is reasonably necessary to enforce the rights of the beneficiary.<sup>553</sup> Generally, the trustee is under no duty to furnish specific information in the absence of a request

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547. IOWA CODE § 633.4212.

548. *See supra* Part X.K.

549. IOWA CODE § 633.4212; U.T.C. § 812 cmt. (2000 Annual Meeting Draft).

550. RESTATEMENT (SECOND) OF TRUSTS § 173 (1959); *see also* BOGERT & BOGERT, *supra* note 50, § 963, at 40-41 (2d rev. ed. 1983).

551. *Schildberg v. Schildberg*, 461 N.W.2d 186, 191 (Iowa 1990).

552. IOWA CODE § 633.4213(1).

553. *Id.*; *see also* RESTATEMENT (SECOND) OF TRUSTS § 173 cmt. c (1959). Note that beneficiary is defined in section 633.1102(1) as including any person having a present or future interest in the trust, and includes the owner of an interest received by assignment or other transfer. IOWA CODE § 633.1102(1).

for information.<sup>554</sup> Therefore, the annual report required by subsection 5 normally serves as the communication of information required by subsection 1.<sup>555</sup>

2. *Informing Beneficiaries of Interests and of Trustee's Acceptance: Section 633.4213(2)*

Section 633.4213(2) provides the trustee must inform the beneficiaries of his, her, or its acceptance of the office within thirty days of the acceptance.<sup>556</sup> This is justified as being essential for the beneficiaries to protect their interests.<sup>557</sup> It would certainly appear reasonable that the beneficiaries know who to contact if an annual report is not received or if the beneficiary desires some information about the trust. Notifying the beneficiary of acceptance of the office appears to be a minimal requirement which would not unduly burden a trustee. While reasonable people could argue over whether thirty days is too short a period to ascertain the names and addresses of the beneficiaries, one of the new trustee's first acts should be to review the trust files, which ought to contain the names and addresses of most—if not all—the beneficiaries. With today's modern methods of communication, filling in any holes in the list of beneficiaries should not be inordinately difficult. Therefore, the thirty day time period for the notice appears reasonable.

In addition, beneficiaries having vested interests must be informed of their interests within thirty days following the settlor's death.<sup>558</sup> This provision has substantial problems. First, "vested" is not defined by the Iowa Trust Code. Second, whether an interest is vested is often not easy to determine.<sup>559</sup> Lastly, and

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554. IOWA CODE § 633.4213(4); *see also* RESTATEMENT (SECOND) OF TRUSTS § 173 cmt. d (1959).

555. IOWA CODE § 633.4213(1), (5).

556. IOWA CODE § 633.4213(2).

557. U.T.C. § 813 cmt. (2000 Annual Meeting Draft) (citing RESTATEMENT (SECOND) OF TRUSTS § 173 cmt. c (1959)). For the definition of beneficiary, see IOWA CODE § 633.1102(1).

558. IOWA CODE § 633.4213(2).

559. I wonder how many readers can distinguish between a vested remainder subject to divestment and an executory interest, on one hand, and two alternative contingent remainders, on the other. I wonder how many readers care. Anyone interested in the difficulty of this task might consult Judge Weaver's wonderful opinion in *Dowd v. Scally*, attempting to make such a determination, only to find out on rehearing the distinction was irrelevant to the discussion. *See Dowd v. Scally*, 174 N.W. 938 (Iowa 1919), *aff'd on reh'g*, 84 N.W. 340 (Iowa 1921). Judge Weaver's opinion describes his task as follows:

There is an irrepressible something in the human mind which responds to the challenge of an unsolved problem or intricate puzzle. . . . [W]hen the young person has . . . ceased to "think as a child" and becomes a lawyer, the same determination to know the unknowable and scale the inaccessible is apt to come to the surface in a life and death struggle with the subject of remainders. Thousands of that learned

most importantly, whether an interest is technically vested or contingent is totally irrelevant to whether the person having the interest should be informed of it.<sup>560</sup>

The only explanation of this provision is that it was intended to give notice only to beneficiaries having an "immediate" interest in the trust.<sup>561</sup> I am not convinced that only those persons having vested interests would be interested in the identity of the trustee. If immediate means present interests, the term vested is overinclusive in that it includes vested remainder, indefeasibly, subject to open, and subject to divestment, and reversions; it may also include executory interests. It is also underinclusive because discretionary income beneficiaries are probably not technically vested due to the fact that, while the identity of the beneficiaries is certain, the amount distributable is subject to the trustee's discretion, although that

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profession have assayed the task of drawing a clear, definite and always recognizable distinction between remainders vested and remainders contingent, but unfortunately, instead of producing what the nonprofessional person would naturally expect, a well-beaten path which the wayfaring court, though less than wise, may follow and be safe, a map of the routes so laid out reveals a labyrinth compared with which a plat of interlacing lines connecting all the stars in the firmament would be a model of simplicity. It may also be admitted that where the courts themselves have sought to blaze their way through a jungle of precedents and mark each turn and twist in the route by guideposts adorned with Latin quotations which everybody feels it duty bound to admire and nobody tries to read, they have, as a rule, found much difficulty in leaving a clear highway which others can follow with any assurance of finding their way home again.

It is to be said, however, that there is little confusion or difference of opinion upon abstract propositions or rules of law defining and governing remainders. The settled definitions may be found in every law dictionary and treatise on the law of real property, and all admit the soundness of the oft-repeated rule that in the construction of wills the intention of the testator is the polestar for judicial guidance, but confusion arises and becomes worse confounded in the apparently hopeless inconsistency of the courts in applying these rules to concrete facts. It is a matter of almost daily occurrence to find that remainders devised in what seems to be identical form and terms are held by one court to be vested and by another court contingent, and not infrequently the same court is found to be committed to both propositions. Naturally, efforts are often made to avoid the appearance of inconsistency by emphasizing minute differences in cases, but each finespun distinction only aggravates the lack of harmony, and leaves the lawyer or court who is anxious to keep in line with the authorities in ever-increasing doubt—not so much in respect to the fundamental principles of the law of remainders as to their practical application to the case in hand.

*Id.* at 939.

560. In fact, outside of the rule against perpetuities, whether an interest is vested or contingent is, or should be, totally irrelevant to every question.

561. The Iowa State Bar Association Section on Probate and Trust Law, Agenda of the Meeting of Nov. 5, 1999 (on file with the author) [hereinafter Meeting Agenda, Nov. 5, 1999]. The UTC does not contain a comparable provision to the second sentence of section 633.4213(2). *Compare* IOWA CODE § 633.4213(2) (2001), with U.T.C. § 813 (2000 Approved).

is arguable. Regardless, the term vested is inappropriate. What is necessary is to decide who should receive notice and to describe that group accurately. Fortunately, however, this notice is not required if the trust instrument negates the requirement of notice to those having vested interests.<sup>562</sup> Until the matter is clarified, the author recommends all trust instruments and wills creating trusts negate the notice to beneficiaries having vested interests on the death of the settlor. The following provision, if inserted in the trust instrument, should accomplish this: "The trustee shall not be required to give notice of a person's interest in this trust to any beneficiary having any interest in any trust created by this instrument<sup>563</sup> within thirty days of the death of the settlor<sup>564</sup> or at any other time."<sup>565</sup>

It is also important to note the unusual repetition in subsection 2 that the trust instrument may negate the required notice to beneficiaries having vested interests.<sup>566</sup> There is no obvious reason for repeating the rule here. One possibility might be the repetition is intended to convey that the requirement is not a part of the common law. If this notice was part of the common law, the notice would be required even if the trust instrument provided otherwise.<sup>567</sup> This matter should be clarified. A similar repetition is also contained in subsection 4 of this section, again with no apparent reason for its inclusion.<sup>568</sup>

### 3. *Informing Beneficiaries of Significant Transactions: Section 633.4213(3)*

If property comprising a significant portion of the value of the trust is involved in a transaction, and the fair market value of the property is not easily ascertainable, the beneficiaries must be informed of the transaction in advance.<sup>569</sup> This was not thought to be part of the common law duty to account.<sup>570</sup> However, in the leading case of *Allard v. Pacific National Bank*,<sup>571</sup> the Supreme Court of Washington held a trustee is required to inform beneficiaries in advance of all

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562. See IOWA CODE § 633.4213(2).

563. If the trust is a testamentary trust, the word "will" should be substituted for "instrument" here.

564. "Testator" can be substituted for "settlor" in testamentary trusts.

565. The author makes no guarantees that any clauses or forms given in this Article will be held by a court to accomplish their purpose. Readers should use any forms or clauses at their own risk. In the opinion of the author, such clauses will accomplish the purpose for which they are written, but this is the author's opinion only.

566. See IOWA CODE § 633.4213(2). This is unusual because section 633.1105 states that the trust provisions control over the Trust Code. *Id.* § 633.1105.

567. See *id.* § 633.1104.

568. *Id.* § 633.4213(4).

569. *Id.* § 633.4213(3).

570. See generally BOGERT & BOGERT, *supra* note 50, § 961 (2d rev. ed.1983).

571. *Allard v. Pac. Nat'l Bank*, 663 P.2d 104 (Wash. 1983).

material facts involving a nonroutine transaction significantly affecting the trust.<sup>572</sup> This significant duty is now made statutory.<sup>573</sup>

#### 4. *Providing Information and Copy of Trust: Section 633.4213(4)*

Subsection 4 mandates the trustee provide a beneficiary who requests it with a copy of the trust instrument.<sup>574</sup> This would appear to be obvious, although anecdotal evidence exists that some trustees and their attorneys do not follow this rule in every case. The subsection also requires that, on reasonable request, a beneficiary be provided with information concerning those administrative matters of the trust relevant to that beneficiary's interest.<sup>575</sup> The trust instrument may negate this duty by specific reference.<sup>576</sup>

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572. *Id.* at 110.

573. See IOWA CODE § 633.4213(3).

574. *Id.* § 633.4213(4).

575. IOWA CODE § 633.4213(4). The UTC states that such a duty is necessary so a beneficiary may make an independent assessment of what information is required to protect the beneficiary's interest. U.T.C. § 813 cmt. (2000 Annual Meeting Draft).

576. IOWA CODE § 633.4213(4). It is unclear whether the trust instrument may negate only a beneficiary's right to specific information concerning that beneficiary's interest, or may also specifically direct against furnishing a copy of the trust instrument to the beneficiary. As a matter of statutory construction, the trust instrument is such a basic piece of information that a settlor should not be able to prevent or hinder the beneficiary from receiving a copy from the trustee. There is no apparent reason for the repetition of the rule, already stated in section 633.1105, that the provisions of the trust instrument override provisions of the Trust Code. *See* discussion *supra* Part X.M.2.

The UTC notes some settlors wish to limit disclosure about trusts they have created. U.T.C. § 813 cmt. (2000 Annual Meeting Draft). This is perhaps an understatement. It is probable some settlors would prefer that at least some beneficiaries do not know a trust even exists for their benefit. In response, UTC section 813(f) allowed the trust terms to waive the notice and information requirements of the section for beneficiaries under age twenty-five. *Id.* § 813 (f). Whether to adopt that exception was a policy issue, on which the Drafting Committee of the UTC asked for the advice of the entire NCCUSL. *Id.* § 813 policy issue. At the 2000 Annual Meeting of NCCUSL, the modified provision was relocated as UTC section 104(b)(8)—the section prohibiting the trust instrument from overriding certain provisions. It now provides:

(b) The terms of a trust override any provision of this [Code] except:

....  
(8) the duty to notify the qualified beneficiaries age 25 or older of the existence of the trust; and to notify them of their right to request, and to respond to a beneficiary's request for, trustee reports and information reasonably related to the administration of the trust[.]

U.T.C. § 104(b)(8) (2000 Approved). The Probate and Trust Law Section might also consider this issue. *See also* discussion *infra* Part X.M.8.

##### 5. *Duty to Account: Section 633.4213(5)*

Subsection 5 requires the trustee to furnish an account at least annually.<sup>577</sup> Such an account must be prepared and sent to the beneficiaries at the termination of the trust and upon a change of trustee.<sup>578</sup> The account, of course, is the basic informational vehicle furnished to the beneficiaries. The requirement that such an account be furnished annually is intended to keep the beneficiaries informed of trust affairs on a regular basis. It is doubtful the Code was intended to prescribe the form of the account simply by the use of the word "account." Rather, the Code appears to require that information on the trust property, liabilities, receipts, and disbursements be provided in a form reasonably likely to inform the beneficiaries of the condition of the trust and any changes during the past year. Subsection 5 also requires the preparation of an accounting by a former trustee in case of resignation or removal—or by the personal representative, guardian, or conservator of a former trustee in case of death or incapacity of a trustee.<sup>579</sup>

##### 6. *Who Receives Account: Section 633.4213(6)*

Subsection 6 deals with the important question of which beneficiaries are to receive copies of the accountings or other information required by section 633.4213. First, each beneficiary who requests such information in writing is entitled to receive the accountings and information.<sup>580</sup> Even without a request, beneficiaries described in section 633.4105<sup>581</sup> are entitled to be provided with the information required by 633.4213.<sup>582</sup> As amended by House File 2518<sup>583</sup> and outlined in section 633.4105, these persons are:

- (1) All adult beneficiaries having a current interest in the trust either entitled or eligible to receive income or corpus of the trust if it was terminated at that time;<sup>584</sup>

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577. IOWA CODE § 633.4213(5).

578. *Id.*

579. *Id.*

580. *Id.* § 633.4213(6).

581. *See supra* Part IX.E.

582. IOWA CODE § 633.4213(6); *see also id.* § 633.4105.

583. Iowa H. File 2518, 78th Gen. Assemb., 2d Sess. (Apr. 26, 2000).

584. IOWA CODE § 633.4105.

(2) Representatives of any minor or incompetent beneficiary<sup>585</sup> having such an interest.<sup>586</sup> The desirability of such a limit has been a topic of discussion in the Probate and Trust Law Section.<sup>587</sup>

#### 7. *Waiver: Section 633.4213(7)*

Subsection 7 provides that a beneficiary may waive the right to receive an accounting or other information by consent in writing.<sup>588</sup> While the section does not state that the writing must be delivered to the trustee, such delivery—or at least knowledge by the trustee of such a waiver—would appear to be implied. Presumably, although not stated, the representative of a minor or incompetent beneficiary may execute a waiver on behalf of the beneficiary.

#### 8. *Probate and Trust Law Section Discussion on Section 633.4213*

Section 633.4213 has generated a great deal of controversy and discussion, primarily on three issues. The first is whether the requirements of the section should apply to the beneficiaries of a revocable trust other than the grantor.<sup>589</sup> A consensus was reached that the interplay of this section and section 633.3103(1) indicates only the grantor of a revocable trust should receive the information and

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585. The subsection refers to section 633.6303 to define representatives. *See id.*; *see also infra* Part XIX.C. Representatives include a conservator, a trustee of another trust, a personal representative of an estate, and a parent of a minor child if no conservator has been appointed. IOWA CODE § 633.6303.

586. IOWA CODE § 633.4105. The reason for this limit is that section 633.4213(6) entitles only those “beneficiaries” defined in section 633.4105 to receive information. *Id.* § 633.4213(6). Section 633.4105 concerns the persons entitled to nominate a trustee when there is a vacancy in that office. *Id.* § 633.4105. Among the methods allowed to fill a vacancy under section 633.4105 is persons nominated by a method contained in the trust instrument. *Id.* However, such a person is not entitled to the information under section 633.4213 unless he, she, or it is also a beneficiary. *Id.* If the trust does not specify a person, a majority vote of the adult beneficiaries and representatives of minor or incompetent beneficiaries is used. *Id.* § 633.4105(3)(b)(2). However, section 633.4105(3) limits those beneficiaries entitled to vote to those stated in the text. *Id.* § 633.4105(3)(b)(3). Because section 633.4213 cross-references section 633.4105, the beneficiaries entitled to information and accounts without filing a written request is also so limited. *Id.* § 633.4213.

587. *See infra* Part X.M.8.

588. IOWA CODE § 633.4213(7).

589. *See* Letter, Todd R. Buchanan, Attorney, The Iowa State Bar Association, Probate & Trust Law Section Chair, to The Iowa State Bar Association, Trust Code Committee (Sept. 27, 1999) (on file with the author) [hereinafter Letter, Buchanan to Iowa Trust Code Committee (Sept. 27, 1999)]; Letter, Barrett to Buchanan (Oct. 5, 1999), *supra* note 155.

accounts mandated by section 633.4213.<sup>590</sup> At the Section meeting on November 5, 1999, an amendment to section 633.4213(1), adding the following sentence to the end of that subsection, was approved: "While the settlor of a revocable trust is alive, all duties to inform and account are owed to the settlor only."<sup>591</sup> However, because of the lack of agreement on the third issue, this amendment was not included in House File 2518.

The second issue was whether only the minor or incompetent beneficiaries or their representatives received information under this section.<sup>592</sup> An amendment adding the words "and representatives" after beneficiaries in subsection 633.4213(6)(a) was approved by the Probate and Trust Law Section.<sup>593</sup> This was also not included in House File 2518.

The third, and most divisive issue, was whether there should be even greater limits on those persons entitled to information.<sup>594</sup> It was agreed a trustee needs certainty and clarity as to whom a notice is to be given.<sup>595</sup> Concerns were raised that sections 633.4213(2) and (6) were unclear.<sup>596</sup> Commentators questioned whether all the beneficiaries needed to be informed or whether limits should be enacted.<sup>597</sup> A suggestion was made that because a trustee is discharged only as to those beneficiaries who have been given an accounting, the trustee should determine to whom information is given.<sup>598</sup> The situation of a grantor not desiring the beneficiaries to receive information—such as a trust with a *Crummey*<sup>599</sup> power—was raised, with suggestions the grantor have a right to specify certain

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590. Letter from Todd R. Buchanan, Attorney, The Iowa State Bar Association, Probate & Trust Law Section Chair, to The Iowa State Bar Association, Trust Code Committee (Sept. 2, 1999) (on file with the author); Letter, Barrett to Buchanan (Oct. 5, 1999), *supra* note 155.

591. Meeting Agenda, Nov. 5, 1999, *supra* note 561.

592. Letter from Marlin M. Volz, Jr., Senior Vice-President, Norwest Bank, N.A., to Todd R. Buchanan, Attorney, Buchanan, Bibler, Buchanan & Gabor (Nov. 16, 1999) (on file with the author) [hereinafter Letter, Volz to Buchanan (Nov. 16, 1999)].

593. Meeting Minutes, Nov. 5, 1999, *supra* note 42. This should mean that only the representatives of minors and incompetent beneficiaries receive the information, and not the beneficiaries themselves.

594. Letter, Volz to Buchanan (Nov. 16, 1999), *supra* note 592.

595. Letter, Begleiter to Buchanan (Oct. 7, 1999), *supra* note 99.

596. Letter, Barrett to Buchanan (Oct. 5, 1999), *supra* note 155; Letter, Begleiter to Buchanan (Oct. 7, 1999), *supra* note 99; Letter, Reimer to Buchanan (Sept. 13, 1999), *supra* note 46; Letter, Volz to Buchanan (Nov. 16, 1999), *supra* note 592.

597. Letter, Barrett to Buchanan (Oct. 5, 1999), *supra* note 155; Letter, Volz to Buchanan (Nov. 16, 1999), *supra* note 592.

598. Letter, Volz to Buchanan (Nov. 16, 1999), *supra* note 592.

599. *Crummey v. Comm'r*, 397 F.2d 82 (9th Cir. 1968) (upholding the application of the annual gift tax exclusion to gifts by a settlor to a trust that had as its beneficiaries minor children on the ground that the beneficiaries had a limited right to withdraw property from the trust).

beneficiaries not receive copies of reports.<sup>600</sup> At the Probate and Trust Law Section meeting on November 5, 1999, this issue was discussed and no resolution was reached.<sup>601</sup> Therefore, no modification of section 633.4213(2) was approved. Unfortunately, the amendments to subsections 1 and 6(a) that were agreed to were inadvertently omitted from House File 2518.

*N. Duties with Regard to Discretionary Powers:  
Section 633.4214*

Section 633.4214 has two subsections. The first subsection states that the standard for the exercise of discretion is reasonableness.<sup>602</sup> The second states that if the trust uses terms such as "sole," "uncontrolled," or "absolute" discretion, the trustee remains a fiduciary, must still act in accordance with the purposes of the trust, and may not act in bad faith.<sup>603</sup> A trustee's discretion may only be overruled by a court if the discretion has been abused.<sup>604</sup>

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600. Letter, Volz to Buchanan (Nov. 16, 1999), *supra* note 592. *Contra*, Letter, Buchanan to Iowa Trust Code Committee (Sept. 27, 1999), *supra* note 589. The UTC has a special provision covering the *Crummey* power situation, allowing the trust to not give notice to a beneficiary who has not attained age twenty-five. U.T.C. § 104(b)(8) (2000 Approved).

601. Meeting Minutes, Nov. 5, 1999, *supra* note 42.

602. IOWA CODE § 633.4214(1) (2001).

603. *Id.* § 633.4214(2).

604. *Id.* This section restates standard doctrine, although the courts vary on expressing the reasonableness standard. See *RESTATEMENT (SECOND) OF TRUSTS* § 187 (1959); BOGERT & BOGERT, *supra* note 50, § 552, at 69 (2d rev. ed. 1980); Edward C. Halbach, Jr., *Problems of Discretion in Discretionary Trusts*, 61 COLUM. L. REV. 1425, 1428-33 (1961).

The UTC includes Iowa Trust Code section 633.4214 in a more expansive section. See U.T.C. § 814 (2000 Approved); *see also* IOWA CODE § 633.4214. The remainder of UTC section 814 limits certain powers which can create tax traps for a trustee who also has a beneficial interest in the trust. U.T.C. § 814(b)(1) (2000 Approved). The Probate and Trust Law Section might consider adding these provisions to section 633.4214. For convenience, UTC section 814(b)-(e) (2000 Annual Meeting Draft) and the comments relating thereto are set out in full:

**SECTION 814. DISCRETIONARY POWERS.**

....

(b) Unless the terms of a trust indicate that a broader standard is intended by an express reference to this subsection, a person other than a settlor who is a beneficiary and trustee of a trust that confers on the trustee a power to make discretionary distributions to or for the trustee's benefit may exercise the power only in accordance with an ascertainable standard relating to the trustee's health, education, support, or maintenance within the meaning of Section 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code of 1986, as in effect on [the effective date of this [Code]] [, or as later amended].

(c) Except as expressly provided in terms of the trust, a trustee may not exercise a power to make discretionary distributions to satisfy a legal obligation of support which the trustee, in an individual capacity, owes another person.

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(d) A power whose exercise is limited or prohibited by subsection (b) or (c) may be exercised by a majority of the remaining trustees whose exercise of the power is not so limited or prohibited. If the power of all trustees is so limited or prohibited, the court may appoint a special fiduciary with authority to exercise the power.

(e) Subsections (b) through (d) do not apply to:

(1) a power held by the settlor's spouse who is the trustee of a trust for which a marital deduction, as defined in Section 2056 or 2523 of the Internal Revenue Code of 1986, as in effect on [the effective date of this [Code]], [, or as later amended], was previously allowed;

(2) any trust during any period that the trust may be revoked or amended by its settlor; or

(3) a trust if contributions to the trust qualify for the annual exclusion under Section 2503(c) of the Internal Revenue Code of 1986, as in effect on [the effective date of this [Code]], [, or as later amended].

#### Comment

While this Code does not in general include tax curative provisions that automatically rewrite the terms of trusts that would otherwise fail to qualify for intended tax benefits, the problem of the beneficiary-trustee is an exception. The unintended inclusion of the trust in the beneficiary-trustee's gross estate is a frequent enough occurrence that it is a topic on which far more States have enacted corrective statutes than on other topics. A tax curative provision differs from a statute such as Section 415 of this Code, which allows a court to modify a trust to achieve an intended tax benefit. Absent federal authority authorizing the specific modification, a lower court decree modifying a trust is controlling for federal estate tax purposes only if the decree was issued before the taxing event, that is, prior to the decedent's death. See Rev. Rul. 73-142, 1973-1 C.B. 404. There is specific federal authority authorizing modification of trusts for a number of reasons (see Comment to Section 415) but not on the specific issues addressed in this section. Subsections (b) through (e), by interpreting the original language of the trust instrument in a way that qualifies for intended tax benefits, obviates the need to seek a later modification of the trust.

Subsection (b) states the general rule. Unless the terms of the trust expressly refer to this subsection, the power in the trustee to make discretionary distributions to the trustee as beneficiary are automatically limited by the requisite ascertainable standard necessary to avoid inclusion of the trust in the trustee's gross estate or taxable gift upon the trustee's release or exercise of the power. Trusts of which the trustee-beneficiary is also a settlor are not subject to this subsection. Limiting the discretion of a settlor-trustee to an ascertainable standard is not sufficient to avoid inclusion of the trust in the settlor's gross estate. More restrictive rules apply. See generally John J. Regan, Rebecca C. Morgan & David M. English, *Tax, Estate and Financial Planning for the Elderly* § 17.07[2][h]. Furthermore, the inadvertent inclusion of a trust in a settlor-trustee's gross estate is a far less frequent and better understood occurrence than is the inadvertent inclusion of the trust in the estate of a trustee-beneficiary who was not the settlor.

Subsection (c) addresses a common trap, the trustee who is not a beneficiary but who has power to make discretionary distributions to those to whom the trustee

## XI. UNIFORM PRUDENT INVESTOR ACT

### A. Introduction

Sections 633.4301 through 633.4309 incorporate the Uniform Prudent Investor Act (UPIA)<sup>605</sup> into the Iowa Trust Code.<sup>606</sup> The UPIA is the statutory expression of the Prudent Investor Rule, introduced by the Restatement (Third) of Trusts in 1992.<sup>607</sup> Of the matters dealt with in the Trust Code, the Prudent Investor Rule has no doubt generated the greatest commentary in the last ten years.<sup>608</sup>

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owes a legal obligation of support. Discretion to make distributions to those to whom the trustee owes a legal obligation of support, such as to the trustee's minor children, results in inclusion of the trust in the trustee's gross estate even if the power is limited by an ascertainable standard. The relevant regulations provide that the ascertainable standard exception applies only to distributions for the benefit of the decedent, and not to distributions to those to whom the decedent owes a legal obligation of support. See Treas. Reg. § 20.2041-1(b)(2).

Subsection (d) deals with cotrustees, incorporating the common drafting technique of granting the broader discretion only to the independent trustee. Cotrustees who are beneficiaries of the trust or have a legal obligation to support a beneficiary may exercise the power only as limited by subsection (b) or (c). If all trustees are so limited, the court is authorized to appoint a special fiduciary to make a decision as to the broader exercise [as] appropriate.

Subsection (e) recognizes some necessary exceptions. Trusts qualifying for the marital deduction are includable in the surviving spouse's gross estate without regard to the trustee's ability to make discretionary distributions to the spouse. Consequently, there is no need to limit a term of the trust authorizing a spouse-trustee to make discretionary distributions for the spouse's benefit. Similar reasoning applies to the revocable trust, which, because of the settlor's power to revoke, is automatically includable in the settlor's gross estate even if the settlor is not named as a beneficiary.

The exception for the Section 2503(c) minors trust is necessary to avoid loss of gift tax benefits. While preventing a trustee from distributing trust funds in discharge of a legal obligation of support would keep the trust out of the trustee's gross estate, such a restriction may result in loss of the gift tax annual exclusion for contributions to the trust, even if the trustee is otherwise granted unlimited discretion. See Rev. Rul. 69-345, 1969-1 C.B. 226.

U.T.C. § 814(b)-(e) cmt. (2000 Annual Meeting Draft).

605. UNIF. PRUDENT INVESTOR ACT §§ 1-16, 7B U.L.A. 280 (2000).

606. IOWA CODE §§ 633.4301-4309 (2001).

607. See generally RESTATEMENT (THIRD) OF TRUSTS—PRUDENT INVESTOR RULE §§ 227-229 (1992).

608. See Martin D. Begleiter, *Does the Prudent Investor Need the Uniform Prudent Investor Act—An Empirical Study of Trust Investment Practices*, 51 ME. L. REV. 27, 28 (1999) [hereinafter Begleiter, *Prudent Investor*]; see also Robert J. Aalberts & Percy S. Poon, *The New Prudent Investor Rule and the Modern Portfolio Theory: A New Direction for Fiduciaries*, 34 AM. BUS. L.J. 39, 39 (1996); Edward C. Halbach, Jr., *Trust Investment Law in the Third Restatement*, 77 IOWA L. REV. 1151, 1151 (1992); William S. Herschberger, *Fiduciary Investing in the 90's—*

Therefore, the treatment of the UPIA in this Article will be limited. First, a short history of the older Prudent Person rule will be offered. Next, a summary of the criticism of that rule and the separate developments in economics and financial theory will be briefly summarized. Then, a summary of the tenets of the Prudent Investor Rule will be presented. Lastly, a few short comments on each section of the UPIA will be made. The reader is urged to consult more extended treatments on the Prudent Investor Rule for elaboration of what is presented here.<sup>609</sup>

### B. *History of the Prudent Man Rule*

The Prudent Man, or Prudent Person, rule originated in an 1830 Massachusetts case.<sup>610</sup> The rule stated that trustees were to invest the trust assets as men of prudence manage their own affairs with regard to the long term safety of the corpus and the income to be earned.<sup>611</sup> This rule developed into a rigid and conservative rule by decisions forbidding speculation, by substituting "the affairs of another" for "their own affairs," and by viewing every type of investment held to be speculative by any court as absolute precedent for future cases.<sup>612</sup> Speculative investments were held to be imprudent per se.<sup>613</sup> Lastly, statutory legal lists of permitted investments were enacted.<sup>614</sup> The permitted investments were extremely conservative.<sup>615</sup>

### C. *Developments in Economic Theory*

Beginning in the 1950s, and entirely independent of trust investment practices, economists and financial theorists began to examine the behavior of investors.<sup>616</sup> These investigators found that investors primarily examine the risk,

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*Restatement Third of Trusts: Panacea or Placebo*, 27 PHILIP E. HECKERLING INST. ON EST. PLAN. ¶ 500 (1993); Michael T. Johnson, *Speculating on the Efficacy of "Speculation": An Analysis of the Prudent Person's Slipperiest Term of Art in Light of Modern Portfolio Theory*, 48 STAN. L. REV. 419, 420 (1996); John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV. 641, 641 (1996).

609. See articles cited, *supra* note 608. The remainder of this section is primarily an adaptation from the author's previous article on the Prudent Investor Rule. See Begleiter, *Prudent Investor*, *supra* note 608.

610. See *Harvard College v. Amory*, 26 Mass. (9 Pick.) 446, 461 (1830).

611. *Id.*

612. Begleiter, *Prudent Investor*, *supra* note 608, at 31-32.

613. *Id.*

614. *Id.* at 32.

615. *Id.* at 31-32.

616. *Id.* at 33-36. The best reference source on this subject for attorneys is JONATHAN R. MACEY, *AN INTRODUCTION TO MODERN FINANCIAL THEORY* (2d ed. 1998).

meaning volatility, and return of assets.<sup>617</sup> They also examine investments in the context of the entire portfolio.<sup>618</sup> Investors are risk averse and prefer risk to be at the lowest level consistent with the desired return.<sup>619</sup> In order to be convinced to invest in assets with increased volatility, the investor must be offered the prospect of greater returns.<sup>620</sup>

Next, the economists examined risk. They found there were two different types of risks—market and non-market risks.<sup>621</sup> Market risk is the risk that the return of the market in which the investment exists will be less than predicted.<sup>622</sup> This risk cannot be reduced by the investor.<sup>623</sup> Non-market risk is the risk that the return of an individual asset will be less than expected, or that its volatility will be greater than expected.<sup>624</sup> This risk can be reduced by diversifying the assets in the portfolio.<sup>625</sup> Moreover, non-market risk is not rewarded by increased return.<sup>626</sup> Therefore, the rational investor would construct a diversified portfolio yielding the lowest level of risk for a given rate of return.<sup>627</sup> Furthermore, the focus of a rational investor is on the total portfolio, not the individual assets.<sup>628</sup> Individual assets are important only as they affect the risk and return of the portfolio.<sup>629</sup> In addition, because of the interaction between assets, highly volatile and speculative assets may reduce the risk of the entire portfolio.<sup>630</sup> Therefore, no asset should be prohibited per se as speculative.<sup>631</sup>

#### *D. Criticisms of the Prudent Man Rule*

In the 1970s and 1980s, attorneys became aware of the theories of economists and financial planners. In a seminal article in 1976, two young law professors, then at the University of Chicago, reviewed modern portfolio theory and suggested its adoption by trustees.<sup>632</sup> The next year, an attorney with a major

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617. Begleiter, *Prudent Investor*, *supra* note 608, at 33-36.

618. *Id.*

619. *Id.*

620. *Id.*

621. *Id.*

622. *Id.*

623. *Id.*

624. *Id.*

625. *Id.*

626. *Id.*

627. *Id.*

628. *Id.*

629. *Id.*

630. *Id.*

631. *Id.*

632. John H. Langbein & Richard A. Posner, *Market Funds and Trust Investment Law*, 1976 AM. B. FOUND. RES. J. 1, 6-18; *see also* Begleiter, *Prudent Investor*, *supra* note 608, at 39.

Chicago bank published an article based on his remarks at an American Bar Association Annual Meeting.<sup>633</sup> In 1985, a partner in a leading New York law firm published a book specifically criticizing the Prudent Man Rule, basing his arguments on the findings of modern portfolio theory.<sup>634</sup> Lastly, in 1987, a law professor published an analytical explanation of the interaction of modern portfolio theory and the Prudent Man Rule, containing the most detailed criticism of the rule to that date.<sup>635</sup>

#### *E. The Development of the Prudent Investor Rule*

The rigidified prudent man rule was subject to myriad criticisms.<sup>636</sup> The American Law Institute, responding to those criticisms, promulgated a reformulation of the trust investment standard—retitled the prudent investor rule—as the first part of the new *Restatement of Trusts*.<sup>637</sup> In 1994, the Uniform Law Commissioners promulgated the UPIA.<sup>638</sup>

The Prudent Investor Rule, as formulated in the Restatement and the Uniform Prudent Investor Act, can be summarized in the following principles:

- (1) No investment or technique is imprudent per se.<sup>639</sup>
- (2) Sound diversification is fundamental to risk management, and is therefore ordinarily required of trustees.<sup>640</sup>

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633. Austin V. Fleming, *Prudent Investments: The Varying Standards of Prudence*, 12 REAL PROP. PROB. & TR. J. 243 (1977); *see also* Begleiter, *Prudent Investor*, *supra* note 608, at 39-40.

634. See BEVIS LONGSTRETH, MODERN INVESTMENT MANAGEMENT AND THE PRUDENT MAN RULE (1986). The importance of this book cannot be overemphasized. The author was a leading practitioner in a most prestigious Wall Street firm. The book was also the first criticism providing empirical evidence for its conclusions. *See* Begleiter, *Prudent Investor*, *supra* note 608, at 40-42.

635. *See* Jeffrey N. Gordon, *The Puzzling Persistence of the Constrained Prudent Man Rule*, 62 N.Y.U. L. REV. 52 (1987); *see also* Begleiter, *Prudent Investor*, *supra* note 608, at 42.

636. *See* Begleiter, *Prudent Investor*, *supra* note 608, at 54, for a summary.

637. *See* RESTATEMENT (THIRD) OF TRUSTS—PRUDENT INVESTOR RULE § 227 (1992). The actual formulation of the rule in the third Restatement reflects little change from the traditional rule. The new rule provides: “The trustee is under a duty to the beneficiaries to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements under other circumstances of the trust.” *Id.* The most significant changes are the change in title, the change from “prudent man” to “prudent investor,” and the omission of any reference to “his own property” and to “preservation of the estate and the amount and regularity of income.” Begleiter, *Prudent Investor*, *supra* note 608, at 56.

638. UNIF. PRUDENT INVESTOR ACT, 7B U.L.A. 280 (2000).

639. Begleiter, *Prudent Investor*, *supra* note 608, at 60.

640. *Id.* at 61.

- (3) The focus of portfolio performance is and should be on the entire portfolio, rather than on the individual assets comprising the portfolio.<sup>641</sup>
- (4) The objective of a trust portfolio should be to achieve the highest total return consistent with the level of risk the beneficiaries are willing to assume, and whether that return is composed of income or appreciation or what level of each is not significant.<sup>642</sup> However, in developing the risk and return levels, many factors, such as beneficiary needs, required distributions, and tax factors should be considered.<sup>643</sup>
- (5) Trustees must avoid expenses that cannot be justified by the requirements and objectives of the trust.<sup>644</sup>
- (6) The trustee's duty of impartiality among the beneficiaries includes protecting the purchasing power of the remainder interests.<sup>645</sup>
- (7) All functions of a trustee may be delegated and the trustee has authority—and in some cases may have a duty—to delegate.<sup>646</sup> However, the trustee must use reasonable care, skill, and caution in selecting the agent, supervising his performance, and monitoring his activities.<sup>647</sup> At a minimum, the trustee must define the trust's investment objectives, and approve the investment plan and the strategy of the trust.<sup>648</sup>

These factors are expanded on and explained in the other materials previously cited and in the comments and Reporter's Notes to the Restatement.<sup>649</sup>

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641. *Id.* at 57-59.

642. *Id.* at 59.

643. *Id.* at 57-59.

644. *Id.* at 61-64.

645. *Id.* at 58-59.

646. *Id.* at 64-65.

647. *Id.*

648. *Id.*

649. See articles cited, *supra* note 608; see also RESTatement (THIRD) OF TRUSTS—PRUDENT INVESTOR RULE § 227 reporter's notes (1992).

#### *F. Specific Comment on Sections*

##### *1. Standard of Care—Portfolio Strategy—Risk and Return Objectives: Section 633.4302*

Subsection 1 of section 633.4302 states the general duties of the trustee regarding investments and the prudent investor rule.<sup>650</sup> Subsection 2 formulates the total portfolio approach.<sup>651</sup> Subsection 5 provides that no investment is imprudent per se, consistent with prudent investor standards.<sup>652</sup> Subsection 3 includes a list of factors the trustee should consider in investing.<sup>653</sup> These factors are:

- (1) General economic conditions.
- (2) The possible effect of inflation or deflation.
- (3) The expected tax consequences of investment decisions or strategies.
- (4) The role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property.
- (5) The expected total return from income and the appreciation of capital.
- (6) Other resources of the beneficiaries.
- (7) Needs for liquidity, regularity of income, and preservation or appreciation of capital.
- (8) An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.<sup>654</sup>

##### *2. Diversification: Section 633.4303*

This section states the rule that diversification is required unless the trustee reasonably determines that not diversifying the assets would better serve the trust purposes.<sup>655</sup> Note that a specific determination by the trustee is required to avoid

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650. IOWA CODE § 633.4302(1) (2001).

651. *Id.* § 633.4302(2).

652. *Id.* § 633.4302(5); *see also* Begleiter, *Prudent Investor*, *supra* note 608, at 57-60.

653. IOWA CODE § 633.4302(3).

654. *Id.* § 633.4302(3)(h).

655. *Id.* § 633.4303; *see also* Begleiter, *Prudent Investor*, *supra* note 608, at 61 (discussing diversification within the context of the adoption of the modern portfolio theory by the Restatement (Third) of Trusts and the Uniform Prudent Investor Act).

the diversification requirement.<sup>656</sup> Presumably, the trustee may later be required to justify a determination not to diversify, perhaps by reference to one or more of the factors in section 633.4302.<sup>657</sup>

### 3. *Duties at Inception of Trusteeship: Section 633.4304*

Within a reasonable time of becoming a trustee or receiving trust property, the trustee must make and implement investment decisions concerning the trust portfolio to achieve compliance with the prudent investor rule and the purposes and terms of the trust.<sup>658</sup> Section 633.4304 will require the trustee to formulate an investment plan based on modern portfolio theory, risk and return considerations, and the factors in section 633.4302, and then select a portfolio consistent with the investment plan so developed.<sup>659</sup>

### 4. *Impartiality: Section 633.4306*

Section 633.4306 implements the protection of the purchasing power of the remainder interests.<sup>660</sup>

### 5. *Investment Costs: Section 633.4307*

Section 633.4307 allows the trustee to "only incur costs that are appropriate and reasonable" in the circumstances.<sup>661</sup>

### 6. *Reviewing Compliance: Section 633.4308*

Section 633.4308 mandates that the propriety of the trustee's investment strategy and decisions are determined "at the time of a trustee's decision or action and not by hindsight."<sup>662</sup>

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656. IOWA CODE § 633.4303.

657. *Id.* § 633.4302.

658. *Id.* § 633.4304.

659. *Id.* § 633.4302; *see* RESTATEMENT (THIRD) OF TRUSTS—PRUDENT INVESTOR RULE § 229 (1992); Begleiter, *Prudent Investor*, *supra* note 608, at 33-38, 53-65.

660. IOWA CODE § 633.4306; *see* Begleiter, *Prudent Investor*, *supra* note 608, at 58-59.

661. IOWA CODE § 633.4307; *see* Begleiter, *Prudent Investor*, *supra* note 608, at 61-64.

662. IOWA CODE § 633.4308; *see* RESTATEMENT (THIRD) OF TRUSTS—PRUDENT INVESTOR RULE § 227 reporter's notes, cmt. b (1992).

7. *Delegation of Investment and Management Functions:*  
*Former Section 633.4309*

Former section 633.4309 expanded the power of a trustee to delegate investment functions.<sup>663</sup> The Probate and Trust Law Section voted to repeal section 633.4309 because it was believed to be duplicative of section 633.4206.<sup>664</sup> The legislature repealed the section in House File 2518.<sup>665</sup> While the author is not enamored with unnecessary duplication, the retention of section 633.4309 might well have been worthwhile. First, it preserves the uniformity of the Uniform Prudent Investor Act, which is always desirable. Second, the location of the provision with the other investment provisions increases the possibility that trustees will become aware of it, which is beneficial. Upon reflection, it would probably have been worthwhile to retain former section 633.4309 in the Trust Code.

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663. 1999 Iowa Acts 250 (section 26 of Iowa House File 2518 repealed Iowa Code section 633.4309); *see also* Begleiter, *Prudent Investor*, *supra* note 608, at 64-65 (charting the evolution and expansion of the trustee's delegation power). Former section 633.4309 provided:

**633.4309. DELEGATION OF INVESTMENT AND MANAGEMENT FUNCTIONS.**

1. A trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in all of the following activities:
  - a. Selecting an agent.
  - b. Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust.
  - c. Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.
2. In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.
3. A trustee who complies with the requirements of subsection 1 is not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated.
4. By accepting the delegation of a trust function from the trustee of a trust that is subject to the law of this state, an agent submits to the jurisdiction of the courts of this state.

1999 Iowa Acts 250, *repealed by* 2000 Iowa Acts 473.

664. Meeting Minutes, Nov. 5, 1999, *supra* note 42.

665. Iowa H. File 2518, 78th Gen. Assemb., 2d Sess. (Apr. 26, 2000). Section 26 of Iowa House File 2518 repealed section 633.4309 by reference to its statute number (1999 Iowa Acts, chapter 125, section 69) rather than to its Iowa Code section number.

### 8. *Language Invoking Prudent Investor Rule: Section 633.4309*

The prudent investor rule may be incorporated by reference in a trust instrument by a variety of phrases, including: "Investments permissible by law for investment of trust funds," "Legal investments" or "Authorized" investments, "Prudent man rule," "Prudent trustee rule," "Prudent person rule" and "Prudent investor rule."<sup>666</sup> Comparable terms will also invoke the rule.<sup>667</sup>

## XII. POWERS OF TRUSTEES

This short subpart consists of only two sections. The first describes general principles regarding trust powers, and the second gives a specific list of trust powers. It should be remembered that powers can be granted, restricted, or denied by the terms of the trust.<sup>668</sup>

### A. *General Powers—Fiduciary Duties: Section 633.4401*

Section 633.4401 first notes that a trustee may exercise powers stated in the trust instrument and—except as the trust instrument limits—the powers conferred by the Trust Code, *without court order or authorization*.<sup>669</sup> In light of the extensive list of powers given under section 633.4402 and ordinarily stated in trust instruments, the freedom to exercise the powers without a court order is of major significance to trustees. Of course, the exercise of a power is not mandatory, but subject to the trustee's discretion.<sup>670</sup> Moreover, as made clear in subsection 3, the fact that a trustee has a power does not say that to exercise it in a given situation is a correct exercise of the power, or that the trustee is free from liability for the consequences.<sup>671</sup> The trustee must exercise powers in accordance with its fiduciary duties.<sup>672</sup> Moreover, a court retains the common law power to relieve the trustee from restrictions on when or how it can exercise a power,<sup>673</sup> to give the trustee

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666. Iowa Code § 633.4309.

667. *Id.*

668. *See id.* § 633.1105 (stating the provision of a trust shall take precedence over the Trust Code).

669. *Id.* § 633.4401(1). This is a change from previous law. Many powers listed in the current Iowa Probate Code may be exercised only with court approval. *See, e.g., id.* § 633.83 (power to continue a business); *id.* § 633.84 (delegation of authority); *id.* § 633.94 (platting land).

670. *Id.* § 633.4402.

671. *See id.* § 633.4401(3).

672. *Id.*

673. *Id.* § 633.4401(2).

additional powers even if the trust forbids such powers,<sup>674</sup> or to restrict the use of a power that is not restricted by the trust instrument or the Iowa Trust Code.<sup>675</sup>

### B. Specific Powers of Trustees: Section 633.4402<sup>676</sup>

The Iowa Trust Code lists thirty specific powers which, unless limited by the trust instrument, are given to all trustees.<sup>677</sup> These powers need not be listed in the trust instrument<sup>678</sup> and may be exercised without court order.<sup>679</sup> This list represents a major expansion over previous statutory provisions.<sup>680</sup> Without intending to

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674. *Id.*

675. *Id.*

676. There are certain additional powers that might merit consideration for inclusion. Among these are:

1. Subsections 633.4402(6) and (16) might be combined and expanded to include other types of business forms as follows:

[W]ith respect to an interest in a proprietorship, partnership, limited liability company, business trust, corporation, or other form of business or enterprise, continue the business or other enterprise and take any action that may be taken by shareholders, members, or property owners, including merging, dissolving, or otherwise changing the form of business organization or contributing additional capital[.]

See U.T.C. § 816(6) (2000 Approved).

2. Current subsection 633.4402(25) might also be expanded as follows: “[O]n distribution of trust property or the division or termination of a trust, make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares, value the trust property for those purposes, and adjust for resulting differences in valuation[.]” See *id.* § 816(22).

3. New subsections might provide:

a. “[S]elect a mode of payment under any employee benefit or retirement plan, annuity, or life insurance payable to the trustee, exercise rights thereunder, including exercise of the right to indemnification for expenses and against liabilities, and take appropriate action to collect the proceeds[.]” See *id.* § 816(17).

b. “[R]esolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternative dispute resolutions[.]” See *id.* § 816(23).

c. “[O]n termination of the trust, exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to it.” See *id.* § 816(26).

677. IOWA CODE § 633.4402.

678. *Id.* § 633.4401(1)(a).

679. *Id.* § 633.4401(1).

680. See IOWA CODE § 633.699. Previously, trustee powers were concentrated in two statutes. See IOWA CODE §§ 633.699, 636.60 (1999). Section 633.699 provides eight enumerated powers, as follows:

1. To collect, receive principal and income belonging to the trust estate, to give receipts for the property, and to abandon, sue on, defend, compromise, arbitrate, or settle claims

discuss every power, mention of some of the more significant additions is appropriate.

The trustee is authorized to collect, hold, and retain trust property received from the settlor or any other person,<sup>681</sup> even though the trustee may have a personal

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against the trust. *Iowa Code* § 633.699 (2001); *see also id.* §§ 633.114-117, .4402(6), (21), (30) (noting the equivalent powers).

2. To acquire real and personal property. *Id.* § 633.699; *see also id.* § 633.4402(5)-(6) (noting the equivalent power).

3. To vote and exercise proxies for corporate securities in the trust. *Id.* § 633.699; *see also id.* § 633.4402(13)(a) (noting the equivalent power).

4. To borrow money for the trust and pledge and mortgage the trust property only with court approval. *Id.* § 633.699; *see also id.* § 633.4402(7) (noting the equivalent power without court order).

5. To execute leases for a customary period, not to exceed the termination date of the trust. *Id.* § 633.699; *see also id.* § 633.4402(7) (expanding this power to lease beyond the term of the trust).

6. To make payments directly to, for the maintenance and education of, to a guardian or conservator of, and to a person caring for, the beneficiary. *Id.* § 633.699; *see also id.* § 633.4402(24) (noting the equivalent power).

7. To make distributions in cash or in kind. *Id.* § 633.699; *see also id.* § 633.4402(25) (noting the equivalent power).

8. To receive additional property from any source. *Id.* § 633.699; *see also id.* § 633.4402(2) (noting this power extends to specifically permit the trustee to refuse to accept additions).

*Iowa Code* section 636.60 permits trustees of trusts not being administered in the probate court—most inter vivos trusts and trusts administered solely or jointly by a corporate trustee—to have all the powers of trusts which are administered in the Probate Code. *Id.* § 636.60; *see also id.* § 633.10(4)(b) (suggesting that most trustees are not subject to jurisdiction unless the trustee invokes jurisdiction or it is provided in the governing instrument). Without intending to be exhaustive, this would presumably include the following powers (this list does not include powers that may only be exercised with court authorization):

1. A surviving co-fiduciary has all the powers of all fiduciaries. *Id.* § 633.67.
2. A successor fiduciary has all the powers of its predecessor. *Id.* § 633.68.
3. To sue, be sued, and defend. *Id.* § 633.81.
4. To release and discharge liens, including mortgages and judgments. *Id.* § 633.95.
5. To invest in mutual funds. *Id.* § 633.123A.
6. If a corporate fiduciary, to hold assets in the name of a nominee. *Id.* § 633.124.
7. To utilize a common trust fund if a corporate fiduciary. *Id.* §§ 633.126-129.
8. To deposit funds in a corporate fiduciary's own banking department. *Id.*

§ 633.156.

It should be noted section 633.4402 lists most of these powers and expands on many.

*See id.* § 633.4402.

681. *See id.* § 633.1102(10) (stating that "person" includes individuals and legal or commercial entities).

interest in the property.<sup>682</sup> A trustee may continue a business and choose to dissolve, incorporate, or change the business's form without court order.<sup>683</sup>

If a corporate trustee is acting, trust funds may be deposited in the trustee's own bank.<sup>684</sup> The trustee may buy and sell property at public or private sale, and may buy and sell on credit.<sup>685</sup> The trustee may lease, mortgage, or encumber the trust property for a term extending beyond the trust term, rejecting the older view which limited encumbrances to the term of the trust.<sup>686</sup> Leases or other arrangements for exploration of natural resources, including geothermal energy and community, pooling, and utilization agreements, are authorized.<sup>687</sup> The power to vote corporate stock is expanded to include foreign corporations, nonprofit organizations, and other property.<sup>688</sup> This power also includes the power to ratify, confirm, and authorize any shareholder, member, or property owner action.<sup>689</sup> The powers over businesses also include the ability to consent to reorganization, consolidation, merger, dissolution, or liquidation and participate in voting trusts, pools, and foreclosures.<sup>690</sup> The trustee may also delegate discretion to a protective committee or another committee in foreclosure.<sup>691</sup>

Holding securities in nominee form without disclosure of the trust is authorized,<sup>692</sup> as is deposit of securities in a depository.<sup>693</sup> The power to borrow is specifically given "for any trust purpose"<sup>694</sup> thus, the sole limit on borrowing is the general obligation to invest prudently.<sup>695</sup> Said otherwise, borrowing is judged as an investment, rather than as a separate power. The power to insure the trust property against damage or loss implements the duty to protect the trust property.<sup>696</sup>

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682. *Id.* § 633.4402(1).

683. *Id.* § 633.4402(3).

684. *Id.* § 633.4402(4). This incorporates section 633.156 and is an exception to the prohibition against self-dealing contained in section 633.155. *See id.* §§ 633.155-156.

685. *Id.* § 633.4402(5).

686. *Id.* § 633.4402(7); *see* RESTATEMENT (SECOND) OF TRUSTS §§ 189 cmt. c, 190 cmt. k (1959) (stating the older view); *see also* IOWA CODE § 633.4402(10) (authorizing options to purchase or renew, also negating the older view prohibiting options to purchase).

687. IOWA CODE § 633.4402(11).

688. *Id.* § 633.4402(13)(c).

689. *Id.*

690. *Id.* § 633.4402(16).

691. *Id.*

692. *Id.* § 633.4402(17).

693. *Id.* § 633.4402(18).

694. *Id.* § 633.4402(20).

695. *See* RESTATEMENT (THIRD) OF TRUSTS—PRUDENT INVESTOR RULE § 191 (1992).

696. IOWA CODE § 633.4402(19).

The trustee may pay expenses of the trust, including compensation of the trustee and of employees and agents, without court order.<sup>697</sup> This arguably conflicts with section 633.200, providing that the court allow and fix the compensation of trustees from time to time.<sup>698</sup> One way of partially reconciling these two sections is to interpret section 633.4402(22) as to only provide for payment without *prior* court approval, leaving the beneficiary the option to challenge the trustee's compensation on an accounting.<sup>699</sup> This would be the preferred reading of the statute.<sup>700</sup>

The power to make loans to beneficiaries and guarantee loans made by others under such terms and considerations as the trustee considers fair and reasonable is a new statutory provision.<sup>701</sup> The trustee must determine what is fair and reasonable in light of the purposes of the trust and the trustee's fiduciary duties.<sup>702</sup>

Payment may be made to a beneficiary directly or to another person for the beneficiary's use or benefit.<sup>703</sup> Distributions may be made pro rata or non-pro rata and in undivided interests.<sup>704</sup> The trustee may adjust differences in valuation on such distributions.<sup>705</sup>

The trustee is given the power to employ professionals, including attorneys, accountants, investment advisors, and others, for advice and assistance.<sup>706</sup> This power recognizes the reality that the trustee may require aid in certain aspects of trust administration and gives the trustee the power to secure the assistance or advice necessary.

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697. *Id.* § 633.4402(22).

698. *Id.* § 633.200.

699. See U.T.C. § 816 cmt. (2000 Annual Meeting Draft).

700. *See id.* It is respectfully suggested that the Probate and Trust Law Section consider the interaction of sections 633.4402(22) and 633.200 in the future with a view to clarifying the rules on payments of the trustee's compensation without prior court approval.

701. IOWA CODE § 633.4402(23).

702. *Id.*; *see also* U.T.C. § 816 cmt. (2000 Annual Meeting Draft). The UTC indicates that the purpose of this provision is to permit loans to beneficiaries that are not prudent in a commercial sense, but which are of great benefit to the trust beneficiary and could correctly be seen as in furtherance of the trust purposes. U.T.C. § 816 cmt. (2000 Annual Meeting Draft). Again, this power is an attempt to give trustees the flexibility necessary to effectuate the settlor's purposes. *See id.*

703. IOWA CODE § 633.4402(24). This applies even if the beneficiary is under a legal disability. *Id.*

704. *Id.* § 633.4402(25).

705. *Id.* This gives the trustee flexibility to make distributions in accordance with the beneficiaries' desires and lessens the risk that a non-pro rata distribution will be treated as a taxable sale for income tax purposes. *See* U.T.C. § 816 cmt. (2000 Annual Meeting Draft). This power in the past has normally been given in the trust instrument. *See id.*

706. IOWA CODE § 633.4402(26). This is another power that was normally given by the trust instrument.

Subsection 27 is intended to address trustee concerns about the potential liability of holding property that may cause environmental problems.<sup>707</sup> First, the trustee may expend trust funds to inspect or investigate such property.<sup>708</sup> Second, trust funds may be expended to prevent or cure any violation of environmental law respecting such property.<sup>709</sup> Of course, the expenditures and the wisdom of acquiring such property for the trust are judged as a matter of the prudence of the investment.<sup>710</sup>

The trustee may establish and maintain a reserve for a valid business purpose or for depletion.<sup>711</sup> This power is useful in cases when not establishing such a reserve for depreciation or depletion would unfairly penalize the interests of the remainder beneficiary.<sup>712</sup>

### XIII. LIABILITY OF TRUSTEES TO BENEFICIARIES

#### A. *Violations of Duties—Breach of Trust: Section 633.4501*

Section 633.4501 is introductory and sets the general standards for the more specific sections to follow. One important principle stated by this section is that the remedies of beneficiaries for violations of duties owed to the beneficiaries by a trustee—defined as a breach of trust—are exclusively equitable.<sup>713</sup> Of course, it

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707. *Id.* § 633.4402(27).

708. *Id.*

709. *Id.*

710. *See id.* §§ 633.4101-.4110.

711. *Id.* § 633.4402(28).

712. This power works in tandem with Iowa Code sections 637.422 through 637.424 and 637.103. *See id.* §§ 637.103, 422-424.

713. *See id.* § 633.4501; RESTATEMENT (SECOND) OF TRUSTS § 197 (1959). This is the traditional view and would generally disallow jury trials or punitive damages in such actions. *Id.* This accords with Iowa law. *See Carstens v. Cent. Nat. Bank & Trust Co.*, 461 N.W.2d 331, 333-34 (Iowa 1990). The court in *Carstens v. Central National Bank and Trust Co.* stated that a beneficiary could maintain an action at law only if the trustee was under a duty to immediately and unconditionally pay money to or transfer a chattel to a beneficiary. *Id.*; *see also In re Anne Hamilton Killian Trust*, 519 N.W.2d 409, 412 (Iowa 1994) (objecting to accounting in equity); *In re Estate of Young*, 273 N.W.2d 388, 394 (Iowa 1978) (creating a trust is equitable). The major exception appears to be an action involving a testamentary trust for the establishment of contested claims. Under Iowa Code section 633.33, such claims are tried at law. IOWA CODE § 633.33. This section has been applied to claims against testamentary trusts. *See In re Estate of Dodge*, 281 N.W.2d 447, 449 (Iowa 1979). In *Coster v. Crookham*, without discussion, the court treated as a law action an action by the beneficiaries against the trustee, the trustee's investment partner, a lender, and a bank that provided services to the trust. *Coster v. Crookham*, 468 N.W.2d 802, 804 (Iowa 1991). The case basically involved self-dealing. *Id.* at 811. Unless the court believed this was a "contested claim," there was no reason for a jury trial in the case. The interesting question is whether a contested claim involving an *inter vivos* trust would be treated as an action at law if a party invoked probate court jurisdiction under Iowa Code

must be remembered that in a revocable trust, the duties of the trustee are owed to the settlor rather than the beneficiaries, so regarding revocable trusts, Subpart E of Part 4 of the Iowa Trust Code would give the rights and remedies stated to the settlor.<sup>714</sup>

### **B. Breach of Trust—Actions: Section 633.4502**

Section 633.4502 lists a number of specific remedies for a breach of trust. Such codification of equitable remedies is unusual. Subsections 1 and 2, allowing the court to compel the trustee to perform its duties or to enjoin the trustee from violating a duty, require little comment.<sup>715</sup> Allowing the court to compel the trustee to pay money to the beneficiaries as compensation for a breach of trust is intended to include liability traditionally ordered under such headings as damages, restitution, or surcharge.<sup>716</sup> Subsection 4 makes explicit the ability to appoint a receiver or a temporary trustee to administer the trust and the trust property.<sup>717</sup> The court is also authorized to remove the trustee.<sup>718</sup> Lastly, the court may reduce the trustee's compensation or deny it altogether—a very significant remedy.<sup>719</sup>

Subsection 7 lists several additional remedies, but all are subject to the rights of bona fide purchasers.<sup>720</sup> These remedies are:

- (1) The imposition of an equitable lien or a constructive trust on trust property;

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section 633.10(4). IOWA CODE § 633.10(4). Section 633.10(4) grants the probate court jurisdiction over express trusts if the instrument confers such jurisdiction or if jurisdiction is invoked by the trustee, a beneficiary, or any interested party. *Id.* § 633.10(4)(a). The answer is unclear. Section 633.33 also provides that an action to contest or set aside a will is at law. *Id.* § 633.33. A claim could be made that an action to set aside or contest an express trust, being similar, should also be treated as an action at law.

714. See IOWA CODE § 633.3103. Recall also that the Probate and Trust Law Section of The Iowa State Bar Association approved an amendment to section 633.4213 providing that all duties to inform and account in revocable trusts are owed to the settlor while he is alive, but the amendment was omitted by inadvertence from House File 2518. See *supra* notes 589-91. Undoubtedly, this amendment will be resubmitted to the Iowa Legislature in the future.

715. These two sections are derived from Restatement (Second) of Trusts section 199(a) and (b). RESTATEMENT (SECOND) OF TRUSTS § 199(a)-(b) (1959).

716. U.T.C. § 1001 cmt. (2000 Annual Meeting Draft). See IOWA CODE § 633.4503 for measure of damages.

717. IOWA CODE § 633.4502(4); RESTATEMENT (SECOND) OF TRUSTS § 199(d) (1959). The court may also appoint a receiver or a temporary trustee as in cases of resignation and removal. IOWA CODE §§ 633.4106, .4107.

718. See IOWA CODE § 633.4107 for grounds for removal of the trustee.

719. IOWA CODE § 633.4502; RESTATEMENT (SECOND) OF TRUSTS § 243 cmt. d (1959).

720. IOWA CODE § 633.4502. See IOWA CODE § 633.4603 for the rights of third parties dealing with the trustees that may limit these remedies. See also discussion *infra* Part XIV.C.

- (2) Tracing and the removal of trust property wrongfully disposed of or its proceeds;
- (3) Nullify an act of the trustee.<sup>721</sup>

This section was derived primarily from the predecessor of section 1001 of the UTC.<sup>722</sup> Both the current draft and the predecessor draft contain a provision that was omitted from the Iowa Trust Code. The UTC provision allows the court to grant any other relief appropriate in the circumstances.<sup>723</sup> No apparent reason exists for this omission from the Iowa Trust Code. While the common law of trusts<sup>724</sup> would seemingly allow the court to fashion and impose other appropriate remedies, stating such a power would remove any doubt and avoid inquiry as to whether the remedy was authorized by the common law.

#### *C. Breach of Trust—Liability: Section 633.4503*

Section 633.4503 states the measure of damages for a breach of trust.<sup>725</sup> The trustee is liable for the greater of:

- (1) The amount required to restore the value of the trust property and trust distributions to what they would have been absent the breach; or
- (2) The profit lost because of the breach.<sup>726</sup>

This section is based on the extensive recent commentary on determination of damages for breaches of trust in the Restatement,<sup>727</sup> but the remedies are grounded in traditional theory. When the trustee commits a breach of trust, the beneficiaries have a choice. They may affirm the transaction, in which case the profit of the trustee inures to the trust, or, if a loss has occurred, renounce the transaction and hold the trustee liable for the amount required to fully compensate the trust for the consequences engendered by the breach.<sup>728</sup>

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721. IOWA CODE § 633.4502(7).

722. U.T.C. § 1001(b)(8) (2000 Approved). The predecessor of section 1001(b)(8) is section 4-505 of the June 6, 1996 draft. *See* U.T.A. § 4-505 (1996 Preliminary Draft).

723. U.T.C. § 1001(b)(10) (2000 Approved).

724. The common law of trusts is incorporated in the Iowa Trust Code under section 633.1104. IOWA CODE § 633.1104; *see also supra* Part IV.C.

725. IOWA CODE § 633.4503.

726. *Id.*

727. *See RESTATEMENT (THIRD) OF TRUSTS—PRUDENT INVESTOR RULE §§ 204-213 (1992).*

728. *Id.* § 205 cmt. a. Iowa has adopted these alternatives under the common law. *Coster v. Crookham*, 468 N.W.2d 802, 806 (Iowa 1991) (citing *RESTATEMENT (SECOND) OF TRUSTS* § 205 (1959)). The court also relied on Iowa Code sections 633.155 and 633.160, which are applicable to fiduciaries generally. *Id.* at 807 (citing IOWA CODE §§ 633.155, .160 (1991)). It might be beneficial if

**D. Limitation of Action Against Trustee Following Final Account:  
Section 633.4504**

At some point, despite the trustee's fiduciary duty, the trustee's acts must be final and immune from attack. Section 633.4504 attempts to establish such a limitation.

Subsection 1 establishes the general rule that an action for a breach of trust is barred as to a beneficiary who has received a final account unless a proceeding to assert the claim is started within one year after the earlier of:

- (1) The receipt of the accounting or report; or
- (2) The termination of the fiduciary relationship between the trustee and that beneficiary.<sup>729</sup>

The claim can be earlier barred by judicial decision, consent, or some other limitation.<sup>730</sup> In order for the bar to apply, the accounting must adequately disclose the existence of the claim.<sup>731</sup> This is defined as providing "sufficient information so that the beneficiary knows of the claim or reasonably should have inquired into its existence."<sup>732</sup>

The important question here, of course, is when the accounting adequately discloses the existence of the claim. Without intending to criticize the statutory definition, which must be general enough to cover a variety of factual situations, it must still be said that it does not inform the trustee with crystal clarity how direct and extensive the disclosure must be to satisfy the section. Is the reporting of the transaction involved enough? Must the trustee provide details? If so, how much in the way of details? Or must the trustee say, in the account, something to the effect of: "This transaction could be questioned because . . .?" Some might think the last suggestion is laughable. However, in one case, in which a prior judicially settled account was attacked on grounds of self-dealing, the investment was listed in the account.<sup>733</sup> The court vacated the order approving the account on the ground that the facts showing the illegality were not reported in the account.<sup>734</sup> Unfortunately,

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the Probate and Trust Law Section of The Iowa State Bar Association undertook to examine whether these and similar statutes should be revised or amended in light of the provisions of the Trust Code.

729. IOWA CODE § 633.4504(1).

730. *Id.*

731. *Id.*

732. *Id.*

733. *Leraan v. Aftenro Soc'y (In re Enger's Will)*, 30 N.W.2d 694, 698-99 (Minn. 1948).

734. *Id.* at 702. The court stated:

Self-dealing by a trustee is not a matter involved in an accounting proceeding by a trustee, where the account and the petition for the allowance thereof do not apprise the beneficiaries of the fact.

because there has not been a great deal of litigation on this matter, some uncertainty exists as to the extent of disclosure required by this section.<sup>735</sup>

The statute does give some rules on when an account or report is deemed to have been received. If an adult is reasonably capable of understanding the account, the account is deemed received if personally received by the adult.<sup>736</sup> If the adult is not reasonably capable of understanding the report, receipt by the adult's legal representative, including a guardian ad litem or other appointed representative, is acceptable.<sup>737</sup> Receipt by a minor's guardian or conservator or, if none, by the minor's parent, is receipt by the minor.<sup>738</sup> If the parent has a conflict of interest, receipt by the parent is not deemed receipt by the minor.<sup>739</sup>

Subsection 3 provides transitional rules. Any claim arising under section 633.4504 within one year after July 1, 2000, is barred one year after that date unless the statute is tolled by an exception.<sup>740</sup> Similarly, claims for breach of trust, in which the beneficiary has received<sup>741</sup> a final report more than one year prior to July 1, 2000, are barred on that date unless the statute has been tolled.<sup>742</sup>

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It is the trustee's duty to disclose to the beneficiary fully, frankly, and without reservation all facts pertaining to the trust. . . . [T]he duty rests on the trustee in accounting proceedings to make the fullest measure of disclosure. . . .

Because a beneficiary may rely upon the disclosures in the trustee's account and the petition for its allowance, a proceeding for the allowance of the account does not impose upon the beneficiary as an ordinary adversary the burden of making his own inquiry to ascertain the truth of the trustee's disclosures. The beneficiary may accept them as true. . . .

Here, there is not one word in any of the petitions and accounts or in the proceedings for the allowance of the annual accounts apprising the beneficiaries of any self-dealing on the part of the trustees. On the contrary, all information with respect to the matter was concealed. Hence no issue was tendered by the trustees in any of the prior proceedings concerning any self-dealing. The self-dealing was not, therefore, a matter determined by any of the orders relied on as having that effect. . . .

. . . It has been held that where an investment is listed in the account, but the fact showing its illegality are not, the order is not res judicata as to the question of the illegality of the investment, because the mere listing of it fails to apprise the beneficiaries of the fact of illegality. (citations omitted).

*Id.* at 701-02.

735. See BOGERT, *supra* note 262, § 143 at 503-04.

736. IOWA CODE § 633.4504(2)(a).

737. *Id.* § 633.4504(2)(b).

738. *Id.* § 633.4504(2)(c).

739. *Id.*

740. *Id.* § 633.4504(3). The statute appears to contemplate any exception to statutes of limitation, including laches and estoppel. See *id.*

741. Subsection 3 is worded "Any claim for breach of trust against a trustee who has presented a final report to the beneficiary . . . ." *Id.* § 633.4504(3). It is assumed this will be

### *E. Exculpation of Trustee: Section 633.4505*

Section 633.4505 codifies the almost universal rule voiding an exculpatory clause that protects a trustee from liability for an intentional breach of trust or bad faith, gross negligence, or reckless indifference to the beneficiary's interests.<sup>743</sup> An exculpatory clause cannot protect a trustee from having to pay back profits from such a breach.<sup>744</sup> Secondly, an exculpatory clause that appears in the trust instrument due to abuse by the trustee of its fiduciary relationship or other confidential relationship to the settlor is unenforceable.<sup>745</sup>

### *F. Beneficiary's Consent, Release, or Affirmance—Nonliability of Trustee: Section 633.4506*

Just as the Trust Code recognizes the trustee may be held liable for breach of trust, the Code also recognizes a beneficiary may, by statements or conduct, ratify the trustee's breach, and in such cases the trustee should not be liable to the beneficiaries.<sup>746</sup> Subsection 1 states those instances in which acts or statements by the beneficiary relieve the trustee of liability.<sup>747</sup> These instances are:

- (1) Consent to the conduct of the trustee;<sup>748</sup>
- (2) Release of the trustee from liability;<sup>749</sup> and

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interpreted as applying to cases in which the beneficiary has received or is deemed to have received a final report, in accordance with the wording of the remainder of the statute. *See id.*

742. *Id.* § 633.4504(3).

743. *See id.* § 633.4505; RESTATEMENT (SECOND) OF TRUSTS § 222 (1959). However, the prohibition against exculpatory clauses protecting against gross negligence does not appear in the Restatement. *See* RESTATEMENT (SECOND) OF TRUSTS § 222 (1959).

744. IOWA CODE § 633.4505(1).

745. *Id.* § 633.4505(2). Subsection 2 protects against the possibility the trustee with superior bargaining power may insist on such a clause, or the existence of the clause may not be understood by or disclosed to the settlor. *Id.* It was deemed better to prohibit such clauses entirely, if they were inserted in the trust as a result of abuse of the relationship by the trustee, rather than to allow the trustee to prove fairness and adequate communication, as allowed by the UTC. U.T.C. § 1008(b) (2000 Approved). Iowa has adopted this rule by explicit reference to the Restatement. *See* Hanson v. Minette, 461 N.W.2d 592, 598 (Iowa 1990).

746. *See* IOWA CODE § 633.4506(1)(a)-(c); *see also* RESTATEMENT (SECOND) OF TRUSTS §§ 216-218 (1959). Iowa has adopted the rationale of this section under the heading of estoppel under common law. *See, e.g.*, Hanson v. Minette, 461 N.W.2d at 596 ("Even if the liberal disbursements were a breach of the trustees' duties, [the trust beneficiary] would be estopped to hold them liable.").

747. IOWA CODE § 633.4506(1).

748. *Id.* § 633.4506(1)(a); *see also* RESTATEMENT (SECOND) OF TRUSTS § 216 (1959).

749. IOWA CODE § 633.4506(1)(b); *see also* RESTATEMENT (SECOND) OF TRUSTS § 217 (1959).

(3) Affirmance of the transaction.<sup>750</sup>

Subject to the provisions of subsection 2, it appears permissible to give consent both before and after the transaction; whereas release and affirmation appear to apply primarily to acts or statements by the beneficiary following the transaction.<sup>751</sup>

The provisions of subsection 2 place important limits on consent. If the beneficiary did not know of his rights and of the material facts of the transaction the trustee knew or should have known at the time of the transaction, and the trustee did not reasonably believe the beneficiary knew these matters, the trustee is liable notwithstanding the consent.<sup>752</sup> Second, if the consent, release, or affirmation is induced by improper conduct on the part of the trustee, the beneficiary may hold the trustee liable for the breach.<sup>753</sup>

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750. IOWA CODE § 633.4506(1)(c); *see also* RESTATEMENT (SECOND) OF TRUSTS § 218 (1959).

751. *See* IOWA CODE § 633.4506. If one or several of the beneficiaries consent, but others do not, courts generally provide a remedy to the non-consenting beneficiaries. RESTATEMENT (SECOND) OF TRUSTS § 216 cmt. k (1959).

752. *See* IOWA CODE § 633.4506(2)(a). Perhaps this would be easier to understand if worded as follows:

A beneficiary may hold a trustee liable for a breach of trust, despite an affirmation, consent or notification, if, at the time of the consent:

a. The beneficiary did not know his rights;  
b. The beneficiary did not know the material facts known to the trustee or which the trustee should have known; and

c. The trustee did not reasonably believe the beneficiary knew a and b.

There is some ambiguity in this subsection, to the extent the trustee's reasonable belief in the beneficiary's knowledge might only apply to the material facts of the transaction—(b) above—rather than to both the material facts and the beneficiary's rights—(a) and (b) above. The better reading would be that the trustee's reasonable belief should apply to both because the fiduciary relationship should require the trustee to disclose to the beneficiary the beneficiary's rights when consent, release, or affirmation is sought. This disclosure would satisfy a reasonable belief standard that the beneficiary knew his rights. Nor would this prohibit advance consents.

For example, suppose the trustee was a corporate trustee that wished to consider selling real estate in the trust, which constituted a major trust asset, although the trustee had neither offers at the time nor was considering sale in the near future. Under the Trust Code, the beneficiaries have a right to advance disclosure of such actions. *Id.* § 633.4213(3). The trustee could inform the beneficiary that the beneficiary would have the right to notice of a pending sale and the material facts of the sale, and could hold the trustee liable if the beneficiary did not receive the information. *Id.* § 633.4213(4). The beneficiary, if he so desired, could consent in advance to the sale of the real estate and to not receive the required information. *Id.* § 633.4213(7). This subsection should not be read to prevent such consent and affirmation. Furthermore, the subsection should not be read to allow blanket consents and affirmances to all transactions in the future without any detail. The validity of each consent needs to be tested on its individual facts and circumstances.

753. *Id.* § 633.4506(2)(b).

#### XIV. RIGHTS OF THIRD PARTIES

The short Subpart F of Part 4 of the Iowa Trust Code consists of five sections, four of which make significant changes from the common law, and the fifth of which introduces a new document in an effort to simplify dealings between the trusts and third parties.

##### *A. Personal Liability—Limitations: Section 633.4601*

Under traditional common law rules, a trustee was personally liable on contracts made in the administration of the trust unless the contract provided otherwise.<sup>754</sup> In cases of breach of contract, the third party brought an action against the trustee personally and collected out of the trustee's personal funds and not from the trust property.<sup>755</sup> The trustee could then bring an action for reimbursement if the contract was one the trustee had the power to enter.<sup>756</sup>

This rule existed at common law for several reasons. First, law, as opposed to equity, recognized only the trustee as an individual.<sup>757</sup> The trustee, in his representative capacity, was not recognized as a distinct legal person; the trust was a creature of equity.<sup>758</sup> Therefore, since the trustee made the promise, he was liable on it.<sup>759</sup> The law court was not concerned with whether the liability would ultimately be shifted to the trust.<sup>760</sup> Second, it was not believed the creditor's recovery should be limited to the amount of the trust, as it would be if the suit was against the trustee in a representative capacity.<sup>761</sup> Third, there was some concern at common law that if suit in a representative capacity was allowed, the question of liability on the contract and the question of whether the trustee personally or the trust estate was ultimately liable—that is, whether the contract was authorized—would be confused.<sup>762</sup> Thus, the questions were separated.<sup>763</sup>

These rules applied even though the trustee revealed his fiduciary capacity, or the third party knew of the trust by other means, and even if the third party knew

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754. BOGERT & BOGERT, *supra* note 50, § 712, at 259 (2d rev. ed. 1982).

755. *Id.* § 712, at 263.

756. *Id.* § 718, at 310-12.

757. *Id.* § 712, at 265.

758. *Id.*

759. *Id.* § 712, at 266.

760. *Id.* § 712, at 267.

761. *Id.* § 712, at 266.

762. *Id.* § 712, at 266-67.

763. *Id.* § 712, at 268-69.

the contract was made in the course of the administration of the trust.<sup>764</sup> Furthermore, the fact the trustee signed the contract "as trustee" was irrelevant.<sup>765</sup>

The cost of this practice was two actions—the contract action against the trustee individually, and the trustee's action for reimbursement. The result was a waste of judicial time because of the repetition of the pleadings and proof of the facts, and some inconsistent decisions.

Section 633.4601 changes the rules in this regard. The general rule provided by the section is that the trustee is not personally liable on contracts if:

- (1) The contract is entered into in the trustee's fiduciary capacity;
- (2) The contract is a proper contract in the administration of the trust; and
- (3) The trustee reveals his office as trustee or the trust is identified in the contract.<sup>766</sup>

The drafters believed that if the third party knew the trustee was making the contract as trustee and the contract was authorized, the trust, and only the trust, should be liable. Subsection 3 furthers this purpose by reversing the common law rule that the action be brought against the trustee individually, and authorizing actions on contracts made by the trustee, as trustee, brought against the trust, even if the trustee is personally liable.<sup>767</sup> This reflects the view that almost all such contracts are indeed proper ones made in the normal course of administration and two actions should normally be avoided.<sup>768</sup> Subsection 4 allows liability between the trust and the trustee concerning the internal affairs of the trust to be determined in a judicial proceeding.<sup>769</sup> The drafters believed, no doubt rightly, that there would be far fewer cases in which two proceedings would be necessary than under the common law rule.

The same common law rule described above for contracts also prevailed for torts. The trustee was personally liable for torts he committed as trustee, and for those of his servants and agents committed in the course of work for the trustee.<sup>770</sup> The trustee, as the owner of record of trust property, was often personally liable for liabilities of the owner—often by statute in cases such as property taxes and unpaid subscription on stock—although statutes often relieved this liability and provided

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764. *Id.* § 712, at 265.

765. *Id.*

766. IOWA CODE § 633.4601(1) (2001).

767. *Id.* § 633.4601(3).

768. *Id.*

769. *Id.* § 633.4601(4) (cross-referencing Iowa Code section 633.6202); *see also infra* Part XVIII.B.

770. BOGERT & BOGERT, *supra* note 50, § 731, at 359 (2d rev. ed. 1982). There was some authority at common law allowing suit for tort against the trustee in his representative capacity. *Id.*

for collection from the trust property.<sup>771</sup> In cases not covered by statute, the trustee had a right to be indemnified from the trust property.<sup>772</sup>

Subsection 2 of section 633.4601 provides that the trustee is liable for torts or for obligations arising from property ownership only if personally at fault.<sup>773</sup> This sensible rule separates liability arising from the course of administration from areas in which liability would not have occurred if the action had been performed properly. Again, claims based on liability of these types can be asserted against the trustee in its representative capacity, even if the trustee is personally liable.<sup>774</sup>

It is most interesting that an early Iowa case, in dicta, indicated a possibility that at common law, the trustee could have avoided a personal judgment if the trustee signed as trustee and revealed for whom he was acting.<sup>775</sup>

#### *B. Dissenting Co-Trustees: Section 633.4602*

Consistent with the common law rule, a trustee who does not join in making a contract is not liable for it.<sup>776</sup> Section 633.4602 has modernized the common law in two ways. First, it applies to the exercise of all powers.<sup>777</sup> A co-trustee who does not join in the exercise of the power is not liable to the third party for the

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771. *Id.* § 720, at 332.

772. *Id.* § 720, at 336.

773. IOWA CODE § 633.4601(2).

774. An interesting and unresolved question under the statute is, if the trustee is personally at fault, whether a claim by the beneficiaries that the trustee pay the liability personally is proper in such a proceeding or must be made in a proceeding under section 633.6202. *See id.* § 633.6202(4). The argument in favor of allowing the claim is to avoid a second proceeding. The arguments against allowing it are that the beneficiaries are not necessary parties to the proceeding against the trustee and may not even receive notice of the third party's claim against the trustee, and that the proper forum is an action involving the trustee and the beneficiaries without third parties—for example, a proceeding to settle the trustee's account.

Iowa Trust Code subsection 633.4601(2) does not specifically mention violations of environmental law. It should be noted that the UTC includes a provision in the section corresponding to Iowa Trust Code section 633.4601(2), providing that a trustee is liable for violation of environmental law only if the trustee is personally at fault. U.T.C. § 1010(b) (2000 Approved). Consideration should be given to adding this provision to the Iowa Trust Code.

775. *Stevenson v. Polk*, 32 N.W. 340, 344-45 (Iowa 1887). In summary, defendant Polk purchased real estate from plaintiff, acting as trustee for the Union Land Company. *Id.* at 342. Polk signed the deed "J.S. Polk, Trustee." *Id.* at 344. The district court, in a foreclosure action, rendered a personal judgment against Polk. *Id.* On appeal, the argument was made that if the third party had full knowledge that a person was acting as agent and who the principal was, the agent was not personally liable, even if the name of the principal was not disclosed on the face of the instrument. *Id.* The court, without deciding the validity of the argument, stated that even if it was true, there were no facts showing that plaintiff knew who Polk's principal was at the time of the contract. *Id.* at 344-45.

776. *See BOGERT & BOGERT, supra* note 50, § 722, at 344 (2d rev. ed. 1982).

777. *See IOWA CODE § 633.4602.*

effects of the exercise.<sup>778</sup> Second, under the Trust Code, a co-trustee may be required to join in an action even though he is against it due to the rule that a majority of the co-trustees may exercise a trust power.<sup>779</sup> A dissenting co-trustee in such a case is not liable to a third party if the trustee dissents in writing at the time of or before the action is taken and the dissent is given to any other co-trustee.<sup>780</sup> This provides the necessary protection for a dissenting co-trustee given that majority action is authorized.<sup>781</sup>

Of course, these protections are not intended to relieve a dissenting co-trustee from his duties as co-trustee, and subsection 3 expressly so states.<sup>782</sup>

### C. Obligations of Third Parties: Section 633.4603

Section 633.4603 is primarily a bona fide purchaser protection provision, broadened to include certain other situations governing interactions between third parties and trustees.<sup>783</sup> The first set of protections applies to third parties dealing with the trustees or assisting the trustees in a transaction.<sup>784</sup> The third party is fully protected in its actions as if the trustee was properly exercising the power, if such a third party:

- (1) Acts in good faith;
- (2) For a valuable consideration; and
- (3) Has no knowledge that the trustee is exercising its powers improperly or is exceeding its powers.<sup>785</sup> The third party may also assume both the existence of the power and its proper exercise without inquiry.<sup>786</sup>

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778. *Id.* § 633.4602(1).

779. *Id.* § 633.4103(1).

780. *Id.* § 633.4602(2).

781. *See id.*

782. *Id.* § 633.4103(3). Presumably, this is intended to make it clear that a trustee cannot take no part in trust administration, dissent to most or every action, and avoid liability. The trustee must participate in the administration of the trust under section 633.4201, unless the trust terms excuse a particular trustee from action on a particular matter. *Id.* § 633.4201(2). If powers are delegated, the trustee must still participate in selecting the agent, establishing the terms of the agent's authority, periodically review the agent's performance, and participate in decisions on discretionary distributions. *Id.* § 633.4206(2). On investments, the trustee must define the investment objective and approve the investment plan and strategy of the trust. *Id.* § 633.4302; *see also* Begleiter, *Prudent Investor, supra* note 608, at 64.

783. *See* IOWA CODE § 633.4603.

784. *Id.* § 633.4603(1).

785. *Id.*

786. *Id.* § 633.4603(1)(a).

It is important to remember that these third-party protections—which bring the liability rules of section 633.4601, other liability rules, and protections outside of the Trust Code into play—depend on the good faith and lack of knowledge of the third party and the presence of a valuable consideration.<sup>787</sup>

Secondly, a third party acting in good faith need not be concerned with what the trustee does with payments made or property delivered to the trustee.<sup>788</sup> The third party does not need to act to ensure that the property or payments are actually added to the trust.<sup>789</sup>

If a third person transacted with a former trustee without knowing that the person was no longer a trustee, the third party is protected in the same manner as if the former trustee still held the office.<sup>790</sup>

#### *D. Certification of Trust: Section 633.4604*

Section 633.4604 attempts to simplify transactions between trustees and third parties.<sup>791</sup> It has no application to dealings between trustees and beneficiaries, and does not limit the rights of beneficiaries or others to get copies of or information regarding the trust.<sup>792</sup>

The section creates a new document called a certification of trust.<sup>793</sup> The certification is a statement that the trust exists and has not been revoked or amended in such a way as to render the statements in the certification incorrect.<sup>794</sup> The certification must be signed by all currently acting trustees.<sup>795</sup> Presumably, the certification will contain information requested or required by a third party to complete a transaction. What the certification will usually *not* contain and need not contain is the dispositive provisions of the trust.<sup>796</sup>

The certification of trust is designed to facilitate commercial transactions, while at the same time protecting the privacy of the beneficiaries' interests in the trust.<sup>797</sup> Third parties usually do not, and should not, need the dispositive

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787. *See id.* § 633.4603(1).

788. *Id.* § 633.4603(2).

789. *Id.*

790. *Id.* § 633.4603(3).

791. *Id.* § 633.4604.

792. *Id.* § 633.4604(7); *see also id.* § 633.4213; *supra* Part X.M.

793. *Iowa Code* § 633.4604.

794. *Id.* § 633.4604(2).

795. *Id.* The certification must be sworn to under penalty of perjury before a notary public.

*Id.*

796. *Id.* § 633.4604(3).

797. *See id.* § 633.4604(5) (stating that reliance on the certification without knowledge that the certification is not correct is not grounds for liability).

provisions. However, they may need to know the trustee's powers and any limits thereon, or other matters. Prior to the development of this instrument, no document with statutory authorization existed to accomplish this task while protecting the privacy of trust instruments.

The statute provides that the third party may rely on the statements in the certification as true without further inquiry and is not liable to any person for acting on those representations, unless the third person has knowledge of the falsity of the representations.<sup>798</sup> However, knowledge that the representations are incorrect will not be inferred solely from the fact that the third person has a copy of all or a part of the trust instrument.<sup>799</sup> Any transaction entered into or lien created in reliance on the certification can be enforced against the trust property.<sup>800</sup>

The only invasion of the privacy of the provisions of the trust instrument is that the trustee must provide copies of those parts of the trust instrument, and amendments, naming the trustee and giving the trustee the power to act in the manner needed for the transaction at issue.<sup>801</sup>

To encourage compliance and acceptance of the certification, a third party demanding the trust instrument when a certification has been offered is liable for attorney fees in addition to damages incurred because of refusal to accept the certification, unless the refusal to accept the certification was reasonable.<sup>802</sup>

**E. Liability for Wrongful Taking, Concealing, or Disposing of Trust Property:  
Section 633.4605**

In order to discourage theft or wrongful disposition of trust property, the Trust Code imposes two extraordinary remedies: damages of double the value of the property—in addition to attorneys fees and court costs—and punitive damages when consistent with existing law.<sup>803</sup>

**XV. TRUST CONSTRUCTION: SECTION 633.4701**

**A. Introduction**

To help explain the rules of this section, it will be useful to build on an example of a simple testamentary trust. Assume a testator (T) creates a trust of her

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798. *Id.*

799. *Id.*

800. *Id.*

801. *Id.* § 633.4604(4).

802. *Id.* § 633.4604(6).

803. *Id.* § 633.4605. The question of when punitive damages are available is beyond the scope of this Article.

residuary estate to pay the income of the trust to A for his life, and on A's death the trust is to terminate and the trust property is to be paid to B. In the discussion we will modify this example in a number of ways. In some parts of the discussion, A will be referred to as the income beneficiary and B will be referred to as the remainderman.

### ***B. The Issue: Survival of B Until A's Death***

In our paradigm simple trust, there is no problem if the order of deaths go as the testator expected. We assume testator expected B to survive A so B would receive the trust property when A dies. But what if B predeceases A? Who receives the trust property at A's death? Before answering this question, we should note that T—or her attorney—could, and should, have anticipated this problem and could have modified T's will accordingly. Thus, for example, T's will could have provided that the income from the residuary trust be paid to A for life and on A's death the trust corpus paid to B if B survived A or, if not, to C if C survived A, and so on, naming a number of alternative beneficiaries. If her will did this, A would have created express conditions of survival on each beneficiary. That is, in order to take under the trust instrument, the terms of the trust would require that each beneficiary survive until the date of possession. In fact, requiring all beneficiaries survive until the date of possession is what law professors instruct students to do and what continuing legal education courses teach lawyers to do as a matter of proper drafting.<sup>804</sup> However, since some drafters and testators do not expressly require survival, we must inquire whether and in what situations courts will imply a condition of survival.

### ***C. Implied Conditions of Survival: The Case Law***

When faced with a case like our simple trust—income to A for life, on A's death to B—when the remainderman predeceases the income beneficiary, whether the courts will imply a requirement that B survive A makes a significant difference. If B must survive A to take the trust property and fails to do so, the remainder will be undisposed of and revert to testator's estate, passing to his heirs.<sup>805</sup> If the court does not require that B survive A to take, the trust property will pass through B's will or if he dies intestate, to B's, not T's, heirs.<sup>806</sup> Often, courts have treated the

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804. See Edward C. Halbach, Jr., *Trusts in Estate Planning*, THE PROB. LAW., Summer 1975, at 87-88. The reasons for this recommendation will be mentioned subsequently. See *infra* notes 812-21 and accompanying text.

805. See LEWIS M. SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS § 90, at 187 (2d ed. 1966). If the trust is a pre-residuary trust, it would pass to the takers of T's residuary estate.

806. See Halbach, *supra* note 804, at 86-87.

question of whether B must survive A to take the trust property as depending on whether B's remainder is vested or contingent.<sup>807</sup> Thus, since B's interest in our problem is indefeasibly vested, a condition that B survive to take is not implied.<sup>808</sup> If B predeceases A, the trust property will pass, along with the rest of B's estate, by B's will or intestacy. Of course, the trust property will not be paid to B's heir or the beneficiary under B's will until A's death.

While the result is clear in this situation, other situations are not so clear. One such situation arises when a clearly non-vested interest is created subject to a condition precedent other than survival.<sup>809</sup> Whether the non-vested interest is also subject to an implied condition of survival is unclear.<sup>810</sup> Class gifts create similar problems in this area. Indeed, one leading Iowa case on this subject enjoys a certain notoriety for the opinion's comment on the difficulty of the problem.<sup>811</sup>

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807. See SIMES, *supra* note 805, § 90, at 187. A remainder is vested when there is "no condition precedent to the interest's becoming a present estate other than the natural expiration" of the prior interest and the identity of the person who would take the interest can be identified regardless of when the estate becomes present. THOMAS F. BERGIN & PAUL G. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 66-67 (2d ed. 1984).

808. See Halbach, *supra* note 804, at 86.

809. See *id.* at 86-87.

810. See *id.*

811. See Dowd v. Scally, 174 N.W. 938, 939 (Iowa 1919). The trust gave a life estate to testator's wife and remainder in equal shares to testator's son and daughter, to "'become theirs in fee simple upon the death of my said wife.'" *Id.* at 938. The will then provided:

Should one of my said children die without lawful issue before my said wife's death then and in such case the survivors of my said children shall upon my said wife's death become the owner in fee simple of said real estate. Should either of my said children die leaving lawful issue then the child or children should take and inherit on the death of my said wife the same as would my said child if then living.

*Id.*

Testator's daughter predeceased testator's wife leaving a husband and two children surviving her. *Id.* The daughter's two children also predeceased testator's wife, but the daughter's husband survived the wife. *Id.* The issue was framed as whether testator's son took the entire remainder, or whether his son-in-law took half. *Id.* at 939. The court stated that this depended on whether the remainder to the daughter was vested or contingent. *Id.* The court said:

[T]his brings to us once more a subject of perennial debate by lawyers and courts, one which no amount of discussion and no accumulation of precedents seems to bring any nearer a final or satisfactory settlement. There is an irrepressible something in the human mind which responds to the challenge of an unsolved problem or intricate puzzle. With young persons it may find expression in labored efforts to answer riddles or conundrums or trick questions in mathematics or in heroic efforts to determine "How old is Ann?" In later years, when the young person has, like Paul, ceased to "think as a child" and becomes a lawyer, the same determination to know the unknowable and scale the inaccessible is apt to come to the surface in a life and death struggle with the subject of remainders. Thousands of that learned profession have essayed the task of drawing a clear, definite, and always recognizable distinction

In all the situations that have arisen in which the question of whether a condition of survival should be implied, in only one situation—class gifts to multi-generational classes—have the courts consistently required survival.<sup>812</sup> The reason why the courts have done so is significant. When the drafter does not direct what is to be done with the trust property if the remainderman predeceases the income beneficiary, the court does not believe it is free to provide a substitute disposition in favor of the appropriate beneficiaries to replace the defeated interest.<sup>813</sup> The draftsperson could have done this, but the courts do not believe it is proper for them to do so.<sup>814</sup> In many cases, implying a condition of survival would cut off a line of descent which courts are extremely reluctant to do.<sup>815</sup> For example, if the remainder is to B's children and a child (B1) dies leaving issue, implying a condition of survival would cause the deceased child's share to be absorbed by the other children, cutting out B1's line of descent.<sup>816</sup> The courts are very reluctant to inadvertently cut out a line of descent, and therefore refuse to imply a condition of survival in such cases, except when the class designation itself—for example, issue or descendants—avoids the problem.<sup>817</sup>

However, the avoidance of inadvertent disinheritance of a line of descent comes at a high price. Creating a transmissible future interest in B in our simple case has several consequences. First, the value of B's remainder is included in B's estate for federal estate tax<sup>818</sup> and Iowa inheritance tax<sup>819</sup> purposes. If the interest

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between remainders vested and remainders contingent, but unfortunately, instead of producing what the nonprofessional person would naturally expect, a well-beaten path which the wayfaring court, though less than wise, may follow and be safe, a map of the routes so laid out reveals a labyrinth compared with which a plat of interlacing lines connecting all the stars in the firmament would be a model of simplicity. It may also be admitted that where the courts themselves have sought to blaze their way through a jungle of precedents and mark each turn and twist in the route by guideposts adorned with Latin quotations which everybody feels in duty bound to admire and nobody tries to read, they have, as a rule, found much difficulty in leaving a clear highway which others can follow with any assurance of finding their way home again.

*Id.* at 939. On rehearing the court determined—with two judges dissenting—that the son-in-law took half of the remainder and it did not matter whether the remainder was vested or contingent. *Dowd v. Scally*, 184 N.W. 340, 342 (Iowa 1921).

812. *SIMES, supra* note 805, §§ 90-96, at 186-195; *Halbach, supra* note 804, at 86-90. Writers have criticized certain cases holding that a condition of survivorship would be implied from another condition. *See SIMES, supra* note 805, § 96, at 194-95; *Halbach, supra* note 804, at 87.

813. *Halbach, supra* note 804, at 88-90.

814. *EDWARD C. HALBACH, JR., TEACHER'S MANUAL FOR EDWARD C. HALBACH, JR. & EUGENE S. SCOLES, PROBLEMS AND MATERIALS ON FUTURE INTERESTS* 20 (1977) (on file with the author).

815. *Id.*

816. *Halbach, supra* note 804, at 89.

817. *Id.*

818. I.R.C. § 2031 (1994).

was not included when B died, new tax proceedings must be instituted. Second, often the estate must be reopened in order to administer the trust property if it was not originally administered in B's estate. Third, it may be necessary to trace the beneficiaries of B's estate when A dies—some may have died or their whereabouts may be unknown.<sup>820</sup> Fourth, B, or those who take the trust property under his will, may leave the interest outside the family, contrary to the settlor's probable wishes.<sup>821</sup>

#### D. The Trust Code Solution

As stated above, in most cases, the courts refuse to imply a condition of survival because they do not feel free to provide a substitute disposition in favor of the appropriate beneficiaries in place of a defeated interest. Of course, it is clear the draftsperson may and should do so through proper planning with a clear express condition of survival and substitute beneficiaries in case the primary remainderman predeceases the income beneficiary.<sup>822</sup> Section 633.4701 attempts to do what the draftsperson should do: provide successor beneficiaries that most testators and grantors would desire so the court can avoid all the disadvantages of transmissible future interests, yet avoid inadvertently cutting off a line of descent.<sup>823</sup> The statute accomplishes this first by making the interest of each beneficiary contingent on survival until the date of possession, and then providing for a series of substitute beneficiaries.<sup>824</sup>

In our simple example, B's interest is contingent on survival until A's death. If B predeceases A, the trust property would go to an alternate beneficiary if one were named in the trust.<sup>825</sup> Because none were named, B's interest would go to his issue who survived A.<sup>826</sup> If none of B's issue survived A, a resulting trust in favor of the grantor or the grantor's estate arises.

To take another example, suppose T's trust had provided for income to A for life and upon A's death, corpus to B or if he is not then living, to C. If B predeceases A, and C survives A, C gets the trust property on A's death. If neither B nor C survives A, but both have issue who survive A, B's issue take the trust property. If B has no issue surviving A—whether he had issue who did not survive

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819. IOWA CODE § 450.3 (2001).

820. Halbach, *supra* note 804, at 88.

821. *Id.* For a famous instance of this, see *In re Stanford's Estate*, 315 P.2d 681 (Cal. 1957).

822. Halbach, *supra* note 804, at 87.

823. See IOWA CODE § 633.4701.

824. *Id.*

825. See *id.* § 633.4701(2).

826. See *id.* § 633.4701(3).

A or never had issue—but C has issue who survived A, the issue of C who survived A take the trust property. If neither issue of B nor issue of C survive A, a resulting trust in favor of grantor, or grantor or testator's estate, arises.

Section 633.4701, by providing the court with substitute takers that would presumably be desired by most grantors, solves the implied condition of survival problem while retaining the flexibility of grantors to provide as many alternate takers as desired.<sup>827</sup> It also makes the question of whether the remainder interest is vested or contingent irrelevant, as it should be.<sup>828</sup>

## XVI. CHARITABLE TRUSTS

### A. *Introduction*

In treating charitable trusts in a trust code, several approaches can be taken. A code can attempt to completely cover the field with a detailed treatment.<sup>829</sup> Alternatively, other codes elect to cover certain aspects of the subject, leaving the remainder to development by case law.<sup>830</sup> Last, the state code can omit the subject entirely. Iowa has chosen the middle route, limited coverage.

### B. *Charitable Purposes: Section 633.5101*

A charitable trust may be created for:

- (1) Relief of poverty;
- (2) Advancement of education or religion;
- (3) Promotion of health; or
- (4) Any other purpose that is beneficial to the community.<sup>831</sup>

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827. See *id.* § 633.4701.

828. SIMES, *supra* note 805, § 90, at 187-88.

829. See, e.g., MINN. STAT. ANN. §§ 501B.31-45 (West 1990 & Supp. 2000) (covering charitable trust provisions including trust validity and construction, interpretation, and administration); N.Y. EST. POWERS & TRUSTS LAW §§ 8-1.1 to -1.8 (McKinney 1992 & Supp. 2000) (covering charitable trusts provisions including purpose, authorization, and regulation).

830. See, e.g., MONT. CODE ANN. §§ 72-33.501-.504 (1999) (referring generally to charitable trusts); TEX. PROB. CODE ANN. §§ 123.001-.005 (Vernon 1995 & Supp. 2000) (providing general definitions of charitable trusts).

831. IOWA CODE § 633.5101(1); see also RESTATEMENT (SECOND) OF TRUSTS § 368 (1959). The Restatement includes trusts for governmental or municipal purposes as a separate category. RESTATEMENT (SECOND) OF TRUSTS § 368 (1959). This purpose would most likely be validated in the Iowa Code under the catch-all provision as "beneficial to the community." IOWA CODE § 633.5101(1).

Section 633.5101 also validates the trust that does not name or indicate a particular charitable purpose or recipient, permitting the trustee to select the purposes and particular recipients.<sup>832</sup> Previously, Iowa validated charitable trusts directing the trustee to distribute the property to charitable organizations selected by the trustee.<sup>833</sup>

### C. Application of Cy-Pres: Section 633.5102

The doctrine of cy-pres, which permits a court to change the purpose or recipients of a charitable trust under certain circumstances, has long been exercised by courts at common law.<sup>834</sup> Courts have always favored sustaining and enforcing charitable trusts, construing them liberally and favorably to support their validity.<sup>835</sup> Section 633.5102 statutorily validates that power.<sup>836</sup>

The section begins by stating that the impossibility of fulfillment, unlawfulness, or impracticability of the original purpose of the trust will not cause the trust to fail.<sup>837</sup> Rather, the court may modify the trust terms or direct that the trust property be used to fulfill the grantor's general charitable purposes.<sup>838</sup> Traditionally, a court proceeded in three steps:<sup>839</sup>

- (1) Determine whether the original trust purpose was impossible to fulfill, illegal or impracticable—in the sense that to devote funds would not fulfill the settlor's intention.<sup>840</sup>
- (2) Determine whether settlor had a general charitable intent—his purpose was not to benefit or accomplish one specific object.<sup>841</sup>
- (3) Determine what altered disposition would be "as near as possible" to the settlor's original intention.<sup>842</sup>

The statute appears to incorporate these steps.<sup>843</sup> However, the section appears to create a presumption that cy-pres should be applied in the absence of a provision in

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832. IOWA CODE § 633.5101(2).

833. *See Estate of Ditz v. Baute*, 117 N.W.2d 825, 830 (Iowa 1962).

834. BOGERT & BOGERT, *supra* note 50, §§ 431-434, at 95-129 (2d rev. ed. 1991).

835. *Id.*; *see also* *Estate of Ditz v. Baute*, 117 N.W.2d at 828 (stating Iowa goes "to considerable lengths in upholding charitable trusts").

836. IOWA CODE § 633.5102.

837. *Id.* § 633.5101(1).

838. *Id.*

839. *See, e.g.*, *Simmons v. Parsons Coll.*, 256 N.W.2d 225, 227 (Iowa 1977).

840. *Id.*

841. *Id.*

842. *Id.*

843. *See* IOWA CODE § 633.5102.

the trust stating otherwise.<sup>844</sup> Presumably, the settlor's heirs or residuary beneficiaries<sup>845</sup> can still challenge the trust on the ground that the settlor had no general charitable intent.<sup>846</sup>

The settlor may, in the trust, negate the application of cy-pres.<sup>847</sup> First, the settlor may direct the trust property or income be distributed to an alternate beneficiary in case his primary purpose fails.<sup>848</sup> Second, if a sufficiently narrow intent to support only one particular purpose is sufficiently established, a court could probably refuse to exercise the cy-pres power.<sup>849</sup>

Section 633.5102 also empowers the court to change the administrative provisions of a trust if the provision impairs the effective administration of the trust, or becomes impracticable, illegal, or impossible.<sup>850</sup>

#### *D. Trust with Uneconomically Low Value: Section 633.5103*

Section 633.5103 basically incorporates existing law permitting the termination of small trusts by the court.<sup>851</sup> No specific dollar amount is stated.<sup>852</sup> The court must determine the value of the trust is so small that the costs of

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844. *Id.* This assumption is derived from subsection 1, stating that, in the absence of a contrary trust provision, a charitable trust will not fail even if the particular purpose for its creation fails. *Id.*

845. If a settlor is found not to have a general charitable intent at common law, the trust, or part thereof, would fail and a resulting trust declared in favor of settlor's estate. See *RESTATEMENT (SECOND) OF TRUSTS* § 413 cmt. a (1959).

846. Under subsection 2, the court "may" modify the trust to best effectuate the settlor's "general charitable purposes." *IOWA CODE* § 633.5102(2). Thus, a court could decide the settlor had no general charitable purposes and it could not modify the trust, but void it. In contrast, the UTC, contrary to common law, presumes the settlor had a general charitable intent, but uses language differing from the Iowa Trust Code. *U.T.C.* § 412(b) cmt. (2000 Annual Meeting Draft). Perhaps this is just an argument over semantics, as courts are highly motivated to find a general charitable intent anyway. *See id.* § 412 cmt.

847. *See IOWA CODE* § 633.5102.

848. *See id.* This was the common law rule. *BOGERT & BOGERT, supra* note 50, § 442, at 211 (2d rev. ed. 1991); *see also* *Simmons v. Parson Coll.*, 256 N.W.2d 225, 227-28 (Iowa 1977) (upholding settlor's intent when settlor provided that if the stated purpose could not be carried out, property should be paid to heirs).

849. *BOGERT, supra* note 262, § 147, at 523-24; *see also supra* note 845 and accompanying text.

850. *IOWA CODE* § 633.5102(2). This was also a common law remedy exercised by the courts. *See BOGERT, supra* note 262, § 147, at 520.

851. *See IOWA CODE* § 633.5103. The 1999 statute applied to both private and charitable testamentary trusts. *IOWA CODE* § 633.699A (1999). Section 633.5103 expands the provision to charitable *inter vivos* trusts. *IOWA CODE* § 633.5103 (2001).

852. *See IOWA CODE* § 633.5103 (2001).

administering the trust are not justified.<sup>853</sup> On termination, the property is distributable "in a manner consistent with the settlor's charitable purposes."<sup>854</sup> Presumably, this would mean to those organizations or entities who received distributions or for those purposes used while the trust was operating. The section, however, appears to provide some room for the court to designate other recipients consistent with the settlor's intent.<sup>855</sup>

#### E. Interested Persons—Proceedings: Section 633.5104

Section 633.5104 specifies who will receive notice<sup>856</sup> and be a party to proceedings involving charitable trusts.<sup>857</sup> The attorney general is an interested person, as is true under current law.<sup>858</sup> The trustee, of course, is also an interested person.<sup>859</sup> A charitable entity or other person with a special interest in the trust is also included.<sup>860</sup> There is some ambiguity here: Would the heirs be included in a cy-pres proceeding because they would take the property if the trust was held void? Who are "other persons"?<sup>861</sup> As to charitable entities, presumably any charity specified in the instrument to receive payments would be included.<sup>862</sup> Whether any other charitable entity has the required special interest in the trust is uncertain.

Contrary to the Restatement,<sup>863</sup> the settlor is an interested party.<sup>864</sup> This is probably the most significant change made by this section. It appears to be logical, since a settlor should be able to act to enforce his purposes.

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853. *Id.* § 633.5103(1).

854. *Id.* § 633.5103(2).

855. *See id.* § 633.5103. The current statute directs distribution in accordance with a court determination of what would be "most consistent with the trustor's original intent." *Id.* § 633.699A(1)(a).

856. *Id.* §§ 633.6202, .6305; *see also infra* Parts XVIII.B, XIX.E.

857. IOWA CODE § 633.5104.

858. *Compare* IOWA CODE § 633.5104 (2001) (stating that the attorney general is a person with a special interest in "a proceeding involving a charitable trust"), *with* IOWA CODE § 633.699A(2) (2001) (stating the attorney general is an interested party under the section).

859. IOWA CODE § 633.5104.

860. *Id.*

861. *See id.*

862. *See* U.T.A. § 1-104 cmt. (1996 Preliminary Draft).

863. RESTatement (SECOND) OF TRUSTS § 391 (1959).

864. IOWA CODE § 633.5104.

## XVII. PROCEEDINGS CONCERNING TRUSTS—JURISDICTION AND VENUE

### A. *Introduction*

The first subpart contains four unremarkable but necessary rules concerning jurisdiction, venue, and the principal place of administration of trusts, and a section concerning transfer of jurisdiction over trusts that is new to this Code.<sup>865</sup>

### B. *Subject Matter Jurisdiction: Section 633.6101*

Section 633.6101 was adopted from an early draft of the UTC.<sup>866</sup> Unfortunately, some words were omitted in the statute, rendering subsection 1 unclear.<sup>867</sup> Assuming the omitted words are restored, the section would provide that the internal affairs of a trust would be decided by the court possessing jurisdiction over the trust, while other matters, such as actions and proceedings involving creditors or other third parties, and actions to determine the existence of the trust, could be decided either by the district court or the court having jurisdiction over the trust.

This section is intended to supplement, but not supplant, current Iowa Code section 633.10. Section 633.10 provides that the district court sitting in probate decides questions regarding the appointment of trustees, the granting of letters of trusteeship, and the administration of testamentary trusts.<sup>868</sup> It may decide questions concerning administration of *inter vivos* trusts only if jurisdiction is specifically conferred on the court by the trust instrument or is invoked by the trustee, a beneficiary, or an interested party.<sup>869</sup> Questions concerning the construction of testamentary trusts are decided by the district court sitting in probate.<sup>870</sup> All other questions are decided by the district court. Unless a trust specifically provides for probate court jurisdiction, trusts are not subject to probate court jurisdiction unless such jurisdiction is invoked by a trustee or beneficiary.<sup>871</sup>

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865. *Id.* §§ 633.6101-6105.

866. U.T.A. § 5-101 (1996 Preliminary Draft).

867. *See id.* Section 5-101(a) reads: “The court *having jurisdiction over a trust* has exclusive jurisdiction of proceedings concerning the internal affairs of the trust.” *Id.* (emphasis added). The underlined words were inadvertently omitted from the Iowa Trust Code. *See Iowa Code § 633.6101(1).* The same words were inadvertently omitted in subsection 2. *See id.* § 633.6101(2).

868. *See Iowa Code § 633.10(1).*

869. *Id.* § 633.10(4)(a).

870. *Id.* § 633.10(2).

871. *Id.* § 633.10(4)(b), (d). The statute accomplishes this in a roundabout way. Subsection 4(b) exempts trusts solely or jointly administered by banks and trust companies. *Id.* § 633.10(4)(b). Subsection 4(d) exempts trusts solely or jointly administered by individuals.

To correct the omission, the missing words could be added to both subsections of this section, or subsection 633.10(4)<sup>872</sup> could be relocated in the Trust Code.

*C. Principal Place of Administration of the Trust:  
Section 633.6102<sup>873</sup>*

Section 633.6102 is new to statutory trust law. It becomes important when dealing with interstate conflicts, particularly in substantive law areas.<sup>874</sup> The

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*Id.* § 633.10(4)(d). Combined, the section exempts all typical trusts from the probate court's jurisdiction. *Id.* § 633.10.

872. Plus so much of subsection 2 of Iowa Code section 633.10 relating to construction of testamentary trusts. In addition to these cosmetic changes, the time might be opportune for consideration of unifying the jurisdiction over all trusts in one court, though that might be a controversial proposal.

873. It would be beneficial to add a provision governing the change of the principal place of administration, either here or in section 633.6105. A starting point could be the approved 2000 version of UTC subsections 110(b)-(d) which provide:

- (b) A trustee is under a continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries.
- (c) Without precluding the right of the court to order, approve, or disapprove a transfer, the trustee, in furtherance of the duty prescribed by subsection (b), may transfer the trust's principal place of administration to another State or country.
- (d) The trustee must notify the qualified beneficiaries of a proposed transfer not less than 60 days before initiating the transfer. The notice of proposed transfer must include:
  - (1) the name of the jurisdiction to which the principal place of administration is to be transferred;
  - (2) the address and telephone number at the new location at which the trustee can be contacted;
  - (3) an explanation of the reasons for the proposed transfer;
  - (4) the date on which the proposed transfer is anticipated to occur; and
  - (5) the date, not less than 60 days after the giving of the notice, by which the qualified beneficiary must notify the trustee of an objection to the proposed transfer.

U.T.C. § 110 (b)-(d) (2000 Approved).

Before adopting such a provision, some changes would be required. First, the Iowa Trust Code does not use the concept of qualified beneficiaries, so a decision would have to be made as to which beneficiaries should receive notice. Second, changing the place of administration raises the question of the rights of beneficiaries to replace trustees when the principal place of administration is changed. See discussion *supra* Part IX.G. A solution to this problem must be found before enacting this type of provision.

874. This includes such questions as whether the trust is subject to the surviving spouse's elective share if the grantor dies in one state and the trust is administered in another state, or whether the trust is subject to the Rule Against Perpetuities. Discussion of these questions is beyond the scope of this Article.

primary rule fixes the principal place of administration at the place where the routine activities of trust administration are done, unless the terms of the trust provide otherwise.<sup>875</sup> If this rule does not determine the principal place of administration, it is at the trustee's residence or usual place of business.<sup>876</sup> If the trust has multiple trustees, the trustees may agree the residence or usual place of business of one of them will govern, or in the absence of an agreement, the residence or usual place of business of any of the co-trustees is used.<sup>877</sup>

**D. Jurisdiction over Trustees and Beneficiaries:**

**Section 633.6103**

Section 633.6103 provides the trustee consents to personal jurisdiction in the courts of the state with the principal place of administration by accepting the trusteeship.<sup>878</sup> In addition, the beneficiaries are subject to jurisdiction of the court in the principal place of administration.<sup>879</sup> For example, if the daily activities of a trust were carried on by a corporate trustee in Iowa, the Iowa courts would have jurisdiction over both the trustee—regardless of where its main office is located—and over all the beneficiaries—regardless of their residence.<sup>880</sup> The second rule is based on the reasonableness of requiring beneficiaries to go to where the trust administration takes place, as the grantor has indicated a main place of administration by provision in the instrument or selection of a trustee, and rights under the trust ought to be determined where the trust is administered.<sup>881</sup>

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875. IOWA CODE § 633.6102(1).

876. *Id.* § 633.6102(2)(a). Query: Where is the "usual place of business" of a trust company whose main office is in one place but has bank branches all over the country? The Code appears to indicate it is where the officer primarily responsible for administration of that trust carries on the day-to-day activities of the trust. *See id.* § 633.6102(1).

877. *Id.* § 633.6102(2)(b). Apparently, this could mean a trust with four trustees could have four principal places of administration. In almost all such cases, agreement by the trustees is likely.

878. *Id.* § 633.6103.

879. *Id.* § 633.6103(2).

880. This should not dispense with any required notice. *See* U.T.C. § 202 cmt. (2000 Annual Meeting Draft).

881. *Id.* Note that jurisdiction on some other basis in another jurisdiction is not precluded. *Id.*

### *E. County of Venue: Section 633.6104*

Section 633.6104 sets out the venue rules. Briefly, they are:

- (1) Venue is in the principal place of trust administration and, in the case of a testamentary trust, the county of estate administration.<sup>882</sup>
- (2) If an *inter vivos* trust has no trustee, the proceeding to appoint a trustee is in the county where a beneficiary resides or the trust property, or a portion thereof, is located.<sup>883</sup>
- (3) Otherwise, the rules for civil actions generally govern.<sup>884</sup>

### *F. Transfer of Jurisdiction: Section 633.6105*<sup>885</sup>

There may be a number of reasons for a change in the place where a trust is administered. The beneficiaries may relocate. Beneficiaries may develop relationships with a different corporate trustee. The beneficiaries may desire that a family member, financial planner, or other person become trustee. The corporate trustee may merge or consolidate with another financial institution. Because the change in the principal place of administration will change the jurisdiction and venue of trust proceedings and will normally change the governing law as to administrative matters, some requirements governing such a transfer are appropriate.<sup>886</sup> These requirements are given in new section 633.6105.

First, the transfer must be made by court order.<sup>887</sup> The transfer is permissive, not mandatory, if the court finds:

- (1) That the transfer will promote the best interests of the beneficiaries and others interested in the trust. The adult beneficiaries must be consulted and their views and the "economic and convenient administration of the trust" must be considered; or
- (2) A new qualified trustee is found; or
- (3) Court approval, if required in the new jurisdiction, has been obtained.<sup>888</sup>

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882. Iowa Code § 633.6104(1). The additional venue for testamentary trusts appears, though it is not certain, to apply only to estates currently under administration. *See id.*

883. *Id.* § 633.6104(2).

884. *Id.* § 633.6104(3).

885. On the principal place of administration, see *supra* Part XVII.C.

886. However, a change in the principal place of administration will not normally alter the governing law on substantive matters, including trust validity and construction.

887. *See* Iowa Code § 633.6105(1).

The court has total control of the transfer and may limit or condition it, including requiring substitution of the successor trustee in any pending litigation.<sup>889</sup> The original trustee is discharged by a delivery of the property to the new trustee in compliance with the court order.<sup>890</sup> If the transferee jurisdiction or Iowa requires bond, the court should impose the bond.<sup>891</sup> The court may also require a bond in the situations provided for in section 633.4102.<sup>892</sup>

### XVIII. JUDICIAL PROCEEDINGS CONCERNING TRUSTS

Subpart B of Part 6—Trust Proceedings—consists of only two sections and requires little comment.<sup>893</sup>

#### A. *Judicial Intervention Intermittent: Section 633.6201*

Traditionally, testamentary trusts were subject to continuing supervision by a court. This included mandated formal accountings, often annually.<sup>894</sup> Recent years have revealed a steady diminution of such court supervision.<sup>895</sup> The drafters of the Trust Code wished to continue and encourage this trend and make explicit that, except as necessary, trusts should be administered without court proceedings. That is, there should be no continuing court supervision.<sup>896</sup> Of course, the court will take cognizance of petitions by the trustee, a beneficiary, or an interested party and decide the question presented to it. But, unless its jurisdiction is invoked, trust administration should proceed without judicial involvement.

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888. *Id.* § 633.6105(1)(a)-(c). It is curious that the section is worded in the alternative—"if it finds any of the following." *See id.* Does this mean that if a new qualified trustee is found, the views of the beneficiaries are not considered? Perhaps this is an inadvertent error and "any of the following" should read "all of the following." In any event, substituting "all" for "any" would appear to make greater sense in this context.

889. *Id.* § 633.6105(2).

890. *Id.*

891. *Id.*

892. *Id.* § 633.4102(1); *see also supra* Part IX.B.

893. IOWA CODE §§ 633.6201-6202.

894. BOGERT & BOGERT, *supra* note 50, § 963, at 40 (2d rev. ed. 1983).

895. *See* IOWA CODE § 633.10(4)(b), (d); *see discussion supra* Part XVII.B. Iowa Code subsections 633.10(4)(b) and (d) are indicative of the trend in Iowa.

896. *See* U.T.C. § 201 cmt. (2000 Annual Meeting Draft).

**B. Petitions—Purposes of Proceedings: Section 633.6202**

The first subsection of this article gives the trustee, or any beneficiary, the right to invoke the court's jurisdiction on a question involving the existence of the trust or its internal affairs.<sup>897</sup> Subsection 2 defines the internal affairs of the trust.<sup>898</sup>

An explicit exception to the rights of the beneficiary or the trustee to petition is made in the case of the revocable trust.<sup>899</sup> Under section 633.3103, the settlor or other person holding the power to revoke has all the rights of beneficiaries.<sup>900</sup> In a revocable trust, it would make no sense for a beneficiary or a trustee to institute an action concerning these matters.<sup>901</sup> Therefore, when the trust is revocable and the holder of the power to revoke is competent, the beneficiaries may not ask for court intervention under this section.<sup>902</sup>

Subsection 2 defines the questions constituting the "internal affairs of the trust."<sup>903</sup> Most of these are obvious, though a few deserve mention. The construction and determination of the terms of a trust relate to the internal affairs of a trust, as does a determination of the validity of a trust provision.<sup>904</sup> An action for termination of a trust is included, as is an action to settle the trustee's accounts and determine the validity of the trustee's acts—including the exercise or non-exercise of discretionary powers.<sup>905</sup> A proceeding to instruct the trustee, grant or modify the trustee's powers, fix or allow the trustee's compensation, or review its reasonableness are under the internal affairs heading.<sup>906</sup> The expanded duty to provide information about the trust or account to the beneficiary is an internal affair of the trust.<sup>907</sup> The question of a transfer of a trust to another jurisdiction is an internal affair, as is, somewhat surprisingly, an action to determine a trust's liability for debts or administration expenses of a settlor's estate.<sup>908</sup> Lastly, there is a catch-all covering any issue that "will aid in the administration of the trust."<sup>909</sup>

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897. IOWA CODE § 633.6202(1).

898. *Id.* § 633.6202(2).

899. *Id.* § 633.3103; *see also supra* Part VIII.D.

900. IOWA CODE § 633.3103.

901. The reason being that if such an action was brought, the grantor would merely amend or revoke the trust, rendering the action moot.

902. See IOWA CODE § 633.3103.

903. *Id.* § 633.6202(2).

904. *Id.*

905. *Id.*

906. *Id.*

907. *Id.*

908. *See id.*

909. *Id.* § 633.6202(q).

## XIX. SETTLEMENT AGREEMENTS AND REPRESENTATION

This, the last subpart of the Trust Code, covers new and controversial matters that have rarely, if at all, been decided in Iowa. Some of the matters covered are quite complex and go well beyond the scope of this Article; to cover them in detail would require an article of a length similar to this. In discussing these, I will make extensive reference to my previous work in this area, which the reader is encouraged to consult if interested.

### A. *Definition and Applicability: Section 633.6301*

Subsection 1 defines a fiduciary matter for sections 633.6301-6307 to include internal matters of a trust as defined in section 633.6202.<sup>910</sup> Thus, in general, matters involving third parties are not subject to the rules of this subpart.<sup>911</sup> This limit is quite significant. The remainder of the section concerns settlement and representation.<sup>912</sup> Some background is necessary.

The first point to remember is that when litigation involves the rights of trust beneficiaries, all the beneficiaries are indispensable parties.<sup>913</sup> The court cannot proceed to decide the case if it cannot obtain jurisdiction over all the beneficiaries.<sup>914</sup> Therefore, if one of the beneficiaries is a minor, incompetent, or unborn, some method of obtaining jurisdiction over that beneficiary must be found.<sup>915</sup> That method is representation—both for service of process and in the litigation.<sup>916</sup> The two major types of representation are representation by a fiduciary—or a guardian ad litem—and virtual representation.<sup>917</sup> Representation of a beneficiary unable to represent herself permits the court to proceed with the case.<sup>918</sup>

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910. *Id.* § 633.6301(1); *see also id.* § 633.6202; *supra* Part XIII.B.

911. *See Iowa Code §§ 633.6301-6307.*

912. *Id.* § 633.6301(2)-(3).

913. *See Begleiter, Guardian Ad Litem, supra* note 58, at 707.

914. *Id.*; *see also id.* at 652-54, 659-63 (discussing the question of the conclusiveness of a judgment obtained against an infant, incompetent, or unborn).

915. *See id.* at 707.

916. *Id.*

917. *Id.*

918. *See Iowa Code §§ 633.6301-6307 (2001).* The current scheme of Part 6, Subpart 3 has, however, one glaring omission. It is a short clean statement of the effect of notice to a representative on the person being represented. *See id.* Fortunately, the defect is easily cured. A new section along the lines of the following should be added to the Trust Code as new section 633.6301.

#### 633.6301—Representation: Basic Effect

1. Notice to a person who may represent and bind another person under this Code has the same effect as if notice was given directly to the other person.

The remainder of section 633.6301 provides that "persons interested" in a fiduciary matter may:

- (1) Approve a judicial settlement;
- (2) Bind other persons interested in the matter; and
- (3) Except as otherwise provided in a trust instrument, approve a nonjudicial settlement if the terms of the settlement could have been approved by the court, and bind other interested persons.<sup>919</sup>

The first problem with this section is that there is some confusion. To illustrate this, subsection 2 states "persons interested in a fiduciary matter may . . . bind other persons interested in the . . . matter."<sup>920</sup> This would appear to indicate that "persons interested" means different things each time it is used. Unfortunately, no definition of the difference is given.

One possible explanation comes from the definition of "interested person" in section 633.1102(9).<sup>921</sup> As relevant,<sup>922</sup> the term includes only those beneficiaries who are current permissible recipients of income or principal, or those who would receive corpus at the time of the settlement of the litigation or nonjudicial settlement.<sup>923</sup> Under this explanation, some of the beneficiaries—those who satisfy the above definition<sup>924</sup>—can bind the remaining future interest holders and successive beneficiaries. This is probably the most logical explanation. However, if it is true, it casts some doubt on the necessity for 633.6303,<sup>925</sup> 633.6304,<sup>926</sup> and 633.6306<sup>927</sup> in many cases, as will be mentioned subsequently. If this is the correct explanation, the first two words in section 633.6301(2) should be changed from

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2. The consent of a person who may represent and bind another person under this Code is binding on the person represented unless the person represented objects to the representation before the consent would otherwise have become effective. *See* U.T.C. § 301(a), (b) (2000 Approved).

UTC section 301(c) involves representing a settlor who lacks capacity to receive notice and give binding consent. *Id.* In the opinion of the author, this subsection deserves more debate and study before recommending its inclusion in the Trust Code. If the above is added to the Trust Code, current section 633.6301 could be renumbered as 633.6301A.

919. *Iowa Code* § 633.6301(2)-(3).

920. *Id.* § 633.6301(2).

921. *Id.* § 633.1102(9).

922. Also included are a trustee and a fiduciary representing an interested person. *Id.* It is unclear if "fiduciary representing an interested person" is intended to include only a guardian or conservator, or includes others, such as an attorney or an attorney-in-fact. *Id.*

923. *Id.*

924. *Id.*

925. *Id.* § 633.6303.

926. *Id.* § 633.6304.

927. *Id.* § 633.6306.

persons interested to interested persons.<sup>928</sup> A similar change should be made in subsection 3.<sup>929</sup>

Another possibility is that 633.6301 merely indicates the parties and representatives—for example, guardian ad litem, conservator, etc.—may settle a case involving the internal affairs of the trust or a nonjudicial settlement and the settlement would bind other parties possibly not before the court.<sup>930</sup> Because the term interested persons does not include a guardian ad litem,<sup>931</sup> the rule becomes that the parties to a proceeding, other than those represented by a guardian ad litem, can settle an action and bind the guardian ad litem's wards. This explanation conflicts with 633.6306.<sup>932</sup>

On top of the uncertain meaning of section 633.6301, the definition of interested person in section 633.1102(9) states that the meaning of the term may vary depending on the nature of the proceeding and its purpose.<sup>933</sup> Given this variance, it is quite difficult to ascertain the meaning of this section. Redrafting this section would significantly improve the Trust Code.<sup>934</sup>

#### *B. Representation by Holders of Powers: Section 633.6302*

As opposed to section 633.6301, section 633.6302 is quite clear.<sup>935</sup> The holder of a power of revocation or of a presently exercisable general power of appointment may represent and bind the persons whose interests are subject to such power as objects or takers in default of appointment.<sup>936</sup> This is because the holders of such powers may eliminate both the objects and the takers in default as beneficiaries by a simple exercise of the power.

The same cannot be said for a general testamentary power of appointment, which is exercisable only by will.<sup>937</sup> The traditional rule is that the holder of such a power cannot bind the objects of the power or the takers in default of

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928. *Id.* § 633.6301. See IOWA CODE § 633.1102(9) for the definition of "interested person."

929. *Id.* § 633.6301.

930. *See id.*

931. *Id.* § 633.1102(9).

932. *See id.* § 633.6306.

933. *Id.* § 633.1102(9).

934. Without intending to suggest the nature of the redraft, since the purpose of section 633.6301 is unclear, focusing on the effect of notice to and consent by a representative, as is done in UTC section 301, might be a possible approach. *See id.* § 633.6301; U.T.C. § 301 (2000 Approved); *see also supra* note 918. If this type of statute is substituted, the material in *supra* note 918 could become subsections 4 and 5 of section 633.6303 instead of a separate section.

935. IOWA CODE § 633.6301; *see id.* § 633.6302.

936. *Id.* § 633.6302(1).

937. *Levy v. Crocker-Citizens Nat'l Bank*, 94 Cal. Rptr. 1, 4 (Cal. Ct. App. 1971).

appointment.<sup>938</sup> The Trust Code modifies this rule, giving the holder of a general testamentary power the right to represent and bind the objects or takers in default to the extent no conflict of interest exists between the holder of the power and the persons represented.<sup>939</sup> The answer to the question of whether a conflict exists might well depend on the nature of the proceeding.<sup>940</sup>

*C. Representation by Fiduciaries and Parents:*  
*Section 633.6303*

Section 633.6303 and section 633.6304 are the heart of Subpart C. Section 633.6303 provides that certain designated fiduciaries may represent beneficiaries.<sup>941</sup> The first three subsections are not controversial. Thus, a conservator, if appointed, may represent the ward.<sup>942</sup> A trustee may bind the beneficiaries of the trust.<sup>943</sup> A personal representative may represent the persons interested in the estate.<sup>944</sup> The section does state that these rules govern only if there is no conflict of interest between the fiduciary and the beneficiary.<sup>945</sup> If conflict does exist, a guardian ad litem should be appointed.<sup>946</sup>

Subsection 4 of section 633.6303 allows a parent to represent and bind a minor child if no conservator has been appointed.<sup>947</sup> This form of representation was unknown at common law. Notice the parent need not have an interest in the trust or be otherwise involved in the proceeding.<sup>948</sup> While it is common for states

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938. *See id.*

939. IOWA CODE § 633.6302(2).

940. If the question involved was whether to accept the resignation of a trustee, or compel the trustee to provide information, there could conceivably be no conflict. In other matters, such as a trust construction proceeding, a conflict might well exist, depending on the trust provision at issue.

941. IOWA CODE § 633.6303.

942. *Id.* It should be noted there is disagreement as to whether representation by the conservator of the ward should be allowed in an action to modify or terminate a trust. *Compare* Randall v. Randall, 60 F. Supp. 308, 309 (S.D. Fla. 1944) (allowing a guardian to act on behalf of a minor), *and* Riedlin's Guardian v. Cobb, 1 S.W.2d 1071, 1072 (Ky. Ct. App. 1928) (stating that the guardian has the power to consent for his wards), *with* *In re Flexner's Trust*, 288 N.Y.S.2d 494, 495-96 (Sup. Ct. 1968), *aff'd sub nom. In re Burch*, 294 N.Y.S.2d 669 (App. Div. 1968) (holding that a corporate guardian of the property of minors' estates could not consent to revocation, but deferring to the order of a California court authorizing the guardian to consent because of California's more significant contacts to the trust); *see also* Begleiter, *Guardian Ad Litem*, *supra* note 58, at 692 n.241.

943. IOWA CODE § 633.6303(2).

944. *Id.* § 633.6303(3).

945. *See id.* § 633.6303.

946. *See infra* Part XIX.D (presenting the topic in more detail as part of virtual representation as conflicts occur more often in that area).

947. IOWA CODE § 633.6303(4).

948. *See id.* § 633.6303.

to statutorily or by rule provide for service on a minor by serving her parent,<sup>949</sup> representation of the minor is normally not so provided. However, providing for representation of a minor—or a person lacking capacity—by her parent is a perfectly logical step in most cases. Normally, the parent will do what is necessary to determine the nature of the proceeding and the minor's interest and do what is necessary to protect the minor. In the normal family trust, the parent will most likely be aware of the trust. And, in the case of conflict, or in the rare event the parent simply ignores the proceeding, a guardian ad litem can be appointed.

**D. Representation by Holders of Similar Interests—Virtual Representation:  
Section 633.6304**

The brevity of section 633.6304 belies its significance. It provides that incompetent, unborn, or unascertained persons may be represented and bound by persons having "a substantially identical" interest in the matter.<sup>950</sup> This states the doctrine of virtual representation.<sup>951</sup> While a full description of the doctrine is beyond the scope of this Article, a brief description will be presented.

Again, the subject starts with the rule previously stated: In trust litigation involving the beneficiaries, all beneficiaries are indispensable parties and, unless jurisdiction is acquired over all the parties, the case cannot proceed.<sup>952</sup> In many trusts, there are unborn beneficiaries who must be parties to trust litigation. To take a simple example: In my will I create a trust to pay the income to my wife for her life and on her death to my issue then living, per stirpes. On my death, I have two children, each of whom has two children, giving me four grandchildren. However, since issue—or descendants—includes all descendants of any degree, and since my children may have more children before my wife dies—and my grandchildren may have children during this period—the trust has unborn contingent remainder beneficiaries at my death and until the trust terminates. One way to represent these beneficiaries is to appoint a guardian ad litem for them, but, as we will see shortly, this can be expensive and inconvenient.<sup>953</sup> As an alternative, the courts came up with the doctrine of virtual representation. The doctrine permits one party to a proceeding to represent other persons or a class of persons having a future interest in the trust, without serving notice or otherwise making the persons represented parties to the proceeding.<sup>954</sup>

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949. See, e.g., IOWA R. CIV. P. 56.1(b) (stating that personal service may be made upon a minor by serving the minor's parent or guardian).

950. *Id.* § 633.6304.

951. See Begleiter, *Guardian Ad Litem*, *supra* note 58, at 721-36.

952. *Id.* at 707, 721-22.

953. See discussion *infra* Part XIX.F.

954. Begleiter, *Guardian Ad Litem*, *supra* note 58, at 727.

How can this be justified? The theory is that the representative has the same economic interest in the proceeding as the persons represented.<sup>955</sup> Therefore, all arguments that could have been made by the persons represented will be made by the representative.<sup>956</sup> Representation is allowed to save the time and money incurred by the appointment of a guardian ad litem and still satisfy the jurisdictional requirements.

In illustration of this concept, my children have a remainder interest although contingent, in the hypothetical trust presented earlier in this section. My grandchildren and other issue also have contingent remainders. The economic interest of all my issue is that the trust perform as well as possible, particularly as to appreciation in corpus. Because the interests of all my issue are identical, my children—who are all in being—can represent my grandchildren, both born and unborn,<sup>957</sup> and any other unborn issue in a trust proceeding. Some states, such as New York, have extensive experience and detailed statutes governing virtual representation.<sup>958</sup> Other states have adopted the concept without the aid of statute.<sup>959</sup>

Notice that section 633.6304 has three major limits. First, if the person is otherwise represented, virtual representation does not apply.<sup>960</sup> Thus, if a minor or incompetent has a conservator, the conservator is a party to the proceeding.<sup>961</sup> Second, the interest of the representor and representee must be "substantially identical."<sup>962</sup> Third, the interest of the person represented must be adequately represented.<sup>963</sup>

The identity of interest and adequate representation determinations are made by the court.<sup>964</sup> The courts have, in general, proven diligent in protecting

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955. *Id.*

956. *Id.*

957. My children can represent my living grandchildren, because they are not interested persons under subsection 633.1102(9) as they would not receive principal if the trust were to terminate at the date of the proceeding. IOWA CODE § 633.1102(9) (2001).

958. See, e.g., N.Y. SURR. CT. PROC. ACT LAW § 315 (McKinney 1994 & Supp. 2000); see also Begleiter, *Guardian Ad Litem*, *supra* note 58, at 721-36 & nn. 339, 341, 343, 355, 359, 362, 363, 378, 380. Due to a printing error, some of the footnote numbers above do not correspond to the text to which they relate. This occurs in footnotes 308-358. Each footnote should be lowered one number, for example, note 308 becomes note 307, note 309 becomes note 308, etc. through note 358, which becomes note 357. See *Errata bound in 20 WILLAMETTE L. REV.* No. 4 (1984).

959. Begleiter, *Guardian Ad Litem*, *supra* note 58, at 721-36.

960. IOWA CODE § 633.6304.

961. *Id.* § 633.6303.

962. *Id.*

963. *Id.*

964. Begleiter, *Guardian Ad Litem*, *supra* note 58, at 730-36.

beneficiaries in these cases.<sup>965</sup> The courts have often denied virtual representation, and appointed a guardian ad litem, when the representative had an additional trust interest not held by the person represented.<sup>966</sup> However, even when courts are cautious, virtual representation risks that the representative may not take an active role in the proceedings, with the result that the position of the party represented will not be forcefully argued.<sup>967</sup> Due to the cost and time savings, and the fact the doctrine operates satisfactorily most of the time, the courts are willing to cautiously employ it.

#### *E. Notice of Judicial Settlement: Section 633.6305*

The first problem in section 633.6305 is definitional. The term "judicial settlement" is not defined. One interpretation is that the term could refer to judicial settlement of the accounts of a trustee, as opposed to nonjudicial settlements.<sup>968</sup> However, this meaning is unlikely given that a trustee's accounting is only one of the fiduciary matters mentioned in section 633.6202, and would not appear to be so unique as to require a separate notice section.<sup>969</sup> Another possible, and more likely, interpretation is that the term refers to the proposed settlement or compromise of a fiduciary matter already before a court. Such an interpretation is supported by the title of the subpart containing this section, which is "Settlement Agreements and Representation."<sup>970</sup> However, if that is the definition, the section would appear to be repetitive, because the persons to whom notice would be given would already appear to be parties to the proceeding. The section provides that notice is to be given to every interested person or one who could bind an interested person under sections 633.6302 and 633.6303.<sup>971</sup> These would be the persons who would already be parties to the proceeding.

One other possibility is that the section contemplates special or additional notice if a settlement agreement is proposed, to alert persons interested in the trust to the settlement and giving them an opportunity to be heard.<sup>972</sup> If this last

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965. *Id.*

966. *Estate of Lawrence*, 430 N.Y.S.2d 533, 534 (Sur. Ct. 1980); *In re Will of Silver*, 340 N.Y.S.2d 335, 342 (Sur. Ct. 1973).

967. *In re Estate of O'Connor*, 339 N.Y.S.2d 726, 729 (Sur. Ct. 1973).

968. Such usage, in the author's experience, is common among practicing attorneys in major cities.

969. *See Iowa Code § 633.6202 (2001).*

970. *Id. ch. 633, Div. XX, Part 6, Subpart C.*

971. *Id. § 633.6305; see also id. §§ 633.6302-6303* (indicating who may bind an interested person).

972. *See id. § 633.6305.*

possibility is correct, subsection 1 should probably be amended to make this clear.<sup>973</sup>

The remaining subsections provide for the manner of notice of judicial settlements. Notice may be given either to a person or to a representative who may bind the person.<sup>974</sup> Two points should be noted. Subsection 2 is phrased in the alternative.<sup>975</sup> Does this mean that notice on the person is preferred, with notice on a representative an alternate choice if there is difficulty performing service on the person, or may the person giving notice choose either alternative? Second, service on a representative is not limited to a representative under sections 633.6302 and 633.6303.<sup>976</sup> Does subsection 2 permit giving notice to a virtual representative under section 633.6304? These points should be clarified.

Lastly, notice to unborn or unascertained persons is made by giving notice to holders of substantially identical interests.<sup>977</sup> No mention is made of the situation in which there are no parties to the proceeding having substantially identical interests.<sup>978</sup> Presumably, a guardian ad litem would have already been appointed in such a case and service would be made on the guardian ad litem.<sup>979</sup>

#### F. Appointment of a Guardian Ad Litem: Section 633.6306

A guardian ad litem is an officer of the court appointed to represent unborns, infants, incompetents, and persons whose whereabouts are unknown in judicial proceedings.<sup>980</sup> Guardians ad litem are used in all types of estate and trust proceedings.<sup>981</sup> The duty of the guardian ad litem is to defend the rights of a

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973. Subsection 1 might be amended to read: If, at any time during a judicial proceeding on a fiduciary matter, an agreement is proposed to settle or partially settle the proceeding, notice of the proposed settlement, and the terms thereof, shall be given to every interested person or to one who can bind an interested person under sections 633.6302 and 633.6303.

As an additional matter, an unresolved question exists as to whether a person who is virtually represented—and is thus not a party to the proceeding—would receive notice under this section. As currently drafted, the answer would appear to be no. Whether that should be the answer is questionable. *See Begleiter, Guardian Ad Litem, supra* note 58, at 707-721.

974. IOWA CODE § 633.6305(1).

975. *See id.* § 633.6305(2).

976. *Id.*; *see also id.* §§ 633.6302-6303.

977. *Id.* § 633.6305(3).

978. *Id.*

979. If not, it is clear a guardian ad litem could be appointed at that time. *See infra* Part XIX.F.

980. Begleiter, *Guardian Ad Litem, supra* note 58, at 644.

981. *Id.*

person under disability in litigation.<sup>982</sup> The powers and duties of the guardian ad litem are similar to that of an attorney of a party.<sup>983</sup>

Section 633.6306 gives the court power to appoint a guardian ad litem to represent a minor, an incapacitated person, an unborn or unascertained person, or a person whose identity or whereabouts are unknown, if that person's interest would be inadequately represented without the appointment.<sup>984</sup> This would occur primarily in cases in which virtual representation would not work, because the representor had interests in addition to the interest of the person to be represented.<sup>985</sup> It also can occur in other cases.<sup>986</sup> The section also permits a guardian ad litem to be appointed to approve a settlement on behalf of his wards.<sup>987</sup> Though this function changes the role of the guardian ad litem from a litigation attorney to a transactional attorney, with all the problems that such a shift can cause, both the cases and the statutes have generally approved the position.<sup>988</sup> But, the statute goes further and allows the guardian ad litem to consider "general family benefit" in approving a settlement.<sup>989</sup>

The term "general family benefit" is not defined. Presumably, instead of only considering the interests of his ward, the guardian ad litem could also consider benefits to the unborn's, minor's, or incompetent's parents, or perhaps to other persons in the ward's extended family. These persons are likely to have prior interests in the trust. The theory would be that if the settlement benefited the parents of the person represented, any detriment to the guardian ad litem's ward would be offset by the benefits to other family members that would in some way "trickle down" to the ward.

Perhaps an example would best illustrate the situation. Suppose grandmother (GM) created a trust with income to daughter (D) for life, then income to granddaughter (GD) until age 21, with corpus to GD if then living, if not to great grandchildren. A proceeding involving the trust is brought—perhaps an accounting—and a guardian ad litem is appointed for minor and unborn great

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982. *Id.* at 663.

983. *Id.* However, the guardian ad litem's role as an officer of the court has resulted in some divergence from the normal function of an attorney and tension in certain cases. *See id.* at 713-21.

984. IOWA CODE § 633.6306(1) (2001).

985. Begleiter, *Guardian Ad Litem*, *supra* note 58, at 731. For example, the representor might be a secondary income beneficiary until age forty, with corpus paid to her at age forty, with the person represented to take the corpus if the representor died prior to age forty. *See id.* at 724-36.

986. *Id.*

987. IOWA CODE § 633.6306(1).

988. Begleiter, *Guardian Ad Litem*, *supra* note 58, at 692-703, 707-13. The author believes modification to the compromise procedure is required to ensure the adequacy of the representation when the guardian ad litem is permitted to compromise. *Id.* at 707-13, 737-48.

989. IOWA CODE § 633.6306(4).

grandchildren because the judge believes the granddaughter's secondary income interest prevents virtual representation. The action is compromised by an agreement to terminate seventy-five percent of the trust, and distribute the terminated portion outright in equal shares to GM, D, and GD.

The reduction of the trust, of course, would not be in the interests of the great grandchildren, and the guardian ad litem would be expected to object to the settlement.<sup>990</sup> However, under the Trust Code formulation, the guardian ad litem could consider the benefit to the mother and grandmother of his wards in determining whether to approve the settlement.<sup>991</sup>

However, without engaging in an extended discussion of the question, which is clearly beyond the scope of this Article, allowing the guardian ad litem to consider general family benefit raises several troubling questions. Is "family" limited to the ward's immediate family? Does it include grandparents? Aunts and uncles? Cousins? Does it matter how close-knit the family is? Does the closeness of the family matter, in the sense of the likelihood of the ward's benefiting indirectly from other members of the family? And how can the guardian ad litem evaluate such benefit? Must the guardian ad litem investigate the family? On another aspect, how much weight does general family benefit have? Because most trusts involve members of a family, in any settlement some family members usually gain and others lose. Is the closeness to the ward of the family members who gain from the settlement determinative? And how should the guardian ad litem weigh these gains against diminution in the potential interest of his wards? None of these questions are answered by section 633.6306.<sup>992</sup>

Lastly, the section enacts two fairly non-controversial rules. A guardian ad litem may represent several persons or interests if there is no conflict between the interests represented.<sup>993</sup> Another beneficial addition is that the court must state its reasons for appointing a guardian ad litem in the record.<sup>994</sup>

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990. Indeed, he might be required to object. Begleiter, *Guardian Ad Litem*, *supra* note 58, at 666-67.

991. IOWA CODE § 633.6306(4). This is essentially what the court approved in the leading case of *Mabry v. Scott*, although not in those terms. *See Mabry v. Scott*, 124 P.2d 659, 666-67 (Cal. Dist. Ct. App. 1942); *see also* Begleiter, *Guardian Ad Litem*, *supra* note 58, at 696-703, 707-13.

992. *See* IOWA CODE § 633.6306.

993. *Id.* § 633.6306(2).

994. *Id.* § 633.6306(3). This is beneficial in that it indicates to all parties, including any reviewing court, the purpose of the appointment.

### G. Appointment of Special Representative: Section 633.6307

Section 633.6307 applies to nonjudicial settlements.<sup>995</sup> Again, the meaning of that term is unclear. Presumably, it applies to a fiduciary matter involving a trust that is not yet in court and that the parties agree to settle out of court.<sup>996</sup> The problem in many such agreements, which are after all only contracts, is that minors, incompetents, and unborns cannot be bound. The section allows a court to appoint a special representative to represent such persons and approve a nonjudicial settlement on their behalf.<sup>997</sup> Essentially, this allows for a guardian ad litem-type representative to represent parties who could not otherwise be bound and to bind them to the agreement. The section basically tracks the provisions of section 633.6306 with two changes.<sup>998</sup> First, the special representative may be appointed for "designated persons."<sup>999</sup> The representation is not limited, as is the appointment of a guardian ad litem, to minors, incompetents, unborns, unascertained persons, and persons whose identity or whereabouts are unknown.<sup>1000</sup> The author is hard pressed to conceive of a person for whom a special representative would be appointed outside these groups, yet the difference in language exists.<sup>1001</sup> Second, the representative may require that the persons represented receive a benefit in addition to considering general family benefit.<sup>1002</sup>

The purpose of the appointment of a special representative, of course, is to encourage nonjudicial settlement of fiduciary matters.<sup>1003</sup> Nonjudicial settlements save time and cost to all involved and contribute to the avoidance of court

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995. *Id.* § 633.6307.

996. Fiduciary accountings are often settled in this manner. *See generally* David W. Westfall, *Nonjudicial Settlement of Trustees' Accounts*, 71 HARV. L. REV. 40, 41 (1957) (stating that the use of a nonjudicial settlement to approve a trustee's account avoids "cumbersome and costly judicial procedures"). The UTC refers to such settlements as "nonjudicial settlement agreements"—which is probably a better term—that may be made "with respect to any matter involving a trust." U.T.C. § 111(b) (2000 Approved).

997. IOWA CODE § 633.6307(1).

998. *See id.* § 633.6306.

999. *Id.* § 633.6307.

1000. *See id.* § 633.6306.

1001. Presumably, the court would not appoint a special representative for an otherwise competent person opposed to the agreement, or even one who wished to take no part in the settlement, but wished not to be bound by the terms of the agreement.

1002. IOWA CODE § 633.6307. Presumably, this would be an inducement to convince the representative to approve the agreement. It will be interesting to see how this works out in practice. Will the representative be liable if he refuses to require the benefit? *See* Begleiter, *Guardian Ad Litem*, *supra* note 58, at 743-48.

1003. *See* David M. English, *Drafting the Uniform Trust Act*, SD84 ALI-ABA 115, 123 (1999) (noting that the Uniform Trust Act authorizes the court to appoint a special representative "in connection with a nonjudicial settlement agreement").

congestion.<sup>1004</sup> As an aside, section 633.6307 creates the apparently unique situation in Iowa of the court acting simply to appoint a special representative without being otherwise involved in the action.<sup>1005</sup> It will be interesting to see if this section encourages nonjudicial settlements.<sup>1006</sup>

## XX. REPEALER AND CONSOLIDATION

### A. Repealer

No list of statutes to be repealed or modified was included with the enactment of the Iowa Trust Code. This is quite understandable. Searching the Iowa Code for references to trusts is only the beginning of the task. Each reference must then be examined to determine whether the section is affected by the Trust Code and needs to be changed. In the interest of enacting the Trust Code, this daunting task was postponed.

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1004. See Melanie L. Fein & David F. Freeman, Jr., *The Authority of National Banks to Invest Trust Assets in Bank-Advised Mutual Funds*, 10 ANN. REV. BANKING L. 131, 162 n.134 (1991) (noting that costs and delays of court proceedings have led to increased interest in nonjudicial settlement).

1005. See IOWA CODE § 633.6307.

1006. This section would be improved by the inclusion of three new subsections, in addition to the changes mentioned earlier. These new subsections are based on subsections 110(b)-(d) of the approved 2000 version of the UTC and would read as follows:

(b) Except as otherwise provided in subsection (c), interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust.

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

(d) Matters that may be resolved by a nonjudicial settlement agreement include:

(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.

See U.T.C. § 111(b)-(d) (2000 Approved).

Nor is identifying references to trusts all that is necessary. The Probate Code contains many sections applicable to "fiduciaries."<sup>1007</sup> Fiduciaries is a defined term in the Probate Code which includes testamentary trustees and trustees of some lifetime trusts.<sup>1008</sup> These sections must also be reviewed.<sup>1009</sup>

This having been said, there are some sections of the Probate Code that are clearly impacted by the Trust Code. To give two examples, the Trust Code extensively modifies sections 633.699 on powers of trustees and 633.699A on modification and termination of small trusts.<sup>1010</sup> These sections must be reconciled.

Until this task is completed, an interim measure might be valuable. A short statute could be enacted as a new section 633.6401 providing: "Notwithstanding any Code provision to the contrary, the provisions of this division shall prevail over any other applicable Code provisions."<sup>1011</sup> This would establish the supremacy of the Trust Code provisions until the laborious task of reviewing current statutes is complete. This appears to be one effective interim solution.

### *B. Consolidation*

In addition to the matters considered in section A, some current statutes should be incorporated into the Trust Code.<sup>1012</sup> Immediately coming to mind are what remains of current division XV of the Probate Code, covering sections 633.699 through 633.703B.<sup>1013</sup> Other possibilities for inclusion will no doubt be uncovered in the review necessary for statutes to be repealed or modified.<sup>1014</sup>

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1007. IOWA CODE § 633.3(17); *see, e.g.*, *id.* §§ 633.63-.89 (discussing the general provisions related to fiduciaries).

1008. *Id.* § 633.3(17). Section 633.3(35) defines trust to include testamentary trusts and, in certain circumstances, express trusts. *Id.* § 633.3(35).

1009. Fortunately, many of the references in the Probate Code are to "personal representative," which includes only executors and administrators, rather than to "fiduciary." *See id.* § 633.3(30) (defining personal representative); *see also, e.g.*, *id.* § 633.197 (using the term personal representative); *id.* § 633.204 (using the term "fiduciary"); *id.* § 633.348 (using the term personal representative).

1010. Compare IOWA CODE §§ 633.699, .699A (2001), with IOWA CODE §§ 633.2204, .4402, .5103 (2001).

1011. This is taken from section 637.601, the Iowa version of the Uniform Principal and Income Act. *See* IOWA CODE § 637.601.

1012. *See* discussion *supra* Part XX.A.

1013. *See* IOWA CODE §§ 633.699-.703B. While section 633.699 will probably be repealed because the Trust Code covers it in greater detail, sections 633.700 through 633.703 on accountings and discharge may survive in some form, although they probably will be altered. Sections 633.699A and 633.703A are covered by the Trust Code, although consideration of whether some of the substance of these sections should be incorporated into the Trust Code is still needed. Compare IOWA CODE §§ 633.699A, .703A (2001) (covering modification or termination of uneconomical

## XXI. CONCLUSION

Iowa finally has a Trust Code. The Trust Code consists of default law—law that is to be applied in the absence of provisions in the trust agreement or will. Such law is extremely valuable in at least two ways. First, testators and settlors rarely include provisions in trust instruments on all matters covered by the Trust Code. Therefore, the Trust Code fills in the gaps on those matters not specified in the trust instrument. Second, and perhaps more important, the Trust Code provides a place in which the settlor or the settlor's lawyer can ascertain the law on specific issues before drafting the trust instrument and determine whether to vary that law for the particular trust. In short, the Trust Code allows settlors, testators, and their attorneys to be proactive rather than corrective.

Is the Trust Code perfect? No. Clarifications and amendments are needed. Some questions remain to be debated. Experience will no doubt reveal other areas needing attention. However, no code is ever perfect. The law is constantly changing as new ideas and new ways of examining issues are developed. The lack of perfection should not detract from the extraordinary effort and expertise of Todd Buchanan and the others who helped in the development of the Trust Code. They have given us an extraordinary and most helpful document—one that was termed by perhaps the leading estate planner in the United States today, “an excellent point of departure” for states considering a trust code.<sup>1015</sup> The Trust Code provisions will help Iowa lawyers draft their clients’ trusts for many years to come.

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testamentary trust and creation and establishment of separate trust), *with* IOWA CODE §§ 633.2205, .5103 (2001) (covering noncharitable trust with uneconomically low value and charitable trust with uneconomically low value). Section 633.703B is an effective date provision for the creation of separate trusts under section 633.703A and will probably not be needed, except perhaps as a historical reference for its availability prior to the enactment of the Trust Code. *See* IOWA CODE §§ 633.703A, .703B. It is possible that none of these sections will be retained.

1014. *See supra* Part XX.A.

1015. PRACTICAL DRAFTING 5897 (2000). The editor-in-chief of Practical Drafting is Richard B. Covey of Carter, Ledyard & Milburn, of New York City, who is widely recognized as one of, if not the, best estate planner in the United States. *Id.*

**APPENDIX—IOWA TRUST CODE (NON-OFFICIAL VERSION)****DISCLAIMER**

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**DIVISION XX****IOWA TRUST CODE****PART 1****DEFINITIONS AND GENERAL PROVISIONS**

Division effective July 1, 2000; 99 Acts, ch 125, §109

**633.1101 Short title.**

This division may be cited as the "Iowa Trust Code" or "Trust Code".  
99 Acts, ch 125, §1, 109

Section effective July 1, 2000; 99 Acts, ch 125, § 109  
NEW section

**633.1102 Definitions.**

For purposes of this division:

1. "Beneficiary", as it relates to a trust beneficiary, includes a person who has any present or future interest in the trust, vested or contingent, and also includes the owner of an interest by assignment or other transfer.

2. "Charitable trust" means a trust created for a charitable purpose as specified in section 633.5101.
3. "Competency" means any one of the following:
  - a. In the case of a revocable transfer, "competency" means the degree of understanding required to execute a will.
  - b. In the case of an irrevocable transfer, "competency" means the degree of understanding required to execute a contract.
  - c. In other circumstances not clearly relating to a revocable or irrevocable transfer, "competency" means the ability to make rational decisions regarding one's financial affairs.
4. "Conservator" means a person appointed by a court to manage the estate of a minor or adult individual.
5. "Court" means any Iowa district court.
6. "Fiduciary" includes a personal representative, executor, administrator, guardian, conservator, and trustee.
7. "Guardian" means a person appointed by a court to make decisions with respect to the support, care, education, health, and welfare of a minor or adult individual, but excludes one who is merely a guardian ad litem. A minor's custodial parent shall be deemed to be the child's guardian in the absence of a court-appointed guardian.
8. "Instrument" means a signed writing.
9. "Interested person" includes a trustee, an acting successor trustee, a beneficiary who may receive income or principal currently from the trust, or would receive principal of the trust if the trust were terminated at the time relevant to the determination, and a fiduciary representing an interested person. The meaning as it relates to particular persons may vary from time to time according to the particular purpose of, and matters involved in, any proceeding.
10. "Person" means an individual or any legal or commercial entity.
11. "Petition" includes a complaint or statement of claim.
12. "Property" means anything that may be the subject of ownership, whether real or personal, legal or equitable, tangible or intangible, and includes any interest in such item, including a chose in action, claim, or beneficiary designation under a policy of insurance, employees' trust, or other arrangement, whether revocable or irrevocable.
13. "Settlor" means a person, including a testator, who creates a trust.
14. "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction of the United States.
15. "Term" or "terms", when used in relation to a trust, means the manifestation of the settlor's intent regarding a trust's provisions at the time of the trust's creation or amendment. "Term" includes those concepts expressed directly in writing, as well as those inferred from constructional preferences or rules, or by other proof admissible under the rules of evidence.
16. "Trust" means an express trust, charitable or noncharitable, with additions thereto, wherever and however created, including a trust created or determined by a judgment or decree under which the trust is to be administered in the manner of an express trust. "Trust" does not include any of the following:
  - a. A Totten trust account.
  - b. A custodial arrangement pursuant to the uniform transfers to minors Act of any state.
  - c. A business trust that is taxed as a partnership or corporation.
  - d. An investment trust subject to regulation under the laws of this state or any other jurisdiction.
  - e. A common trust fund.
  - f. A voting trust.
  - g. A security arrangement.
  - h. A transfer in trust for purpose of suit or enforcement of a claim or right.
  - i. A liquidation trust.
  - j. A trust for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind.

k. An arrangement under which a person is a nominee or escrow agent for another.

l. Constructive or resulting trusts.

17. "Trust company" means a person who has qualified to engage in and conduct a trust business in this state.

18. "Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by a court.

99 Acts, ch 125, §2, 109; 2000 Acts, ch 1150, §7

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

#### **633.1103 Per stirpes rule of descent.**

Unless the trust instrument provides otherwise, all gifts to multigeneration classes shall be per stirpes.

99 Acts, ch 125, §3, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

#### **633.1104 Common law of trusts.**

Except to the extent that this division modifies the common law governing trusts, the common law of trusts shall supplement this trust code.

99 Acts, ch 125, §4, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

#### **633.1105 Trust provisions control.**

The provisions of a trust shall always control and take precedence over any section of this trust code to the contrary.

99 Acts, ch 125, §5, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

#### **633.1106 General rule concerning application of the Iowa trust code.**

1. This trust code applies to all trusts within the scope of this trust code, regardless of whether the trust was created before, on, or after July 1, 2000, except as otherwise stated in this trust code.

2. This trust code applies to all proceedings concerning trusts within the scope of this trust code commenced on or after July 1, 2000.

3. This trust code applies to all trust proceedings commenced before July 1, 2000, unless the court finds that application of a particular provision of this trust code would substantially interfere with the effective conduct of the proceedings or the rights of the parties or other interested persons. In that case, the particular provision of this trust code at issue shall not apply, and the court shall apply prior law.

99 Acts, ch 125, §6, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

#### **633.1107 Scope of trust code.**

This trust code is intended to apply to trusts, as defined in section 633.1102, subsection 16, that are intentionally created, or deemed to be intentionally created, by individuals and other entities.

99 Acts, ch 125, §7, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**PART 2****CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUSTS****SUBPART A**  
**CREATION AND VALIDITY OF TRUSTS****633.2101 Methods of creating trusts.**

A trust may be created by any of the following methods:

1. Transfer of property to another person as trustee during the settlor's lifetime, or by will taking effect upon the settlor's death.
2. Declaration by the owner of property that the owner holds property as trustee.
3. Exercise of a power of appointment in favor of another person as trustee.
4. A promise enforceable by the trustee to transfer property to the trustee.

99 Acts, ch 125, §§8, 109

Section effective July 1, 2000; 99 Acts, ch 125, § 109

NEW section

**633.2102 Requirements for validity.**

1. A trust is created only if all of the following elements are satisfied:

- a. The settlor was competent and indicated an intention to create a trust.
- b. The same person is not the sole trustee and sole beneficiary.

c. Unless the trust is a charitable trust, an honorary trust, or a trust for the care of an animal, the trust has a definite beneficiary or a beneficiary who will be definitely ascertained within the period of the applicable rule against perpetuities.

2. A definite or definitely ascertainable beneficiary includes a beneficiary or class of beneficiaries designated under a power to select the beneficiaries granted by the terms of the trust to the trustee or another person.

99 Acts, ch 125, §9, 109

Section effective July 1, 2000; 99 Acts, ch 125, § 109

NEW section

**633.2103 Statute of frauds.**

1. A trust is enforceable when evidenced by either of the following:

- a. A written instrument signed by the trustee, or by the trustee's agent if authorized in writing.
- b. A written instrument conveying the trust property signed by the settlor, or by the settlor's agent if authorized in writing.

2. If an owner of property declares that property is held upon a trust for which a written instrument is required, the written instrument evidencing the trust must be signed by the settlor according to one of the following:

- a. Before or at the time of the declaration.

- b. After the time of the declaration but before the settlor has transferred the property.

3. If an owner of property while living transfers property to another person to hold upon a trust for which a written instrument is required, the written instrument evidencing the trust must be signed according to one of the following:

- a. By the settlor, concurrently with or before the transfer.

b. By the trustee, concurrently with or before the transfer, or after the transfer but before the trustee has transferred the property to a third person.

99 Acts, ch 125, §10, 109

Section effective July 1, 2000; 99 Acts, ch 125, § 109

NEW section

**633.2104 Trust purposes.**

1. A trust is created only if it has a private or charitable purpose that is not unlawful or against public policy.
2. A trust created for a private purpose must be administered for the benefit of its beneficiaries.

99 Acts, ch 125, §11, 109  
Section effective July 1, 2000; 99 Acts, ch 125, § 109  
NEW section

**633.2105 Honorary trusts -- trusts for pets.**

1. A trust for a lawful noncharitable purpose for which there is no definite or definitely ascertainable beneficiary is valid but may be performed by the trustee for only twenty-one years, whether or not the terms of the trust contemplate a longer duration.
2. A trust for the care of an animal living at the settlor's death is valid. The trust terminates when no living animal is covered by its terms.
3. A portion of the property of a trust authorized by this section shall not be converted to any use other than its intended use unless the terms of the trust so provide or the court determines that the value of the trust property substantially exceeds the amount required.
4. The intended use of a trust authorized by this section may be enforced by a person designated for that purpose in the terms of the trust or, if none, by a person appointed by the court.

99 Acts, ch 125, §12, 109  
Section effective July 1, 2000; 99 Acts, ch 125, § 109  
NEW section

**633.2106 Resulting trusts.**

1. Where the owner of property gratuitously transfers the property and manifests in the trust instrument an intention that the transferee should hold the property in trust but the trust fails, the transferee holds the trust estate as a resulting trust for the transferor or the transferor's estate, unless either of the following is true:
  - a. The transferor manifested in the trust instrument an intention that no resulting trust should arise.
  - b. The intended trust fails for illegality and the policy against unjust enrichment of the transferee is outweighed by the policy against giving relief to a person who has entered into an illegal transaction.
2. Where the owner of property gratuitously transfers the property subject to a trust which is properly declared and which has been fully performed without exhausting the trust estate, the trustee holds the surplus as a resulting trust for the transferor or the transferor's estate, unless the transferor manifested in the trust instrument an intention that no resulting trust of the surplus should arise.
3. If the transferor's estate is the recipient of property under this section and the administration of that estate has been closed and there is no question as to the proper recipients of the property, it is not necessary to reopen the estate administration for the purpose of distribution.

99 Acts, ch 125, §13, 109; 2000 Acts, ch 1150, §8  
Section effective July 1, 2000; 99 Acts, ch 125, § 109  
NEW section

**633.2107 Constructive trusts.**

A constructive trust arises when a person holding title to property is subject to an equitable duty to convey the property to another, on the ground that the person holding title would be unjustly enriched if the person were permitted to retain the property.

99 Acts, ch 125, §14, 109  
Section effective July 1, 2000; 99 Acts, ch 125, § 109  
NEW section

**SUBPART B**  
**MODIFICATION AND TERMINATION OF TRUSTS**

**633.2201 Termination of trust.**

1. In addition to the methods specified in sections 633.2202 through 633.2206, a trust terminates when any of the following occurs:
  - a. The term of the trust expires.
  - b. The trust purpose is fulfilled.
  - c. The trust purpose becomes unlawful or impossible to fulfill.
  - d. The trust is revoked.
2. On termination of a trust, the trustee may exercise the powers necessary to wind up the affairs of the trust and distribute the trust property to those entitled to the trust property.
3. For purposes of sections 633.2202 through 633.2206, a beneficiary is limited to a person that is an eligible recipient of income or principal, or would receive principal or income from the trust if it were terminated.

99 Acts, ch 125, § 15, 109; 2000 Acts, ch 1150, §9

Section effective July 1, 2000; 99 Acts, ch 125, § 109

NEW section

**633.2202 Modification or termination by settlor and all beneficiaries.**

1. An irrevocable trust may be modified or terminated upon the consent of the settlor and all of the beneficiaries.
2. Upon termination of the trust, the trustee shall distribute the trust property as agreed by the settlor and all beneficiaries, or in the absence of unanimous agreement, as ordered by the court.
3. For purposes of this section, the consent of a person who may bind a beneficiary or otherwise act on a beneficiary's behalf is considered the consent of the beneficiary.

99 Acts, ch 125, §16, 109

Section effective July 1, 2000; 99 Acts, ch 125, § 109

NEW section

**633.2203 Modification or termination of irrevocable trust by court.**

1. An irrevocable trust may be terminated or modified by the court with the consent of all of the beneficiaries if continuance of the trust on the same or different terms is not necessary to carry out a material purpose.
2. Upon termination of the trust, the court shall order the distribution of trust property in accordance with the probable intention of the settlor.
3. For purposes of this section, the consent of a person who may bind a beneficiary is considered the consent of the beneficiary.

99 Acts, ch 125, §17, 109; 2000 Acts, ch 1150, §10

Section effective July 1, 2000; 99 Acts, ch 125, § 109

NEW section

**633.2204 Modification of administrative provisions by court for change of circumstances.**

On petition by a trustee or beneficiary, the court may modify the administrative provisions of the trust, if, owing to circumstances not known to the settlor and not anticipated by the settlor, the continuation of the trust under its terms would defeat or substantially impair the accomplishment of the purposes of the trust. If necessary to carry out the purposes of the trust, the court may order the trustee to do acts that are not authorized or are forbidden by the trust instrument.

2000 Acts, ch 1150, §11

NEW section

**633.2205 Noncharitable trust with uneconomically low value.**

1. On petition by a trustee or beneficiary, the court may terminate or modify a noncharitable trust or appoint a new trustee if the court determines that the value of the trust property is insufficient to

justify the cost of administration involved and that continuation of the trust under its existing terms would defeat or significantly impair the accomplishment of the trust purposes.

2. Upon termination of a trust under this section, the trustee shall distribute the trust property in accordance with the probable intention of the settlor under the circumstances.

99 Acts, ch 125, §18, 109

Section effective July 1, 2000; 99 Acts, ch 125, § 109

NEW section

#### **633.2206 Reformation -- tax objectives.**

1. The terms of a trust may be reformed to conform to the settlor's intent if the failure to conform was due to a mistake of fact or law and the settlor's intent can be established.

2. The terms of the trust may be construed or modified, in a manner that does not violate the settlor's probable intent, to achieve the settlor's tax objectives.

99 Acts, ch 125, §19, 109

Section effective July 1, 2000; 99 Acts, ch 125, § 109

NEW section

#### **633.2207 Combination of trusts.**

1. A trustee, without approval of court, may combine two or more trusts with substantially similar beneficial interests unless the trust is a court reporting trust.

2. On petition by a trustee or beneficiary, the court may combine two or more trusts, whether or not the beneficial interests are substantially similar, if the court determines that administration as a single trust will not defeat or significantly impair the accomplishment of the trust purposes or the rights of the beneficiaries.

3. Where the court orders the combination of two trusts that are not essentially identical, the court shall include in its order a finding as to which trust provisions control.

99 Acts, ch 125, §20, 109; 2000 Acts, ch 1150, §12

Section effective July 1, 2000; 99 Acts, ch 125, § 109

NEW section

#### **633.2208 Division of trusts.**

1. Without approval of a court, a trustee may divide a trust into two or more separate trusts with substantially similar terms if the division will not defeat or substantially impair the accomplishment of the trust purposes or the rights of the beneficiaries unless the trust is a court reporting trust.

2. On petition by a trustee or beneficiary, the court may divide a trust into two or more separate trusts, whether or not their terms are similar, if the court determines that dividing the trust is in the best interest of the beneficiaries and will not defeat or substantially impair the accomplishment of the trust purposes or the rights of the beneficiaries. To facilitate the division, the trustee may divide the trust assets in kind, by pro rata or non-pro rata division, or by any combination of the methods.

99 Acts, ch 125, §21, 109; 2000 Acts, ch 1150, §13

Section effective July 1, 2000; 99 Acts, ch 125, § 109

NEW section

### **SUBPART C SPENDTHRIFT PROTECTION**

#### **633.2301 Spendthrift protection recognized.**

Except as otherwise provided in section 633.2302, if the terms of the trust provide that a beneficiary's interest in the income and principal is not subject to either voluntary or involuntary transfer, the beneficiary's interest shall not be transferred and is not subject to enforcement of a money judgment until paid to the beneficiary.

99 Acts, ch 125, §22, 109

Section effective July 1, 2000; 99 Acts, ch 125, § 109

NEW section

**633.2302 Exceptions to spendthrift protection.**

A term of a trust prohibiting an involuntary transfer of a beneficiary's interest shall be invalid as against claims by any of the following:

1. Any creditor of the beneficiary if the beneficiary is the settlor.
2. Any creditor of the beneficiary as to a distribution to be made upon an event terminating or partially terminating the trust.

99 Acts, ch 125, §23, 109

Section effective July 1, 2000; 99 Acts, ch 125, § 109

NEW section

**633.2303 Amount reachable by creditors or transferees.**

1. If a settlor is a beneficiary of a trust created by the settlor, a transferee or creditor of the settlor may reach the maximum amount that the trustee could pay to or for the settlor's benefit.

2. In the case of a trust with multiple settlors, the amount the creditor or transferee of a particular settlor may reach shall not exceed the portion of the trust attributable to that settlor's contribution.

99 Acts, ch 125, §24, 109

Section effective July 1, 2000; 99 Acts, ch 125, § 109

NEW section

**PART 3****PROVISIONS RELATING TO REVOCABLE TRUSTS****633.3101 Competency to create, revoke, or modify a revocable trust.**

1. To create, revoke, or modify a revocable trust, the settlor must be competent. An aggrieved person shall have all causes of action and remedies available to the aggrieved person in attacking the creation, revocation, or modification of a revocable trust as one would if attacking the propriety of the execution of a will.

2. The level of competency required of a settlor to direct the actions of the trustee, or to contribute property to, or to withdraw property from, a trust is the same as that required to create a revocable trust.

99 Acts, ch 125, §25, 109; 2000 Acts, ch 1150 §14

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.3102 Revocation or modification.**

1. Unless the terms of the trust expressly provide that the trust is irrevocable, the settlor may revoke or modify the trust. This subsection does not apply to trusts created under instruments executed before July 1, 2000.

2. Except as otherwise provided by the terms of the trust, if a trust is created or funded by more than one settlor, each settlor may revoke or modify the trust as to the portion of the trust contributed by that settlor.

3. A trust that is revocable by the settlor may be revoked or modified by any of the following methods:

a. By compliance with any method specified by the terms of the trust.

b. Unless the terms of the trust expressly make the method specified exclusive, then either of the following:

(1) By a writing, other than a will, signed by the settlor and delivered to the trustee during the settlor's lifetime.

(2) By a later will or codicil expressly referring to the trust and which makes a devise of the property that would otherwise have passed by the terms of the trust.

4. Upon termination of a revocable trust, the trustee must distribute the trust property as the settlor directs.

5. The settlor's powers with respect to revocation or modification may be exercised by an agent under a power of attorney only and to the extent the power of attorney expressly so authorizes.

6. Except to the extent prohibited by the terms of the trust, a conservator may revoke or modify a trust with the approval of the court supervising the conservatorship.

99 Acts, ch 125, §26, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

#### **633.3103 Other rights of settlor.**

Except to the extent the terms of the trust otherwise provide, while a trust is revocable and the individual holding the power to revoke the trust is competent, all of the following apply:

1. The holder of the power, and not the beneficiary, has the rights afforded beneficiaries.

2. The duties of the trustee are owed to the holder of the power.

3. The trustee shall follow a written direction given by the holder of the power, or a person to whom the power has been delegated in writing, without liability for so doing, so long as the action by the delegate is authorized by the trust.

99 Acts, ch 125, §27, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

#### **633.3104 Creditor claims against revocable trust.**

1. During the lifetime of the settlor, the trust property of a revocable trust is subject to the claims of the settlor's creditors to the extent of the settlor's power of revocation.

2. Following the death of a settlor, the property of a revocable trust subject to the settlor's power of revocation at the time of death is subject to the claims of the settlor's creditors and costs of administration of the settlor's estate to the extent of the value of the property over which the settlor had a power of revocation, if the settlor's estate is inadequate to satisfy those claims and costs.

99 Acts, ch 125, §28, 109; 2000 Acts, ch 1150, §15

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

#### **633.3105 Rights of and creditor claims against holder of general power of appointment.**

1. The holder of a presently exercisable general power of appointment over trust property has the rights of a holder of the power to revoke a trust under section 633.3103 to the extent of the property subject to the power.

2. Property in trust subject to a presently exercisable general power of appointment is chargeable with the claims of the holder's creditors and costs of administration of the holder's estate to the same extent as if the holder was a settlor and the power of appointment was a power of revocation.

99 Acts, ch 125, §29, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

#### **633.3106 Children born or adopted after execution of a revocable trust.**

When a settlor fails to provide in a revocable trust for any of the settlor's children born to or adopted by the settlor after the making of the trust, such child, whether born before or after the settlor's death, shall receive a share of the trust equal in value to that which the child would have received under section 633.211, 633.212, or 633.219, whichever is applicable, as if the settlor had died intestate, unless it appears from the terms of the trust or decedent's will that such omission was intentional.

99 Acts, ch 125, §30, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.3107 Effect of divorce or dissolution.**

1. If, after executing a revocable trust, the settlor is divorced or the settlor's marriage is dissolved, all provisions in the trust in favor of the settlor's spouse including, but not limited to, dispositions, appointments of property, and nominations to serve in any fiduciary or representative capacity are revoked by divorce or dissolution of marriage.

2. In the event the settlor and spouse remarry each other, the provisions of the revocable trust revoked by the divorce or dissolution of marriage shall be reinstated unless otherwise modified by the settlor.

**99 Acts, ch 125, §31, 109; 2000 Acts, ch 1150, §16**

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.3108 Limitation on contest of revocable trust.**

Unless notice is given as provided in section 633.3109, the following provisions shall apply:

1. Unless previously barred by adjudication, consent, or other limitation, a proceeding to contest the validity of a revocable trust must be brought no later than one year following the death of the settlor.

2. Unless the trustee is a party to a pending proceeding contesting its validity, six months following the death of the settlor, the trustee of a revocable trust may assume the trust's validity and proceed to distribute the trust property in accordance with the terms of the trust, without liability for so doing. Liability for an improper distribution in such a case is solely on the beneficiaries.

**99 Acts, ch 125, §32, 109; 2000 Acts, ch 1150, §17**

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.3109 Notice to creditors, heirs, spouse, and beneficiaries.**

1. As used in this section, "heir" means only such person as would, in an intestate estate, be entitled to a share under section 633.219, subsection 1, 2, 3, or 4.

2. A creditor of a deceased settlor of a revocable trust must bring suit to enforce its claim against the assets of the decedent's trust within one year of the decedent's death or be forever barred from collection against the trust assets. If a probate administration is commenced for the decedent and notice is properly given pursuant to section 633.230 or 633.304, a creditor's rights shall be determined under those sections and section 633.3104.

3. If no notice is given to creditors and heirs pursuant to subsection 2, a creditor's rights may be established or terminated if the trustee gives notice as follows:

a. The trustee shall publish a notice once each week for two consecutive weeks in a daily or weekly newspaper of general circulation published in the county in which the decedent was a resident at the time of death, and in any county of which the decedent was a nonresident but in which some real estate of the trust is located. If the decedent was not a resident of Iowa, but the principal place of administration is in Iowa, the trustee shall publish notice in the county that is the principal place of administration pursuant to section 633.6102.

b. If at any time during the pendency of the trust administration the trustee has knowledge of the name and address of a person believed to own or possess a claim which will not, or may not, be paid or otherwise satisfied during administration, the trustee shall provide a notice by ordinary mail to each such claimant at the claimant's last known address.

c. As soon as practicable, the trustee shall give a notice by ordinary mail to the surviving spouse, the heirs of the decedent, and each beneficiary under the trust whose identities are reasonably ascertainable, at such persons' last known addresses.

d. The notice in paragraphs "a", "b", and "c" shall include notification of the decedent's death, and the fact that any action to contest the validity of the trust must be brought within the later to occur of sixty days from the date of the second publication of the notice made pursuant to paragraph "a" or thirty days from the date of mailing of the notice pursuant to paragraph "b" or "c". A person who does not make a claim within the appropriate period is forever barred.

e. The trustee shall give notice to debtors to make payment, and to creditors having claims against the trust assets to mail proof of their claim to the trustee via certified mail, return receipt requested, within the later to occur of sixty days from the second publication of the notice or thirty days from the date of mailing of the notice, or thereafter be forever barred.

4. The notice described in subsection 3 shall be substantially in the following form:

To all persons regarding \_\_\_\_\_, deceased, who died on or about \_\_\_\_\_ (year) \_\_\_\_\_. You are hereby notified that \_\_\_\_\_ is the trustee of the \_\_\_\_\_ Trust. At this time, no probate administration is contemplated with regard to the above-referenced decedent's estate.

Any action to contest the validity of the trust must be brought in the District Court of \_\_\_\_\_ County, Iowa, within the later to occur of sixty days from the date of second publication of this notice, or thirty days from the date of mailing this notice to all heirs of the decedent, spouse of the decedent, and beneficiaries under the trust whose identities are reasonably ascertainable. Any claim not filed within this period shall be forever barred.

Notice is further given that all persons indebted to the decedent or to the trust are requested to make immediate payment to the undersigned trustee. Creditors having claims against the trust must mail them to the trustee at the address listed below via certified mail, return receipt requested. Unless creditor claims are mailed by the later to occur of sixty days from the second publication of this notice or thirty days from the date of mailing this notice, a claim shall be forever barred, unless otherwise allowed or paid.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, (year) \_\_\_\_\_

\_\_\_\_\_  
Trust

\_\_\_\_\_  
Trustee

\_\_\_\_\_  
Address:

Date of second publication \_\_\_\_\_ day of \_\_\_\_\_, (year) \_\_\_\_\_

5. The claimant either must receive satisfaction of its claim, or must file suit against the trust to enforce collection of the creditor's claim within sixty days of mailing its claim to the trustee. The trustee and creditor may agree to extend the limitations period for filing an action to enforce the claim. If the claimant fails to properly file its claim within the established time period or bring an action to enforce its claim within the established time period, the creditor's claim shall be forever barred.

99 Acts, ch 125, §33, 109; 2000 Acts, ch 1150, §18

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

#### **633.3110 Rights of trustee regarding claims in a probate administration.**

1. If a probate administration has been commenced for which a revocable trust could be held responsible for the payment of claims, expenses, or taxes, the trustee shall be an interested party in that probate administration.

2. The trustee shall receive notice of all potential charges against the trust assets and must either authorize the payments for which the trust may be found liable or be given the opportunity to dispute or defend any such payment.

99 Acts, ch 125, §34, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.3111 Trustee's liability for distributions.**

1. A trustee who distributes trust assets without making adequate provisions for the payment of creditor claims that are known or reasonably ascertainable shall be jointly and severally liable with the beneficiaries to the extent of the distributions made.
2. A trustee shall be entitled to indemnification from the beneficiaries for all amounts paid to creditors under this section, to the extent of distributions made.

99 Acts, ch 125, §35, 109; 2000 Acts, ch 1150, §19

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**PART 4****TRUST ADMINISTRATION****SUBPART A  
OFFICE OF TRUSTEE****633.4101 Acceptance or declination to serve as trustee.**

1. A person named as trustee accepts the office of trustee by doing one of the following:
  - a. Signing the trust instrument, or signing a separate written acceptance.
  - b. Except as provided in subsection 3, knowingly accepting delivery of the trust property or exercising powers or performing duties as trustee.
2. A person named as trustee who has not yet accepted the office of trustee may in writing decline to serve as trustee.
3. If there is an immediate risk of damage to the trust property, the person named as trustee may act to preserve the trust property without accepting the office of trustee, if within a reasonable time after acting, the person delivers a written declination to serve to the settlor, or if the settlor is dead or lacks capacity, to the beneficiaries eligible to receive income or principal distributions from the trust.

99 Acts, ch 125, §36, 109; 2000 Acts, ch 1150, §20

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.4102 Trustee's bond.**

1. A trustee is not required to give a bond to secure performance of the trustee's duties unless one of the following applies:
  - a. A bond is expressly required by the terms of the trust.
  - b. A bond is found by the court to be necessary to protect the interests of beneficiaries, regardless of the terms of the trust.
2. If a bond is required, it must be filed, and be in an amount and with sureties and liabilities as the court may order. The court may excuse a requirement of a bond, reduce or increase the amount of a bond, release a surety, or permit the substitution of another bond with the same or different sureties.
3. The amount of a bond otherwise required may be reduced by the value of trust property deposited with a financial institution in a manner that prevents its unauthorized disposition, and by the value of real property which the trustee, by express limitation of power, lacks power to convey without court authorization.
4. Except as otherwise provided by the terms of the trust or ordered by the court, the cost of a bond is charged to the trust.
5. A bank or trust company shall not be required to give a bond, whether or not the terms of the trust require a bond.

99 Acts, ch 125, §37, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.4103 Actions by cotrustees.**

Unless the terms of the trust provide otherwise, the following apply to actions of cotrustees:

1. A power held by cotrustees may be exercised by majority action.
2. If impasse occurs due to the failure to reach a majority decision, any trustee may petition the court to decide the issue, or a majority of the trustees may consent to an alternative form of dispute resolution.
3. If a vacancy occurs in the office of a cotrustee, the remaining cotrustees may act for the trust as if they are the only trustees.
4. If a cotrustee is unavailable to perform duties because of absence, illness, or other temporary incapacity, the remaining cotrustees may act for the trust, as if they were the only trustees, if necessary to accomplish the purposes of the trust or to avoid irreparable injury to the trust property.

99 Acts, ch 125, §38, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.4104 Vacancy in office of trustee.**

A vacancy in the office of trustee exists if any of the following occurs:

1. The person named as trustee declines to serve as trustee.
2. The person named as trustee cannot be identified or does not exist.
3. The trustee resigns or is removed.
4. The trustee dies.

5. A guardian or conservator of the trustee's person or estate is appointed.

99 Acts, ch 125, §39, 109; 2000 Acts, ch 1150, §21

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.4105 Filling vacancy.**

1. A trustee must be appointed to fill a vacancy in the office of the trustee only if the trust has no trustee or the terms of the trust require a vacancy in the office of cotrustee to be filled.

2. A vacancy in the office of trustee shall be filled according to the following:

- a. By the person named in or nominated pursuant to the method specified by the terms of the trust.
- b. If the terms of the trust do not name a person or specify a method for filling the vacancy, or if the person named or nominated pursuant to the method specified fails to accept, one of the following methods shall be used:

(1) By majority vote of all adult beneficiaries and the representative of any minor or incompetent beneficiary, as defined by section 633.6303.

(2) By a person appointed by the court on petition of an interested person or of a person named as trustee by the terms of the trust. The court, in selecting a trustee, shall consider any nomination made by the adult beneficiaries and representatives.

3. Beneficiaries entitled to vote are those who are currently entitled or eligible to receive trust income or a distribution of principal if the trust were to terminate at the time of the vote.

99 Acts, ch 125, §40, 109; 2000 Acts, ch 1150, §22

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.4106 Resignation of trustee.**

1. A trustee who has accepted a trust may resign by any of the following methods:

- a. As provided by the terms of the trust.
- b. With the consent of the person holding the power to revoke the trust if the holder is competent or is represented by a guardian, conservator, or agent.
- c. With the consent of the adult beneficiaries as defined in section 633.4105, subsection 1,\* if the trust is irrevocable or the holder of the power to revoke lacks competency or is not represented by a guardian, conservator, or agent.

d. Upon written notice to the holder of the power to revoke if the holder substantially changes the trustee's duties and the trustee does not concur.

e. By filing a petition to resign under section 633.6202. The resignation takes effect ninety days after the filing, or upon approval of the petition by the court, whichever first occurs. The court must accept the trustee's resignation but may impose such orders and conditions as are reasonably necessary for the protection of the trust property, including the appointment of a receiver or temporary trustee.

2. The liability for acts or omissions of a resigning trustee or of any sureties on the trustee's bond is not released or affected by the trustee's resignation.

99 Acts, ch 125, §41, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

\*Definition of "adult beneficiary" stricken by 2000 Acts, ch 1150, §22; corrective legislation is pending

NEW section

#### 633.4107 Removal of trustee.

1. A trustee may be removed in accordance with the terms of the trust, or on petition of a settlor, cotrustee, or beneficiary under section 633.6202.

2. The court may remove a trustee, or order other appropriate relief if any of the following occurs:

- a. If the trustee has committed a material breach of the trust.
- b. If the trustee is unfit to administer the trust.
- c. If hostility or lack of cooperation among cotrustees impairs the administration of the trust.
- d. If the trustee's investment performance is consistently and substantially substandard.
- e. If the trustee's compensation is excessive under the circumstances.
- f. For other good cause shown.

3. If it appears to the court that trust property or the interests of a beneficiary may suffer loss or injury pending a final decision on a petition for removal of a trustee, the court may suspend the powers of the trustee, compel the trustee to surrender trust property to a cotrustee, receiver, or temporary trustee, or order other appropriate relief.

99 Acts, ch 125, §42, 109; 2000 Acts, ch 1150, §23

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

#### 633.4108 Delivery of property by former trustee.

Unless a cotrustee remains in office, a former trustee, or if the trustee's appointment terminated because of death or disability, the former trustee's personal representative or guardian or conservator, is responsible for and has the powers necessary to protect the trust property and other powers essential to the trust's administration until the property is delivered to a successor trustee or a person appointed by the court to receive the property.

99 Acts, ch 125, §43, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

#### 633.4109 Compensation of trustee.

1. If the terms of the trust do not specify the trustee's compensation, a trustee or cotrustee is entitled to compensation that is reasonable under the circumstances.

2. If the terms of the trust specify the trustee's compensation, the trustee is entitled to be compensated as so provided, except that upon proper showing, the court may allow more or less compensation in the following instances:

- a. If the duties of the trustee are substantially different from those contemplated when the trust was created.
- b. If the compensation specified by the terms of the trust would be inequitable, or unreasonably low or high.
- c. In extraordinary circumstances calling for equitable relief.

99 Acts, ch 125, §44, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.4110 Repayment for expenditures.**

A trustee is entitled to be repaid out of the trust property, with interest as appropriate, for all of the following expenditures:

1. Expenditures that were properly incurred in the administration of the trust.
2. To the extent that they benefited the trust, expenditures that were not properly incurred in the administration of the trust.

99 Acts, ch 125, §45, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109  
NEW section

**633.4111 Notice of increased trustee's fee.**

1. As used in this section, "trustee's fee" includes a trustee's periodic base fee, rate of percentage compensation, minimum fee, hourly rate, and transaction charge, but does not include fees for extraordinary services.

2. A trustee shall not charge an increased trustee's fee for administration of a trust unless the trustee first gives at least thirty days' written notice of the increased fee to all of the following beneficiaries:

- a. Each beneficiary who is entitled to an accounting under section 633.4213, subsection 6.
- b. Each beneficiary who was given the last preceding accounting.
- c. Each beneficiary who has made a written request to the trustee for notice of an increased trustee's fee, and has given an address for receiving notice by mail.

3. If a beneficiary files a petition for review of an increased trustee's fee or for removal of a trustee and serves a copy of the petition on the trustee within the thirty-day period, the increased fee does not take effect until otherwise ordered by the court or the petition is dismissed.

99 Acts, ch 125, §46, 109; 2000 Acts, ch 1150, §24

Section effective July 1, 2000; 99 Acts, ch 125, §109  
NEW section

**SUBPART B  
FIDUCIARY DUTIES OF TRUSTEE****633.4201 Duty to administer trust — alteration by terms of trust.**

1. On acceptance of a trust, the trustee shall administer the trust according to the terms of the trust and according to this trust code, except to the extent the terms of the trust provide otherwise.
2. The terms of the trust may expand, restrict, eliminate, or otherwise alter the duties prescribed by this trust code, and the trustee may reasonably rely on those terms, but nothing in this trust code authorizes a trustee to act in bad faith or in disregard of the purposes of the trust or the interest of the beneficiaries.

99 Acts, ch 125, §47, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109  
NEW section

**633.4202 Duty of loyalty -- impartiality -- confidential relationship.**

1. A trustee shall administer the trust solely in the interest of the beneficiaries, and shall act with due regard to their respective interests.
2. Any transaction involving the trust which is affected by a substantial conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless one of the following applies:
  - a. The transaction was expressly authorized by the terms of the trust.
  - b. The beneficiary consented to or affirmed the transaction or released the trustee from liability as provided in section 633.4506.
  - c. The transaction is approved by the court after notice to interested persons.

3. A transaction affected by a substantial conflict between personal and fiduciary interests includes any sale, encumbrance, or other transaction involving the trust property entered into by the trustee, the spouse, descendant, agent, or attorney of a trustee, or corporation or other enterprise in which the trustee has a substantial beneficial interest.

4. A transaction not involving trust property between a trustee and a beneficiary which occurs during the existence of the trust or while the trustee retains significant influence over the beneficiary and from which the trustee obtains an advantage is an abuse of a confidential relationship unless the trustee establishes that the transaction was fair.

5. This section does not apply to any of the following:

- a. An agreement between a trustee and a beneficiary relating to the appointment of the trustee.
- b. The payment of compensation to the trustee, whether by agreement, the terms of the trust, or this trust code.
- c. A transaction between a trust and another trust, decedent's or conservatorship estate of which the trustee is a fiduciary if the transaction is fair to the beneficiaries of the trust.

99 Acts, ch 125, §48, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

#### **633.4203 Standard of prudence.**

A trustee shall administer the trust with the reasonable care, skill, and caution as a prudent person would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust.

99 Acts, ch 125, §49, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

#### **633.4204 Costs of administration.**

A trustee may only incur costs that are reasonable in relation to the trust property, purposes, and other circumstances of the trust.

99 Acts, ch 125, §50, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

#### **633.4205 Special skills.**

A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise.

99 Acts, ch 125, §51, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

#### **633.4206 Delegation.**

1. A trustee shall not delegate to an agent or cotrustee the entire administration of the trust or the responsibility to make or participate in the making of decisions with respect to discretionary distributions, but a trustee may otherwise delegate the performance of functions that a prudent trustee of comparable skills might delegate under similar circumstances.

2. The trustee shall exercise reasonable care, skill, and caution in the following activities:

- a. Selecting an agent.
- b. Establishing the scope and terms of a delegation, consistent with the purposes and terms of the trust.
- c. Periodically reviewing an agent's overall performance and compliance with the terms of the delegation.
- d. Redressing an action or decision of an agent which would constitute a breach of trust if performed by the trustee.

3. A trustee who complies with the requirements of subsections 1 and 2 is not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom a function was delegated.
4. In performing a delegated function, an agent shall exercise reasonable care to comply with the terms of the delegation.
5. By accepting the delegation of a trust function from the trustee of a trust that is subject to the law of this state, an agent submits to the jurisdiction of the courts of this state.

99 Acts, ch 125, §52, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109  
NEW section

#### **633.4207 Directory powers.**

1. If the terms of the trust grant a person other than the trustee power to direct certain actions of the trustee, the trustee shall act in accordance with the exercise of the power unless an attempted exercise violates the terms of the trust or the trustee is aware that the attempted exercise violates a fiduciary duty which the person owes the beneficiaries of the trust or the trustee believes or has reason to know that the individual is incompetent.
2. The holder of a directory power who violates a fiduciary duty owed to the beneficiaries is liable for any loss which results.

99 Acts, ch 125, §53, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109  
NEW section

#### **633.4208 Cotrustees.**

1. If a trust has more than one trustee, each trustee shall perform all of the following duties:
  - a. Participate in the administration of the trust.
  - b. Take reasonable steps to prevent a cotrustee from committing a breach of trust, and to compel a cotrustee to redress a breach of trust.
2. A trustee who complies with subsection 1 is not liable to the beneficiaries or to the trust for the decisions or actions of a cotrustee.

99 Acts, ch 125, §54, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109  
NEW section

#### **633.4209 Control and safeguarding of trust property.**

A trustee shall take reasonable steps under the circumstances to take control of and to safeguard the trust property unless it is in the best interests of the trust to abandon or refuse acceptance of the property.

99 Acts, ch 125, §55, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109  
NEW section

#### **633.4210 Separation and identification of trust property.**

A trustee shall do all of the following:

1. Keep the trust property separate from other property of the trustee unless the trust provides otherwise.
2. Cause the trust property to be designated in such a manner that the interest of the trust clearly appears.

99 Acts, ch 125, §56, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109  
NEW section

#### **633.4211 Enforcement and defense of claims and actions.**

A trustee shall take reasonable steps to enforce claims that are part of the trust property and to defend against actions that may result in a loss to the trust.

99 Acts, ch 125, §57, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109  
NEW section

**633.4212 Prior fiduciaries.**

A trustee shall take reasonable steps to do all of the following:

1. Compel a former trustee or other fiduciary to deliver trust property to the trustee.
2. Redress a breach of trust known to the trustee to have been committed by a prior trustee or other fiduciary.

99 Acts, ch 125, §58, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.4213 Duty to inform and account.**

1. A trustee shall keep the beneficiaries of the trust reasonably informed of the administration of the trust.

2. Within thirty days after accepting the office of the trustee, the trustee shall inform the beneficiaries of the acceptance. Within thirty days after the death of a settlor of a trust, the trustee shall inform the beneficiaries having vested interests of their respective interests in the trust unless the trust specifies otherwise.

3. A trustee shall inform the beneficiaries in advance of a transaction affecting trust property comprising a significant portion of the value of the trust and whose fair market value is not readily ascertainable.

4. On reasonable request of a beneficiary, a trustee shall provide the beneficiary with a copy of the trust instrument and with information about matters of administration relevant to the beneficiary's interest unless the trust specifies otherwise.

5. A trustee shall prepare and send to the beneficiaries an account of the trust property, liabilities, receipts, and disbursements at least annually, at the termination of the trust, and upon a change of a trustee. An accounting on behalf of a former trustee shall be prepared by the former trustee, or if the trustee's appointment terminated by reason of death or incapacity, by the former trustee's personal representative or guardian or conservator.

6. Copies of accountings and other information required under this section need only be sent to the following beneficiaries:

- a. The beneficiaries defined in section 633.4105.
- b. Each beneficiary who has delivered to the trustee or other fiduciary a written request for a copy of the account or other information.

7. An accounting and other information required under this section may be waived if the person entitled to a copy consents in writing.

99 Acts, ch 125, §59, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.4214 Duties with regard to discretionary powers.**

1. A trustee shall exercise a discretionary power within the bounds of reasonable judgment and in accordance with applicable fiduciary principles and the terms of the trust.

2. Notwithstanding the use of such terms as "absolute", "sole", or "uncontrolled" in the grant of discretion, a trustee shall act in accordance with fiduciary principles and shall not act in bad faith or in disregard of the purposes of the trust or the power. Absent an abuse of discretion, a trustee's exercise of discretion is not subject to control by a court.

99 Acts, ch 125, §60, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**SUBPART C**  
**UNIFORM PRUDENT INVESTOR ACT**

**633.4301 Short title.**

This subpart may be cited as the "Uniform Prudent Investor Act".

99 Acts, ch 125, §61, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.4302 Standard of care – portfolio strategy – risk and return objectives.**

1. A trustee shall invest and manage trust property as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

2. A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

3. A trustee shall consider all of the following circumstances, to the extent relevant to the trust or its beneficiaries in investing and managing trust property:

a. General economic conditions.

b. The possible effect of inflation or deflation.

c. The expected tax consequences of investment decisions or strategies.

d. The role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property.

e. The expected total return from income and the appreciation of capital.

f. Other resources of the beneficiaries.

g. Needs for liquidity, regularity of income, and preservation or appreciation of capital.

h. An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

4. A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust property.

5. A trustee may invest in any kind of property or type of investment consistent with the standards of this subpart.

99 Acts, ch 125, §62, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.4303 Diversification.**

A trustee shall diversify the investments of the trust unless the trustee reasonably determines that the purposes of the trust are better served without diversifying.

99 Acts, ch 125, §63, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.4304 Duties at inception of trusteeship.**

Within a reasonable time after accepting a trusteeship or receiving trust property, a trustee shall review the trust property and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of this subpart.

99 Acts, ch 125, §64, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.4305 Loyalty.**

A trustee shall invest and manage the trust property solely in the interest of the beneficiaries.

99 Acts, ch 125, §65, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.4306 Impartiality.**

If a trust has two or more beneficiaries, the trustee shall act impartially in investing and managing the trust property, taking into account any differing interests of the beneficiaries.

99 Acts, ch 125, §66, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.4307 Investment costs.**

In investing and managing trust property, a trustee may only incur costs that are appropriate and reasonable in relation to the property, the purposes of the trust, and the skills of the trustee.

99 Acts, ch 125, §67, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.4308 Reviewing compliance.**

Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.

99 Acts, ch 125, §68, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.4309 Language invoking prudent investor rule.**

The following terms or comparable language in the provisions of a trust, unless otherwise limited or modified, authorizes any investment or strategy permitted under this trust code:

1. Investments permissible by law for investment of trust funds.

2. Legal investments.

3. Authorized investments.

4. Using the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital.

5. Prudent man rule.

6. Prudent trustee rule.

7. Prudent person rule.

8. Prudent investor rule.

99 Acts, ch 125, §70, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**SUBPART D  
POWERS OF TRUSTEES****633.4401 General powers -- fiduciary duties.**

1. A trustee, without authorization by the court, may exercise the following powers:

a. The powers conferred by the terms of the trust.

b. Except as limited by the terms of the trust, powers conferred by this trust code.

2. This subpart does not affect the power of the court to relieve a trustee from restrictions in the terms of the trust on the exercise of powers, to confer on a trustee additional powers whether or not

authorized by the terms of the trust, or to restrict the exercise of a power otherwise given to the trustee by the terms of the trust or this trust code.

3. The grant of a power to a trustee, whether by the terms of the trust, this trust code, or the court, does not in itself govern the exercise of the power. In exercising a power, the trustee shall act in accordance with fiduciary principles.

99 Acts, ch 125, §71, 109  
Section effective July 1, 2000; 99 Acts, ch 125, §109  
NEW section

#### **633.4402 Specific powers of trustees.**

In addition to the powers conferred by the terms of the trust, a trustee may perform all actions necessary to accomplish the proper management, investment, and distribution of the trust property, including the following powers:

1. Collect, hold, and retain trust property received from a settlor or any other person. The property may be retained even though it includes property in which the trustee is personally interested.
2. Accept or refuse to accept additions to the property of the trust from a settlor or any other person.
3. Continue or participate in the operation of a business or other enterprise that is part of the trust property and affect an incorporation, dissolution, or other change in the form of the organization of the business or enterprise.
4. Deposit trust funds in an account in a financial institution, including a financial institution operated by the trustee.
5. Acquire or dispose of property, for cash or on credit, at public or private sale, or by exchange.
6. Manage, control, divide, develop, improve, exchange, partition, change the character of, or abandon trust property.
7. Encumber, mortgage, or pledge trust property for a term within or extending beyond the term of the trust in connection with the exercise of a power vested in the trustee.
8. Make ordinary or extraordinary repairs, alterations, or improvements in buildings or other trust property; demolish improvements; and raze existing or erect new party walls or buildings.
9. Subdivide or develop land, dedicate land to public use, make or obtain the vacation of plats and adjust boundaries, adjust differences in valuation on exchange or partition by giving or receiving consideration, and dedicate easements to public use without consideration.
10. Enter into a lease for any purpose as lessor or lessee with or without the option to purchase or renew and for a term within or extending beyond the term of the trust.
11. Enter into a lease or arrangement for exploration and removal of gas, oil, or other minerals or geothermal energy, and enter into a community oil lease or a pooling or unitization agreement.
12. Grant an option involving disposition of trust property or take an option for the acquisition of property, including an option that is exercisable beyond the duration of the trust.
13. With respect to shares of stock of a domestic or foreign corporation, any membership in a nonprofit corporation, or other property, the trustee may do the following:
  - a. Vote in person, and give proxies to exercise, any voting rights with respect to the shares, memberships, or property.
  - b. Waive notice of a meeting or give consent to the holding of a meeting.
  - c. Authorize, ratify, approve, or confirm any action that could be taken by shareholders, members, or property owners.
14. Pay calls, assessments, and any other sums chargeable or accruing against or on account of securities.
15. Sell or exercise stock subscription or conversion rights.
16. Consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise, and participate in voting trusts, pooling arrangements, and foreclosures, and in connection therewith, deposit securities

with and transfer title and delegate discretion to any protective or other committee as the trustee considers advisable.

17. Hold a security in the name of a nominee or in other form without disclosure of the trust so that title to the security may pass by delivery.

18. Deposit securities in a securities' depository.

19. Insure the property of the trust against damage or loss and insure the trustee against liability with respect to third persons.

20. Borrow money for any trust purpose to be repaid from trust property.

21. Pay or contest any claim; settle a claim by or against the trust by compromise, arbitration, or otherwise; and release, in whole or in part, a claim belonging to the trust.

22. Pay taxes, assessments, reasonable compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the collection, care, administration, and protection of the trust.

23. Make loans out of trust property to a beneficiary on terms and conditions the trustee considers to be fair and reasonable under the circumstances, and guarantee loans to the beneficiary by encumbrances on trust property.

24. Pay an amount distributable to a beneficiary, whether or not the beneficiary is under a legal disability, by paying the amount to the beneficiary or by paying the amount to another person for the use or benefit of the beneficiary.

25. Make a distribution of property and money in divided or undivided interests, pro rata or non-pro rata, and adjust resulting differences in valuation.

26. Employ accountants, attorneys, investment advisors, appraisers, or other persons, even if they are associated or affiliated with the trustee, to advise or assist the trustee in the performance of administrative duties.

27. Expend trust funds to inspect or investigate property that the trustee has been asked to hold, or property owned or operated by an entity in which the trustee holds or has been asked to hold an interest for the purpose of determining the application of environmental law with respect to the property, and take action to prevent, abate, or otherwise remedy any actual or potential violation of any environmental law affecting property held directly or indirectly by the trustee.

28. Withhold funds from distribution for the purpose of maintaining a reserve for any valid business purpose, or as a depletion reserve, if, in the trustee's discretion, the failure to do so would unfairly, and materially, reduce the value of the interest of the remainder.

29. Execute and deliver instruments that are useful to accomplish or facilitate the exercise of the trustee's powers.

30. Prosecute or defend an action, claim, or proceeding in order to protect trust property.

99 Acts, ch 125, §72, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

## SUBPART E LIABILITY OF TRUSTEES TO BENEFICIARIES

### 633.4501 Violations of duties -- breach of trust.

1. A violation by a trustee of a duty the trustee owes a beneficiary is a breach of trust.

2. The remedies of a beneficiary for breach of trust are exclusively equitable and any action shall be brought in a court of equity.

99 Acts, ch 125, §73, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.4502 Breach of trust -- actions.**

To remedy a breach of trust which has occurred or may occur, a beneficiary or cotrustee of the trust may request the court to do any of the following:

1. Compel the trustee to perform the trustee's duties.
2. Enjoin the trustee from committing a breach of trust.
3. Compel the trustee to redress a breach of trust by payment of money or otherwise.
4. Appoint a receiver or temporary trustee to take possession of the trust property and administer the trust.
5. Remove the trustee.
6. Reduce or deny compensation to the trustee.
7. Subject to section 633.4603, nullify an act of the trustee, impose an equitable lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds.

99 Acts, ch 125, §74, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.4503 Breach of trust -- liability.**

A beneficiary may charge a trustee who commits a breach of trust with the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred, or, if greater, the amount of profit lost by reason of the breach.

99 Acts, ch 125, §75, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.4504 Limitation of action against trustee.**

1. Unless previously barred by adjudication, consent, or other limitation, a claim against a trustee for breach of trust is barred as to a beneficiary who has received a final account or other report adequately disclosing the existence of the claim, unless a proceeding to assert the claim is commenced within one year after the earlier of the receipt of the accounting or report of the termination of the trust relationship between the trustee and beneficiary. An account or report adequately discloses the existence of a claim if it provides sufficient information so that the beneficiary knows of the claim or reasonably should have inquired into its existence.

2. For the purpose of subsection 1, a beneficiary is deemed to have received an account or report in the following instances:

a. In the case of an adult who is reasonably capable of understanding the account or report, if it is received by the adult personally.

b. In the case of an adult who is not reasonably capable of understanding the account or report, if it is received by the adult's legal representative, including a guardian ad litem or other person appointed for this purpose.

c. In the case of a minor, if it is received by the minor's guardian or conservator or, if the minor does not have a guardian or conservator, if it is received by a parent of the minor who does not have a conflict of interest.

3. Any claim for breach of trust against a trustee who has presented a final report to a beneficiary more than one year prior to July 1, 2000, shall be time barred unless some exception stated in this section applies which tolls the statute. Any claim arising under this section within one year of July 1, 2000, shall be time barred after one year unless an exception applies to toll the statute.

99 Acts, ch 125, §76, 109; 2000 Acts, ch 1150, §25

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.4505 Exculpation of trustee.**

A provision in the terms of the trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it does either of the following:

1. Relieves a trustee of liability for breach of trust committed intentionally, with gross negligence, in bad faith, or with reckless indifference to the interest of the beneficiary, or for any profit derived by the trustee from the breach.
2. Was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.

99 Acts, ch 125, §77, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.4506 Beneficiary's consent, release, or affirmation -- nonliability of trustee.**

1. A beneficiary shall not hold a trustee liable for a breach of trust if the beneficiary does any of the following:

- a. Consents to the conduct constituting the breach.
- b. Releases the trustee from liability for the breach.
- c. Affirms the transaction constituting the breach.

2. Notwithstanding the provisions of subsection 1, a beneficiary may hold a trustee liable for breach of trust under either of the following circumstances:

a. The beneficiary at the time of the consent, release, or affirmation did not know of the beneficiary's rights and of the material facts the trustee knew or should have known and the trustee did not reasonably believe that the beneficiary knew.

b. The consent, release, or affirmation of the beneficiary was induced by improper conduct of the trustee.

99 Acts, ch 125, §78, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

## SUBPART F RIGHTS OF THIRD PARTIES

**633.4601 Personal liability -- limitations.**

1. Except as otherwise provided in the contract or in this subpart, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administration of the trust unless the trustee fails to reveal the representative capacity or identify the trust in the contract.

2. A trustee is personally liable for obligations arising from ownership or control of trust property or for torts committed in the course of administering a trust only if the trustee is personally at fault.

3. A claim based on a contract entered into by a trustee in the trustee's representative capacity, on an obligation arising from ownership or control of trust property, or on a tort committed in the course of administering a trust may be asserted against the trust by proceeding against the trustee in the trustee's representative capacity, whether or not the trustee is personally liable on the claim.

4. A question of liability as between the trust and the trustee personally may be determined in a proceeding brought under section 633.6202.

99 Acts, ch 125, §79, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.4602 Dissenting cotrustees.**

1. A cotrustee who does not join in exercising a power is not liable to a third party for the consequences of the exercise of the power.

2. A dissenting cotrustee who joins in an action at the direction of the majority cotrustees is not liable to a third party for the action if the dissenting cotrustee expresses the dissent in writing to any other cotrustee at or before the action is taken.

3. This section does not excuse a cotrustee from liability for failure to discharge a cotrustee's duties as a trustee.

99 Acts, ch 125, §80, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

#### **633.4603 Obligations of third parties.**

1. With respect to a third party dealing with a trustee or assisting a trustee in the conduct of a transaction, if the third party acts in good faith and for a valuable consideration and without knowledge that the trustee is exceeding the trustee's powers or is improperly exercising them, the following apply:

a. A third party is not bound to inquire as to whether a trustee has power to act or is properly exercising a power and may assume without inquiry the existence of a trust power and its proper exercise.

b. A third party is fully protected in dealing with or assisting a trustee, as if the trustee has and is properly exercising the power the trustee purports to exercise.

2. A third party who acts in good faith is not bound to ensure the proper application of trust property paid or delivered to the trustee.

3. If a third party acting in good faith and for a valuable consideration enters into a transaction with a former trustee without knowledge that the person is no longer a trustee, the third party is fully protected as if the former trustee were still a trustee.

99 Acts, ch 125, §81, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

#### **633.4604 Certification of trust.**

1. A trustee may present a certification of trust to any person in lieu of providing a copy of the trust instrument to establish the existence or terms of the trust.

2. The certification must contain a statement that the trust has not been revoked, modified, or amended in any manner which would cause the representations contained in the certification of trust to be incorrect and must contain a statement that it is being signed by all of the currently acting trustees of the trust and is sworn and subscribed to under penalty of perjury before a notary public.

3. A certification of trust need not contain the dispositive provisions of the trust which set forth the distribution of the trust estate.

4. A person may require that the trustee offering the certification of trust provide copies of those excerpts from the original trust instrument and amendments to the original trust instrument which designate the trustee and confer upon the trustee the power to act in the pending transaction.

5. A person who acts in reliance upon a certification of trust without knowledge that the representations contained in the certification are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification. Knowledge shall not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying upon the trust certification. A transaction, and a lien created by a transaction, entered into by the trustee and a person acting in reliance upon a certification of trust is enforceable against the trust assets.

6. A person making a demand for the trust instrument in addition to a certification of trust or excerpts shall be liable for damages, including attorney fees, incurred as a result of the refusal to accept the certification of trust or excerpts in lieu of the trust instrument if the court determines that the person acted unreasonably in requesting the trust instrument.

7. This section does not limit the rights of beneficiaries to obtain copies of the trust instrument or rights of others to obtain copies in a proceeding concerning the trust.

99 Acts, ch 125, §82, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109  
NEW section

**633.4605 Liability for wrongful taking, concealing, or disposing of trust property.**

A person who, in bad faith, wrongfully takes, conceals, or disposes of trust property is liable for twice the value of the property, attorney fees, court costs, and where consistent with existing law, punitive damages, recoverable in an action by a trustee for the benefit of the trust.

99 Acts, ch 125, §83, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109  
NEW section

**SUBPART G**  
**TRUST CONSTRUCTION**

**633.4701 Survivorship with respect to future interests under terms of trust -- substitute takers.**

1. Unless otherwise specifically stated by the terms of the trust, the interest of each beneficiary is contingent on the beneficiary surviving until the date on which the beneficiary becomes entitled to possession or enjoyment of the beneficiary's interest in the trust.
2. If a beneficiary dies prior to becoming entitled to possession or enjoyment of the beneficiary's interest and the terms of the trust provide for an alternate beneficiary who is living on the date the interest becomes possessory, the alternate beneficiary succeeds to the interest in accordance with the terms of the trust.
3. If a beneficiary dies prior to becoming entitled to possession or enjoyment of the beneficiary's interest and no alternate beneficiary is named in the trust, and the beneficiary has issue who are living on the date the interest becomes possessory, the issue of the beneficiary who are living on such date shall receive the interest of the beneficiary.
4. If both a beneficiary of an interest and any alternate beneficiary of that interest named in the trust die prior to the interest becoming possessory, and the beneficiary has no issue who are living on the date the interest becomes possessory, the issue of the alternate beneficiary who are living on such date shall take the interest of the beneficiary.
5. If both the beneficiary of an interest and any alternate beneficiary of that interest named in the trust die prior to the interest becoming possessory, and neither the beneficiary nor the alternate beneficiary has issue who are living on the date the interest becomes possessory, the beneficiary's interest shall be distributed in accordance with section 633.2106.

99 Acts, ch 125, §84, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109  
NEW section

**PART 5**

**CHARITABLE TRUSTS**

**633.5101 Charitable purposes.**

1. A charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, or any other purpose the accomplishment of which is beneficial to the community.

2. If the terms of the trust do not indicate a particular charitable purpose or beneficiaries, the trustee may select one or more charitable purposes or beneficiaries.

99 Acts, ch 125, §§85, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.5102 Application of cy-pres.**

Unless the terms of the trust provide to the contrary the following apply:

1. A charitable trust does not fail, in whole or in part, if a particular purpose for which the trust was created becomes impracticable, unlawful, or impossible to fulfill.

2. If a particular charitable purpose for which a trust was created becomes impracticable, unlawful, or impossible to fulfill, the court may modify the terms of the trust or direct that the property of the trust be distributed in whole or in part in a manner best meeting the settlor's general charitable purposes. If an administrative provision of a charitable trust becomes impracticable, unlawful, impossible to fulfill, or otherwise impairs the effective administration of the trust, the court may modify the provision.

99 Acts, ch 125, §86, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.5103 Trust with uneconomically low value.**

1. On petition by a trustee or other interested person, if the court determines that the value of the trust property is insufficient to justify the cost of administration involved, the court may appoint a new trustee or may modify or terminate the charitable trust.

2. Upon termination of a trust under this section, the court shall distribute the trust property in a manner consistent with the settlor's charitable purposes.

99 Acts, ch 125, §87, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.5104 Interested persons -- proceedings.**

The settlor, the trustee, the attorney general, and any charitable entity or other person with a special interest in the trust shall be interested persons in a proceeding involving a charitable trust.

99 Acts, ch 125, §§88, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**PART 6**

**PROCEEDINGS CONCERNING TRUSTS**

**SUBPART A**  
**JURISDICTION AND VENUE**

**633.6101 Subject matter jurisdiction.**

1. The court has exclusive jurisdiction of proceedings concerning the internal affairs of a trust.

2. The court has concurrent jurisdiction of actions and proceedings to determine the existence of a trust, actions and proceedings by or against creditors or debtors of trusts, and other actions and proceedings involving trustees and third persons.

99 Acts, ch 125, §89, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.6102 Principal place of administration of trust.**

1. Unless otherwise designated in the terms of the trust, the principal place of administration of a trust is the usual place where the day-to-day activity of the trust is carried on by the trustee or the trustee's representative who is primarily responsible for the administration of the trust.

2. If the principal place of administration of the trust cannot be determined under subsection 1, it must be determined as follows:

a. If the trust has one trustee, the principal place of administration of the trust is the trustee's residence or usual place of business.

b. If the trust has more than one trustee, the principal place of administration of the trust is the residence or usual place of business of any of the cotrustees as agreed upon by them or, if not, the residence or usual place of business of any of the cotrustees.

99 Acts, ch 125, §90, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.6103 Jurisdiction over trustees and beneficiaries.**

1. By accepting the trusteeship of a trust having its principal place of administration in this state, the trustee submits personally to the jurisdiction of the court.

2. To the extent of their interests in the trust, all beneficiaries of a trust having its principal place of administration in this state are subject to the jurisdiction of the court.

99 Acts, ch 125, §91, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.6104 County of venue.**

1. A proceeding may be commenced in the county in which the trust's principal place of administration is or is to be located and if the trust is created by will, also in the county in which the decedent's estate is administered.

2. If a trust not created by will has no trustee, a proceeding for appointing a trustee shall be commenced in the county in which a beneficiary resides or the trust property, or some portion of the trust property, is located.

3. Except as otherwise provided in subsections 1 and 2, a proceeding shall be commenced in accordance with the rules applicable to civil actions generally.

99 Acts, ch 125, §92, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.6105 Transfer of jurisdiction.**

1. The court may transfer the place of administration of a trust to or from this state or transfer some or all of the trust property to a trustee in or outside this state if it finds any of the following:

a. The transfer of the trust property to a trustee in this or another jurisdiction, or the transfer of the place of administration of the trust to this or another jurisdiction, will promote the best interests of the trust and those interested in it, taking into account the economical and convenient administration of the trust and the views of the adult beneficiaries.

b. Any new trustee to whom the trust property is to be transferred is qualified, willing, and able to administer the trust or trust property under the terms of the trust.

c. If the trust or any portion of the trust property is to be transferred to another jurisdiction and if approval of the transfer by the other court is required under the law of the other jurisdiction, the proper court in the other jurisdiction has approved the transfer.

2. If a transfer is ordered, the court may direct the manner of transfer and impose terms and conditions as may be just, including a requirement for the substitution of a successor trustee in any pending litigation in this state. A delivery of property in accordance with the order of the court is a full discharge of the trustee with respect to all property embraced in the order.

3. If the court grants a petition to transfer a trust or trust property to this state, the court shall require the trustee to give bond, if necessary under the law of the other jurisdiction or of this state, and may require bond as provided in section 633.4102.

99 Acts, ch 125, §93, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

## SUBPART B

### JUDICIAL PROCEEDINGS CONCERNING TRUSTS

#### 633.6201 Judicial intervention intermittent.

The administration of trusts shall proceed expeditiously and free of judicial intervention, except to the extent the jurisdiction of the court is invoked by interested parties or otherwise exercised as provided by law.

99 Acts, ch 125, §94, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

#### 633.6202 Petitions — purposes of proceedings.

1. Except as otherwise provided in section 633.3103, a trustee or beneficiary of a trust may petition the court concerning the internal affairs of the trust or to determine the existence of the trust.

2. Proceedings concerning the internal affairs of a trust include proceedings to do any of the following:

- a. Construe and determine the terms of a trust.
- b. Determine the existence of any immunity, power, privilege, duty, or right.
- c. Determine the validity of a trust provision.
- d. Ascertain beneficiaries and determine to whom property shall pass or be delivered upon final or partial termination of the trust.
- e. Settle accounts and pass upon the acts of the trustee, including the exercise of discretionary powers.
- f. Instruct the trustee.
- g. Compel the trustee to report information about the trust or account to the beneficiary.
- h. Grant powers to or modify powers of the trustee.
- i. Fix or allow payment of the trustee's compensation or review the reasonableness of the compensation.
- j. Appoint or remove a trustee.
- k. Accept the resignation of a trustee.
- l. Compel redress of a breach of trust by any available remedy.
- m. Approve or direct the modification or termination of the trust.
- n. Approve or direct the combination or division of trusts.
- o. Authorize or direct transfer or a trust or trust property to or from another jurisdiction.
- p. Determine liability of a trust for debts or the expenses of administration of the estate of a deceased settlor.
- q. Determine any other issue that will aid in the administration of the trust.

99 Acts, ch 125, §95, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**SUBPART C**  
**SETTLEMENT AGREEMENTS AND REPRESENTATION**

**633.6301 Definition and applicability.**

1. For purposes of this subpart, "fiduciary matter" includes any item listed in section 633.6202, subsection 2.
2. Persons interested in a fiduciary matter may approve a judicial settlement and represent and bind other persons interested in the fiduciary matter.
3. Except to the extent the terms of the trust indicate that the procedures specified are not to apply, a person interested in a fiduciary matter may approve a nonjudicial settlement containing such terms and conditions as a court could properly approve and represent and bind other persons interested in the fiduciary matter.

99 Acts, ch 125, §96, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.6302 Representation by holders of powers.**

1. The holders or all coholders of a power of revocation or presently exercisable general power of appointment, including one in the form of a power of amendment, may represent and bind the persons whose interests, as objects, takers in default, or otherwise, are subject to the power.
2. To the extent there is no conflict of interest between the holders and the persons represented with respect to the fiduciary matter, persons whose interests are subject to a general testamentary power of appointment may be represented and bound by the holder or holders of the power.

99 Acts, ch 125, §97, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.6303 Representation by fiduciaries and parents.**

To the extent there is no conflict of interest between the representer and those represented with respect to the fiduciary matter, the following are permitted:

1. A conservator may represent and bind the person whose estate the conservator controls.
2. A trustee may represent and bind the beneficiaries of the trust.
3. A personal representative may represent and bind the persons interested in the decedent's estate.
4. If no conservator has been appointed, a parent may represent and bind a minor child.

99 Acts, ch 125, §98, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.6304 Representation by holders of similar interests.**

Unless otherwise represented, a minor or an incompetent, unborn, or unascertained person may be represented by and bound by another person having a substantially identical interest with respect to the fiduciary matter but only to the extent that the person's interest is adequately represented.

99 Acts, ch 125, §99, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.6305 Notice of judicial settlement.**

1. Notice of a judicial settlement shall be given to every interested person or to one who can bind an interested person as described in sections 633.6302 and 633.6303.
2. Notice may be given to a person or to another who may bind the person.
3. Notice is given to unborn or unascertained persons who are not represented under sections 633.6302 and 633.6303, by giving notice to all known persons whose interests in the proceedings are

substantially identical to those of the unborn or unascertained persons.

99 Acts, ch 125, §100, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.6306 Appointment of guardian ad litem.**

1. At any point in a judicial proceeding, the court may appoint a guardian ad litem to represent and approve a settlement on behalf of the interest of a minor, an incapacitated, unborn, or unascertained person, or a person whose identity or address is unknown, if the court determines that representation of the interest otherwise would be inadequate.
2. If not precluded by conflict of interest, a guardian ad litem may be appointed to represent several persons or interests.
3. The court shall set out its reasons for appointing a guardian ad litem as a part of the record of the proceeding.
4. In approving a judicially supervised settlement, a guardian ad litem may consider general family benefit.

99 Acts, ch 125, §101, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

**633.6307 Appointment of special representative.**

1. In connection with a nonjudicial settlement, the court may appoint a special representative to represent the interests of and approve a settlement on behalf of designated persons.
2. If not precluded by a conflict of interest, a special representative may be appointed to represent several persons or interests.
3. In approving a settlement, a special representative may consider general family benefit. As a condition for approval, a special representative may require that those represented receive a benefit.

99 Acts, ch 125, §102, 109

Section effective July 1, 2000; 99 Acts, ch 125, §109

NEW section

