

SON OF THE TRUST CODE—

THE IOWA TRUST CODE AFTER TEN YEARS*

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** Ellis and Nelle Levitt Distinguished Professor of Law, Drake University Law School; B.A., University of Rochester, 1967; J.D., Cornell Law School, 1970. I wish to acknowledge the assistance of the many attorneys who sent me e-mails containing questions or comments on the Iowa Trust Code—most of whom shall remain nameless in this Article. Particular mention should be made of the contribution of attorneys Todd R. Buchanan of Algona, Iowa; Paul Morf of Cedar Rapids, Iowa; Marlin M. (“Hap”) Volz Jr. of Davenport, Iowa; Michel Nelson of Carroll, Iowa; and Susan Pence of Cedar Rapids, Iowa, for providing me with materials used in the preparation of this article. I thank Mark Kende, James Madison Chair Professor of Constitutional Law, Drake University Law School, for his help on the retroactivity section of this Article. I wish to express my appreciation to Miriam D. Van Heukelem, Drake Law School Class of 2009, for her valuable assistance in the research and preparation of this Article. The opinions and conclusions expressed in this Article, as well as any errors, are, of course, mine.

I have functioned for many years as Advisor and Resource Person to the Probate and Trust Law Section of The Iowa State Bar Association (Section) and its predecessor, the Committee on Real Property, Probate and Trust Law. In this capacity, I was involved in the drafting of the Iowa Trust Code (Trust Code) and the amendments thereto.

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I. INTRODUCTION

In an article published in 2001, I told the story of the drafting of the Iowa Trust Code and the amendments made during 2000, and conducted an analysis of each provision of the Trust Code.¹ Now, ten years following the drafting of the Trust Code, the process of solving problems unseen when the Trust Code was drafted, reacting to significant developments and decisions with new legislation, and correcting statutes as new problems occurred has largely been completed.² It is time to supplement and update my previous article to trace the developments—legislative and judicial—over the last ten years.

A. *The Process of Amendment*

The process that has developed over the years for proposing amendments to the Trust Code begins with an idea. Either I find an issue that should be discussed or another member of the Section or a lawyer contacts me with a proposal or a question. I, or in some cases, another member of the Trust Code Committee of the Probate and Trust Law Section (Committee),³ then write an “Issue Paper” containing a statement of the issue, a discussion of the current law on the issue, and some possibilities for legislation.⁴ The Issue Paper is then distributed to the

1. See generally Martin D. Begleiter, *In the Code We Trust—Some Trust Law for Iowa at Last*, 49 DRAKE L. REV. 165 (2001). A Committee of the Probate and Trust Law Section of The Iowa State Bar Association proposed and drafted the Iowa Trust Code. Todd R. Buchanan, a partner with the law firm of Buchanan, Bibler, Buchanan & Gabor, of Algona, Iowa, and I were the primary drafters.

2. Amendments will continue to be discussed, drafted, and adopted as new problems and issues arise; however, the major issues involved in developing the Trust Code—with a couple of exceptions noted later in the Article—have been discussed. The results of the discussion have either been proposed as legislation or a decision has been made not to propose legislation on that issue.

3. See *infra* Part I.B.

4. The Issue Paper may also contain a discussion of policy matters relevant to the issue.

members of the Committee, who respond to the issue raised in the Issue Paper, usually by e-mail. Often, subsequent exchanges follow, discussing the points raised in the e-mail. Once the Committee agrees legislation is desirable and the form of the legislation is determined, I will draft a legislative proposal and send it to the Committee members for comments. After the Committee reaches an agreement on the proposal, it is presented to the Section for discussion. Following any amendments, if the Section approves the proposal, it is submitted to the Board of Governors of The Iowa State Bar Association for approval. If the Board of Governors approves, the proposal is submitted to the legislature as part of the Bar's affirmative-legislative package.

Occasionally, if I believe strongly about a position on an issue, I will submit to the Committee a proposal for legislation instead of an Issue Paper. The same process as noted above is followed for such proposals.

As most readers of this Article know, Iowa has no generally available legislative history. The Issue Papers and the comments to proposed legislation, which contain substantial discussions of the issue, the need for legislation, and the arguments for and against each position, can be invaluable to courts and attorneys concerning the meaning of the statutes and the reasons behind the Section's recommendations for the proposals. Lacking any official legislative history, the analysis in the Issue Papers and the comments can serve as a sort of unofficial legislative history when questions arise. Similarly, the comments of Committee members in e-mails can shed light on the meaning and content of the legislation. I have retained almost all the Issue Papers and proposals for legislation.⁵ I will employ these heavily in this Article in the belief the legislative history of the Trust Code will be useful to attorneys and courts. However, several caveats are in order. First, the Issue Papers and proposals are entirely unofficial. Although in some cases the comments to proposed legislation were sent to the Legislative Service Bureau with the proposals, there is no assurance that any of the commentary was seen by any legislator. Second, these records are kept in my office; there is no official repository of the records. Third, I make no assurances of the completeness of my records, as mentioned above. Last, and perhaps unfortunately, the Issue Papers do not have dates. In some cases, I retained the letters sending these to the

5. Unfortunately, after ten years, an office move, furniture replacements, and several computer and operating system replacements, some of the Issue Papers and proposals have been misplaced.

Committee.⁶ In other cases, the computer mailing gives the date the Issue Paper or proposal was sent.⁷ As to e-mails, again, some have been lost in the changing of computers and programs.⁸ In addition, I have decided, as a matter of respect to my colleagues in the Section, to generally not divulge the identity of the sender of the e-mail. Thus, the reader will only know a Committee member or an attorney made a comment; except in a limited number of cases where the identity is crucial to understanding the legislation, the reader will not know the identity of the person making the comment. Also, some e-mail comments will undoubtedly be missed in the writing of this Article.⁹ Even with these limitations, however, I hope to provide readers with an explanation of the intentions of the drafters regarding the provisions of the Trust Code.

Lastly, I will not discuss those sections of the Trust Code that have not been amended or interpreted since 2000. The reader should refer to my previous article for a discussion of these sections.¹⁰ That is, this Article should be read together with my previous article for a complete understanding of the Iowa Trust Code.

B. *Passages*

I previously wrote about the contributions of Todd Buchanan of Algona, Iowa, to the Trust Code.¹¹ After the passage of the Trust Code, Todd continued his tireless work to publicize the Code to lawyers and citizens. He lectured widely and well to any group or organization that requested information on the Trust Code. His presentations brought news and explanation of the provisions of the Trust Code to the citizens of Iowa and the lawyers who serve them.

6. Where I can locate these letters, I will use the date of the letter as the date of the Issue Paper or proposal.

7. This is not true in all cases because a new computer or a new program may give the date it was moved to that computer or program, as opposed to the date the document was created, as the date of creation.

8. *See supra* note 5.

9. I have 1,396 e-mails in my Trust Code e-mail folder. Many of these contain several messages and responses, and many refer to more than one subject or issue. I believe it would be almost impossible for me to correctly classify and include every e-mail on the correct subject.

10. *See generally* Begleiter, *supra* note 1.

11. *Id.* at 174-77.

On August 5, 2004, Todd Buchanan resigned as Chair of the Trust Code Committee.¹² His contributions to the development and acceptance of the Iowa Trust Code are incalculable and, at least by this author, will not be forgotten.

In recent years, the Trust Code Committee has been composed of Marlin M. (“Hap”) Volz Jr. of Davenport, Chris Even of Dubuque, Paul Morf of Cedar Rapids, Professor Sheldon M. Kurtz of the University of Iowa School of Law, and me.

C. The Trust Code as a Separate Chapter

Originally, the Trust Code was a part of the Probate Code in Chapter 633.¹³ As part of the repeals and consolidation task,¹⁴ the Reconciliation Committee headed by Paul Morf recommended the Trust Code be placed in a separate chapter. The Reconciliation Committee believed the purpose of the “Trust Code was to provide a single source of reference for attorneys drafting and overseeing Trusts.”¹⁵ This purpose was frustrated by placing

12. However, I recently learned the good news that Todd will return as Chair of the Trust Code Committee in the near future.

13. See, e.g., IOWA CODE ch. 633 (1999).

14. See Begleiter, *supra* note 1, at 310–11; see also *infra* Part I.D (describing the process of repeal and consolidation). This committee began its work in October 2002.

15. Probate & Trust Law Section, The Iowa State Bar Ass’n, Proposed Amendments to the Iowa Trust Code (on file with author). The entire comment to the Committee’s proposal for recodification was:

The Trust Code has entirely separate definitions and entirely different jurisdictional provisions from the Probate Code. They are separate entities. The entire purpose for enacting a new Trust Code was to provide a single source of reference for attorneys drafting and overseeing Trusts. This is frustrated by having the Trust Code buried within Chapter 633. Confusion is caused by the fact that the Probate Code’s definitions (“fiduciaries,” “estate,” “trust,” “trustee,” and so forth) and other provisions purport to govern the entire chapter or “code.” This can be alleviated by simply recodifying the entire Trust Code as Chapter 633A. To minimize confusion, it is recommended that the current numbering system be retained, such that the first section of Chapter 633A will be 633A.1101. This solution will greatly reduce the potential for malpractice and will help to realize the full potential of the Trust Code as a new regime separate and apart from the Probate Code.

Id. The members of the Probate and Trust Code Reconciliation Committee (Reconciliation Committee) were Paul Morf, Chair; Martin Begleiter; Mike Deege,

the Trust Code within the Probate Code due to the Probate Code's inconsistent definitions and references.¹⁶ The easiest way to cure this problem was to recodify the entire Trust Code as Chapter 633A.¹⁷ This was done by legislation passed by the 2005 Iowa Legislature.¹⁸

D. Changes to Court Jurisdiction of Trusts

In addition to making the Trust Code a separate chapter and recommending the incorporation of certain wills doctrine into the Trust Code,¹⁹ the Reconciliation Committee recommended certain other changes to the Probate Code that greatly impacted trusts and should be discussed.

The primary change was made to section 633.10(4) of the Probate Code. Prior to the change, the district court sitting in probate had continuing jurisdiction over the administration of all testamentary trusts unless (1) the trust was administered by a bank or trust company; (2) the trust was in existence on May 20, 1985; (3) the corporate trustee applied for the release of the jurisdiction and no beneficiaries objected; or (4) in the case of an individual trustee, the trustee applied for release of court jurisdiction and no beneficiary objected.²⁰ One of the basic premises of the Trust Code is that a trust should not be subject to continuing court jurisdiction and the beneficiaries should have easy access to a convenient tribunal to decide questions as needed on an in-and-out basis.²¹ Section 633.10(4) was changed to provide a default rule that trusts were not subject to continuing court jurisdiction, with exceptions for trusts in existence on July 1, 2005, and subject to continuous court supervision, and trusts established by court decree and subject to continuing supervision.²²

In addition, those trusts subject to court jurisdiction because of their existence on July 1, 2005 may be released from court supervision by the court following notice to the beneficiaries, and they must be released from court supervision if an application to do so is made by all trustees, notice is

Chris Even; Todd Slagter; Roy Van Der Kamp; and Marlin Volz.

16. *Id.*

17. *Id.* To reflect this split, if this Article refers to a pre-2005 provision of the Trust Code, it will reference chapter 633 of the Iowa Code, while any reference made to the Trust Code following the split in 2005 will be to chapter 633A of the Iowa Code.

18. 2005 Iowa Acts 122.

19. *See infra* Part XIV.

20. IOWA CODE § 633.10(4) (2003).

21. *See* IOWA CODE § 633A.6101 (2009).

22. *Id.* § 633.10(4)(a), (c).

given to the beneficiaries, and no beneficiary objects.²³ In addition, a clarification was added to provide that all trusts that are or become unsupervised by the district court sitting in probate are governed solely by the Trust Code.²⁴ Additionally, conforming amendments were made to the Probate Code to accomplish the overriding purpose of subjecting all trusts—except those excepted by section 633.10(4)—to the provisions of the Trust Code rather than the Probate Code.²⁵

II. DEFINITIONS—SECTION 633A.1102

A. *Adjusted Gross Estate*

As previously noted, section 636.61 was repealed in connection with the cleanup provisions.²⁶ That section contained the definition of “adjusted gross estate.”²⁷ It was suggested, in connection with the repeal, the definition be moved to the Trust Code. This was accomplished in 2005 by adding a new subsection and renumbering later subsections of section 633A.1102.²⁸

23. *Id.* § 633.10(4)(d).

24. *Id.* § 633.10(4)(c).

25. Among those changes were changes in the definitions of “Fiduciary,” “Trustee,” and “Trusts” in Iowa Code sections 633.3(17), 633.3(34), and 633.3(35) to limit the definition to trustees of trusts governed by the Probate Code; the amendment of section 633.27(4); the repeal of section 633.28; the rewriting of section 633.699 to incorporate the trustee powers of sections 633.4401 and 633.4402 of the Trust Code; the repeal of section 633.699A; and the repeal of sections 633.703A and 633.703B—the Trust Code contains broader provisions covering these topics. Changes also include the recodification of the statutes on disclaimers, sections 633.901 through 633.917, to Chapter 633E; medical assistance trusts, sections 633.707 through 633.711, to Chapter 633C; and Transfer on Death Security Registration, sections 633.800 through 633.811, to Chapter 633D. 2005 Iowa Acts 113–14, 118–19, 122. Also, a new section, 633.699B, was enacted, providing that terms of the Probate Code relating to trusts and trustees apply only to trusts that continue to be court supervised under section 633.10 and have not been released from continuous court supervision. *Id.* at 119. Such trusts are also subject to the provisions of the Trust Code to the extent not inconsistent with the Probate Code. IOWA CODE § 633.699B. In addition, sections 636.60, 636.60A, and 636.61 were repealed. 2005 Iowa Acts 122.

26. *See supra* note 25.

27. IOWA CODE § 636.61 (2005).

28. 2005 Iowa Acts 120, 122–23. The new definition reads: “‘*Adjusted gross estate*’, [sic] as it relates to a trust, means the same as defined in section 633.266.” IOWA CODE § 633A.1102(1) (2009).

B. *Competency*

Competency was previously defined separately for revocable transfers, irrevocable transfers, and nondonative transfers in trust.²⁹ These definitions were drafted prior to the question of competency being addressed by the Restatement (Third) of Trusts.³⁰ When the Restatement reached the subject of competency and adopted a section on the subject,³¹ it became apparent the Trust Code needed change. Section 633.1102(3)(c) was intended to apply to nondonative transfers, such as those established as part of a commercial transaction or as incident to a divorce.³² For such transfers, a contract standard is appropriate. However, such a situation is rarely, if ever, found in a trust governed by the Trust Code. As the Issue Paper on the question states, because this rule is not unique to trusts and is almost never involved in a trust subject to the Trust Code, section 633.1102(3)(c) was repealed.³³

In addition, for irrevocable trusts, section 633.1102(3)(b)—now section 633A.1102(4)(b)—used a contract standard.³⁴ Normally, a gift standard is used when defining such benefits since the creation of trusts is normally done as a gift.³⁵ The rule on competency to create an irrevocable trust was restated as a gift standard.³⁶

29. IOWA CODE § 633.1102(3)(a)–(c) (2003).

30. The American Law Institute (ALI) began working on the Restatement (Third) of Trusts in 1987 with Edward C. Halbach Jr. as Reporter. The project began with a rewriting of the prudent investor rule. *See* RESTATEMENT (THIRD) OF TRUSTS ch. 17, intro. note (2007). The project then considered the remaining issues in trust law. I am an Adviser to the Reporter of the Restatement (Third) of Trusts. The contents in this Article are solely my responsibility and do not represent the views of the Reporter or the ALI.

31. *See id.* § 11. The Restatement uses the term “capacity.” *See, e.g., id.*

32. *See* IOWA CODE § 633.1102(3)(c) (2003).

33. 2003 Iowa Acts 197. Section 633A.1102(4)(b) now reads: “In the case of an irrevocable transfer, ‘competency’ means the ability to understand the effect the gift may have on the future financial security of the donor and anyone who may be dependent on the donor.” IOWA CODE § 633A.1102(4)(b) (2009). The definition of competency, formerly in section 633A.1102(3), was moved to section 633A.1102(4) when a definition of “adjusted gross estate” was added to the Trust Code. *See supra* Part II.A.

34. IOWA CODE § 633.1102(3)(b) (2003).

35. *See* RESTATEMENT (THIRD) OF TRUSTS § 11 cmt. c.

36. 2003 Iowa Acts 197.

C. *Qualified Beneficiaries*

This definition is new and is relevant mostly to the subject of information required to be furnished to beneficiaries in section 633A.4213. The suggestion for the inclusion of such a definition did not come from me, for reasons detailed later in this Article, but from other attorneys in the Probate and Trust Law Section. I should mention, however, the first set of Issue Papers on the Trust Code, written in 2001, did mention this issue and suggested the possibility of defining “qualified beneficiaries” or “interested beneficiaries” as including current mandatory recipients of income and current discretionary recipients of income or corpus.³⁷ The definition of “qualified beneficiary” added in 2002 followed this suggestion, but it added to the definition any beneficiary who would receive property if the trust terminated on the date the definition applied.³⁸ Perhaps a few examples

37. MARTIN D. BEGLEITER, ISSUE PAPER, IOWA CODE, DEFINITIONS.

38. 2002 Iowa Acts 192. Current Iowa Code section 633A.1102(14), enacted as section 1102(12A), reads:

“*Qualified beneficiary*” means a beneficiary who, on the date the beneficiary’s qualification is determined, is any of the following:

Eligible to receive distributions of income or principal from the trust.

Would receive property from the trust upon immediate termination of the trust.

IOWA CODE § 633A.1102(14) (2009).

Subsections 15–20 of Iowa Code section 633A.1102—former subsections 13–18—were renumbered as subsections 14–19. In addition to the examples below, the decision in *In re Grandquist Revocable Trust* sheds light on the scope of the definition. *In re Grandquist Revocable Trust*, No. 03-1688, 2005 WL 1962554 (Iowa Ct. App. Aug. 17, 2005). The trust provided, at the grantor’s death, his daughter, Cynthia, and his son, Douglas, would each receive \$1,000,000. *Id.* at *1. In addition, the trust provided either the son or daughter would receive the other’s share if the other predeceased without children. *Id.* at *1 & n.1. Following the grantor’s death, in a proceeding to remove the trustee of Douglas’s trust, Cynthia objected to the trustee’s final report. *Id.* at *1. Douglas had no children at the time of the proceedings. *Id.* at *1 n.1. The court held Cynthia, as a contingent beneficiary, was a beneficiary for the purposes of section 633A.6202(1) and had standing to object to the accounting. *Id.* at *2–3.

It should be noted, although not at issue in the case, Cynthia also could have been considered a qualified beneficiary because she would have received the trust property had the trust terminated at the time of the proceeding. The court appeared to imply such would not be the case by quoting only part of the definition—“A qualified beneficiary is entitled to receive, or is a permissible distributee of, income or principal from the trust.” *Id.* at *2 n.5 (citing IOWA CODE § 633.1102(13) (2003)). It should

will clarify the definition:

Example 1: “Trust with income to my spouse for life, remainder to my children.” The spouse and children are all qualified beneficiaries (the children qualify under section 633A.1102(14)(b)).

Example 2: “Trust with income and principal payable in the discretion of my Trustee to any of my issue from time to time living. On the death of the last to die of my children, the trust shall terminate and be payable to my issue then living, per stirpes.” All the living issue of the settlor are qualified beneficiaries.

Example 3: “Trust with income to my spouse for life, on her death remainder to my issue then living per stirpes.” Settlor has children and grandchildren living on creation of the trust or on settlor’s death if a testamentary trust. Spouse and testator’s children are qualified beneficiaries. If a child is dead at the time the trust is created, or predeceases the testator, that child’s children are qualified beneficiaries. Other grandchildren of the settlor are not qualified beneficiaries.

D. Burial Trusts

Burial, funeral, and perpetual care trusts are extensively regulated in Iowa.³⁹ Given the specific purpose of such trusts and the extensive statutory provisions, there was no need to subject such trusts to the Trust Code.⁴⁰ It should be noted the use of the terms “burial,” “funeral,” and “perpetual care” were intended to be descriptive of the types of trusts exempted and are not restricted to trusts containing such words.

further be noted some of the cases discussed in dicta by the court are reversed by the definition of “beneficiary” in the Trust Code. *See, e.g., id.* at *3 (citing *In re Trust of Willcockson*, 368 N.W.2d 198, 203 (Iowa Ct. App. 1985) (holding beneficiaries having a contingent interest dependent on the exercise of a power of appointment by another did not have a sufficient interest in the trust to have standing to bring an action)). *Contra* IOWA CODE § 633A.1102(2) (2009) (“‘Beneficiary’, [sic] 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.” (second emphasis added)).

39. IOWA CODE §§ 523A, 523I (2009).

40. “Perpetual care cemetery” is a defined term. *Id.* § 523I.102(37).

III. GENERAL PROVISIONS

A. *The Trust Code and the Common Law*

I will discuss sections 633A.1104 and 633A.1105 together, as they have common themes. Originally, these sections were simply stated. Section 633A.1104 provided, except to the extent the Trust Code modified the common law, that the common law of trusts supplemented the Trust Code.⁴¹ Section 633A.1105 provided that the provisions of the trust instrument control and take precedence over the Trust Code.⁴² As discussed extensively in my previous article, the provision in section 633.1105 making the Trust Code default law, permitting change by the trust instrument, did not permit all changes that could be made by the trust instrument.⁴³ Certain common law rules limited the modifications that could be made.⁴⁴ An example of a trust provision absolutely insulating “the trustee from any duty or responsibility to a court” was given, and I concluded such a provision would be void under the common law.⁴⁵ It was stated, “Section 633.1104 was intended to act as a check on secrecy, giving too much power to trustees, and negating a trustee’s duty.”⁴⁶

Because the Uniform Trust Code (UTC) makes certain provisions mandatory,⁴⁷ there have been proposals by some lawyers and academicians to alter sections 633A.1104 and 633A.1105 since the Trust Code was enacted. These proposals basically fall into two groups. The first set of proposals was to make the application of the common law more explicit. The second was to introduce mandatory provisions into the Iowa Trust Code. As early as February 4, 2002, I sent a letter to the Trust Code Committee containing a series of Issue Papers. The Issue Paper on section 633.1104 noted Professor Kurtz of the University of Iowa College of Law suggested at a section meeting on October 26, 2001, “that a trust instrument could negate the common law application to [a] trust by

41. 1999 Iowa Acts 236; 2005 Iowa Acts 122.

42. 1999 Iowa Acts 236; 2005 Iowa Acts 122.

43. Begleiter, *supra* note 1, at 183–85.

44. *Id.* at 185.

45. *Id.* (providing another example of a trust provision declared void under the common law).

46. *Id.* (citing IOWA CODE § 633.1104 (2001)).

47. UNIF. TRUST CODE § 105 (amended 2004).

negating section 633A.1104” of the Trust Code.⁴⁸ The opposite side of the issue, also raised by Professor Kurtz at that meeting, was whether the common law governed whether a trust instrument could negate a provision of the Trust Code.⁴⁹ I had thought it was clear from the Trust Code that the answer to that question was “yes.” I agreed, however, if there was any question about the answer, clarification does no harm. The Issue Paper also suggested a solution.⁵⁰

Following a number of comments by committee members who were divided on whether an addition was necessary—and, if it was, whether it should be in section 633A.1104 or section 633A.1105—a provision very similar to the suggested provision in the Issue Paper was added as a second sentence to section 633A.1105.⁵¹

48. MARTIN D. BEGLEITER, ISSUE PAPER, IOWA CODE, COMMON LAW OF TRUSTS.

49. MARTIN D. BEGLEITER, ISSUE PAPER, IOWA CODE, TRUST PROVISIONS CONTROL. In my previous article, I stated certain provisions of the common law would prevent negating certain provisions of the Trust Code through a trust instrument. Begleiter, *supra* note 1, at 185. I did not discuss the subtly different issue of whether negating a Trust Code provision that was not basic to trust law meant the common law would apply.

50. MARTIN D. BEGLEITER, ISSUE PAPER, IOWA CODE, TRUST PROVISIONS CONTROL. The Issue Paper suggested adding a sentence to the end of the section reading, “If the trust instrument makes any section of the Trust Code inapplicable to a trust, the common law shall apply to any issue raised by such provision of the trust.” *Id.* The Issue Paper also noted the UTC did not include a provision stating a trust instrument may not negate the application of the common law to the trust. MARTIN D. BEGLEITER, ISSUE PAPER, IOWA CODE, COMMON LAW OF TRUSTS.

51. A second sentence was added to section 633.1105 in 2003, reading: “If a provision of the trust instrument makes any section of this trust code inapplicable to a trust, the common law shall apply to any issues raised by such provision.” 2003 Iowa Acts 197. Amendments in 2004 changed the word “provisions” in the first sentence of the section to “terms”; changed the word “provision” in the second sentence to “term”; deleted the word “instrument” in the second sentence, adding “modifies or” in place of “instrument”; changed “a” to “the” before “trust”; and changed the last word of the section from “provision” to “term.” 2004 Iowa Acts 33–34. Thus, the provision now reads: “The terms of a trust shall always control and take precedence over any section of this trust code to the contrary. If a term of the trust modifies or makes any section of this trust code inapplicable to the trust, the common law shall apply to any issues raised by such term.” IOWA CODE § 633A.1105 (2009). The proposal presented to the Probate and Trust Law Section recommending the 2004 changes commented:

These amendments are intended as clarification and no substantive change in meaning is intended. “Terms” is a defined term and is therefore substituted

The second matter in section 633A.1105 is whether some provisions should be mandatory, that is, they are not waivable by the terms of the trust. As noted in my previous article, Todd Buchanan and I carefully considered this question when drafting the Trust Code.⁵² However, partly because the UTC has mandatory provisions,⁵³ and partly because some attorneys in Iowa believe some provisions ought to be mandatory,⁵⁴ the 2001 Issue Papers discussed this subject.⁵⁵

I have always resisted the inclusion of any mandatory provisions in the Trust Code. My reason is that in order for a provision to be mandatory, unanimous agreement is needed on two things. Whatever the subject of the mandatory rule, there must be agreement the drafted rule is correct. Take, for example, the duty to inform beneficiaries.⁵⁶ As I will detail later, I think a mistake was made in limiting this duty in 2002.⁵⁷ Although others feel the same, the majority favored the amendment. So there is substantial dispute over the correct rule. I should also note the UTC made this a mandatory rule, but later backed off because of substantial disputes. I suppose all might agree this is important enough to rate as a mandatory section, but it cannot—or, at least, should not—be made mandatory if there is substantial disagreement over the correct substantive rule.⁵⁸ In addition, there must be agreement that the rule is so significant that it should be mandatory. Supporters say there must be some rules on which everyone should agree. One example is the rule that a trust “must be administered for the benefit of its beneficiaries.”⁵⁹ One Iowa attorney used this as an example of a provision that should be mandatory.

for “provisions.” “Instrument” is unnecessary in the second sentence because of the change from “provisions” to “terms” and is therefore deleted. Changing “a” to “the” makes specific the trust to which the sentence applies.

Probate & Trust Law Section, The Iowa State Bar Ass’n, Proposed Amendments to the Iowa Trust Code 2 (2004) (on file with author).

52. See Begleiter, *supra* note 1, at 183–84 n.99.

53. UNIF. TRUST CODE § 105(b) (amended 2004).

54. Although, interestingly enough, different attorneys argue different provisions ought to be mandatory.

55. MARTIN D. BEGLEITER, ISSUE PAPER, IOWA CODE, TRUST PROVISIONS CONTROL.

56. See IOWA CODE § 633A.4213.

57. See *infra* Part VIII.H.

58. See, e.g., UNIF. TRUST CODE § 105(b)(8), (9), cmt. (explaining why sections 8 and 9 were made optional in 2004).

59. IOWA CODE § 633A.2104(2). This statement of the rule omits restrictions the settlor puts on the beneficiaries’ interests.

But what about settlor restrictions on investments or purposes under such a rule? A recent article illustrated what the UTC mandatory provision requiring a trust to be administered for the benefit of the beneficiaries can do to trust investments.⁶⁰ In the article, Professor Jeffrey A. Cooper raised the possibility such a mandatory rule could void a provision prohibiting the sale of a certain trust asset, including perhaps the 100-year-old farm or the settlor's closely held business.⁶¹

Without unduly prolonging the discussion, it is almost impossible to achieve universal agreement on the correct rule in almost any area of trust law without qualifications and exceptions. It is equally difficult to achieve agreement on which rules are important enough to merit making them mandatory. Iowa's solution—to make all Trust Code rules default rules, with the common law filling the gaps and used when a Trust Code rule is modified or negated—is far preferable to a list of mandatory rules.⁶²

B. *Scope of the Trust Code—Section 633A.1107*

As part of the reconciliation between the Probate Code and the Trust Code,⁶³ a coordination provision was added to section 633.1107 of the Trust Code in 2005.⁶⁴ The purpose of the amendment was to clarify that for all trusts not under court supervision, the Trust Code, and not the Probate Code, governs.

60. See Jeffrey A. Cooper, *Empty Promises: Settlor's Intent, the Uniform Trust Code, and the Future of Trust Investment Law*, 88 B.U. L. REV. 1165, 1175 (2008).

61. See *id.* at 1175–77. Professor Cooper used IBM stock and a closely held business as an example, but his analysis could easily apply to a farm. See *id.*

62. See, e.g., EUGENE F. SCOLES ET AL., *PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS* 798–800 (7th ed. 2006) (discussing mandatory versus default rules).

63. See *supra* Part I.D.

64. The addition was a new subsection providing:

With regard to trusts described in section 633.10, that have not been judicially released from continuous court supervision, this trust code shall apply only to the extent not inconsistent with the relevant provisions of chapter 633. With regard to all other trusts defined in section 633.1102, the terms of chapter 633 shall be inapplicable, and the terms of this trust code shall prevail over any inconsistent provisions of Iowa law.

C. Governing Law—New Section 633A.1108

It was recognized in the initial set of Issue Papers issued in 2001 that in drafting the Trust Code, a section on governing law was inadvertently omitted.⁶⁵ It was suggested that provisions in the UTC could be a beginning point for developing such an addition to the Trust Code.⁶⁶ A discussion draft was developed in 2002 that included substantial changes from the UTC. This formed the basis of the governing law section as finally adopted. To enable a fuller understanding of the changes from the UTC, the discussion draft is produced in full below, followed by discussion of the differences from the UTC.

The discussion draft provided:

Section 633.1108—Governing Law

1. A trust not created by will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which at the time of the creation of the trust, the settlor was domiciled, had a place of abode, or

65. MARTIN D. BEGLIETER, ISSUE PAPER, IOWA CODE, GOVERNING LAW.

66. See UNIF. TRUST CODE §§ 107, 403 (amended 2004). UTC section 107 states:

The meaning and effect of the terms of the trust are determined by:

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

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

Id. § 107. UTC section 403 states:

A trust not created by will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which, at the time of creation:

(1) the settlor was domiciled, had a place of abode, or was a national;

(2) the trustee was domiciled or had a place of business; or

(3) any trust property was located.

Id. § 403.

was a national.

2. The meaning and effect of the terms of a trust not created by will are determined by:

a. The law of the jurisdiction designated in the terms, provided that at the time of the creation of the trust the designated jurisdiction had a substantial relationship to the trust. Without intending to be exclusive, a jurisdiction has a substantial relationship to the trust if it is the residence or domicile of the settlor or of any beneficiary, or a place where the trustee was domiciled or had a place of business.

b. In the absence of a controlling designation in the terms of the trust, the law of the jurisdiction having the most significant relationship to the matter at issue.⁶⁷

As can be seen from a perusal of the provisions, the changes from the UTC are substantial.⁶⁸ First, the decision was made to include all the conflicts rules in one section. Second, the section was limited to *inter vivos* trusts. The Trust Code Committee believed the validity of trusts created by wills are determined by the validity of the will, which should be left to the Probate Code, and the death of a decedent domiciled in Iowa provides a substantial reason for Iowa law to be used for testamentary trusts.⁶⁹ Even for *inter vivos* trusts, UTC section 403(2) and (3) were omitted because they were too broad,⁷⁰ and omitting these sections helps limit the number of jurisdictions to which a court is required to look on questions of validity. Third, the exception for “strong public policy of the jurisdiction having the most significant relationship to the matter at issue” in the UTC was omitted.⁷¹ That phrase introduces a large element of uncertainty as to which public policies qualify as “strong.” In addition, any reference to “public policy” introduces substantial uncertainty, lack of predictability,

67. Probate & Trust Law Section, The Iowa State Bar Ass’n, Proposed Amendments to the Iowa Trust Code 2–3 (2002) (on file with author).

68. See generally Jeffrey A. Schoenblum, *Conflict of Laws Under the Uniform Trust Code*, 3 TRUSTS E ATTIVITÀ FIDUCIARIE 15 (Jan. 2001) (discussing UTC sections 107 and 403 and the drawbacks of these provisions).

69. Probate & Trust Law Section, The Iowa State Bar Ass’n, Proposed Amendments to the Iowa Trust Code 3 (2002) (on file with author).

70. See Schoenblum, *supra* note 68, at 17–21.

71. Compare UNIF. TRUST CODE § 107(1) (including the language regarding the public policy), with IOWA CODE § 633A.1108(1) (2009) (omitting such language).

and interference with a testator's choice into the governing law decision. Often, no answer can be given by the lawyer to the settlor as to whether a particular policy might or might not be against public policy.⁷² Iowa Code section 633A.1108(2)(a) also requires the governing law have a substantial relationship to the trust and, unlike the UTC, gives some examples.⁷³ The examples were not intended to be exclusive.⁷⁴

A number of lawyers still had questions and concerns about this provision, as the draft was discussed at several section meetings and then rewritten. Three changes were made. First, in subsection 2(a), the residence or domicile of a qualified beneficiary only, rather than any beneficiary, constitutes a substantial relationship to a jurisdiction.⁷⁵ Second, "the location of a substantial portion of the assets of the trust" was added as a factor constituting a substantial relationship of a jurisdiction to the trust.⁷⁶ Third, and most significantly, subsection 2(c), as a controlling determinant of governing law, was added, providing: "[a]s to real property, the law of the jurisdiction where the real property is located" governs.⁷⁷ The last two changes were suggested and approved by the Section at its October 26, 2001 meeting, and the subsection was added in 2003.⁷⁸

One significant matter to note is that a settlor *cannot* designate the law governing real property in a trust by the trust instrument. This means, in many trusts, one law will apply to determine the meaning and effect of the terms and a different law will apply to real property. For example, if a trust created by an Iowa grantor contains real estate located in Iowa and designated South Dakota law to govern the trust—and names a South

72. See Probate & Trust Law Section, The Iowa State Bar Ass'n, Proposed Amendments to the Iowa Trust Code 3 (2002) (on file with author); see also Begleiter, *supra* note 1, at 190–91 & n.137.

73. Compare IOWA CODE § 633A.1108(2) (containing examples of substantial relationships), with UNIF. TRUST CODE § 107(2) (omitting such language).

74. Probate & Trust Law Section, The Iowa State Bar Ass'n, Proposed Amendments to the Iowa Trust Code 3 (2002) (on file with author).

75. 2003 Iowa Acts 197–98.

76. *Id.* at 198.

77. *Id.*

78. Probate & Trust Code Section, The Iowa State Bar Ass'n, Proposed Amendments to the Iowa Trust Code 10 (2002) (on file with author). The words "[e]xcept as provided in paragraph 'c'" were added to subsections 2(a) and 2(b); thus, the law of the jurisdiction where real property is located governs the law as to any real property in the trust. 2003 Iowa Acts 197–98.

Dakota bank as trustee and trust assets are located at the bank in South Dakota—the trust will be governed by South Dakota law except for the Iowa real estate, which will be governed by Iowa law.⁷⁹ Also, apparently the Iowa real estate in a trust created by an out-of-state settlor will be governed by Iowa law, regardless of any governing law designation in the trust instrument.⁸⁰

IV. CREATION AND VALIDITY OF TRUSTS

A. *Requirements for Validity—Section 633A.2102*

Originally, subsection 1(c) of this section was stated in the negative.⁸¹ The first Issue Paper raised the question of whether the section could be improved by technical amendments.⁸² The proposal for separate paragraphs under subsection (c) was changed to a continuation of the same

79. See IOWA CODE § 633A.1108(2)(c) (2009).

80. See *id.*

81. Subsection 1(c), as originally enacted, provided a trust was only valid if the following was satisfied: “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.” IOWA CODE § 633.2102(1)(c) (2001).

82. MARTIN D. BEGLEITER, ISSUE PAPER, IOWA CODE, REQUIREMENTS FOR VALIDITY. The suggestions were to rephrase subsection (c) to state:

(c) the trust has a definite beneficiary or a beneficiary who will be definitely 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.

Id.

Also suggested was a new subsection, 1(d), reading: “The trustee has duties to perform” to eliminate passive trusts. *Id.* It was also suggested a sentence be added to the end of subsection 2, which deals with definiteness of beneficiaries, to read: “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.” *Id.* The last proposal was based on the idea that, although a class or person designated under a power to select the beneficiaries should be valid, some time limit for the designation ought to be required, and a substitute disposition provided for, if no beneficiaries were selected.

sentence with parenthetical numbers and was enacted in 2002.⁸³ Unfortunately, in the bill-drafting process, the numbers were deleted and the previous confusion remained. In addition, the cross reference to section 633.2105 did not make it into the legislation. Noticing this, the Committee proposed the wording suggested in the first Issue Paper.⁸⁴ Also, the addition of subsection 1(d), as in the original proposal, was repropoed.⁸⁵ Lastly, a new subsection was suggested by Mike Nelson of Carroll, based on the concern of attorneys in eastern Iowa “that the doctrine of merger may apply in those instances where a very basic trust is used (often as a temporary measure pending completion of a more complex plan) with the settlor as trustee and sole beneficiary and with a reversion to the settlor’s estate upon settlor’s death.”⁸⁶ Neither Mike Nelson nor I believed the merger doctrine would apply in these circumstances, but it was agreed no harm occurred by clarifying the situation, so it was proposed as new subsection 3. In addition, a number of technical changes were suggested to clarify the meaning of the section. The proposal was enacted in 2003.⁸⁷

83. 2002 Iowa Acts 192.

84. See MARTIN D. BEGLEITER, ISSUE PAPER, IOWA CODE, REQUIREMENTS FOR VALIDITY.

85. Probate & Trust Law Section, The Iowa State Bar Ass’n, Proposed Amendments to the Iowa Trust Code 11 (2001) (on file with author).

86. Letter from Michel Nelson, Vice President, Iowa Sav. Bank, to the Trust Code Committee (June 19, 2001) (on file with author).

87. 2003 Iowa Acts 198. For clarity, section 633A.2102, as it currently exists, provides:

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. The trust has a definite beneficiary or a beneficiary who will be definitely ascertained within the period of the applicable rule against perpetuities, unless the trust is a charitable trust, an honorary trust, or a trust for pets.
 - d. The trustee has duties to perform.
2. A power in a trustee to select a beneficiary from an indefinite class is valid. If the power is not exercised within a reasonable time, the power fails and the property passes to the person or persons who would have taken the property had the power not been conferred.

The new wording of subsection 2 was derived from UTC section 402(c). New subsection 3 was derived from New York Estates, Powers and Trusts Law 7-1.1.⁸⁸ The doctrine of merger “provides that a trust is not created if the settlor is the sole trustee and sole beneficiary of *all* beneficial interests.”⁸⁹ Subsection 3 clarifies the doctrine by providing that it does *not* apply if the settlor is the trustee and sole life beneficiary but others have remainder interests. Even though the common law doctrine of merger would apply to a trust where the settlor is sole trustee and sole life beneficiary and the remainder is payable to the settlor’s estate, subsection 3 is intended to reverse that result so the merger doctrine will not apply in that situation.

Lastly, my proposal for numbered subdivisions in section 633A.2102(1)(c) did not survive the amendment process.⁹⁰

B. *Statute of Frauds—Section 633A.2103*

Several attorneys raised the question of whether oral trusts were enforceable under the Trust Code. The question was based on section 633.2103(1), which provided that a trust was enforceable when evidenced by either a written instrument signed by the trustee or the trustee’s agent, or a written instrument conveying the property signed by the settlor or the settlor’s agent.⁹¹ This left no room for an oral trust. The counterargument was that section 633.2103 was not exclusive and oral trusts were covered under the common law retained by section 633.1104.⁹²

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3. A trust is not merged or invalid because a person, including but not limited to the settlor of the trust, is or may become the sole trustee and the sole holder of the present beneficial interest in the trust, provided that one or more other persons hold a beneficial interest in the trust, whether such interest be vested or contingent, present or future, and whether created by express provision of the instrument or as a result of reversion to the settlor’s estate.

IOWA CODE § 633A.2102 (2009).

88. See N.Y. EST. POWERS & TRUSTS LAW § 7-1.1 (McKinney 2002 & Supp. 2010). Credit goes to Hap Volz, Chris Even, and Mike Nelson for suggesting section 3 and to Professor Sheldon Kurtz for suggesting using UTC section 402(1) in place of former subsection 2.

89. UNIF. TRUST CODE § 402 cmt. (amended 2004).

90. Sometimes you just can’t win.

91. IOWA CODE § 633.2103(1) (2003).

92. *Id.* § 633.1104 (2003); see also GEORGE T. BOGERT, TRUSTS 51 (6th ed. 1987) (explaining how oral trusts, except those regarding land, are allowed by the common law of most states).

An Issue Paper proposed allowing oral trusts if the trust was established by clear and convincing evidence.⁹³ At a meeting of the Section on August 16, 2002, the Section defeated this proposal and directed the Trust Code Committee to draft the statute to prohibit oral trusts. For the next meeting, the Committee proposed an amendment to delete the words “for which a written instrument is required” in subsections 2 and 3 and add a new subsection, 4. This subsection was adopted in 2003 to read as follows:

4. Oral trusts that have not been reduced to writing as specified in this section are not enforceable. This section does not affect the power of a court to declare a resulting or constructive trust in the appropriate case or to order other relief where appropriate.⁹⁴

It is important to recognize resulting trusts are trusts arising by operation of law rather than oral trusts and, as such, are not affected by the statute of frauds.⁹⁵ Resulting trusts—those other than purchase-money resulting trusts—are really reversionary interests arising either in cases of incomplete dispositions or when some trust interest violates legal rules, such as the rule against perpetuities.⁹⁶ Constructive trusts are equitable remedies.⁹⁷ Both are excluded from the definition of trusts under section 633A.1102(18)(1).

V. MODIFICATION AND TERMINATION OF TRUSTS

A. *Termination of Trusts—Section 633A.2201*

The only substantive change in section 633A.2201 was the deletion of former subsection 3.⁹⁸ This subsection was deleted because it significantly reduced the number of beneficiaries required to terminate the trust by eliminating contingent beneficiaries. In addition, the subsection was ambiguous as to the time when beneficiaries were determined—whether

93. MARTIN D. BEGLEITER, ISSUE PAPER, IOWA CODE, STATUTE OF FRAUDS.

94. 2003 Iowa Acts 198.

95. BOGERT, *supra* note 92, at 50.

96. *Id.* at 261–62.

97. *Id.*

98. 2002 Iowa Acts 192. Former subsection 3 provided: “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.” IOWA CODE § 633.2201(3) (2001).

consent is required only from those persons who would take on the termination of the trust at the time of the termination, at the time of the court petition if done by a court proceeding, or at any time in the future. If the time referred to is the time of the termination or court proceedings, subsection 3 would constitute a major change in the “consent of all of the beneficiaries” requirement of 633A.2203(1). There was no intention when the section was drafted to ease the requirement of the *Claflin* doctrine,⁹⁹ which requires all beneficiaries consent to a termination or modification, except that virtual representation or a guardian *ad litem* may be used to secure consent as provided in sections 633A.2202(3) and 633A.2203(3).¹⁰⁰ The following illustrates the effect of former subsection 3:

[S]uppose a trust provided for income to A for life and on A’s death to B, or if B predeceases A, to C. If a trust termination is attempted while B is alive, must C consent? Or, if the remainder provision is to A’s issue then living, per stirpes, do only A’s living children need to consent, or is the consent of all of A’s living and unborn issue required? Common law (the *Claflin* doctrine) required the consent of all the beneficiaries, which was often unobtainable.¹⁰¹

Unlike requirements of notice, filling vacancies, and other matters under Subchapter IV of the Trust Code,¹⁰² where the term “qualified beneficiaries”¹⁰³—proposed at the same time as the deletion of subsection 3—will be employed when necessary, termination of a trust is an action directly contrary to the settlor’s intention. Therefore, the requirements for termination should be difficult. For these reasons, deletion of former subsection 3 was proposed and adopted.¹⁰⁴

Section 633.2201(1)(c)—termination because the trust purpose becomes impossible to fulfill—was interpreted in *In re Rowe*.¹⁰⁵ Judith and Robert Rowe, both with children from previous marriages, were married in

99. See Begleiter, *supra* note 1, at 196–200.

100. See *infra* Part V.B–C.

101. MARTIN D. BEGLEITER, ISSUE PAPER, IOWA CODE, CONSENT OF BENEFICIARIES FOR TERMINATION OR MODIFICATION PROVISIONS.

102. IOWA CODE §§ 633A.4101–.4707 (2009).

103. *Id.* § 633A.1102(14).

104. See 2002 Iowa Acts 192.

105. *In re Rowe*, No. 02-0841, 2003 WL 21361278 (Iowa Ct. App. June 13, 2003).

1980.¹⁰⁶ In 2000, shortly before Judith's death from terminal cancer, Robert and Judith executed a revocable trust, transferring their residence, which was owned by the couple as joint tenants, to the trust.¹⁰⁷ Robert and Judith were initial trustees, with Judith's sons, Brad Seibert and Lee Seibert, named successor trustees in case of death or incompetence of either Robert or Judith.¹⁰⁸ The trust provided Robert could live in the residence as long as he desired, without rent.¹⁰⁹ Maintenance, repair, insurance, and taxes on the residence were to be paid by trust income and principal.¹¹⁰ The home could not be sold during Robert's lifetime without his consent.¹¹¹ On the death of both settlors, the trust property was to be distributed to Judith's children.¹¹² Judith died in 2001, and the trust became irrevocable.¹¹³ The house was the trust's only asset.¹¹⁴ Judith's three sons petitioned to terminate the trust on the grounds of impossibility because the trust contained no assets that could be used to repair and insure the home and pay the taxes on it.¹¹⁵ The court disagreed with the position of Judith's children that the primary purpose of the trust was preserving the home intact for them.¹¹⁶ The court held the trust purposes were to provide Robert a place to live during his life and then be distributed to Judith's children.¹¹⁷ The court further held the goal of the trust could be achieved by mortgaging the property.¹¹⁸ Citing Trust Code section 633.2201(1)(c) and comment *a* of Restatement (Third) of Trusts section 30, the court held the trustees were required to maintain the home for Robert's use and that it was not impossible to fulfill the trust's purpose.¹¹⁹

106. *Id.* at *1.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* ("Robert and Judith had intended, but failed, to transfer additional assets into the trust . . .").

115. *Id.*

116. *Id.* at *2-3.

117. *Id.*

118. *Id.* at *3.

119. *Id.* (citations omitted).

B. *Section 633A.2202—Modification or Termination by Settlor and All Beneficiaries—An Amendment Not Made*

UTC section 411(a) formerly provided a trust may be modified or terminated on consent of the settlor and all the beneficiaries, even if the modification was inconsistent with a material purpose of the trust.¹²⁰ Some authorities, including the Estate and Gift Tax Committee of the American College of Trust and Estate Counsel (ACTEC), became concerned the lack of a requirement for court approval on any modification or termination might make such a trust includable in the settlor's gross estate under Internal Revenue Code section 2038.¹²¹ The UTC was amended to provide several choices on termination and modification by the settlor and all beneficiaries, at least one of which required court approval.¹²²

I had been following this issue and prepared an Issue Paper on the subject.¹²³ My opinion was that because Treasury Regulation section 20.2038-1(a)(2) specifically states “[i]f the decedent's power could be exercised only with the consent of all parties having an interest (vested or contingent) in the transferred property, and if the power adds nothing to the rights of the parties under local law,” section 2038 does not apply. Thus, section 633A.2202 did not make a trust—or, indeed, all trusts—subject to section 2038.¹²⁴ This opinion is supported by the decision of the United States Supreme Court in *Helvering v. Helmholz*, which held a trust instrument giving the settlor and all the beneficiaries the ability to

120. UNIF. TRUST CODE § 411(a) (amended 2004).

121. *Id.* § 411 cmt. The Internal Revenue Code section 2038(a) provides, in part:

The value of the gross estate shall include the value of all property . . . [t]o the extent of any interest therein of which the decedent has at any time made a transfer . . . where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power . . . by the decedent alone or by the decedent in conjunction with any other person . . . to alter, amend, revoke or terminate

I.R.C. § 2038(a) (2006). In fact, this question was discussed intensively on ACTEC list servs.

122. UNIF. TRUST CODE § 411.

123. MARTIN D. BEGLEITER, ISSUE PAPER, IOWA CODE, MODIFICATION OR TERMINATION BY SETTLOR AND ALL BENEFICIARIES.

124. Treas. Reg. § 20.2038-1(a)(2) (as amended in 1962); see MARTIN D. BEGLEITER, ISSUE PAPER, IOWA CODE, MODIFICATION OR TERMINATION BY SETTLOR AND ALL BENEFICIARIES.

terminate the trust was not a joint power under section 302—now codified as 26 U.S.C. § 2038.¹²⁵ The opinion stated:

This argument overlooks the essential difference between a power to revoke, alter or amend, and a condition which the law imposes. The general rule is that all parties in interest may terminate the trust. The clause in question added nothing to the rights which the law conferred. Congress cannot tax as a transfer intended to take effect in possession or enjoyment at the death of the settlor a trust created in a state whose law permits all the beneficiaries to terminate the trust.¹²⁶

Neither the Trust Code Committee nor the Section recommended a change to this section.

C. *Section 633A.2203—Modification or Termination of Irrevocable Trust*

1. *Restriction to Dispositive Provisions*

Section 633A.2203 has generated the greatest number of telephone calls to me from attorneys of any section of the Trust Code. Almost all the callers asked the same question: Can section 633A.2203 be used to remove a trustee or to add a provision to the trust, allowing the beneficiaries to remove a trustee and appoint a successor trustee? The answer I gave to this question is, “No, section 633A.2203 cannot be used for such a purpose.” The reason for that answer to the question, as I discussed in detail in my previous article, is section 633A.2203 is the Trust Code’s version of the *Clafin* doctrine.¹²⁷ “The *Clafin* 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.”¹²⁸ Because most of the cases at common law involved termination, questions involving the type of provisions to which the doctrine applied rarely came

125. *Helvering v. Helmholtz*, 296 U.S. 93, 96–97 (1935).

126. *Id.* at 97 (citing RESTATEMENT (FIRST) OF TRUSTS §§ 337, 338 (1935)). In fairness, one change in the section from the common law is that virtual representation is permitted, which was not the case at common law in termination proceedings. See Martin D. Begleiter, *Serve the Cheerleader—Serve the World: An Analysis of Representation in Estate and Trust Proceedings and Under the Uniform Trust Code and Other Modern Trust Codes*, 43 REAL PROP. TR. & EST. L.J. 311, 351–57 (2008).

127. Begleiter, *supra* note 1, at 196–200.

128. *Id.* at 196 (citing RESTATEMENT (SECOND) OF TRUSTS § 337 (1957)); see *Clafin v. Clafin*, 20 N.E. 454 (Mass. 1889).

up. An examination of the Trust Code, however, makes it absolutely clear section 633A.2203 applies only to dispositive—distributive—provisions.¹²⁹ This is obvious because *the very next section* of the Trust Code—section 633A.2204—provides for modification of *administrative* provisions and sets different rules for these provisions.¹³⁰ Given this sequence, it is clear section 633A.2203 applies only to dispositive provisions.

This would have been the end of the discussion, except for a report by some lawyers of a decision made in a case raising this question. This court decision made it necessary to modify the section to make it clear section 633A.2204 only applied to dispositive provisions.

I believe, quoting the Issue Paper prepared on the subject,

Termination of a trust [prematurely], being in violation of a testator's directions, should be difficult, even considered as a matter of balancing the interests of beneficiaries against upholding the settlor's intent. This was the case at common law, where it was uniformly held that virtual representation did not apply in termination proceedings. Consent of all the beneficiaries was required. This was often impossible to obtain, because in most cases there were unborn beneficiaries. I am convinced that the common law rule was correct as regards termination of a trust, and that under the Trust Code it should be difficult to terminate a trust.¹³¹

Five proposals were presented to the Section. They were:

1. Return section 633A.2203 to the common law rule by adding “dispositive provisions” to the title and to subsection 1 and not allowing virtual representation in such proceedings.
2. Add Proposal 1 and an amendment providing a more lenient rule to section 633A.2204, allowing modification of a trust when the modification would not violate a material purpose of the trust. Virtual representation would be allowed on modifications.
3. Restrict section 633A.2203 to termination, as modified by proposal 1, and leave modification uncovered in the Trust Code and subject to

129. To make it easier, one could call them “who gets what” provisions.

130. See IOWA CODE § 633A.2204 (2009).

131. Probate & Trust Law Section, The Iowa State Bar Ass'n, Proposed Amendments to the Iowa Trust Code 2 (2009) (on file with author).

common law.

4. Add Proposal 1 and additional grounds to remove the trustee in section 633A.4107. This was based on the idea that the lawyers consulting me on this question could not fit the reasons they wanted the trustee removed under section 633A.4107 as currently stated. However, when suggestions were solicited for additions to the grounds for removing trustees, three of the five reasons suggested were already in the statute, one was partially covered, and the other could be easily added. The fact this alternative was not seriously debated convinced the Reporter the problem did not lie with the grounds of removal being insufficient.¹³²

5. Lastly, an intriguing provision of the South Dakota statute was presented to the Section, together with a proposal based on that statute.¹³³ The proposal was to amend section 633A.2203 to allow termination of a trust only under section 633A.2205—trusts where the trust property is insufficient to justify the costs of administration of the trust—where continuation of the trust under its existing terms would defeat or substantially impair the accomplishment of the trust purposes and to replace section 633A.2204 with the following:

1. An irrevocable trust may be modified by the court with the consent of all the beneficiaries if the modification will substantially further the settlor's purposes in creating the trust.
2. In making this determination, the court shall give appropriate weight to the settlor's choice of trustee. Parol evidence of the settlor's intent may be considered by the court where appropriate.
3. For purposes of this section, the consent of a person who may bind a beneficiary is considered the consent of the beneficiary.¹³⁴

132. *Id.*

133. *See* S.D. CODIFIED LAWS § 55-3-26 (2004 & Supp. 2010) (“On petition by a trustee or beneficiary, the court may modify the administrative or dispositive terms of the trust or terminate the trust if, because of circumstances not anticipated by the trustor, modification or termination of the trust would substantially further the trustor's purposes in creating the trust. Upon termination of a trust under this section, the trust property shall be distributed in accordance with the trustor's probable intention.”).

134. Probate & Trust Law Section, The Iowa State Bar Ass'n, Proposed

The Section, in its meeting in May 2008, voted not to change section 633A.4107 at that time. The Section directed the Trust Code Committee to propose an amendment to section 633A.2203 to make the section applicable only to dispositive provisions and to make clear that a provision modifying the trust terms to remove trustees, or to insert a provision allowing a beneficiary or group of beneficiaries to remove trustees and appoint successor trustees, was not allowed under section 633A.2203. This proposal was adopted by the Section at its August 2008 meeting and enacted into law.¹³⁵

2. *Spendthrift and Discretionary Clauses Presumptively Demonstrate Continuing Material Purpose*

In my previous article, I discussed the fact the Restatement (Second) of Trusts considered both a spendthrift clause and a provision giving the

Amendments to the Iowa Trust Code 2 (2009) (on file with author).

135. The section, as amended, now reads:

An irrevocable trust may be terminated or its dispositive provisions 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.

Upon termination of the trust, the court shall order the distribution of trust property in accordance with the probable intention of the settlor.

For purposes of this section, the consent of a person who may bind a beneficiary is considered the consent of the beneficiary.

For the purposes of this section, removal of the trustee or the addition of a provision to the trust instrument allowing a beneficiary or a group of beneficiaries to remove the trustee or to appoint a new trustee shall not be allowed as a modification under this section. This subsection shall not operate to limit the scope of dispositive provisions for the purposes of this section.

2009 Iowa Acts 229.

It will be interesting to see whether the Section pursues the proposal based on the South Dakota statute in the future. The amendment enacted by the 2009 legislature also contains a special effective-date provision. The amendment applies to all proceedings instituted “to modify dispositive provisions of or to terminate an irrevocable trust on or after July 1, 2009, regardless of the date the trust was created.” *Id.* The effective-date provision reinforces the analysis made in the text that the amendments conform the section to its original intention rather than making substantive changes in the rule. Had the rule been seen as changing the law, the effective-date provision might have stated the amendments apply to irrevocable trusts created on or after July 1, 2009.

trustee discretion in distributions as evidence a material purpose of the trust remained to be accomplished.¹³⁶ I noted a draft of the UTC had changed this rule and the drafters of the Iowa Trust Code chose not to follow the UTC in this regard.¹³⁷ However, the drafters of the Iowa Trust Code chose not to specify that spendthrift clauses and discretionary provisions constituted a material purpose remaining to be accomplished because the UTC was in draft form at the time and the authors of the Iowa Trust Code hoped the position might be reversed, and also because Iowa courts have been quite liberal in finding material purposes remaining to be completed when termination has been requested.¹³⁸

After the Iowa Trust Code was enacted, comments *d* and *e* of the Restatement (Third) of Trusts section 65 purported to reverse the rule of the Restatement (Second) as to both spendthrift trusts and discretionary trusts.¹³⁹ However, neither the provision of the UTC nor the Restatement (Third) has met great success in this regard. The Uniform Law Commissioners (ULC) were forced to bracket section 411(c) in 2004 because many states adopting the UTC did not adopt that section.¹⁴⁰ The Restatement provision has not, to date, influenced courts to change their positions on spendthrift and discretionary clauses.

On December 17, 2009, the Iowa Court of Appeals decided *In re Weitzel*.¹⁴¹ Mary Weitzel created a will leaving all of her assets in a discretionary trust for her daughter and, on the daughter's death, to her grandsons.¹⁴² The trust contained a spendthrift clause.¹⁴³ The testator's daughter and grandsons petitioned to terminate the trust, alleging it was created to avoid subjecting the trust to the daughter's debts due to the

136. Begleiter, *supra* note 1, at 197–200, 198 n.188, 199 n.190 (citations omitted).

137. *Id.* at 198–99, 199 n.190. The UTC contained this provision in its final draft. UNIF. TRUST CODE § 411(c) (amended 2004).

138. Begleiter, *supra* note 1, at 197–99, 197–98 n.181, 199 n.190.

139. See RESTATEMENT (THIRD) OF TRUSTS § 65 cmts. d, e (2003).

140. Bracketing a provision in a uniform law signals the ULC does not expect uniformity on the provision, making it optional in effect. See UNIF. TRUST CODE § 411 cmt.

141. *Stricker v. First Citizens Trust Co. (In re Trust of Weitzel)*, No. 09-0447, 2009 WL 4842807, at *6 (Iowa Ct. App. Dec. 17, 2009).

142. See *id.* at *1.

143. See *id.* at *2.

financial troubles of the daughter and her husband.¹⁴⁴ The petition alleged the “debt concerns [were] resolved and there [was] no purpose in having the Trust.”¹⁴⁵ The court denied the application to terminate because, on the facts presented, material purposes—preventing the sale of the farmland and protecting the farmland from the daughter’s creditors—remained to be completed.¹⁴⁶ In an admirably thorough opinion, the court extensively discussed the UTC and Restatement (Third) provisions and Iowa’s rejection of the UTC approach.¹⁴⁷ However, the court did not decide whether a spendthrift clause presumptively established that a material purpose of the trust remained to be completed.¹⁴⁸ In view of the question being raised in the *Weitzel* case, the Trust Code Committee offered—and the Section adopted—a proposal to state affirmatively that these provisions presumptively demonstrated a material purpose of the trust remained to be completed.¹⁴⁹

D. *Section 633A.2205—Noncharitable Trust with Economically Low Value*

This section permits termination or modification of a trust “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.”¹⁵⁰ If a trust is terminated under this section, the trust property is distributed “in accordance with the probable intention of the settlor under the circumstances.”¹⁵¹ In the first set of Issue Papers, I raised the question of how the probable intention of the settlor was determined and noted the statute contained no indicator of whether

144. *Id.* at *3.

145. *Id.* at *2.

146. *Id.* at *4–6.

147. *See id.*

148. *See id.* The material purpose was the protection of the trust assets from the beneficiary’s creditor. *Id.* at *5.

149. The proposal will be submitted to the Iowa Legislature in the 2011 session and seeks to add a new subsection, 5, to section 633A.2203. This subsection reads: “A spendthrift provision or a provision giving the trustee discretion to distribute income or principal to a beneficiary, or among beneficiaries, in the terms of the trust is presumed to constitute a material purpose of the trust.” H.F. 609, 86th Gen. Assemb. (Iowa 2011).

150. IOWA CODE § 633A.2205(1) (2009).

151. *Id.* § 633A.2205(2).

extrinsic evidence was admissible.¹⁵² I proposed adding a sentence to provide, “[E]xtrinsic evidence is admissible for the purpose of ascertaining the probable intention of the donor.”¹⁵³ This was approved by the Section and enacted by the legislature.¹⁵⁴

E. *Section 633A.2206—Reformation—Tax Objectives*

The first set of Issue Papers raised the question of whether clear and convincing evidence was required to reform a trust.¹⁵⁵ My suggestion to require clear and convincing evidence and reword subsection 1 of the section was enacted by the legislature.¹⁵⁶

F. *Section 633A.2208—Division of Trusts*

The amendment to this section was suggested by the Reconciliation Committee. Part of the recommendation of that committee involved the repeal of former section 633.703A of the Probate Code, which was inconsistent with section 633A.2208 in several respects. However, former section 633.703A of the Probate Code included examples of certain types of tax-motivated divisions that were not expressly enumerated in section 633A.2208.¹⁵⁷ It was thought beneficial to practitioners and their clients to include this list for reference. The list was only intended to be illustrative and not exhaustive of the types of divisions allowed. Nevertheless, the list

152. MARTIN D. BEGLEITER, ISSUE PAPER, IOWA CODE, NONCHARITABLE TRUST WITH UNECONOMICALLY LOW VALUE.

153. *Id.*

154. 2002 Iowa Acts 192.

155. MARTIN D. BEGLEITER, ISSUE PAPER, IOWA CODE, REFORMATION—TAX OBJECTIVES (citing RESTATEMENT (THIRD) OF PROPERTY § 12.1 cmt. c (Tentative Draft No. 1, 1995)) (suggesting section 633.2206(1) could be reworded to require “clear and convincing evidence 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” (quoting UNIF. TRUST CODE § 415)).

156. 2002 Iowa Acts 192. Subsection 1 was rewritten to provide:

The court may reform the terms of the trust, even if unambiguous, to conform to the settlor’s intent if it is proved by clear and convincing evidence that the settlor’s intent and the terms of the trust were affected by a mistake of fact or law whether expressed or induced.

Id.

157. Compare IOWA CODE § 633.703A(1) (2003) (including examples of tax-motivated divisions), with IOWA CODE § 633A.2208(3) (2009) (omitting such language).

of tax purposes for divisions of trusts is useful, although one wonders why a similar subsection was not added to section 633A.2207 on combinations of trusts.¹⁵⁸ Perhaps more concerning is the final clause of subsection 3, allowing division of a trust “to facilitate the administration of a trust.”¹⁵⁹ While this may aid many trusts in beneficial ways, such as allowing different children to have diverse investment policies for trusts, the breadth of the clause could, in the future, engender unnecessary litigation. I, however, am not aware of any current problems in this regard.

VI. SUBPART C—CREDITOR RIGHTS, SPENDTHRIFT TRUSTS, AND DISCRETIONARY TRUSTS

The group of sections on the rights of creditors and beneficiaries has been changed and broadened perhaps more than any other group of Trust Code sections. Originally composed of three sections and generally concerned with spendthrift trusts, this subpart has expanded to seven sections and includes several other topics as well.

Because a major reorganization of these sections occurred in 2008, including extensive renumbering, this topic will be dealt with in two parts. The first part will discuss changes from 2000 to 2007, and the second will deal with the 2008 reorganization.¹⁶⁰ In Part A, addressing the changes before 2008, I will cite in the footnotes the 2008 revised section number to give the reader an additional method for tracking the changes.

158. See IOWA CODE § 633A.2207 (2009). The Restatement (Third) allows dividing and combining trusts, and many of the instances covered in the comments involve tax elections. RESTATEMENT (THIRD) OF TRUSTS § 68 cmt. b (2003). Perhaps the reason a similar list was not included in section 633A.2207 is most tax advantages are gained by divisions, as opposed to combinations, of trusts. Examples are a division of Qualified Terminable Interest Property (QTIP) trusts into two trusts, for one of which a reverse-QTIP trust election is made for generation-skipping tax purposes, or a division of a marital trust into two trusts, for only one of which a QTIP election is made.

159. IOWA CODE § 633A.2208(3).

160. I was neither the instigator nor primary drafter of the revisions to these sections. This honor belongs to Hap Volz of Davenport, Iowa. I was, however, involved in these changes and have extensive notes concerning them. Any errors in the description of these changes are solely mine.

*A. Changes Prior to 2008*1. *Section 633A.2301—Spendthrift Protection Recognized*

Section 633A.2301 started as a modest section recognizing spendthrift trusts and prohibiting both creditors from reaching the beneficiary's interest and the beneficiary from transferring the interest. The 2004 changes made in this section began in the first set of Issue Papers. At that time, they were focused on then-section 633.2302(2) regarding exceptions to spendthrift clauses, which excepted distributions or events terminating or partially terminating the trust from the recognition of spendthrift trusts.¹⁶¹ I believed the exemption was unclear.¹⁶² It could be interpreted as meaning a distribution or a full or partial termination would be made to the creditor instead of to the beneficiary because spendthrift protection for the beneficiary's interest would end, or partially end, on the trust's full or partial termination.¹⁶³ The section could also refer to overdue distributions.¹⁶⁴ Work continued on this section over the next several years, focusing on rephrasing subsection 2 with a provision based on UTC section 506, which deals with overdue distributions. The Trust Code Committee proposed a change along those lines in 2002, but this proposal was withdrawn due to a concern it could subject the beneficiary's interest in a spendthrift trust to garnishment or attachment. While researching this issue, the Committee concluded the provisions were properly included under spendthrift trusts, rather than exceptions. In 2003, a revised proposal was placed before the Section to retain the text of then-section 633.2301 under new subsection 1, which followed a slightly modified introductory phrase. New subsections were added, proposing that a creditor could reach a mandatory overdue distribution—one not made within a reasonable time after the required date of distribution—defining “mandatory distribution,” and limiting the remedies available to creditors who apply for a court order compelling the trustee to pay the creditor either the lesser of the amount of the debt or the mandatory distribution.¹⁶⁵ Additionally, in partial response to another prominent issue on the

161. MARTIN D. BEGLEITER, ISSUE PAPER, IOWA CODE, EXCEPTIONS TO SPENDTHRIFT PROTECTION.

162. *Id.*

163. *See id.*

164. *Id.*

165. These provisions were based partly on the UTC. *See* UNIF. TRUST CODE §§ 504(b), 506 (amended 2004).

Section's agenda at the time, the Committee added a subsection providing limited protection to discretionary distributions in a discretionary support trust containing a spendthrift clause.¹⁶⁶ The section became much more extensive, dealing not only with spendthrift trusts, but also overdue distributions.¹⁶⁷

166. The issue was whether, and if, discretionary support trusts should or could be eliminated in Iowa. *See infra* Parts VI.B, XIII (discussing the 2008 changes and section 633A.4702, respectively).

167. The revised section 633.2301—new sections 633A.2302(1), 633A.2307, and 633A.2305(1)—provided:

Except as otherwise provided in section 633.2302, all of the following provisions shall apply:

1. A term of a trust providing that the interest of a beneficiary is held subject to a “spendthrift trust”, [sic] or words of similar import, is sufficient to restrain both voluntary and involuntary transfers of the beneficiary's interest.

2. a. A creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal, including a distribution upon termination of the trust, if the trustee has not made the distribution to the beneficiary within a reasonable time after the required distribution date.

b. For the purposes of this subsection, “mandatory distribution” means a distribution required by the express terms of the trust of any of the following:

(1) All of the income, net income, or principal of the trust.

(2) A fraction or percentage of the income or principal of the trust.

(3) A specific dollar amount from the trust.

c. A distribution that is subject to a condition shall not be considered a mandatory distribution.

3. If a creditor or assignee of a beneficiary is permitted to reach a mandatory distribution under this section, the sole remedy of the creditor or assignee shall be to apply to the court having jurisdiction of the trust after such reasonable period of time has expired for a judgment ordering the trustee to pay to the creditor or the assignee a sum of money equal to the lesser of the amount of debt or assignment, or the amount of the mandatory distribution described in subsection 2. No other remedy, including but not limited to, attachment or garnishment of any interest in the trust, recovery of court costs or attorney fees, or placing a lien of any type on any trust property or on the interest of any beneficiary in the trust, shall be permitted or ordered by any court. Any writing signed by the beneficiary allowing any remedy other than payment of the mandatory distribution not made to the beneficiary within a

2. Section 633A.2302—Exceptions to Spendthrift Provisions

a. *Change Made.* As mentioned in the previous subsection, the Committee was uncertain of the purpose of former subsection 633A.2302(2). It was deleted in 2004, accompanied by a minor change of wording in the section.¹⁶⁸

b. *Amendment Not Adopted.* In my previous article, I made reference to the fact the drafters of the Trust Code decided not to include an exception to spendthrift trusts for claims against the beneficiary for child support and alimony, primarily because of the controversy surrounding this issue and fear the Trust Code could be delayed or rejected if that issue was included.¹⁶⁹ Of course, that did not mean the inclusion of an exception for spousal and child support did not have supporters, chief of which was Professor Sheldon F. Kurtz of the University of Iowa College of Law. I did promise Professor Kurtz his proposal would be presented to the Section once the Trust Code was established. In August of 2002, Professor Kurtz proposed such an exception. The proposal, presented to a Section meeting on October 25, 2002, in Iowa City, was soundly defeated.¹⁷⁰ Thus,

reasonable time after the required distribution date shall be void and shall not be enforced by any court.

4. A creditor or assignee of a beneficiary of a spendthrift trust shall not compel a distribution that is subject to the trustee's discretion if any of the following apply:

a. The distribution is expressed in the form of a standard distribution.

b. The trustee has abused its discretion.

2004 Iowa Acts 34 (codified at IOWA CODE §§ 633A.2302(1), 633A.2307, 633A.2305(1) (2009)). Due to an error in the 2004 legislation, the 2005 amendments made minor changes in subsection 4. See 2005 Iowa Acts 120, 122–23. “[S]hall” was changed to “may” and “if any of the following apply” was changed to “despite the fact that.” *Id.* at 120. After the 2008 changes, subsection 1 of section 633A.2301 was relocated as subsection 1 of section 633A.2302. See § 633A.2302(1). The remainder of former section 633A.2301 is located in new subsection 633A.2307, except for subsection 4, which was relocated as 633A.2305(1) and is no longer dependent on a spendthrift provision. *Id.* §§ 633A.2305(1), 633A.2307.

168. 2004 Iowa Acts 34. “[O]f the following” was deleted from the introductory clause. *Id.* In the 2008 changes, the section was relocated as section 633A.2303. 2008 Iowa Acts 428.

169. Begleiter, *supra* note 1, at 211–12, 211 n.271, 211–12 nn.275–78.

170. See Letter from Michel Nelson, Vice President, Iowa Sav. Bank, to Martin

no such proposal has been submitted to the legislature.

3. *Section 633A.2303—Amount Reachable by Creditors or Transferees*

The only change in this section prior to 2008 was the addition of a new subsection, 3, first suggested by Bill Brown of Brown, Winick, Graves, Gross, Baskerville & Schoenebaum, P.L.C.¹⁷¹ The amendment was a response to Revenue Ruling 2004-64.¹⁷² The ruling involved the gift and estate taxes of an intentionally defective grantor trust (IDGT).¹⁷³ The Trust Code amendment provided an irrevocable trust would not become subject to creditors' claims solely due to a trust provision allowing the trustee to reimburse the settlor for income taxes paid on the trust's income. It created a narrow exception to the general rule of section 633A.2203, which should have no real effect on creditors' rights.

Begleiter, Professor, Drake Univ. Law Sch. 3 (Nov. 2002) (on file with author).

171. Probate & Trust Law Section, The Iowa State Bar Ass'n, Proposed Amendments to the Iowa Trust Code 1 (2005) (on file with author). In 2008, the section was relocated as 633A.2304. 2008 Iowa Acts 428.

172. Rev. Rul. 2004-64, 2004-27 I.R.B. 7-9.

173. An IDGT is an irrevocable trust deliberately set up by a grantor to take advantage of the differing rules for income tax, on one hand, and estate and gift tax, on the other. An IDGT contains provisions making the trust a grantor trust, so all or part of the trust's income is taxed to the grantor. However, the creation of the trust is a gift for gift tax purposes and is not included in the grantor's estate for estate tax purposes. Because the grantor is subject to income tax on the trust income of an IDGT, the trust is often drafted to require or permit the trust to reimburse the grantor for income taxes payable by the grantor on trust income. Revenue Ruling 2004-64 held reimbursement of such income taxes pursuant to a mandatory or permissive reimbursement provision has no gift tax consequences, but reimbursement pursuant to a mandatory provision will cause the trust to be included in the grantor's gross estate under Internal Revenue Code section 2036(a)(1). Rev. Rul. 2004-64, 2004-27 I.R.B. 9. However, a provision giving a trustee not related or subordinate to the grantor discretion to reimburse the grantor for income taxes paid on trust income will ordinarily not cause inclusion of the trust in the gross estate of the grantor for estate tax purposes. The ruling states, however, a discretionary reimbursement provision could result in inclusion of the trust in the grantor's estate if applicable local law subjects the trust assets to the claims of the grantor's creditor. *Id.*

Research on the matter indicated it was possible Iowa Code section 633.2303 could permit the IRS to argue this provision subjected the trust assets to creditors' claims, and Iowa law was unclear on the question.

B. 2008 Changes (Except Sections 633A.2302(3), 633A.2305(2), and 633A.2306(2))

Shortly following the 2004 and 2005 changes to the spendthrift trust provisions, the Trust Code Committee began to discuss a major reorganization and rewriting of this part of the Trust Code. The problem was that the part had expanded from the short recognition of spendthrift trusts and exceptions to include overdue distributions and provisions on discretionary trusts.¹⁷⁴ The committee proposed a reorganization as follows:

1. General statement on creditor's rights—§ 633A.2301.
2. Spendthrift trusts—§ 633A.2302.
3. Spendthrift trusts for the benefit of the settlor—§ 633A.2203 and 633A.2304.
4. Discretionary trusts—§§ 633A.2305 and 633A.2306.
5. Overdue distributions—§ 633A.2307.¹⁷⁵

The reasons for the proposal were for clarification purposes and clearer ordering of the subjects covered.¹⁷⁶ In the presentation to the Section, I emphasized very little of the proposal was new.¹⁷⁷ After much discussion, the Committee agreed on the following proposals and presented them to the Section.

174. Probate & Trust Law Section, The Iowa State Bar Ass'n, Proposed Amendments to the Iowa Trust Code 1 (2008) (on file with author).

175. *Id.* at 2.

176. *Id.*

177. *Id.*

1. *Section 633A.2301—Rights of Beneficiary, Creditor, or Assignee*¹⁷⁸

This section is new and was included in order to remedy the situation of not having a general section on creditors' rights in the Trust Code. The initial omission was due to the inability to locate a member of the Section who was knowledgeable on creditors' remedies. The Section was fearful of creating new creditor remedies inadvertently. This problem was solved by suggestions from several knowledgeable attorneys and consultation with the Commercial Law and Bankruptcy Section. The comments emphasized the section did not intend to specify the procedures or remedies for reaching a beneficiary's interest, leaving those issues to the laws on creditors' rights.¹⁷⁹

178. The section as proposed provided:

To the extent a beneficiary's interest is not subject to a spendthrift provision, and subject to sections 633A.2305 and 633A.2306, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by levy, attachment, or execution of present or future distributions to or for the benefit of the beneficiary or other means.

Id. at 3.

The proposed language of section 633A.2301 was based on section 501 of the UTC. The Commercial and Bankruptcy Law Section had some concerns over the interpretation of the initial last sentence—"The court may limit the award to such relief as is appropriate under the circumstances"—in light of the recent bankruptcy developments on self-settled trusts. UNIF. TRUST CODE § 501 (amended 2004). I agreed to delete this sentence for the final proposed amendment because section 633A.6202 and the common law would give the court broad discretion in fashioning a remedy in any event. The Commercial Law and Bankruptcy Section also suggested the insertion of "levy" prior to "attachment" and the words "or execution" following "attachment."

179. Probate & Trust Law Section, The Iowa State Bar Ass'n, Proposed Amendments to the Iowa Trust Code 3 (2008) (on file with author).

2. *Section 633A.2302—Spendthrift Protection Recognized*¹⁸⁰

Subsection 1 was subsection *c* of former section 633A.2301. Subsection 2 was new and derived from UTC section 502(c). It became necessary when the “mandatory distribution” provisions, formerly in section 633A.2301, were relocated.¹⁸¹

3. *Section 633A.2303—Spendthrift Trusts for the Benefit of Settlor*

This section was formerly section 633A.2302 and has been relocated without change.¹⁸²

4. *Section 633A.2304—Amount Reachable by Creditors or Transferees of Settlor*

This section was formerly section 633A.2303 and has been relocated without change.¹⁸³

5. *Section 633A.2305(1)—Discretionary Trusts—Effect of Standard*

Although the section is new, it is quite similar to former section 633A.2301(4).¹⁸⁴ The only difference is the addition of the phrase

180. Current section 633A.2302 provides, in part:

Except as otherwise provided in section 633A.2303:

1. A term of a trust providing that the interest of a beneficiary is held subject to a “*spend thrift trust*”, [sic] or words of similar import, is sufficient to restrain both voluntary and involuntary transfer, assignment, and encumbrance of the beneficiary’s interest.

2. A beneficiary shall not transfer, assign, or encumber an interest in a trust in violation of a valid spendthrift provision, and a creditor or assignee of the beneficiary of a spendthrift trust shall not reach the interest of the beneficiary or a distribution by the trustee before its receipt by the beneficiary.

IOWA CODE § 633A.2302 (2009).

181. Probate & Trust Law Section, The Iowa State Bar Ass’n, Proposed Amendments to the Iowa Trust Code 5–6 (2010) (on file with author).

182. 2008 Iowa Acts 428.

183. *Id.*

184. The section as proposed read:

[1.] Whether or not a trust contains a spendthrift provision, a creditor or assignee of the beneficiary ~~may~~ [shall] not compel a distribution that is subject

“[w]hether or not a trust contains a spendthrift provision.” That phrase was included to clarify the rule applies to both spendthrift and discretionary trusts.¹⁸⁵

6. *Section 633A.2306(1)—Court Prohibited from Exercising Trustee’s Discretion*

The proposal for this new section, as modified slightly in the legislative drafting, was as follows:

If a trustee has discretion as to payments to a beneficiary, and refuses to make payments or exercise its discretion, the court shall neither order the trustee to exercise its discretion, nor order payment from any such trust, if any such payment would inure, directly or indirectly, to the benefit of a creditor of the beneficiary.¹⁸⁶

Unlike the other sections involved in the reorganization, this section has no counterpart in the previous Trust Code sections and requires some explanation.

The common law rule was, where a trustee with discretion over making distributions refused to make a distribution, a creditor could not sue to force the trustee to make a distribution.¹⁸⁷ Said otherwise, a creditor is forbidden from compelling a distribution from a trust where distributions are subject to the trustee’s discretion, “even if the trustee . . . has abused a discretion. . . . [T]he power to force a distribution due to an abuse of discretion . . . belongs solely to the beneficiary.”¹⁸⁸

to the trustee’s discretion, even if [any of the following occur]; ~~or~~ [:]

[a.] The discretion is expressed in the form of a standard of distribution.

[b.] The trustee has abused its discretion.

Probate & Trust Law Section, The Iowa State Bar Ass’n, Proposed Amendments to the Iowa Trust Code 10 (2008) (on file with author). The bracketed words and strikethroughs were made by the Legislative Bill Drafting Bureau. They do not alter the meaning of the section as proposed.

185. That probably would have been the holding under the former section 633A.2301(4), but the title of the section—“Spendthrift Protection Recognized”—created some doubt on the question.

186. Probate & Trust Law Section, The Iowa State Bar Ass’n, Proposed Amendments to the Iowa Trust Code 11 (2008).

187. BOGERT, *supra* note 92, at 160–61. Of course, the beneficiary could challenge the trustee for an abuse of discretion, though a creditor could not.

188. UNIF. TRUST CODE § 504 cmt. (amended 2004). The UTC also includes a

Because this was the invariable rule at common law, one might wonder why it was necessary to state it in the Trust Code. A California case, *Ventura County Department of Child Support Services v. Brown*, made it necessary.¹⁸⁹ In *Brown*, a mother created a spendthrift trust for her sons.¹⁹⁰ The trust was totally discretionary, but it was to be administered for “the trustee to provide for the proper support, care, maintenance and education” of the children.¹⁹¹

One of the sons, Kenneth Marinos, failed to pay child support for six of his children for about fifteen years.¹⁹² The Ventura County Department of Child Support Services (Child Support Services) obtained a judgment against Marinos for arrears and ongoing monthly support totaling about \$140,000.¹⁹³ The mother of two of Marinos’s children and Child Support Services sued the trustee to collect the judgments.¹⁹⁴ The trustee argued his broad discretion as trustee justified his refusal to make a distribution from the trust.¹⁹⁵ The court disagreed, ordering the trustee to pay the support due over the trustee’s objection.¹⁹⁶ The court held the strong public policy favoring payment of support, together with an unusual California statute permitting the court to satisfy a support judgment from payments which the beneficiary has a right to compel,¹⁹⁷ meant refusal of payment was not

failure to comply with a standard for distribution as being subject to this rule. *Id.* However, the UTC eliminates the distinction between discretionary and support trusts, with a standard stated in the trust being one factor for the trustee to consider in exercising his discretion. *Id.*; see also RESTATEMENT (THIRD) OF TRUSTS §§ 50(2) & cmts. d–f, 58 cmt. d(2), 60 & cmts. a, c, e (2003) (providing a fuller explanation and the origin of this approach). The approach of the Restatement (Third) and the UTC is not taken in the Iowa Trust Code. However, the general idea—quoted from the UTC in the text—that only a beneficiary, and not a creditor, can attack a trustee’s failure to exercise discretion, by refusing to make a distribution, is at the heart of section 633A.2306.

189. *Ventura Cnty. Dep’t of Child Support Servs. v. Brown*, 11 Cal. Rptr. 3d 489 (Ct. App. 2004).

190. *Id.* at 492.

191. *Id.*

192. *Id.* at 491.

193. *Id.* at 496–97.

194. *Id.* at 492. Under California law, child support is an exception to the rule protecting spendthrift trusts from creditors’ claims. *Id.* at 494. This rule differs from the Iowa rule, which does not recognize this exception. See IOWA CODE §§ 633A.2301–.2307 (2009).

195. *Brown*, 11 Cal. Rptr. 3d at 493.

196. *Id.* at 499.

197. *Id.* at 497–98 (citing CAL. PROB. CODE § 15305).

within the trustee's discretion.¹⁹⁸

The Trust Code Committee and the Section much preferred the common law rule that a creditor could not compel a distribution over which the trustee has discretion.¹⁹⁹ Only the beneficiary should be able to challenge the trustee for an abuse of discretion.²⁰⁰

7. *Section 633A.2307—Overdue Distribution*

This section was a relocation of subsections 2 and 3 of former section 633A.2301.²⁰¹

C. *Sections 633A.2302(3), 633A.2305(2), and 633A.2306(2)*

The Probate Section bill was moving along in the legislature, as they almost always do, until March 6, 2008, when a state senator sent Jenny Tyler a memorandum listing concerns of the Department of Human Services (DHS) about the bill.²⁰² I proposed a response, pointing out the

198. *Id.* at 498. The California Court of Appeals recognized California Probate Code section 15305 was modeled after a Wisconsin statute. *Id.* at 496. With no California cases interpreting section 15305, the court relied on a single Wisconsin decision involving a trust created by the beneficiary, under which a creditor would be allowed to reach the beneficiary's interest under most trust law. *See id.* at 496–97.

199. Probate & Trust Law Section, The Iowa State Bar Ass'n, Proposed Amendments to the Iowa Trust Code 11–12 (2008) (on file with author).

200. *See* IOWA CODE § 633A.2306 (2009). It is significant that this section is the same as UTC section 504, without the UTC exception for a spousal and child support. UNIF. TRUST CODE § 504(c)(1) (amended 2004).

201. 2008 Iowa Acts 429.

202. Jenny Tyler, affiliated with the law firm of Carney & Appleby, PLC, is legislative counsel for The Iowa State Bar Association. The memorandum stated, as follows:

The legislation affects the Medicaid program and ability to make recoveries under the Estate Recovery program by exonerating a trustee from improper spending of a trust, and allowing a conflict of interest when the trustee is also the residual beneficiary of the trust who then can redirect funds of the trust to be spent in a different way than the trust specifies. This legislation also prohibits the court to order the trustee to exercise its discretion or to order payment from any such trust, if any such payment would inure, directly or indirectly, to the benefit of a creditor of the beneficiary which could be the Medicaid program.

Sections 17–23 that refer to Iowa Code [s]ections 633A.2301 through

633A.2307, and include several new sections, attempt to expand a trustee's powers to the extent far beyond what is reasonable. The manner in which this is being attempted is by taking the current provisions in Iowa Code 633A.2301 and 633A.2302—that specifically apply to “spendthrift provisions” in a trust, and modify those provisions to apply to many other types of trusts.

Spendthrift provisions generally protect a trust beneficiary from himself or herself. So, for example, if parents set aside a large pot of money for a son or daughter beneficiary, and the beneficiary spends his or her own money recklessly, the spendthrift provisions assure the parents that the creditors of the beneficiary can not levy, garnish, or otherwise deplete the funds of the trust. Ordinarily, spendthrift provisions do not apply to Medicaid, because Medicaid is a necessary expenditure, so the current law has had very little, if any, effect on Medicaid estate recovery.

The Study Bill changes these sections and adds four more sections that consequently do not limit their application to just spendthrift trusts. This results in a limitation of creditor's recoveries from trusts, possibly including Medicaid. Specifically, 633A.2305 takes language currently only applicable to spendthrift trusts and also applies them to “discretionary trusts”. [sic] This includes making a creditor unable to compel a distribution even if the [trustee has abused its discretion—Iowa law should not approve of trustees' [sic] abusing the discretion given to them. It is not their money and they should follow the direction that the settlor, who set up the trust, gave them. Ordinarily, the Department would also not be concerned with “discretionary trusts”, [sic] but the trusts where the Department does obtain recovery are from “discretionary support trusts” as approved by the Iowa Supreme Court in *Estate of Barkema*, [sic] 690 N.W.2d 50 (Iowa 2004). The similarity in terms between a “discretionary” trust and a “discretionary support” trust is likely to cause problems in the proposed 633[A].2305.

The proposed 633A.2306 that says that if the trustee has discretion as to payments to a beneficiary, and refuses to make payments, the court shall not order that payment be made from the trust if such a payment would inure to the benefit of a creditor. [sic] This section is particularly bad and may affect Medicaid estate recovery because there is no description as to what type of trusts this provision applies. If the courts apply this section to discretionary support trusts, then the fiscal impact will be at least several hundred thousand dollars per year to the Department in estate recovery dollars, and likely much more in the future.

Memorandum from Dep't of Human Servs. to Jenny Tyler, Legislative Counsel, The Iowa State Bar Ass'n (Mar. 6, 2008) (on file with author).

As will be discussed, this memorandum shows a disconcerting lack of understanding of Iowa law, as well as a clear lack of understanding of what the proposals did:

1. No attempt was made to “extend a trustee's power beyond what is

errors in the DHS memo, which was forwarded to the concerned senator.²⁰³

reasonable.” In fact, as explained above, the proposals merely incorporated into the Trust Code universal common law rules.

2. The only extension made was that some rules were expressly made applicable to any trust where the trustee was given discretion. As pointed out above, this was actually in the Trust Code before 2008, it was simply not as clear.

3. The objections are incorrect in saying the bill makes the rules apply to “discretionary trusts.” The bill provides that the rule applies wherever the trustee has discretion. It does not apply to particular “types” of trusts, and it does not apply when the beneficiary has a right in the trust.

4. As stated above, the fourth and fifth paragraphs are incorrect. Only the beneficiary may challenge an abuse of discretion, and the bill did not change that. It simply made clear a creditor could not challenge an abuse of discretion, as was the rule under the common law.

203. I quote this response in full not to unduly extend this Article, but to acquaint readers with the scope of the DHS’s lack of understanding of the Section’s proposal.

This e-mail is intended to suggest our response to Senator [Hogg] regarding the Probate and Trust Section proposed legislation amending part 3 of the Iowa Trust Code (proposed sections 633A.2301–633A.2307). I suggest that you send a copy of this e-mail and the attachments to Senator [Hogg] as our response. Attached are the proposed amendments to the Trust Code with my comments. The comments were presented to the Probate and Trust Law Section when the proposals were discussed and explain the amendments.

Three types of trusts are involved in the DHS memorandum and the proposals: Spendthrift trusts (or more properly, trusts containing spendthrift clauses), discretionary support trusts and fully discretionary trusts. An analysis of the proposals on each of these types of trusts will reveal that the DHS’s interests are totally unaffected by any of the proposed amendments.

First, spendthrift trusts. The DHS memorandum claims to have an interest in such trusts since it furnished necessities. Without evaluating whether or not that statement is true, four of the seven sections of the proposal affect spendthrift trusts (proposed sections 633A.2301–633A.230[4]). Section 633A.2301 is new, but merely is a general section on creditors['] rights. It certainly has no effect [on] the rights of DHS. Even the reference to 633A.2305 and 633A.2306 does not affect the rights of DHS, as will be discussed subsequently.

The remaining sections of the proposal concerning spendthrift trusts, sections 633A.2302–633A.2304, are, with one small exception, already part of the Trust Code. They are merely relocated in order to more clearly state the law and

separate the provisions concerning spendthrift trusts from those concerning discretionary trusts. The rights of DHS are clearly not affected by any of the sections that are already in the Trust Code, since they are merely restated provisions of current law. The only new part of these sections is in subsection 2 of 633A.2302. It merely states the current (and common) law that a beneficiary of a spendthrift trust may not transfer, assign or encumber his or her interest in a spendthrift trust and a creditor may not reach the interest until payment to the beneficiary. Since, according to the DHS memo, DHS proceeds under an exception to the spendthrift rules by furnishing necessities, the new subsection does not affect its rights.

Second, discretionary support trusts. The reason DHS has an interest in such trusts is that the trusts contain the word “support”. [sic] The Supreme Court in In the Matter of the George G. Barkema Trust, 690 N.W.2d 50 (2004), the case cited by DHS, ruled that the inclusion of that word in the trust gives the beneficiary the right to a minimum amount of support, a right which gives the beneficiary an interest in the trust which the beneficiary’s creditors have a right to reach. It is absolutely clear that the Supreme Court viewed support as a right which is enforceable by the beneficiary against the trustee. The court in Barkema stated: “inclusion of the support language suggests an enforceable standard requiring the trustee to provide a minimum level of support to the beneficiary.” Barkema, 690 N.W.2d at 54–55, quoting Bohac v. Graham, 424 N.W.2d 144, 146 n. 3 (N.D. 1988). This enforceable right of the beneficiary gave the beneficiary an enforceable interest, which is the basis of the DHS ability to reach the beneficiary’s interest in the trust. Barkema at 55. Stated otherwise, the beneficiary’s right to support is an enforceable right, it is no longer within the trustee’s discretion to deny the beneficiary at least a minimum amount of support. In short, the beneficiary has a right to support and the trustee has no discretion in paying the beneficiary a minimal amount for support. It is a right, not discretion.

Given that support in a discretionary support trusts [sic] is a right, the proposed amendments to the Trust Code say nothing about the enforcement of [a] beneficiary’s rights. Proposed sections 633A.2305 and 633A.2306 involve rules for trusts involving the trustee’s discretion; they say nothing about enforcing a beneficiary’s right to support. Therefore, these sections can in no way affect the rights of DHS. The last new proposed section, 633A.2307, deals with overdue distributions and is merely current sections relocated. Since it is already in the Trust Code, it can in no way affect the rights of DHS in a way that such rights were not previously affected under current section 633A.2301.

To reiterate, since proposed sections 633A.2305 and 633A.2306 involve only matters subject to the trustee’s discretion, and the basis of DHS[']s interest in and ability to reach discretionary support trusts is the right of the beneficiary to a minimum amount of support which is not subject to the trustee’s discretion, these new sections have no effect on the right of DHS under Barkema.

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DHS response merely cited a brief in a pending case that made the argument the former sections did not apply to Medicaid Estate Recovery. The job of an attorney is to argue his or her client's position. Any attorney will argue for the position that benefits his or her client. If proposed legislation was not enacted simply because some attorney might argue it benefitted his or her client, no legislation would ever be enacted.

Lastly, fully discretionary trusts. DHS has no rights in fully discretionary trusts because the beneficiary has no rights (or, in the words of Barkema, no interest) in such trusts that DHS can reach. Therefore, these proposed new sections have no effect on DHS rights because they apply to trusts in which the DHS has no interest.

Therefore, an analysis of the proposed new sections reveals that none of the proposals have any effect on the rights of DHS.

A brief comment on other aspects of the DHS memo [is] in order. The first 2 sentences of the DHS comment are simply incorrect. The sections in no way exonerate a trustee for improper spending of trust funds. Nor do they permit a trustee who is a residuary beneficiary to spend trust funds in a way not permitted by the trust. The sections apply to discretionary trusts (whether or not the trust contains a spendthrift clause), and merely prevent a creditor from forcing the trustee to exercise its discretion, and prohibit the court from ordering the trustee to exercise its discretion to pay a beneficiary when the trustee refuses to do so if such payment would inure to the benefit of a creditor. In short, these sections permit only a beneficiary, not a creditor, to sue the trustee for an abuse of discretion.

Finally, it is true that proposed section 633A.2[3]05, while similar to current subsection 4 of section 633A.2301, extends the rule of that section to discretionary trust[s], in addition to spendthrift trust[s] as in the current section. The reason is that the Probate and Trust Law Section believes that the rule in that proposed section applies equally to discretionary and spendthrift trusts. That rule is that it is the beneficiary, not a creditor, that should have the right to challenge the trustee's exercise of discretion. This is the law in almost every state and, to repeat, this section has absolutely no application to rights of the beneficiary. Proposed section 633A.2306 is indeed new, and is directed at a particular case which is unique in American law. Due to a later decision by another California Court of Appeal, it may not even represent the law in California, where it was decided, but the Probate and Trust Law Section was concerned enough about the case to recommend preventative legislation. It applies only to a trustee's discretion and therefore has no effect on DHS.

I trust this answers Senator [Hogg's] question. I suggest you transmit to Senator [Hogg] this e-mail and the attachment.

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On March 17, 2008, the Legislative Fiscal Bureau prepared a fiscal note on the proposed legislation.²⁰⁴ I was informed the data used in this

E-mail from Martin D. Begleiter, Professor, Drake Univ. Law Sch., to Jim Carney and Jenny Tyler, Legislative Counsel, The Iowa State Bar Ass'n (Mar. 7, 2008, 10:38 CST) (on file with author).

204. The fiscal note stated:

Description

Senate File 2350 relates to trusts and estates, including the administration of small estates. The Bill also includes retroactive and other applicability provisions. Sections 17 through 23 reorganize and restructure current provisions in the trust code relating to creditors' rights, spendthrift trusts, spendthrift trusts for the benefit of the settler [sic], overdue distributions, and creates new provisions relating to creditors' rights and discretionary trusts. According to the Department of Human Services, these sections may affect the Medicaid program and the ability to make recoveries under the Estate Recovery program.

Background

A discretionary trust is a trust where the beneficiaries and/or their entitlements to the trust fund are not fixed, but are determined by criteria set out in the trust instrument by the settlor. Discretionary trusts relate to the discretionary distribution of income, but in some cases the trustees will also have a power of appointment with respect to capital assets.

A spendthrift trust is a trust that is created for the benefit of a person (often because he or she is unable to control spending) that give an independent trustee full authority to make decisions as to how the trust funds may be spent for the benefit of the beneficiary. Creditors of the beneficiary generally cannot reach the funds in the trust, and the funds are not actually under the control of the beneficiary. Spendthrift provisions typically do not apply to Medicaid because Medicaid is a necessary expenditure.

The Iowa Supreme Court in *Estate of Barkema*[,] 690 N.W.2d 50 (Iowa 2004) stated that the Department of Human Services can obtain recovery from discretionary support trusts.

42 United States Code (USC) 1396p (Liens, Adjustments, and Recoveries, and Transfers of Assets) allows States to access and use interests in trusts to repay medical assistance debt.

Based on current Estate Recovery Program experience for FY 2008, the State is currently in litigation with three discretionary support trusts, three cases are pending, and two additional cases are anticipated before the close of the fiscal year.

fiscal note came entirely from state agencies and departments. Indeed, the note gives as the sole source of its data and analysis the DHS.²⁰⁵ Especially important is the first assumption: “This results in the limitation of the creditor’s recoveries from trusts, possibly including Medicaid.”²⁰⁶ Obviously, the proposers of the note did not read the Section’s response to the DHS concerns. Moreover, this was an assumption, not a fact. *Thus, all the figures in the fiscal note were based entirely on an assumption!*

The length of time to complete Estate Recovery proceedings with discretionary trusts varies from case to case, but if litigation is involved, the case can cross multiple fiscal years.

Assumptions

Sections 17 through 23 of the Bill do not limit the application to just spendthrift trusts. This results in the limitation of the creditor’s recoveries from trusts, possibly including Medicaid. This could limit the Medicaid Program’s ability to perform estate recovery functions.

Assumes the impact is a range of one to eight discretionary support trusts per year at an average recovery of \$80,000 to \$100,000 per trust.

The federal participation rate for Medicaid is 62.40% FY 2009 and 62.85% for FY 2010.

Senate File 2350 may result in lost Medicaid dollars for both the State and federal government.

Fiscal Impact

The estimated fiscal impact of SF 2350 ranges from \$34,000 to \$271,000 in lost Medicaid revenue for the State in FY 2009 and from \$33,000 to \$267,000 in lost Medicaid revenue for the State in FY 2010.

	FY 2009		FY 2010	
	One Trust	Eight Trusts	One Trust	Eight Trusts
Federal Share	\$51,160	\$449,280	\$56,565	\$452,520
State Share	\$33,840	\$270,720	\$33,435	\$267,480
Total	\$90,000	\$720,000	\$90,000	\$720,000

Sources

Department of Human Services

FISCAL SERVS. DIV., LEGISLATIVE SERVS. AGENCY, FISCAL NOTE (2008), available at http://www3.legis.state.ia.us/fiscalnotes/data/82_5222SVv0_FN.pdf.

205. *Id.*

206. *Id.*

However, the unfortunate fact was that the Section was not asked to respond to the legislature regarding the data and statistics. Even if the Section could have responded, it would have been required to present compelling rebuttal information and statistics to the legislature. Even when such information is presented, fiscal notes are almost never revised. Moreover, the leaders of the majority party in that session refused to schedule for debate any bills with potential negative fiscal impact or that were controversial. So the dilemma we were faced with was, unless the unwarranted concerns of DHS were satisfied, the Probate Bill would not be debated and would die.

Faced with this situation, I agreed to a meeting with Ben Chatman of Estate Recovery and the lobbyists of DHS and the Bar.²⁰⁷ I was negotiating from a position of extreme weakness because DHS would have been perfectly happy if the bill died. Therefore, I knew the outcome would be unsatisfactory, and all I could do was attempt to limit the damage the changes would cause.

What resulted from this meeting was the addition of subsection 2 of section 633A.2305, subsection 2 of section 633A.2306, and subsection 3 of section 633A.2302. I will discuss sections 633A.2305 and 633A.2306 first because they are quite similar.²⁰⁸

The first, and perhaps most important, fact to remember is DHS wanted to protect its interest in recovering Medicaid payments from discretionary support trusts.²⁰⁹ To explain this, a short discussion of the extent to which Estate Recovery has a right to payments from these trusts is necessary.

207. Representative Geri Huser presided over the meeting. I cannot give Representative Huser enough credit for her patience and persistence in conducting the meeting, keeping the meeting on track, and ultimately forging the compromise that resulted.

208. Section 633A.2305(2) reads: “This section shall not apply to a creditor of a beneficiary or to a creditor of a deceased beneficiary enforcing an interest in a trust, if any, given to a beneficiary by the trust instrument.” IOWA CODE § 633A.2305(2) (2009).

Section 633A.2306(2) provides: “Notwithstanding subsection 1, the court may order payment to a creditor of a beneficiary or to a creditor of a deceased beneficiary if the beneficiary has or had an interest in the trust.” *Id.* § 633A.2306(2).

209. See *infra* Part XIII (discussing section 633A.4702 and the extent to which discretionary support trusts still exist in Iowa).

The leading Iowa case on this question is *In re Barkema Trust*.²¹⁰ *Barkema* involved a testamentary trust created by George Barkema of one-fourth of his estate for his daughter, Lois.²¹¹ The will provided: “‘If possible, only the income from said share shall be used for Lois, however, if necessary for her proper support and maintenance, then the corpus of said trust may be invaded to the extent said trustees deem necessary.’”²¹² No disposition of the remainder of the trust was made after Lois’s death.²¹³ George’s children agreed that, after Lois’s death, the trust would be distributed in equal shares to Lois’s children.²¹⁴ Years later, Lois began residing in a nursing home and received Medicaid benefits of about \$55,000.²¹⁵ After Lois died, the trustee filed a final report recommending the remaining corpus be distributed to Lois’s children.²¹⁶ Health Management Systems, on behalf of DHS, filed a claim for distribution of the corpus to it.²¹⁷

The court classified the trust as a discretionary support trust because the trust could only be invaded if necessary for Lois’s support and maintenance, which is characteristic of a support trust, and because the amount was discretionary with the trustee—as much as the trustee deems necessary, which is characteristic of a discretionary trust.²¹⁸ Because Iowa Code section 249A.5(2)(c) created a debt due DHS payable from Lois’s estate, defined to include “interests in trusts,” and because chapter 249A did not define “interests in trusts,” the court found, “[A] person has an ‘interest’ in the trust to the extent the assets of a trust are actually available to a trust beneficiary, as that term is used in section 249A.5(2)(c).”²¹⁹ The court then stated, “‘In order for an asset to be considered an actually available resource, an applicant must have a legal ability to obtain it.’ This

210. Torgerson v. Barkema (*In re Trust of Barkema*), 690 N.W.2d 50 (Iowa 2004).

211. *Id.* at 52.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* For some reason, the State neither sought to obtain income from the trust nor to compel the trustee to award corpus. *Id.* at 52–53.

216. *Id.* at 53.

217. *Id.* The remaining corpus was about \$18,000. *Id.*

218. *Id.* at 53–54.

219. *Id.* at 53, 55 (citations omitted).

approach is consistent with the purpose of the recovery statute”²²⁰ The court then defined the standard to determine whether Lois had an “interest in the trust,” stating, “The trustee was required to pay Lois, during her lifetime, ‘the amount which in the exercise of reasonable discretion [was] needed for [her] support.’ This gave Lois the *legal ability* to compel the trustee to invade the corpus of the trust and make distributions to her for her support.”²²¹ Concluding, the court held, “[T]he Department acquired Lois’s ‘right that the trustee pay [her] the amount which in the exercise of reasonable discretion is needed for [her] support.’”²²²

In short, when a discretionary support trust is created, *Barkema* holds DHS may enforce its debts against the trust to the extent the trust gives a *legal right* to the beneficiary.²²³ This legal right is what constitutes the beneficiary’s “interest in the trust.”²²⁴ The extent of that enforceable standard is “‘a minimum level of support to the beneficiary’” or “‘the amount which in the exercise of reasonable discretion [was] needed for [her] support.’”²²⁵ It is respectfully suggested that the court did not intend to differentiate between these two phrases.

To the extent of satisfying the beneficiary’s enforceable right, the trustee has no discretion. The beneficiary can compel the trustee to invade the corpus to the extent necessary for the beneficiary’s support.²²⁶ The trustee must make distributions to satisfy the minimum standard. Sections 633A.2305(1) and 633A.2306(1) involve only situations in which the trustee has discretion and do not apply to the extent a beneficiary has a right to compel a distribution.²²⁷ They do not, and were not, intended to apply to a situation in which the beneficiary has a right to compel the trustee to make

220. *Id.* at 55–56 (quoting *Hecker v. Stark Cnty. Soc. Serv. Bd.*, 527 N.W.2d 226, 237 (N.D. 1994)).

221. *Id.* at 56 (alterations in original, emphasis added) (quoting GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 229 (2d ed. 1993)).

222. *Id.* (alterations in original, emphasis added) (quoting BOGERT & BOGERT, *supra* note 221, § 229).

223. *See id.*

224. *See id.*

225. *Id.* at 54–55 (citations omitted).

226. *Id.* at 56. The only question then becomes whether the trustee’s determination of the amount required for the beneficiary’s support was reasonable.

227. IOWA CODE §§ 633A.2305(1), 633A.2306(1) (2009).

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a distribution.²²⁸ Following my meeting with DHS over its objections to these sections, I sent a revised proposal to the Section Council containing the new language that came out of the meeting. My comments on the language added to Section 633A.2305 were:

Subsection 2 was added at the insistence of DHS. I do not believe adding this is a problem, since the section is aimed at preventing creditors from enforcing payments that are subject to the trustee's discretion. If the beneficiary has a right in the trust, such as the right to support, payments for the minimum amount of support are no longer subject to the trustee's discretion. I preferred the word "right" to the term "interest in a trust," but Ben [Chatman, of Estate Recovery] stated that "interest in trust" was a term of art in Medicaid statutes. I do not think it will make any difference.²²⁹

The term "interest in a trust" no doubt originated in Iowa Code section 249A.5.

My comments on subsection (2) of section 633A.2306 were:

The last sentence [subsection 2] is included at the insistence of the Department of Human Services (DHS), even though it is clear that DHS has no rights in a discretionary trust, because the beneficiary of a discretionary trust has no interest in the trust which is enforceable by a creditor. Under Iowa case law, the use of the word "support" turns the trustee's discretion into a right to a minimum amount of support that is independent of the trustee's discretion and that the trustee must pay, giving the beneficiary an interest in the trust which can be reached by DHS and Estate Recovery. *Estate of Barkema*, 690 N.W.2d 50, 54 (Iowa 2004). Since the section [as originally proposed] applies only to discretionary decisions by the trustee, the Probate and Trust Section of The Iowa State Bar Association believes that the last sentence of the section is unnecessary. However, since the last sentence merely recognizes that DHS can enforce rights given to a beneficiary no harm is done by including it.²³⁰

Since the adoption of the 2008 amendments by the legislature, I have had at least a dozen telephone calls from lawyers asking what subsection 2

228. *Id.*

229. MARTIN D. BEGLEITER, ISSUE PAPER, IOWA CODE, COURT PROHIBITED FROM EXERCISING TRUSTEE'S DISCRETION.

230. *Id.*

of sections 633A.2305 and 633A.2306 mean. The first advice I have is the word “interest” in both cases should be read as “right” of the beneficiary. That is all subsection 2 of both sections is intended to reach. Second, the subsections are poorly worded and confusing.²³¹ Third, in my opinion, subsection 2 adds nothing to what is in subsection 1 of sections 633A.2305 and 633A.2306. That being said, language that confuses lawyers should not be included in statutes. It is bad for the law and the Trust Code. I urge all attorneys reading this Article to contact their legislators and urge support of a bill to repeal subsection 2 of sections 633A.2305 and 633A.2306.²³²

The addition of subsection 3 of section 633A.2302, providing that the interest of a beneficiary in a spendthrift trust may be used to satisfy tax claims of the United States or necessities, stands on a somewhat different footing.²³³ Again, the inclusion was suggested by DHS. As I stated in my previous article, the two exceptions to spendthrift protection are widely recognized at common law.²³⁴ Thus, subsection 3 of section 633A.2302

231. I absolve myself of some of the blame for the confusing drafting because I was negotiating from a position of extreme weakness, as detailed above, and was not in a position to object to the inclusion of phrases such as “interest in a trust.”

232. The lawyers should inform the legislators such a bill will no doubt generate a fiscal note from the DHS. My response to the fiscal note in 2008 should ease the fears of legislators that repeal of these subsections will cause a loss in funds to the State. *See supra* note 203.

One possibility to ease the fears of DHS might be to add the words “during the beneficiary’s lifetime” after “shall not compel a distribution” in section 633A.2305(1) and to add the same words after “the court shall neither order the trustee to exercise its discretion nor order payment from any such trust” in section 633A.2306(1). *See IOWA CODE* §§ 633A.2305–2306. Such a change would leave Estate Recovery free to seek recovery following the beneficiary’s death, assuming *Barkema* remains good law, while accomplishing what sections 633A.2305 and 633A.2306 were intended to accomplish.

233. Subsection 3 of section 633A.2302, added in 2008, provides as follows:

Notwithstanding subsections 1 and 2, the interest of a beneficiary of a valid spendthrift trust may be reached to satisfy an enforceable claim against the beneficiary or the beneficiary’s estate for either of the following:

- a. Services or supplies for necessities provided to or for the beneficiary.
- b. Tax claims by the United States to the extent authorized by federal law or an applicable provision of the [Iowa] Code.

Id. § 633A.2302(3).

234. Begleiter, *supra* note 1, at 210–11, 210 nn.262–63 (citations omitted). *In re Estate of Dodge* narrowly held an exception to spendthrift protection for necessities

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really adds nothing to the Trust Code. The danger of including the subsection was stated in the revised comments to the proposal e-mailed to the Section Council following the meeting with DHS:

Subsection 3 is new and is included in response to the desire of the Department of Human Services to have the exceptions stated in the statute. This makes no change in current law as these exceptions to the spendthrift trust rule were recognized by common law. I was reluctant to add this, as legislators may seek to add additional exceptions without consulting the Bar Association, which is why I did not add such exceptions to the Trust Code in the first place We will have to be watchful that legislators do not seek to expand this [subsection] to add additional exceptions.²³⁵

Because the temptation to add additional exceptions is great, and the proposal can be buried in a larger bill or accomplished by a late amendment that nobody notices, I recommend repealing section 633A.2302(3).

VII. REVOCABLE TRUSTS

With one exception, the changes to sections 633A.3101 through 633A.3112 are primarily related to clarifying and simplifying section 633A.3109—the notice to creditors, heirs, spouse, and beneficiaries.²³⁶ In an effort led by Hap Volz, the Committee is still working on section 633A.3109.

A. Section 633A.3102—Revocation or Modification

Former subdivision 6—allowing a conservator to revoke or modify a trust with the approval of the court supervising the conservatorship, except

exists only when the settlor intends to provide such services and goods to the beneficiary. *See id.* at 210 n.262 (“Even in such cases, Iowa requires a showing the claim is ‘for necessary goods and services, not officiously 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.” (quoting *Estate of Dodge v. Scott*, 281 N.W.2d 447, 450 (Iowa 1979))). I do not believe the *Dodge* limitation is significant because it would be a rare settlor who allowed payments for the beneficiary’s support but intended not to include necessities. Thus, any expansion to the necessities exception over what is recognized in Iowa caselaw would be rare and minimal.

235. MARTIN D. BEGLEITER, ISSUE PAPER, IOWA CODE, SPENDTHRIFT PROTECTION RECOGNIZED.

236. *See* IOWA CODE § 633A.3109.

to the extent such action was prohibited by the terms of the trust—was deleted by the legislature in 2006.²³⁷

This originated in a proposal by Hap Volz and was extensively discussed at the May 2005 Section meeting.²³⁸ In fact, there was disagreement among the Committee as to whether the Section favored deleting the provision or leaving it in the Trust Code. At the August 2005 meeting, the Section voted to delete the provision, reasoning that a conservator's duties do not include changing a ward's estate plan. The Section believed to permit a conservator to terminate or modify a revocable trust was an unwarranted extension of the conservator's duties.

B. *Section 633A.3103—Other Rights of Settlor*

Minor changes were made to section 633A.3103 in 2006.²³⁹ First, the phrase “and the individual holding the power to revoke the trust is competent” was deleted.²⁴⁰ The section generally provides the holder of the power to revoke has the rights afforded beneficiaries, and the duties of the trustee are owed to the holder of the power to revoke.²⁴¹ The above phrase was deleted to eliminate the need for the trustee to both monitor the competency of the holder of the power to revoke and determine the mental capacity of the holder of the power every time the trustee received a direction. This was believed to place an undue burden on the trustee.

Section 633A.4207(2), discussed later in this Article, allows the trustee to follow the written direction of the holder of a power to revoke.²⁴² Originally, this section applied unless the trustee believed, or had reason to know, the person holding the power was incompetent. This section was changed in 2003 to require actual knowledge on the part of the trustee that the holder of the power was not competent.²⁴³ It was believed that imposing a burden on the trustee when he or she believed, or had reason to know, the powerholder was incompetent imposed too great a burden of inquiry on the trustee. Section 633.3103 was amended to make it consistent

237. 2006 Iowa Acts 244.

238. Probate & Trust Law Section, The Iowa State Bar Ass'n, Proposed Amendments to the Iowa Trust Code 3 (2005) (on file with author).

239. See 2006 Iowa Acts 244.

240. *Id.*

241. IOWA CODE § 633A.3103.

242. *Id.* § 633A.4207(2).

243. See 2003 Iowa Acts 1999.

with the changes to section 633A.4207(2).²⁴⁴ This was done by adding the words “unless the trustee actually knows that the individual holding the power to revoke the trust is not competent” at the end of the introductory paragraph and the words “unless the trustee actually knows that the direction violates the terms of the trust” at the end of subsection 3.²⁴⁵

The effect of the change is that, in a revocable trust, the holder of the power has all the rights of the beneficiaries and the trustee’s duties are owed to the powerholder unless the trustee actually knows the powerholder is not competent. The trustee must follow another direction of the powerholder, without liability on the part of the trustee, unless the trustee actually knows the direction violates the terms of the trust.

C. Section 633A.3104—*Claims Against Revocable Trusts*

This is the first of the sections affected by the changes to section 633A.3109.

It is easiest to begin with the change to subsection 3 of section 633A.3104.²⁴⁶ This subsection originated as section 633A.3112.²⁴⁷ Under section 633A.3104(2), a revocable trust is subject to the settlor’s debts and the costs of administration of the settlor’s estate to the extent the estate is insufficient.²⁴⁸ As part of the separation of the Probate Code and Trust Code, the order of priority for debts and charges in sections 633.425 and 633.426 was no longer specifically applicable to the Trust Code. A separate and general priority section in the Trust Code was contemplated but was rejected for several reasons.²⁴⁹ In the reorganization of the creditor rights

244. 2006 Iowa Acts 244.

245. *Id.*

246. IOWA CODE § 633A.3104(3) (“If a revocable trust becomes subject to the debts of a settlor and the charges of the settlor’s estate pursuant to this section, following the payment of the proper costs of administration of the trust and any claims against the trust, the debts and charges of the settlor’s estate payable by the trust shall be classified pursuant to sections 633.425 and 633.426 as such sections exist on the date of the settlor’s death and paid in the order listed therein to the extent the settlor’s estate is inadequate to satisfy the listed debts and charges.”).

247. The 2005 amendments added section 633A.3112. *See* 2005 Iowa Acts 121.

248. IOWA CODE § 633A.3104(2).

249. First, many of the provisions in section 633.425 are inapplicable to irrevocable trusts, thus necessitating a debate over the proper priority. Second, the issue of whether irrevocable trusts with “discretionary support” language are responsible for Medicaid or estate recovery claims was a “hot” issue in the Section at

sections in the 2006 legislation, the terms “claimants” and “claims” were eliminated.²⁵⁰ Former section 633A.3112 was relocated as subsection 3 of section 633A.3104²⁵¹ and reworded, reflecting the change from “creditor claims” to “debts and charges.”²⁵²

For similar reasons, in subsection 1, the word “claims” was changed to “debts” and the words “settlor’s creditors” were changed to “settlor.”²⁵³

The rewording of section 633A.3105 subsection 2, though more extensive, was made for the same reason—to substitute “debts” and “charges” for the words “claims” and “costs.”²⁵⁴ No change in substance was intended.

D. *Section 633A.3105—Rights of, and Claims Against, Holder of General Power of Appointment*

As a part of the change from “claims” and “costs” to “debts” and “charges,” subsection 2 was amended in 2006 with no substantive change involved.²⁵⁵

E. *Section 633A.3106—Pretermitted Children—The Proposal That Failed*

It was recognized fairly early on that neither the Probate Code’s nor the Trust Code’s pretermitted heir statute identified with sufficient precision the share to which an omitted child is entitled.²⁵⁶ In addition, in a revocable trust, it was not clear what, if anything, a child born after the creation of the trust, but before an amendment was executed, should take.

that time. *See infra* Part XIII.C–D. This question would have to be squarely faced in a priority statute applicable to irrevocable trusts. Therefore, the decision was made to limit the statute to revocable trusts only and to merely incorporate the Probate Code priorities. *See* 2006 Iowa Acts 121.

250. *See infra* Part VII.H.

251. *Compare* 2005 Iowa Acts 121 (adding section 633.3112), *with* IOWA CODE § 633A.3104 (containing statute’s language in its current form).

252. *See* 2006 Iowa Acts 245, 247. The legislature also made other minor language changes to accommodate the new language. *Id.*

253. *Id.* at 244.

254. *Id.*

255. *Id.* at 245. Subsection 2 now reads: “Property in trust subject to a presently exercisable general power of appointment is chargeable with the debts of the holder and charges 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.” IOWA CODE § 633A.3105.

256. Unfortunately, I have no record of exactly when this was recognized.

A proposal was developed to clarify and coordinate the sections in the Probate Code—section 633.267—and the Trust Code—section 633.3106. At the May 2005 Section meeting, a number of proposals were presented, discussed extensively, and voted on.

The basic proposal involved amending section 633.267 of the Probate Code to provide two basic rules. The first rule, similar to current section 633.267, provided that if testator fails to provide in her will for any of her children born or adopted after the execution of the will, such child or children would receive an intestate share of testator's estate, unless it appeared from the will that the omission was intentional. The second basic rule, an exception to the first rule, provided that if all the following conditions were satisfied:

1. the testator had one or more children living at the execution of the will, and failed to provide for afterborn children,
2. the testator was survived by issue, some of whom were not issue of the surviving spouse, and
3. no spouse survived the testator

then one of two distributions would occur. If no bequest was made to a child living when the will was executed, the afterborn children take nothing. However, if the will bequeathed property to one or more living children, an afterborn child received a share equal to the smallest amount bequeathed to a living child by the will.

The Trust Code proposal basically tracked the amendment to the Probate Code for children born or adopted after the later of the date of the execution or its last amendment, if the settlor of the trust died with a valid, probated will.

At the May 2005 Section meeting, the above-mentioned proposal was withdrawn by the Trust Code Committee.²⁵⁷ “The Section directed the Trust Code Committee to draft proposed language using the intestate share and requested clean-up of subparagraph (a) references to other code sections.”²⁵⁸

257. Probate & Trust Law Section, The Iowa State Bar Ass'n, Minutes of the Meeting of May 13, 2005 (on file with author).

258. *Id.*

However, an additional problem was that the Trust Code had to provide for settlors of revocable trusts dying intestate. If the settlor of the revocable trust died intestate, the proposal has two options. First, if the settlor died intestate, and was survived by a spouse and by issue who are all issue of the surviving spouse, omitted afterborn children do not take. Second, if the settlor had no surviving spouse or children not of the surviving spouse, the afterborn's share turned on whether the trust provided for his children who were alive at the time the trust was created.

If the trust made a provision for any child alive when the trust was created, afterborn children would receive an intestate share. However, if the trust does not provide for any of his or her children who were alive at the creation of the trust, any afterborn child would not be entitled to a share.

At the May 2005 Section meeting, the Section approved a rule giving nothing to afterborn children of a testator dying with a will that bequeathed nothing to children living at the time the will was executed or when the omission of afterborn children was intentional as evidenced by the terms of the will. If the children living at the time of the execution of the will received a bequest, the afterborn children received an intestate share. The Section also approved a similar provision in the Trust Code.²⁵⁹ Following the May 2005 Section meeting, Professor Kurtz presented an alternative proposal based on Uniform Probate Code section 2-302.

These proposals were discussed and revised many times and at numerous Section meetings. To make a very long story short, the Section finally approved amendments to both sections 633.267 and 633.3106 and submitted them to the Board of Governors in September 2006.²⁶⁰ The

259. In the proposal, the trust property was treated as intestate property solely for the computation of the share of the afterborn children.

260. The proposal submitted to the Board of Governors regarding section 633.267 was as follows:

Except as provided in subsection (b), if a testator fails to provide in the testator's will for any of the testator's children born to or adopted by the testator after the execution of the testator's last will, such child, whether born before or ~~within one year~~ after the testator's death, shall receive a share in the estate of the testator equal in value to that which the child would have received under section 633.211, 633.212, or 633.219, whichever section or sections are applicable, if the testator had died intestate, unless it appears from the will that such omission was intentional.

If the testator is survived by one or more children who were living when testator executed his last will and who are all omitted from the will, any child or children born to or adopted by the testator after the execution of the will shall not qualify to receive the share set out in (a).

Probate & Trust Law Section, The Iowa State Bar Ass'n, Proposed Amendments to the Iowa Probate Code (2006) (on file with author).

The proposal submitted to the Board of Governors regarding section 633.3106 was as follows:

1. 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 later of the date of the execution of the trust or its last amendment, and if the settlor dies with a will which is admitted to probate within four months following the date of the settlor's death, such child or children shall receive a share of the trust equal to the amount provided under section 633.267, unless it appears from the terms of the trust or decedent's will that such omission was intentional.
2. 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 later of the date of the execution of the trust or its last amendment and dies intestate, such child or children shall receive a share of the trust equal to the amount provided in section 633.267, unless it appears from the terms of the trust that such omission was intentional.
3. For the purposes of this section and section 633.267 of the Probate Code:
 - a. For the sole purpose of determining whether a child is entitled to a share of the trust or of the settlor's estate and the amount of such share, the will and trust are to be treated as one document.
 - b. The share of a child shall be computed on the total value of any trust to which this section applies and of the settlor's estate.
 - c. Any share payable to a child shall be paid prorata from the settlor's estate and any revocable trust, unless the will or trust instrument provides otherwise.
 - d. Within each of the will and any revocable trust, each disposition shall abate proportionately, unless the will or trust instrument, as the case may be, provides otherwise.
4. A will of the settlor that is admitted to probate more than four months following the date of the settlor's death shall not affect the distribution of assets under this section.

COMMENT: Neither the Probate Code's pretermitted heir statute nor the Trust Code's pretermitted heir statute (applicable only to revocable trusts) is

sufficiently precise to make clear exactly the share of the omitted child. In addition, the Trust Code provision measures pretermisison from the date of the making of the trust rather than from the last amendment to the trust. The Committee believes that if a settlor has a child at the time of amending the trust, the settlor would include a provision for the child if the settlor intended the child to benefit from the trust. In addition, the Committee wishes to clarify that a provision intentionally omitting a child in a will shall also apply to that decedent's revocable trust, thereby furthering the concept, used throughout the Trust Code, of a revocable trust as a will substitute. In fact, the Committee has determined that for the purposes of the pretermitted heir provision, the will and any revocable trust should be construed together to determine whether any afterborn or after-adopted child should be entitled to a share of settlor's estate or revocable trust. This section is intended to effectuate this concept.

Subsection [4] was added to deal with the fact that, with the distribution of the trust assets, there needs to be a relatively quick determination as to whom the beneficiaries are. Trustees need to distribute the trust quickly and need not wait (as the executor does) to complete administration in order to do so. People use trusts so that there will not be undue delay in the distribution of the assets. Four months was chosen somewhat arbitrarily as an estimate of the time necessary to complete the notice procedure under § 633A.3109, as the exact period of notice under that section will not be the same in each trust. The alternate one year period under § 633A.3109 was rejected as too long to wait for the distribution of the trust.

Perhaps the best way to illustrate the operation of this section (and section 633.267 of the Probate Code) is by series of examples.

Example 1. Settlor's will devises his entire estate to charity. Settlor's revocable trust provides that the entire trust is distributable to charity (or is held in further trust for a charity) following settlor's death. A child of settlor is alive when the will and trust were executed. An additional child of settlor is born following the execution of the will and trust. The afterborn child takes nothing.

Example 2. Same facts as Example 1, except no child of the settlor is living on the date of execution of the instruments, the settlor's spouse does not survive settlor, and neither the will nor the trust say anything about children. The afterborn child takes the entire estate and trust.

Example 3. Same facts as Example 2, except settlor's spouse survives settlor. The afterborn child takes nothing.

Example 4. Settlor's will pours over settlor's residuary estate into the revocable trust. The revocable trust creates a trust for settlor's spouse for life, on death to testator's children then living. Testator had one child prior to the execution of the will and trust agreement and one born after the execution.

Board of Governors then asked for comments from the Family Law Section. After several years of consideration, the Family Law Section objected to the Probate and Trust Law Section's proposal and the Board of Governors decided not to forward it to the legislature. Therefore, only very minor changes to the existing statutes were made by the 2008 Iowa Legislature.²⁶¹

Spouse survives. Afterborn child takes nothing under either this section or section 633.267, but does have an interest in the remainder of the trust if he survives testator's spouse.

Example 5. Same facts as Example 1, except spouse does not survive settlor. The result is the same as Example 4. If spouse's death accelerates the remainder, afterborn child takes one-half of the combined estate and trust property under the instruments.

Example 6. Testator dies intestate, but has a revocable trust providing for distribution to his issue who survive him, per stirpes. The trust includes a provision defining children as including afterborn or after-adopted children. Settlor has one child born before the execution of the trust, and one child born and one child adopted after the execution of the trust. All three children take under the trust agreement, not under this section.

Example 7. Same facts as Example 1, except the trust instrument contains a provision stating: "I expressly make no provision for any children of mine, whether born before or after the execution of this trust." Any afterborn children take nothing from either the settlor's estate or the trust, despite the fact that only the trust and not the will contained the clause negating the statute. This is because the will and trust are read together in determining whether the afterborn child takes and the trust provision applies to the estate property also under subsection (c)(1) of this section.

Probate & Trust Law Section, The Iowa State Bar Ass'n, Proposed Amendments to the Iowa Trust Code (2006) (on file with author).

The argument between the Probate and Trust Law Section and the Family Law Section boiled down to what should be done in the situation where a testator—or grantor—expressly omits living children from a will or revocable trust and an additional child is born to the testator or grantor thereafter. Should the afterborn child take? The Probate and Trust Law Section, after extended discussion and a vote, determined the afterborn child should not take. The Probate and Trust Law Section believed the logical inference from the deliberate omission of the testator's or grantor's other children was the testator or grantor intended the afterborn child not take, although the presumption was rebuttable by a provision in the will or trust under the Probate and Trust Law Section's proposal. The Family Law section believed the afterborn child should take a share of the estate.

261. In section 633.267, the first word of the section was changed from "[w]hen" to "[i]f," and "making" was changed to "execution." 2008 Iowa Acts 427. In section 633A.3106, "making" was changed to "execution," and "or the last amendment

One will notice there is no real coordination between section 633.267 and section 633A.3106 as they currently exist.²⁶² The will and the trust are treated separately. What happens if afterborn children are mentioned in the will and not in the revocable trust? What if the settlor dies intestate? Does it make any difference if a bequest or trust provision is made for children living when the will for trust amendment is executed or, indeed, if there are children alive at that time? These questions are not answered.

A few things are certain. If the terms of the will indicate the omission is intentional, this will constitute a direction against the pretermitted heir taking from the revocable trust. The reverse case—an intentional omission provision in the trust but not in the will—is not covered. First, if a decedent–settlor is survived only by a spouse and children, all of whom are also children of the surviving spouse, the omitted child receives nothing. The courts will have to answer the remaining questions.

F. *Section 633A.3107—Effect of Divorce and Dissolution*

This section originally applied only to provisions and appointments in favor of the settlor’s spouse, which were revoked for divorce and reinstated if the settlor and spouse remarried each other, unless the instrument provided otherwise. The section was significantly broadened to include relatives of the settlor’s spouse. This required a definition of “relatives of the settlor’s spouse,” which was necessary so that bequests to, and appointments in favor of, relatives of the surviving spouse, who were also relatives of the settlor, were not revoked.²⁶³

G. *Section 633A.3108—Limitation on Contest of Revocable Trust*

The sole amendment to this section was a minor addition to solve a

to the trust” was added following “execution of the trust.” *Id.* at 429.

262. IOWA CODE §§ 633.267, 633A.3106 (2009).

263. The definition was provided in an addition to subsection 2, which defines “relative of the settlor’s spouse” as “a person who is related to the divorced settlor’s former spouse by blood, adoption, or affinity, and who, subsequent to the divorce or dissolution of marriage, ceased to be related to the settlor by blood, adoption, or affinity.” 2005 Iowa Acts 121.

In addition, subsections 1 and 2 of the statute were amended to explicitly state the trust instrument could change the rules of the section to both emphasize the rule and to conform the Trust Code language to an amendment to section 633.271 of the Probate Code, which was enacted. *Id.* at 117–18. Lastly, a sentence was added to the end of subsection 2 not reinstating trust provisions in favor of persons who had died when the spouses were divorced, which would have been undesirable. *Id.*

problem of awkwardness I noticed while teaching this section in one of my classes. The addition consisted of inserting the words “on or after the date” prior to the words “six months following the death of the settlor” in subsection 2.²⁶⁴ The previous version was awkward—it was unclear whether the trustee had to be a party to a proceeding six months after the settlor’s death or whether once six months had passed since the settlor’s death, the trustee could assume the trust was valid and make distributions, unless he or she was a party to the proceeding contesting the trust’s validity at that time. The added words clarify the latter interpretation is the correct one.

H. *Section 633A.3109—Notice to Creditors, Claimants, Heirs, Spouse, and Beneficiaries*

I could start discussion of this section as I should have done, but did not, in my previous article. The practitioners wrote this section.²⁶⁵ My involvement was at the fringes, attempting to simplify the language and improve coordination. My involvement was not large or significant.

In my previous article, I mentioned this section is a work in progress.²⁶⁶ One problem, as described in my previous article, is that the section attempts to deal with the rights of two different groups—creditors and contestants, the latter of which include the spouse, issue, and other intestate heirs.²⁶⁷ The discussion began in 2003 with a flurry of drafts attempting to use one term to describe both groups mentioned above.²⁶⁸ When these drafts were presented to the Section for discussion, many comments and suggestions were made. The Committee took the

264. The change applies to trusts in existence on or after July 1, 2008. 2008 Iowa Acts 429, 431.

265. The writers were primarily Todd Buchanan and, after his retirement from the Committee, Hap Volz.

266. Begleiter, *supra* note 1, at 221 & n.350.

267. *See id.* at 220–26.

268. The early drafts, circulated in the summer of 2003, included a proposed new definition of “claimant” covering “any interested party who possesses any legal claim to trust property” and specifically including a settlor’s spouse and issue, creditors, a person who could contest the trust, and the executor of settlor’s estate; and changing “creditors” in section 633A.3109 to “claimants.” Probate & Trust Law Section, The Iowa State Bar Ass’n, Proposed Amendments to the Iowa Trust Code (2003) (on file with author). These drafts were subjected to numerous e-mail comments over the summer of 2003.

suggestions and redrafted the proposals, which took several years.

As mentioned above, the basic thrust of the proposed changes, with one exception, was to clarify ambiguities, rather than to change existing law. Several changes were enacted.

In subsection 1, the listing of subsections 1, 2, 3, and 4 in the definition of “heir” was deleted.²⁶⁹ To conform to the new terminology, the first sentence of subsection 2 was deleted and the second sentence changed.²⁷⁰ Several points should be noted about these changes. First, the attempt to use “claimant” to describe all persons having possible rights against the trust was abandoned because “creditor” is used in this subsection.²⁷¹ Second, together with subsection 4, to be discussed below, the question of whether a probate notice prevailed over the trust notice or if the trust notice governed regardless of whether a probate administration was commenced was settled by saying the probate notice governed *only if the probate administration was commenced within one year of the decedent’s date of death*.²⁷² This clarified a question that generated many comments and inquiries of estate and trust attorneys.

Subsection 3 was reordered and much of it was altered, but only in an attempt to clarify the language. The only major clarification related to the standard of knowledge required to trigger the giving of notice. The change required actual knowledge of claimants or that the claimants be reasonably ascertainable, and it provided different limits on the notice if the trustee acquired knowledge of a claimant during the trust administration.²⁷³

269. This was done in 2002, prior to the remainder of the changes discussed below. 2002 Iowa Acts 262.

270. The amendment read:

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 the notice provided for in subsection 3 has not been published and if a probate administration is commenced for the decedent within one year of the decedent’s date of death 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 633A.3104.

2006 Iowa Acts 245.

271. IOWA CODE § 633A.3109(2) (2009).

272. *See id.*

273. The amendments made to this section are substantial:

~~If no notice is given to creditors and heirs pursuant to subsection 2, creditor's rights may~~ Except as provided in subsections 2 and 4, the rights of creditors against assets of the trust and those of heirs to contest the trust shall be established or terminated ~~if~~ by the trustee ~~gives~~ giving notice as follows:

. . . .

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. As soon as practicable, the trustee shall give 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 person's last known address. [This is former subsection (c), slightly reworded.]~~

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.~~

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 creditor at the creditor's last known address stating the decedent settlor's date of death and that the claim shall be forever barred unless proof of the creditor's claim is mailed to the trustee by certified mail, return receipt requested, within the later to occur of sixty days from the second publication of notice or thirty days from the date of mailing of the notice.

d. The notice in paragraphs "a", ~~and "b", and "e"~~ 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 "e"~~ and that any claim against the trust assets will be forever barred unless proof of a creditor's claim is mailed to the trustee by certified mail, return receipt requested, within the later to occur of sixty days from the second publication of notice or thirty days from the date of mailing the notice, if required. A person who does not make a claim within the appropriate period is forever barred.

[Former subsection (e), which was similar to the amended portion of subsection (d), was deleted.]

4. If notice has not been published or given as provided in subsection 2 or 3, a

claimant 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 collecting against the trust assets unless the trustee has failed to comply with subsection 3, paragraph "c". [sic] The one year limitation period shall not be extended by the commencement of probate administration for the settlor more than one year following the settlor's death.

4. 5. [Former subsection 4, containing the notice provided for in subsection 3, was renumbered as subsection 5. The only changes in the notice itself were in the last paragraph.]

. . . .

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~~ any person or entity possessing a claim against the trust must mail ~~them~~ proof of the claim 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~~ if required, or the claim shall be forever barred, unless ~~otherwise allowed or paid or otherwise satisfied~~. . . .

6. The proof of claim must be in writing stating the party's name and address and describing the nature and amount of the claim, if ascertainable, and accompanied by an affidavit of the party or a representative of the party verifying the amount that is due, or when the amount will become due, that no payments have been made on the claim that are not credited, and that no offsets to the claim exist.

7. At any time after receipt by the trustee of a proof of claim, the trustee may give the party submitting the claim a written notice of disallowance of the claim. The notice shall be given by certified mail, return receipt requested, addressed to the party at the address stated in the claim, and to the attorney of record of the party submitting the claim. Such notice of disallowance shall advise the party submitting the claim that the claim has been disallowed and will be forever barred unless suit is filed against the trustee to enforce the claim within thirty days of the date of the mailing of the notice of disallowance. If suit is filed, the provisions in chapter 633 relating to actions to enforce a claim shall apply with the trust and trustee substituted for the estate and personal representative. [Former subsection 5 was renumbered as subsection 8, changed as follows:]

5. 8. ~~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

Subsection 4 does make a substantive change. In the words of the comment on the revisions presented to the Section:

The most significant change is in subsection 4 that closes what may have been a gaping loop-hole in the existing statute. The scenario envisioned is as follows: A revocable trust has been administered, the property distributed and the administration is closed. [Two] years after settlor's death, a claimant wants to collect. This claimant possesses a legitimate claim against the trust property that trustee was not aware of and had no reason to know about. The claimant could commence a probate administration, prove up their claim in the probate (which has no assets) and then proceed to collect against the trust through 633.3104.

Even though the trust administration is completed, the claimant can probably collect from the beneficiaries in this scenario. Thus, there in effect would be no one-year statute of limitations on claims against trust assets. This amendment attempts to prohibit the undesirable late-filed proceedings such as the one envisioned, while allowing one that is properly brought when the trustee failed to properly respond to a claim. Therefore, the law would still provide a remedy for the claimant who has a legitimate claim due to trustee's mistake.²⁷⁴

Subsections 6 and 7 attempt to coordinate, insofar as possible, the Trust Code provisions with the Probate Code.²⁷⁵ The amendments made to these sections in 2006 "apply to trusts of settlors who die on or after July 1, 2006."²⁷⁶

There is no doubt some clarification was achieved by the 2006 amendments. The use of "claimant" instead of "creditors" when referring to the entire class of creditors, heirs, spouse, and persons entitled to contest a trust helps avoid confusion. Previously, only the term "creditors" was used to refer to persons having debts or claims against the estate of the settlor or the trust. The change under new subsection 4 is important in

~~claimant~~ creditor 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.

2006 Iowa Acts 245-47.

274. Probate & Trust Law Section, The Iowa State Bar Ass'n, Proposed Amendments to the Iowa Trust Code 5-6 (2005) (on file with author).

275. Compare IOWA CODE §§ 633.410, 633.424, with IOWA CODE § 633A.3109.

276. 2006 Iowa Acts 248.

closing an unintended loophole and clarifying some of the confusion over the notice required in different situations.

The case of *Sieh v. Sieh* held that the spouse's elective share under common law included any trust made by the decedent that was revocable at the time of decedent's death.²⁷⁷ Discussion of the *Sieh* case is beyond the scope of this Article.²⁷⁸ What is relevant to this Article, however, is whether the notice given for revocable trusts under section 633A.3109 should make reference to the right of election against revocable trusts. Many of those who drafted section 633A.3109 never intended it to cover spousal election rights; it was intended to cut off creditors' claims and rights to contest the validity of the trust—notice in the probate proceeding was the correct method to deal with spousal election rights.²⁷⁹

However, section 633A.3109 is still a work in progress. As this Article is written, the Committee is drafting further amendments to clarify and simplify the section. The changes the Committee is working on include:

- (1) Completely separating the Probate Code notice from the Trust Code notice in 633A.3109.
- (2) Separating the provisions for notice on claims against the trust from the notice provisions on contests to the validity of the trust.
- (3) Making clear the probate notice and the trust notice are separate—the trust notice does not cut off a claim against the probate assets and a probate notice does not cut off a claim against trust assets. Each pool of assets will stand on its own, except the estate is primarily liable for claims against the estate and the revocable trust is liable for claims only to the extent estate assets are insufficient.

277. *Sieh v. Sieh*, 713 N.W.2d 194, 197–98 (Iowa 2006).

278. Prior to the decision in *Sieh*, on March 17, 2006, the legislature amended the Probate Code to include a provision recognizing revocable trusts as property subject to a spouse's right of election. *See* 2006 Iowa Acts 115–16; *Sieh*, 713 N.W.2d at 194. The court did not decide *Sieh* under the statute because the decedent died prior to the statute's effective date. *Id.* at 196.

279. E-mail from Marlin Volz Jr., Senior Vice President, Wells Fargo Bank, to Martin Begleiter, Reporter, Probate & Trust Law Section, The Iowa State Bar Ass'n (Oct. 10, 2007, 10:57 CDT) (on file with author). Some members of the Section would like a cross reference in the Trust Code to the right-of-election statute, section 633.238. That idea is still under discussion.

(4) Relocating the trust notice provision in a new section—tentatively 633A.3113—and extending the period to have it consistent with the probate notice period.

(5) Due to a second decision in the *Sieh* case, which held a revocable trust is liable for support allowances awarded to a spouse, adding new provisions governing the procedures for paying support allowances from a revocable trust.²⁸⁰

I. Section 633A.3111—Trustee’s Liability for Distributions

As part of the language clarification in the creditors’ rights sections, minor changes in wording were made to this section in 2006.²⁸¹

J. Section 633A.3112—Definitions—Revocable Trusts

As noted above, section 633A.3112 classified debts and charges under sections 633.425 and 633.426, and former section 633A.3112 was relocated as section 633A.3104(3).²⁸² This left section 633A.3112 to be used to collect the new definitions used in the revocable trust sections of the Trust Code. Three definitions were necessary.

The definition of “charges” in subsection 1 intentionally mirrors the definition in the Probate Code,²⁸³ as does the definition of “debts” in

280. See *Sieh v. Sieh (In re Estate of Sieh)*, 745 N.W.2d 477, 480 (Iowa 2008) (“[T]he assets of the trust were properly subjected to payment of the spousal allowance.”).

281. The changes include:

1. A trustee who distributes trust assets without making adequate provisions for the payment of ~~creditor claims~~ debts and charges that are known or reasonably ascertainable at the time of the distribution 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~~ for debts and charges under this section, to the extent of distributions made.

2006 Iowa Acts 247.

282. 2005 Iowa Acts 120–21; see 2006 Iowa Acts 244–45; *supra* Part VII.C.

283. See IOWA CODE § 633.3(4) (2009). “‘Charges’ includes costs of administration, funeral expenses, costs of monuments, and federal estate taxes.” *Id.* § 633A.3112(1). The section as originally drafted included state estate taxes, but this was later deleted. 2008 Iowa Acts 429.

subsection 3, though with necessary modifications, given the purpose of section 633A.3104.²⁸⁴ “Claimant” is defined in accordance with the 2006 changes to include all persons having any claim on trust assets, whether as spouse, issue, heir, contestant, or creditor.²⁸⁵

VIII. TRUST ADMINISTRATION—OFFICE OF THE TRUSTEE

A. Section 633A.4105—Filling Vacancy

This section was modified in connection with the change regarding notification and the limitation of certain rights to “qualified beneficiaries,” which will be discussed in detail in connection with section 633A.4213.²⁸⁶ Subsection 2(b)(1) of this section allows the filling of vacancies by a majority vote of all the adult qualified beneficiaries and the representative of minor or incompetent qualified beneficiaries.²⁸⁷ Similarly, subdivision 2(b)(2) was amended to provide that the court, in selecting a trustee, shall consider nominations made by adult beneficiaries, as well as nominations made by representatives of any minor and incompetent beneficiaries.²⁸⁸ Subsection 3 was deleted in light of the addition of a definition of “qualified beneficiaries” in section 633A.1102(14).²⁸⁹ Minor clarifying amendments to subsections 2(b)(1) and 2(b)(2) were made in 2003.²⁹⁰

B. Section 633A.4106—Resignation of Trustees

As in section 633.4105, subsection 1(c) of section 633A.4106 was amended in 2002 to limit the consent required to resign as a trustee to

284. See IOWA CODE § 633.3(10). “‘Debts’ includes liabilities of the settlor owed at death that survive the settlor’s death, whether arising in contract, tort, or otherwise.” *Id.* § 633A.3112(3).

285. “‘Claimant’ includes any interested party who possesses any legal claim to trust property, the settlor’s spouse, the settlor’s heirs as defined in section 633A.3109, and any other person or entity with standing to challenge the trust, a creditor of the settlor, and a personal representative of the settlor’s estate.” *Id.* § 633A.3112(2).

286. See *infra* Part VIII.H.

287. 2002 Iowa Acts 192.

288. *Id.*

289. *Id.*

290. In section 633.4105(2)(b)(1), “provided in” was substituted for “defined by.” 2003 Iowa Acts 85. Also, the phrase “as designated in section 633.6303” was added to the end of section 633.4105(2)(b)(2). *Id.* at 198. No change in substance was intended.

qualified beneficiaries.²⁹¹

C. Section 633A.4107—Removal of Trustee

In 2003, the permitted grounds for court removal of the trustee were expanded. The new ground allows for the trustee's removal "[i]f the trustee merges with another institution or the location or place of administration of the trust changes."²⁹² Whether removal should be permitted—or mandated—when the trustee merges with another bank or the place of administration of the trust changes is a contentious question. It arose when work began on the Trust Code and generated strong feelings.²⁹³ Indeed, the initial set of Issue Papers, written in 2001, stated, "We have already discussed this issue to such an extent that I need not add more. We simply need to come to closure on this."²⁹⁴ At a meeting on May 10, 2002, the Committee decided to add a subsection permitting the removal of a trustee if the trustee merged with another institution or changed ownership, or if the place of administration of the trust changed. Todd Buchanan, then-Chair of the Committee, agreed to draft the new subsection,²⁹⁵ which was ultimately adopted by the Committee and passed by the legislature.²⁹⁶

291. Specifically, the amendment to section 633.4106(1)(c) read: "With the consent of the ~~adult~~ qualified beneficiaries as defined in section 633.4105, subsection 1, who are adults 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." 2002 Iowa Acts 193.

292. 2003 Iowa Acts 199; *see also infra* Part XVI.B (discussing the place of administration of a trust).

293. Begleiter, *supra* note 1, at 238.

294. MARTIN D. BEGLEITER, ISSUE PAPER, IOWA CODE, REMOVAL OF TRUSTEE.

295. Letter from Martin D. Begleiter, Reporter, Probate & Trust Law Section, to the Trust Code Comm. (May 13, 2002) (on file with author). Michel Nelson of Carroll substantially contributed to the Committee's development of this position by suggesting a more general proposal permitting removal of the trustee if there was a substantial change of circumstances and the court finds removal "is clearly in the best interests of the trust and all of the beneficiaries, [and] is not inconsistent with a material purpose of the trust." Letter from Michel Nelson, Vice President, Iowa Sav. Bank, to the Trust Code Comm. (June 19, 2001) (on file with author). There was no unity in the Committee on this question. One member noted an individual trustee was more likely to move than a corporate trustee, but there was no suggestion for automatic removal on such an occurrence.

296. 2003 Iowa Acts 199.

Two things need to be noted regarding the change. First, removal on the grounds of merger with another institution or change in the place of administration is permissive, not mandatory. Second, removal on these grounds may be ordered only by the court. While a settlor, cotrustee, or beneficiary may petition for removal, only a court may remove the trustee.²⁹⁷

While the question generated a good deal of discussion in the Committee and the Section, I am not aware of any significant controversy regarding this question since the addition of subsection 633A.4107(8) in 2003. The solution was a compromise, but it seems to be a compromise that has worked.

It should be noted certain other proposals to change section 633A.4107 were rejected by the Committee. My first article noted hostility among beneficiaries was not a ground for removal, nor was hostility between beneficiaries and the trustee.²⁹⁸ This was proposed for discussion in the original set of Issue Papers. One Committee member noted that making this a ground for removal would put intense pressure on the trustee from both sides and could interfere with the trustee's duty of impartiality. The Committee decided not to recommend adding a provision to the Trust Code on this issue. Another member suggested substituting "serious" for "material" in subsection 2(a), commenting that the UTC uses the former term.²⁹⁹ This was not adopted.³⁰⁰

D. *Section 633A.4111—Notice of Increased Trustee's Fee*

Consistent with previous changes regarding the addition of a "qualified beneficiary," subsection 2(a) of section 633.4111 was amended in 2002 to limit notice requirements regarding an increase in trustee's fees to qualified beneficiaries.³⁰¹

297. See IOWA CODE § 633A.4107 (2009).

298. Begleiter, *supra* note 1, at 237.

299. The member noted *Black's Law Dictionary* defined "material" as significant or substantial, while "serious" indicated weighty or important. See BLACK'S LAW DICTIONARY 998, 1398 (8th ed. 2004).

300. I am not certain the change from "material" to "serious," if made, would cause a significant change in the breach standard required for removal of a trustee.

301. 2002 Iowa Acts 193.

E. *Section 633A.4202—Duty of Loyalty, Impartiality, Confidential Relationship*

In its original form, subsection 2 of section 633.4202 made transactions involving the trust voidable if affected by a “substantial” conflict of interest between the trustee’s fiduciary and personal interests.³⁰² Subsection 3 designates the types of transactions included and applies the section to the trustee, certain members of the trustee’s family, the trustee’s agent, the trustee’s attorney, or a business in which the trustee has a substantial interest.³⁰³ My prior article noted “substantial” was not defined.³⁰⁴ The question of the meaning of “substantial” was raised in the first set of Issue Papers.³⁰⁵ In 2002, the word was changed to “material” in both subsection 2 and at the beginning of subsection 3.³⁰⁶ The comment states the change from “substantial” to “material” clarified “the standard is the quality, rather than the size, of the conflict.”³⁰⁷

Two new subsections excluding certain transactions from the operation of the sections were also added to this section.³⁰⁸ Subsection 5(d) permits an investment in the trust of “securities of an investment company or investment trust to which the trustee . . . provides services in a capacity other than as trustee if the investment complies with the prudent investor rule.”³⁰⁹ Subsection 5(e) permits a deposit of trust money in a regulated financial services institution operated by the trustee.³¹⁰ Both new exceptions are based on exceptions to the duty-of-loyalty rules allowed by the Restatement (Third) of Trusts.³¹¹

302. See 1999 Iowa Acts 246.

303. *Id.* at 246–47.

304. See Begleiter, *supra* note 1, at 242.

305. MARTIN D. BEGLEITER, ISSUE PAPER, IOWA CODE, DUTY OF LOYALTY—IMPARTIALITY—CONFIDENTIAL RELATIONSHIP.

306. 2002 Iowa Acts 193 (the word “substantial” at the end of subsection 3 was retained: “or corporation or other enterprise in which the trustee has a substantial beneficial interest”).

307. See Probate & Trust Law Section, The Iowa State Bar Ass’n, Proposed Amendments to the Iowa Trust Code 10 (2002) (on file with author). “Substantial” was retained at the end of subsection 3 because, in that instance, the reference was to the size of the trustee’s interest in the corporation or other business entity. See *id.*

308. 2002 Iowa Acts 193 (adding new subsections (d) and (e) to subsection 5).

309. *Id.* (adding subsection 5(d)).

310. *Id.* (adding subsection 5(e)).

311. RESTATEMENT (THIRD) OF TRUSTS § 78 cmt. c(8) (2007) (permitting the

Some discussion of subsection 1 of section 633A.4202, which has not changed, is necessary. Subsection 1 provides: “A trustee shall administer the trust solely in the interest of the beneficiaries, and shall act with due regard to their respective interests.”³¹² This does not mean that if the trustee does not do what the beneficiary wants the beneficiary can sue the trustee for a breach of the duty of loyalty. What it does mean is the trustee is prohibited

from entering into transactions involving the trust property, or affecting its investment or management, if the transaction is for the trustee’s personal account (self-dealing) or otherwise involves or creates a conflict between the fiduciary duties and personal interests of the trustee . . . unless authorized . . . expressly or implied[ly] by the terms of the trust.³¹³

The trustee cannot, in any case, act in bad faith or unfairly.³¹⁴ However, subsection 1 merely means the trustee must administer the trust considering only the interests of the beneficiaries, as defined in the trust instrument, as opposed to the trustee’s own interests or the interests of third parties.³¹⁵

F. Section 633A.4207—Directory Powers

This section concerns the trustee’s duty to follow the direction of a person—not the settlor—if another person is given the power by the trust instrument to direct certain actions, such as investments or distributions, of the trustee.

statutory exception for investing trust funds—proprietary funds—where the trustee provides services to the funds, such as an investment advice, custody, or transfer agent, and is compensated for these other services). The Restatement comment notes the compensation details must be reported to the beneficiaries, which is specified in subsection 5(d). *Id.* cmt. c(6) (permitting deposits of trust funds with the banking department of the corporate trustees).

312. IOWA CODE § 633A.4202(1) (2009).

313. RESTATEMENT (THIRD) OF TRUSTS § 78 cmt. a.

314. *See id.*

315. This is based on information provided by attorneys of several actions being considered in Iowa by beneficiaries attempting to use section 633A.4202(1) as a basis for challenging actions by the trustee the beneficiaries did not like. Jeffrey A. Cooper provides an excellent discussion of some of the problems interpreting provisions like section 633A.4202(1)—and the similar UTC section 404—to deny a settlor the right to insert terms and conditions limiting the interests of the beneficiaries. Cooper, *supra* note 60, at 1203–09.

The section as originally enacted provided the trustee should follow the direction of a person having the power to direct unless the order violated the trust terms, the trustee was aware the direction violated a fiduciary duty the person having the power owed to the beneficiaries, or the trustee believed or had reason to know the person having the directory power was incompetent.³¹⁶ By at least 2002, it was recognized the latter two conditions—the trustee was aware the direction violated a fiduciary duty or the trustee believed or had reason to know the person having the directory power was incompetent—called for difficult decisions on the part of the trustee. The Issue Papers noted UTC section 808(b) provided different standards,³¹⁷ and while these standards also called for difficult decisions, they might be better than the Trust Code’s standards.³¹⁸ At a meeting of the Trust Code Committee on May 10, 2002, it was decided to substitute the substance of UTC section 808(a), (b), and (d) with the major modification that the trustee have actual knowledge either that the direction violated the terms of the trust or that the powerholder was incompetent in order for the trustee to refuse to act. These changes were enacted by the legislature in 2003.³¹⁹ In 2006, the legislature changed the

316. 1999 Iowa Acts 247.

317. UNIF. TRUST CODE § 808(b) (amended 2004) (providing the direction was “manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty” the powerholder owes the trust beneficiaries).

318. MARTIN D. BEGLEITER, ISSUE PAPER, IOWA CODE, DIRECTORY POWERS.

319. 2003 Iowa Acts 199. The amendment read:

1. While a trust is revocable, the trustee may follow a written direction of the settlor that is contrary to the terms of the trust.
2. If the terms of the trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the trustee knows the attempted exercise violates the terms of the trust or the trustee knows that the person holding the power is incompetent.
3. A person other than a beneficiary who holds a power to direct is presumptively a fiduciary who is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from a breach of a fiduciary duty.

Id.

last word in subsection 2 from “incompetent” to “not competent.”³²⁰

The two most significant changes in this section were (1) requiring actual knowledge by the trustee to ignore a direction of a person having a directory power and (2) making a person having a directory power a presumptive fiduciary.³²¹ The requirement that the trustee know the attempted exercise of power violates the terms of the trust, or know the powerholder is incompetent, probably relieves the trustee of the duty to investigate the powerholder’s competency, but the duty for the trustee to at least review the trust instrument on receiving a direction may be retained.³²² This puts a lesser burden on the trustee when confronted with a direction by a powerholder. Moreover, unless the trustee knows the powerholder is incompetent, or compliance with the powerholder’s direction would violate the terms of the trust, the trustee would have no liability for following the powerholder’s direction. This should result in the powerholder’s directions being followed more frequently.

Balanced against the reduced duty on, and liability of, the trustee is the provision making the powerholder a fiduciary—as to the power—and liable for damages for any loss resulting from the exercise of—and, presumably, the decision not to exercise—the power.³²³ This provision correctly subjects the powerholder to all fiduciary duties—loyalty, impartiality, and good faith—as to the power. It would appear the amendment achieves the correct result in the case of directory powers, relieving the trustee of fiduciary duties and risk of liability in most cases for following the direction, and places such responsibility and liability on the powerholder.

320. 2006 Iowa Acts 247.

321. See 2003 Iowa Acts 199. The comment to UTC section 808 provides that the fiduciary duty of section 808(d) applies to trust protectors and advisers. See UNIF. TRUST CODE § 808 cmt. Restatement (Third) of Trusts provides, except for a power held solely for the benefit of the powerholder, the power is held in a fiduciary capacity. RESTATEMENT (THIRD) OF TRUSTS § 75 cmt. c(1) (2007).

322. This conclusion is not certain but, because the trust instrument is normally in the trustee’s files, a duty to examine the trust instrument would appear to be reasonable. Undetermined is whether if, after examination of the instrument, the trustee is uncertain as to whether the direction would violate the terms of the trust, the trustee has a duty to go further—for example, consult an attorney or bring a court proceeding. The answer would appear to be “no,” because to require the trustee to go further if it is uncertain would be more akin to “believe” or “has reason to know” than “knows.” To be uncertain of the conclusion is to not “know” it.

323. IOWA CODE § 633A.4207(3) (2009).

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G. *Section 633A.4211—Enforcement and Defense of Claims and Actions*

This section was amended in 2002 to delete several unnecessary words and to add the phrase “to defend claims against the trust,” making explicit what was implicit in the section prior to 2002.³²⁴

H. *Section 633A.4213—Duty to Inform and Account*

1. *General Discussion and Qualified Beneficiaries*

I previously identified those issues on former section 633.4213 that generated a great deal of controversy and discussion.³²⁵ In summary, these issues were:

1. Should the requirements of the section apply only to the grantor of a revocable trust? Put differently, should the grantor of a revocable trust, while alive and competent, have all the rights of the beneficiaries? As previously reported, in 1999 the Section agreed the answer should be yes.³²⁶ However, the provision was not submitted to the legislature due to disagreement on Issue 3.³²⁷
2. Should only the minor beneficiaries and persons under disability receive notice, or should notice also be given to the representatives of these beneficiaries? At the same meeting, the Probate Law Section voted to give notice to the representatives of these beneficiaries, but the amendment was not submitted to the legislature.³²⁸
3. Should notice and accountings be provided to all beneficiaries or just to a selected group of beneficiaries? The Probate Law Section noted the UTC limited the notice to “qualified beneficiaries.”³²⁹ The

324. 2002 Iowa Acts 193.

325. Begleiter, *supra* note 1, at 255–57.

326. *Id.* at 256.

327. *See id.*

328. *Id.*

329. UNIF. TRUST CODE § 813 (amended 2004). The UTC defines “qualified beneficiary” as

a beneficiary who, on the date the beneficiary’s qualification is determined:

(A) is a distributee or permissible distributee of trust income or principal;

(B) would be a distributee or permissible distributee of trust income or

Section did not reach agreement on this issue. This question involves a difficult balancing of the beneficiaries' rights and the grantor's desires.

During further discussion on the issue over the next several years, most practitioners favored limiting the right to notice and accounting to certain beneficiaries. They cited grantor concerns about keeping trust terms private in *Crummey* trusts, concerns that informing remote beneficiaries about the affairs of the trust was unnecessary and would waste time and effort by giving information to persons who were unlikely to benefit from the trust or would not do so until far into the future, and concerns regarding the administrative complexities involved in maintaining current information. Most Section members preferred to omit remaindermen from the notice provisions.³³⁰ Ultimately, a compromise position was reached and enacted by the legislature, and it will be discussed in the remainder of this section. First, however, the Iowa Trust Code definition of "qualified beneficiary," enacted in 2002, should be mentioned.³³¹ The definition of qualified beneficiary provides as follows:

14. "*Qualified beneficiary*" means a beneficiary who, on the date the beneficiary's qualification is determined, is any of the following:
 - a. Eligible to receive distributions of income or principal from the trust.
 - b. Would receive property from the trust upon immediate termination of the trust."³³²

principal if the interests of the distributees described in subparagraph (A) terminated on that date without causing the trust to terminate; or

(C) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

Id. § 103(13).

330. I strongly objected to this suggestion. The notice and accounting are the primary means of informing the beneficiaries of the affairs of the trust. Information of this sort is necessary for the beneficiaries to enforce their rights because without information on trust administration, the beneficiaries would have no basis on which to question the trustee's actions. However, as will be discussed later in this section, the draft as finally approved by the Section and the legislature did preserve a beneficiary's common law right to an accounting, so the information is available to all beneficiaries, though the beneficiary will need to take the initiative to obtain it. IOWA CODE § 633A.4213(7) (2009).

331. 2002 Iowa Acts 192.

332. IOWA CODE § 633A.1102(14). Note the definition is similar to that of the UTC, but the language is simplified. See UNIF. TRUST CODE § 101(13); see also *supra*

In addition to section 633A.4213, “qualified beneficiaries” was substituted for other terms in the following sections: 633A.4105 (filling vacancies in the office of trustee),³³³ 633A.4106 (resignation of trustee),³³⁴ and 633A.4111 (notice of increased trustee’s fee).³³⁵

I did not author the changes in section 633A.4213, so I cannot state the rationale for them. However, the author of the changes offered the following explanation in a comment to the proposal:

This new statute attempts to address the difficulty of finding the right balance between a beneficiary’s right to know and a [t]rustor’s right to keep these matters private if they desire. Only prospective application of this section may alleviate some of those concerns. Also, this revised statute allows drafting around the statute so long as it is specific. However, drafting around the statute creates perils for the Trustee. The statute does not create any of these perils, but reminds all that they exist whether there is a statute or a waiver of the statute.

A defining point comes when we are dealing with the issue of remaindermen. It would seem that most practitioners would prefer to leave remaindermen out and a statute that everyone drafts around is useless. On the other hand there are situations where irreparable damage will occur because the remaindermen were never informed. This statute attempts to find a middle ground through the required notice provision. This will solve the typical problem scenarios that people are complaining about, which are the spousal by-pass trust and life insurance trust. In most circumstances the[] surviving spouse will obtain waivers from the children which will permanently avoid annual accountings, unless they request. If the surviving spouse is unable to obtain the waiver from the remaindermen there may be good reason to have that oversight by them. The ILIT is easy since there will need to be contact made with the beneficiaries (or their representative) to obtain their signature on the Crummey letter.

Hopefully by requiring a specific waiver in the Trust document the drafting attorney will pause for a moment to consider whether drafting around the notice and right to accounting is an intelligent decision.³³⁶

Part II.C (providing illustrations of the definition).

333. IOWA CODE § 633A.4105(2)(b)(1).

334. *Id.* § 633A.4106(1)(c).

335. *Id.* § 633A.4111(2)(a).

336. Probate & Trust Law Section, The Iowa State Bar Ass’n, Proposed

2. *Section 633A.4213(1)*

The opening sentence prior to subsection 1 is similar to the former subsection 1, except the section is now expressly limited to irrevocable trusts and “qualified beneficiaries” was substituted for “beneficiaries.”³³⁷ A phrase was added to the end of the sentence reading: “and the material facts necessary to protect the beneficiaries’ interests.”³³⁸ Making this explicit is probably a beneficial change.

New subsection 1 is far more explicit than former subsection 2, which it replaced. It requires the trustee to inform each qualified beneficiary of (1) the beneficiary’s right to receive an annual accounting and a copy of the trust instrument and (2) the process required to obtain the annual accounting and the trust instrument if they are not provided automatically by the trustee.³³⁹ In addition, the trustee must inform each qualified beneficiary of whether the beneficiary will automatically receive an annual accounting if the beneficiary does not request one.³⁴⁰ Once a notice is given to a qualified beneficiary, neither a change of trustee nor a change in the group of qualified beneficiaries requires an additional notice.³⁴¹ The prior thirty-day limit on the time for the trustee to inform beneficiaries of the trustee’s acceptance of the office has been eliminated as unnecessary.³⁴² In a salutary change, also eliminated was the prior reference to informing beneficiaries having vested interests of their interests, which was a reference that would have generated a great deal of uncertainty had it remained in the Trust Code.³⁴³

The specificity in the new subsection 1 is to be commended. One notice to each qualified beneficiary will provide all the information a qualified beneficiary will need as to what information he or she is entitled to receive, how to get it if it does not come automatically, and whether it will come automatically. The change to this subsection is a good one.

Amendments to the Iowa Trust Code 11–12 (2002) (on file with author). ILIT stands for Irrevocable Life Insurance Trust.

337. 2002 Iowa Acts 193; *see infra* Part VIII.H.5 for further discussion.

338. 2002 Iowa Acts 193.

339. *Id.* at 193–94.

340. *Id.*

341. *Id.*

342. *See id.*

343. *See id.*; Begleiter, *supra* note 1, at 250–51 & nn.559–60.

3. *Section 633A.4213(2)*

Section 633A.4213(2) deals with the time limits for providing information.³⁴⁴ The section specifies the section 633A.4213(1) notice must be provided within a “reasonable time”—as opposed to the prior section’s thirty days—on any of four events:

- a. The commencement of the trust administration.
- b. The trustee becoming aware that there is a new qualified beneficiary or a representative of any minor or incompetent beneficiary.
- c. The trust becoming irrevocable. [This is presumably for a previously revocable trust that becomes irrevocable on the death or loss of capacity of the grantor.]
- d. The time that no person, except the trustee, has the right to change the beneficiaries of the trust.³⁴⁵

Section 633A.4213(2)(d) is somewhat unclear, but it may have been intended to cover the case in which a grantor, or another person, reserves the right to change beneficiaries but not to revoke the trust.³⁴⁶

4. *Section 633A.4213(3)*

Except where the grantor has restricted the right to change the beneficiaries, or transferred that right to another person,³⁴⁷ the trustee shall provide an accounting “to each adult beneficiary and the representative of any minor or incompetent beneficiary who may receive a distribution of income or principal during the accounting time period” unless the right to receive an accounting has been waived for that period.³⁴⁸

It is interesting that “qualified beneficiary” was not used in this subsection. In fact, the exclusion was intentional. For reporting purposes, it was desired to limit the reporting requirement to those beneficiaries

344. IOWA CODE § 633A.4213(2) (2009).

345. *Id.* § 633A.4213(2)(a)–(d).

346. *See id.* § 633A.4213(d).

347. The exception language was added in 2006. 2006 Iowa Acts 247.

348. IOWA CODE § 633A.4213(3).

described in section 633A.1102(14)(a)³⁴⁹ and to exclude those described in section 633A.1102(14)(b).³⁵⁰ Remaindermen are not required to be provided an annual accounting unless the trust terminated during the period, even though they are qualified beneficiaries. Income beneficiaries, discretionary income beneficiaries, and corpus beneficiaries are provided an annual accounting.³⁵¹ Remaindermen need to request an accounting when they receive the subsection 1 notice.³⁵² I suspect this was the rule desired by most practitioners, who probably assumed, and hoped, few remaindermen would take advantage of the opportunity to request accountings.

Former subsection 3 was repealed. Originally, this section required the trustee “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.”³⁵³ In some cases, irreplaceable property, such as farmland, could be sold by the trustee without advance notice.³⁵⁴ Advance notice may constitute the only possible opportunity for the beneficiaries to object to the sale or outbid the prospective buyer. It is unfortunate this significant provision was deleted from the Trust Code.³⁵⁵ However, it is possible, a court may incorporate this rule under the common law.³⁵⁶

5. *Section 633A.4213(4)*

The former subsection 4, requiring the trustee to provide the beneficiary with a copy of the trust instrument and information about the trust administration on request, has been partially absorbed by current subsection 1.³⁵⁷ The ability of beneficiaries to obtain this information is part of the common law of trusts and will be discussed under subsection

349. *Id.* § 633A.1102(14)(a) (including those “[e]ligible to receive distributions of income or principal from the trust”).

350. *Id.* § 633A.1102(14)(b) (excluding those who “[w]ould receive property from the trust upon immediate termination of the trust”).

351. *Id.* §§ 633A.1102(14)(a), 633A.4213(3).

352. *Id.* § 633A.4213(1)–(2).

353. 1999 Iowa Acts 248.

354. *See* Begleiter, *supra* note 1, at 252–53.

355. 2002 Iowa Acts 193–94.

356. *See infra* Part VIII.H.8 (discussing section 633A.4213(7)).

357. *Compare* 1999 Iowa Acts 248, *with* IOWA CODE § 633A.4213(1).

7.³⁵⁸

Current subsection 4 provides the section does not apply to revocable trusts or trusts where the grantor has retained the right, or transferred the right, to change the beneficiaries.³⁵⁹ In such a case, the trustee reports only to the settlor or the holder of a presently exercisable general power of appointment.

6. *Section 633A.4213(5)*

Former subsection 5, directing when an accounting should be prepared, has been moved to subsection 6. Current subsection 5 contains an important new limit on the remedies available for failure to provide information. The only remedy for failure to provide a required accounting or notice is the trustee is prohibited from relying on the one-year statute of limitations in section 633A.4504.³⁶⁰ The thought, presumably, was if the notice or accounting was not provided, the qualified beneficiary would be free to challenge any of the trustee's actions or a later accounting.³⁶¹ If that is correct, it ignores the problem of memories fading and the significance of information being lost as time passes. It also ignores the problem of the death of a qualified beneficiary prior to an accounting.³⁶²

The statute does permit the recovery of costs and attorneys' fees against the trustee personally if the trustee refuses a reasonable request for an accounting by a qualified beneficiary.³⁶³

Recently, a member of the Section informed me some trustees were resisting court orders to provide accountings to qualified beneficiaries on the ground subsection 5 does not specify the court could order an accounting.³⁶⁴ Of course, the Trust Code Committee had no intention to

358. *See infra* Part VIII.H.8 (discussing section 633A.4213(7)).

359. IOWA CODE § 633A.4213(4).

360. *See* 2002 Iowa Acts 194; *see also infra* Part X.B (discussing section 633A.4504).

361. My recollection is this was insisted on by certain members of the Section employed by corporate trustees.

362. While it is true the beneficiary's personal representative could sue the trustee, the death of the qualified beneficiary could result in a significant loss of information in such an action.

363. 2002 Iowa Acts 194.

364. That is, these banks claimed the only remedy was loss of reliance on the statute of limitations.

prohibit the court from ordering the trustee to furnish an account to the qualified beneficiary in these circumstances and proposed an amendment to subsection 5 specifically allowing the court to order the trustee to account.³⁶⁵

7. *Section 633A.4213(6)*

Former subsection 6, directing to whom accountings need to be sent, has been replaced by the “qualified beneficiary” requirement previously discussed.³⁶⁶ The specific statement that any beneficiary who has requested, in writing, an accounting or other information is entitled to that accounting or information has unfortunately been deleted.³⁶⁷ Former subsection 6 was replaced by the current provision, leaving the format of the accounting to the discretion of the trustee as long as the accounting provides sufficient information to inform the beneficiary of the condition of the trust and the trustee’s activity during the period accounted for.³⁶⁸

8. *Section 633A.4213(7)*

This subsection does two things. The first is to make the rules passed by the 2002 legislature prospective only.³⁶⁹ Thus, the 2002 amendments described above apply only to trusts created on or after July 1, 2002. Trusts created prior to that date should be governed by prior law. The second

365. This proposal will be submitted during the 2011 legislative session. In addition, the Committee took the opportunity to rewrite the statute to clarify it. The current section 633A.4213(5) reads:

The only consequence to a trustee’s failure to provide a required accounting or notice is that the trustee shall not be able to rely upon the statute of limitations under section 633A.4504. If the trustee has refused, after a reasonable request, to provide an accounting to a qualified beneficiary, the court may assess costs, including attorney fees, against the trustee personally.

IOWA CODE § 633A.4213(5) (2009).

366. *See supra* Part VIII.H.1–2.

367. 2002 Iowa Acts 193–94. However, this is almost certainly part of the common law of trusts, made applicable to trusts governed by the Trust Code under subsection 7. *See* IOWA CODE § 633A.4213(7).

368. 2002 Iowa Acts 193–94.

369. 2003 Iowa Acts 199 (“This section does not apply to any trust created prior to July 1, 2002. This section applies to any trust created on or after July 1, 2002, unless the ~~trustor~~ settlor has specifically waived the requirements of this section in the trust instrument.”).

matter governed by this subsection was the cause of great concern in the years leading up to the 2002 amendments: Could a grantor place a provision in the trust instrument providing section 633A.4213 of the Trust Code did not apply to the trust,³⁷⁰ and the trustee did not have to account to any beneficiary for actions as trustee? Section 633A.4213(7) answers the question, providing:

Waiver of this section [in the trust agreement] shall not bar any beneficiary's common-law right to an accounting, and shall not provide any immunity to a trustee, acting under the terms of the trust, for liability to any beneficiary who discovers facts giving rise to a cause of action against the trustee.³⁷¹

In fact, prior to the amendment, I discussed this question in the context of sections 633A.1104 and 633A.1105 and determined such a provision would be invalid under the common law of trusts.³⁷²

Given the express provision added to this subsection in 2002, it is notable Iowa law has long embraced this rule.³⁷³ In *In re Clark*, the testator in his will created a trust requiring the trustees to “hold and control [the legacies to Clark] as may seem best in their judgment to advance the interests of such legatee, and if, in their judgment, it should be deemed advisable to give said legatee control of said estate, they are empowered to do so.”³⁷⁴ The trustees contended the trust was so absolute no court could examine the trustee's conduct or control the trustee's discretion.³⁷⁵ The court disagreed, stating, “It cannot be that the creator of a trust by will can absolutely exclude the courts from controlling any and all expenditures from the trust fund”³⁷⁶ It added, “Surely, a good-faith claim . . . that these trustees should be compelled to make a proper accounting, and an attempt to recover of them a forfeiture for failure to make reports, are for the benefit of the trust estate.”³⁷⁷ Just two years later, in *Keating v.*

370. Recall section 633A.1105 provides the terms of the trust take precedence over the Trust Code. See IOWA CODE § 633A.1105. Said otherwise, the Trust Code is entirely default law.

371. *Id.* § 633A.4213(7).

372. Begleiter, *supra* note 1, at 185.

373. 2002 Iowa Acts 194.

374. *In re Clark*, 154 N.W. 759, 759 (Iowa 1915).

375. *Id.*

376. *Id.* at 760.

377. *Id.* at 761.

Keating, a trust giving the trustee the discretion to distribute real estate to the testator's son, should "he prove to be a careful and prudent man," was characterized by the court as "remarkable . . . for the broad scope of the discretion reposed in the trustee."³⁷⁸ However, in an action by the beneficiary to force the trustee to turn the real estate over to the beneficiary, to remove the trustee, and to receive an accounting, the court held for the beneficiary, stating:

We think it equally true that no trust has been or can be created in property where the discretion of the trustee is so broad or illimitable that equity will not entertain a complaint by the beneficiary that the trust has been or is being abused, or that the property is being wrongfully diverted to the destruction or defeat of the purpose for which the founder established it.³⁷⁹

The court held such authority was inherent in courts of equity, even in the absence of statute.³⁸⁰ Later, the court noted:

Nor can any provision in the trust instrument, however emphatically expressed, intended to relieve the trustee from any responsibility to the courts, prevent the interference of equity to see that the trustee's power and discretion are not exercised arbitrarily or selfishly or with disregard for the purposes for which the trust is created.³⁸¹

According to the court, any such provision would be void to the extent it gave a trustee unlimited and uncontrolled discretion independent of court review.³⁸²

The next question is whether a beneficiary who is not a qualified beneficiary has a right to information about the trust and an accounting. Section 633A.4213 provides nothing about the rights of such a beneficiary, except in subsection 3. But all the beneficiaries described in that section—those "who may receive a distribution of income or principal during the accounting time period"³⁸³—would be qualified beneficiaries for that

378. *Keating v. Keating*, 165 N.W. 74, 74, 77 (Iowa 1917).

379. *Id.*

380. *Id.* at 77–78.

381. *Id.* at 78.

382. *Id.*

383. IOWA CODE § 633A.4213(3) (2009).

period. Thus, the common law of trusts controls this question.³⁸⁴ The answer, under Iowa law, is such beneficiaries *are* entitled to information about the trusts and an accounting.

It is one of the elementary rules of the law of trusts that when a trustee repudiates his trust or sets up or asserts rights to the trust property which are destructive of the trust or otherwise antagonistic to the rights and interests of the beneficiary, the latter may maintain an action in equity for the removal of such trustee and for an accounting.³⁸⁵

In *Keating*, the beneficiary instituting the action was a discretionary beneficiary, but other than the trustee, he was also the sole beneficiary of the trust.³⁸⁶

More recently, in *Cox v. Cox*, a contingent remainderman of the trust filed a petition against the trustee for an accounting.³⁸⁷ The sole issue was whether a contingent remainderman of a trust was entitled to an accounting, even if he could not show waste or mismanagement.³⁸⁸ The court, relying on the Restatement (Second) of Trusts, held a contingent remainderman is entitled to an accounting.³⁸⁹ The court stated:

Accountability is the hallmark of a trust. Property cannot be the subject of a trust where its application for the purposes of the trust depends upon the uncontrolled discretion of the one to whom legal title has been entrusted. . . .

Because the trustee acts on his or her behalf, the beneficiary is “entitled to know what the trust property is and how the trustee has dealt with it.” We assume defendants would not contest a vested beneficiary’s right to an accounting. We find no good reason to hold a contingent beneficiary’s right to an accounting must await a trustee’s breach of trust. Even contingent remaindermen are entitled to guard

384. *See id.* § 633A.1104.

385. *Keating*, 165 N.W. at 79.

386. *Id.* at 74–75.

387. *Cox v. Cox*, 357 N.W.2d 304, 305 (Iowa 1984).

388. *Id.*

389. *See id.* at 306 (citing RESTATEMENT (SECOND) OF TRUSTS § 172 cmt. c (1959)).

against damage to their interest.³⁹⁰

The Restatement (Third) of Trusts modified the rule of the Restatement (Second) slightly. The Restatement (Third) imposes on a trustee a duty “to inform fairly representative beneficiaries of the existence of the trust,” that they are beneficiaries thereto, of basic information about the trust, and of “their right to obtain further information.”³⁹¹ The Restatement (Third) limits the right to fairly representative beneficiaries. The comment explains the term “fairly representative” beneficiaries, noting the duty can usually be satisfied by providing information to those entitled to income or corpus, and those who would be entitled to income or corpus if the trust or current interests were to terminate at that time.³⁹² This definition corresponds closely to the Trust Code’s definition of “qualified beneficiary.”³⁹³ However, the Restatement (Third) goes on to provide: “[A] trustee also ordinarily has a duty promptly to respond to the request of any beneficiary for information concerning the trust and its administration, and to permit beneficiaries on a reasonable basis to inspect trust documents, records, and property holdings.”³⁹⁴ Can the terms of the trust restrict this right? The answer appears to be “no,” except for restricting the circumstances and frequency of requests and the amount of information. “[A] beneficiary is always entitled under Subsection (2) to request such information as is reasonably necessary to enable the beneficiary to prevent or redress a breach of trust and otherwise to enforce his or her rights under the trust.”³⁹⁵ Specifically, any beneficiary is entitled to request and receive accountings or comparable reports from the trustee.³⁹⁶

To summarize, any beneficiary is entitled to information about the trust and to an accounting. A beneficiary who is not a qualified beneficiary will probably not be provided with such information as a right; instead, he or she will need to request it. The terms of the trust may not deny this right to any beneficiary.

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390. *Id.* (citations omitted).
391. RESTATEMENT (THIRD) OF TRUSTS § 82(a) (2007).
392. *Id.* § 82 cmt. a(1).
393. *See* UNIF. TRUST CODE § 103(13) (amended 2004).
394. RESTATEMENT (THIRD) OF TRUSTS § 82(2).
395. *Id.* § 82 cmt. a(2).
396. *Id.* § 83 cmt. b.

I. Section 633A.4214—Duties with Regard to Discretionary Powers

Before discussing the amendment, it should be noted that a case involving auction bids stated both section 633A.4214 and section 633.4401(3) statutorily adopted “preexisting common law principles in this area.”³⁹⁷

In the first series of Issue Papers, the question was raised whether this section should be expanded to cover certain tax traps for a trustee who was also a beneficiary.³⁹⁸ These tax traps involve situations in which the trust would be included in the trustee–beneficiary’s estate for estate tax purposes. The UTC, issued at that time, contained such provisions.³⁹⁹

In 2002, subsections 3 and 4 were added to this section to do just that.⁴⁰⁰ First, subject to subsection 3(c), which lists certain types of trusts and powers not subject to the new rule, subsection 3(a) provides a beneficiary–trustee having “the power to make discretionary distributions to or for the trustee’s personal benefit may exercise the power only in accordance with an ascertainable standard relating to the trustee’s individual 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.”⁴⁰¹ In addition, under subsection 3(b), “a power to make discretionary distributions to satisfy a legal obligation of support” by a trustee–beneficiary shall not be exercised by the trustee.⁴⁰² It is important to note this rule is mandatory unless the terms of the trust *expressly* provide the rule does not apply.⁴⁰³

There are only three situations, other than an express negation of the

397. *In re* H.W.G. Folkers Revocable Trust, No. 02-1075, 2004 WL 434199, at *4 n.7 (Iowa Ct. App. Mar. 10, 2004) (citing *In re* Tone’s Estate, 39 N.W.2d 401, 405 (Iowa 1949)).

398. MARTIN D. BEGLEITER, ISSUE PAPER, IOWA CODE, DUTIES WITH REGARD TO DISCRETIONARY POWERS.

399. UNIF. TRUST CODE § 814(b)–(d) (amended 2004).

400. *See* 2002 Iowa Acts 194–95. These subsections were based on the UTC, reworded slightly. *See* UNIF. TRUST CODE § 814.

401. IOWA CODE § 633A.4214(3)(a) (2009).

402. *Id.* § 633A.4214(3)(b).

403. This is to prevent inadvertent exercise of the power where the instrument is silent or where the language of the instrument is not clear, which could possibly lead to adverse estate tax consequences for the trustee–beneficiary. *See* UNIF. TRUST CODE § 814 cmt.

rule by the trust instrument, in which the rule does not apply.⁴⁰⁴ The first is in a trust that may be revoked or amended by the settlor.⁴⁰⁵ In this case, the trust is included in the settlor's gross estate in any case.⁴⁰⁶ The second involves a power held by a settlor's spouse as trustee of a marital-deduction trust.⁴⁰⁷ Again, because such a trust will be included in the spouse's gross estate in any event, the rule is not necessary. A third exception exists for trusts qualifying for an unusual exclusion under section 2503(c) of the Internal Revenue Code.⁴⁰⁸ These trusts are carefully circumscribed for the benefit of persons under age twenty-one if certain requirements are met.⁴⁰⁹ In this case, the prevention of the trustee from distributing trust property in satisfaction of a trustee's legal obligation of support could result in the loss of the annual exclusion for gift tax purposes, which was the purpose for creating this type of trust in the first place.

If the trust has other trustees who are not beneficiaries, subsection 4 provides a majority of these trustees may exercise the power. If all the trustees are also discretionary beneficiaries of the trust, "the court may appoint a special fiduciary with authority to exercise the power."⁴¹⁰

IX. TRUSTEE POWERS AND DUTIES

A. Section 633A.4401—General Powers—Fiduciary Duties

In *In re H.W.G. Folkers Revocable Trust*, the court commented subsection 3 of this section—providing the grant of a power to the trustee does not in itself govern the exercise of the power and the power shall be exercised by the trustee in accordance with fiduciary principles—embodied common law principles.⁴¹¹

404. See IOWA CODE § 633A.4214(c).

405. *Id.* § 633A.4214(c)(2).

406. See *id.* § 633A.3104.

407. *Id.* § 633A.4214(c)(1).

408. *Id.* § 633A.4214(c)(3).

409. The requirements and use of section 2503(c) trusts are beyond the scope of this Article.

410. IOWA CODE § 633A.4214(4).

411. See *In re H.W.G. Folkers Revocable Trust*, No. 02-1075, 2004 WL 434199, at *4 n.7 (Iowa Ct. App. Mar. 10, 2004) (citing *In re Tone's Estate*, 39 N.W.2d 401, 405 (Iowa 1949)).

B. *Section 633A.4402—Special Powers of Trustees*

There were some rewrites and additions to this section in 2002 based on a review of the way the powers were stated. First, subsection 3 was expanded to include other forms of organization and to combine the powers in former subsections 3 and 16, and it was based on UTC section 816(6).⁴¹² Subsection 6 was expanded to include some of the powers formerly in subsection 16.⁴¹³ Subsection 16, with its powers transferred to subsection 6, was used for a new power to select a mode of payment under retirement plans and was based on UTC section 816(17).⁴¹⁴ Subsection 25 was broadened based on UTC section 816(22).⁴¹⁵ Subsection 27, based on UTC section 816(13), was expanded to encompass protection against liability for environmental law violations of holding certain trust

412. Former subsection 3 was amended to read:

With respect to an interest in a proprietorship, partnership, limited liability company, business trust, corporation, or other form of business or enterprise, continue or participate in the operation of a business or other enterprise that is part of the trust and take any action that may be taken by shareholders, members, or property owners, including merging, dissolving, or otherwise changing the form of a business organization and contributing additional capital.

2002 Iowa Acts 195; *see* UNIF. TRUST CODE § 816(6) (amended 2004).

413. Subsection 6 now includes, in part, the following powers:

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.

IOWA CODE § 633A.4402(6).

414. *See* 1999 Iowa Acts 252. Subsection 16 currently reads: “Select a mode of payment under any employee benefit or retirement plan, annuity, or life insurance payable to the trustee, and exercise rights thereunder, including the right to indemnification for expenses and against liabilities, and take appropriate action to collect proceeds.” IOWA CODE § 633A.4402(16); *see* UNIF. TRUST CODE § 816(17).

415. Former subsection 25 was deleted and replaced with: “Upon distribution of trust property or the division or termination of a trust, make distribution 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.” 2002 Iowa Acts 195; *see* UNIF. TRUST CODE § 816(22).

property.⁴¹⁶ Subsections 31 and 32 are new and are based on UTC sections 816(23) and 816(26), respectively.⁴¹⁷

X. LIABILITY OF TRUSTEES TO BENEFICIARIES

A. *Section 633A.4502—Breach of Trust Actions*

In 2002, subsection 1(h) added to the remedies available to the court to remedy a breach of trust by including the words “[o]rder any other

416. Former subsection 27 was deleted and the subsection was expanded and divided into parts as follows:

With respect to any actual or potential violation of any environmental law affecting property held directly or indirectly by the trustee, a trustee shall do all of the following:

- a. Inspect or investigate property the trustee holds or has been asked to hold or property owned or operated by an organization in which the trustee holds an interest or has been asked to hold an interest in, and expend trust funds therefore, for the purpose of determining any potential environmental law violations with respect to the property.
- b. 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, whether taken before or after the assertion of a claim or the initiation of governmental enforcement.
- c. Decline to accept property into trust or disclaim any power with respect to property that is or may be burdened with liability for violation of any environmental law.
- d. Negotiate claims against the trust which may be asserted for an alleged violation of environmental law.
- e. Pay the expense of any inspection, review, abatement or remedial action to comply with environmental law.

2002 Iowa Acts 195.

417. Subsection 31 was enacted to provide the following power: “Resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternative dispute resolution.” *Id.* at 196; *see* UNIF. TRUST CODE § 816(23). Subsection 32, added by the same legislation, provided the following powers: “Upon termination of the trust, exercise the powers necessary to conclude the administration of the trust and distribute the trust property to the person or persons entitled to the trust property.” 2002 Iowa Acts 196; *see* UNIF. TRUST CODE § 816(26).

appropriate relief,” to make explicit what was almost certainly implicit in the equity power of the court.⁴¹⁸

At a meeting of the Section in August 2008, amendments to section 633A.4213(5) were discussed and adopted. In the course of discussing this topic, it was noted the remedies for failure to provide information and accounts to qualified beneficiaries were limited by section 633A.4213, and the question was raised of whether explicit reference to this should be made in section 633A.4502. This was accomplished by adding the following words at the beginning of subsection 1: “Except as provided in section 633A.4213.”⁴¹⁹ An inadvertent error in the effective-date provision of this addition was corrected by the 2010 legislature.⁴²⁰

B. *Section 633A.4504—Limitation of Action Against Trustee*

Turner v. Iowa State Bank & Trust Co. of Fairfield involved a motion for summary judgment to dismiss a claim for a breach of trust based on the one-year statute of limitations contained in this section.⁴²¹ The allegations of the petition involved failure to pay a beneficiary’s legal fees for his successful defense of a criminal trespass charge for going on trust property when he was a trustee, interference with a family settlement agreement, and interference with a lawsuit between the trust’s beneficiaries.⁴²² The court denied the motion for summary judgment on the ground the first claim was properly a creditors’ claim and the other claims were based on tortious interference.⁴²³ Therefore, none of these claims were for breach of trust; rather, they were independent claims outside the purview of the

418. 2002 Iowa Acts 196.

419. 2009 Iowa Acts 229.

420. The original effective-date provision was copied from the effective-date provision of section 633A.4213(7) and made the entire section 633A.4502 applicable only to trusts created on or after July 1, 2002. 2009 Iowa Acts 229. This, of course, was incorrect because section 633A.4502, or its predecessor, has been in the Trust Code since its enactment and was effective on July 1, 2000. 1999 Iowa Acts 253. In 2010, the Section approved—and the legislature passed—corrective legislation amending the subsection to read: “The exception created in subsection 1 of this section does not apply to any trust created prior to July 1, 2002,” and deleting the remainder of the language in subsection 2. H.R. 2483, 83d Gen. Assemb., Reg. Sess. (Iowa 2010). This correction was retroactive to July 1, 2009. *Id.*

421. *Turner v. Iowa State Bank & Trust Co. of Fairfield*, 743 N.W.2d 1, 2 (Iowa 2007).

422. *Id.* at 4.

423. *Id.* at 5–6.

Trust Code.⁴²⁴

A much more detailed examination of this section was involved in *In re Trust #2 Under Will of Dulin*.⁴²⁵ In his will, Dulin created two trusts.⁴²⁶ The assets of Trust 1 were added to Trust 2 ten years after decedent's death by mutual agreement of the beneficiaries, testator's children.⁴²⁷ In the second trust, the income was payable to his children annually in equal shares.⁴²⁸ On the death of the last surviving child, the trust was to terminate and the assets were to be distributed to testator's grandchildren.⁴²⁹ Reports were filed yearly by the trustees from the inception of the trust until 1995.⁴³⁰ The reports, including a special report when one of the trustees resigned, were approved by all the beneficiaries and the court.⁴³¹ Purchases of three parcels of farmland were reflected in the reports.⁴³² After 1995, the sole remaining trustee continued to prepare annual reports, but one of the beneficiaries, Mary, refused to sign them and they were never filed with the court.⁴³³

In 2005, the children had a meeting regarding the trust.⁴³⁴ Mary voiced dissatisfaction with the trust administration.⁴³⁵ After a failure to resolve their differences, Mary petitioned to have her brother, Bill, removed as trustee.⁴³⁶ A court removed Bill as trustee, appointing a corporate trustee in his place.⁴³⁷ Bill filed an accounting and a supplemental accounting, to which Mary objected.⁴³⁸

The court held section 633A.4504 barred Mary from objecting to the

424. *Id.*

425. *In re Trust #2 Under Will of Dulin*, No. TRPR 14637 (Iowa Dist. Ct. Mar. 13, 2007) (on file with author).

426. *Id.* at 2.

427. *Id.*

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.*

432. *Id.*

433. *Id.* at 3.

434. *Id.*

435. *Id.*

436. *Id.* at 3–4.

437. *Id.* at 4.

438. *Id.*

accountings from 1974 to 1994 on the ground the accounting gave Mary sufficient information to be aware of her rights, the trust administration, and that the trust was conducting farm operations through a partnership of which the trustee was a partner.⁴³⁹ The court ruled “Mary should have known of any claim or reasonably should have inquired into the existence of a claim” by a date within one year from the 1995 accounting.⁴⁴⁰

The court also correctly held the Trust Code’s accounting requirements did not apply to this trust because it was a court-supervised trust, and the requirements of Probate Code sections 633.700 and 633.701, together with the Uniform Principal and Income Act, governed the trust.⁴⁴¹

C. Section 633A.4506—Beneficiary’s Consent, Release, or Affirmance—No Liability of Trustee

The first set of Issue Papers noted subsection 2 of section 633A.4506 was difficult to understand and was ambiguous as to whether the trustee’s reasonable belief applies only to the material facts of the transaction or also to the beneficiary’s rights.⁴⁴² Following my recommendation, the legislature split subsection 2 into three separate parts to make it more coherent.⁴⁴³ They also rewrote subsection 2 to clarify that the trustee’s reasonable belief applies to both the material facts of the transaction and the beneficiary’s rights.⁴⁴⁴

439. *See id.* at 5–6.

440. *Id.* at 6.

441. *See id.* at 10; IOWA CODE § 633.10(4) (2009). The analysis of the adequacy of the accounting is beyond the scope of this Article. The court further analyzed whether the trustee had invested the trust prudently under the Uniform Prudent Investor Act in preserving a “century farm” owned by the decedent in the trust and purchasing additional farmland in Keokuk County. In a primarily factual analysis, the court approved the trustee’s investments, concluding, “He preserved the trust assets while keeping the farmland owned by his father in the family as long as he could. . . . He preserved the assets of the trust and has provided income to the other two beneficiaries, as well as himself.” In re *Dulin*, No. TRPR 14637 at 17.

442. MARTIN D. BEGLEITER, ISSUE PAPER, IOWA CODE, BENEFICIARY’S CONSENT, RELEASE OR AFFIRMANCE.

443. *See* 2002 Iowa Acts 196.

444. Following the revision, the amendment read:

2. A beneficiary may hold a trustee liable for breach of trust despite a consent, release, or affirmation by the beneficiary, if, at the time of the consent, release, or affirmation, all of the following applied:

D. *Section 633A.4507—New Section—Attorneys’ Fees and Costs*

The question of a new section on attorneys’ fees and costs was raised by Michel Nelson and Todd Buchanan following the decision in *McKinnon v. McCabe*.⁴⁴⁵ In that case, Daniel McCabe created a revocable trust.⁴⁴⁶ After Daniel’s death, the corpus was to be split into two trusts.⁴⁴⁷ The income from the first trust was to be distributed to Daniel’s second wife, Delores, for life, together with so much of the corpus as the trustee determined for her health support, reasonable comfort, best interests, and welfare.⁴⁴⁸ The second trust, the “Family Trust,” was discretionary as to both income and principal, but it contained similar provisions for Delores’s benefit.⁴⁴⁹

Delores suffered a stroke and moved to Florida to reside with her son.⁴⁵⁰ After Daniel’s death, the trustee began sending Delores the income from the first trust but told Dolores the trust would no longer pay her expenses and she would be expected to pay her expenses from the income of the first trust.⁴⁵¹ When Delores moved to a nursing home, the trustee refused to pay her expenses without a detailed accounting of her financial circumstances.⁴⁵² Delores applied for an order directing the trustee to pay

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- a. The beneficiary did not know of the beneficiary’s rights.
 - b. The beneficiary did not know the material facts known to the trustee or which the trustee should have known.
 - c. The trustee did not reasonably believe that the beneficiary knew the beneficiary’s rights or that the beneficiary knew material facts known to the trustee or which the trustee should have known.
3. A beneficiary may hold a trustee liable for breach of a trust, despite a consent, release, or affirmation by the beneficiary, if the consent, release, or affirmation was induced by improper conduct of the trustee.

Id. The next year the legislature changed “or” to “and” in subsection 2(c). 2003 Iowa Acts 199.

445. *McKinnon v. McCabe (In re Trust of McCabe)*, No. 01-1972, 2002 WL 31757533 (Iowa Ct. App. Dec. 11, 2002).

446. *Id.* at *1.

447. *Id.*

448. *Id.*

449. *Id.*

450. *Id.*

451. *Id.*

452. *Id.*

her nursing home bills.⁴⁵³

The court ordered the trustee to pay Delores's nursing home expenses.⁴⁵⁴ The lower court also ordered the trustee to pay Delores's attorneys' fees.⁴⁵⁵ The court, citing the "normal" rule that "[a] party generally may not recover attorneys['] fees in the absence of a statute or agreement authorizing them," held section 633A.4502 does not "expressly authorize payment of a beneficiary's attorney[s'] fees" by the trust.⁴⁵⁶ The court reversed the award of Delores's attorneys fees from the trust.⁴⁵⁷ The Committee believed the court should have the power to award attorneys' fees to a beneficiary in the proper case.⁴⁵⁸ While expressing no opinion as to whether *In re McCabe* was a proper case for an award of attorneys' fees to a beneficiary, the Committee presented to the Section a proposal based on UTC section 1004, which the Section approved and the legislature enacted in 2004.⁴⁵⁹

XI. RIGHTS OF THIRD PARTIES

A. Section 633A.4601—Personal Liability—Limitations

In light of the increased emphasis on liability of trustees for environmental violations regarding trust property, an addition limiting the trustee's personal liability for environmental violations was added in 2002.⁴⁶⁰

453. *Id.*

454. *Id.* This aspect of the case will be discussed under section 633A.4702. *See infra* Part XIII.

455. *In re Trust of McCabe*, 2002 WL 31757533, at *1.

456. *Id.* at *3 (citing *Thorn v. Kelley*, 134 N.W.2d 545, 548 (Iowa 1965)).

457. *Id.*

458. Probate & Trust Law Section, The Iowa State Bar Ass'n, Proposed Amendments to the Iowa Trust Code (2004) (on file with author).

459. 2004 Iowa Acts 34. Section 633A.4507 reads: "In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney fees, to any party, to be paid by another party or from the trust that is the subject of the controversy." IOWA CODE § 633A.4507 (2009); *see* UNIF. TRUST CODE § 1004 (amended 2004).

460. 2002 Iowa Acts 196 ("A trustee is personally liable for obligations arising from ownership or control of trust property ~~or~~ including liability for environmental law violations, and for torts committed in the course of administering a trust only if the trustee is personally at fault."). This addition is based on the UTC. *See* UNIF. TRUST CODE § 1010(b) (amended 2004).

In *Himes v. Runyan*, the court agreed a trustee, acting as a fiduciary, was not personally liable for a breach of contract claim under this section.⁴⁶¹ However, the court held—entirely apart from trust law—a person acting for another “may be held liable for negligence if they take part personally in the commission of the tort against a third party.”⁴⁶² A directed verdict on the trustee’s personal liability for negligence was reversed.⁴⁶³

B. Section 633A.4604—Certification of Trusts

In 2008, a number of Section members renewed a complaint that had been made periodically over the years: transfer agents refused to process requests by trustees to transfer property into or from trusts and asked for proof of the trustee’s authority, preferably letters of trusteeship.

It has been previously noted that, under the Trust Code, continuing supervision of most trusts by the Probate Court was discontinued.⁴⁶⁴ Under section 633A.6201, a trustee may apply to a convenient court when a question arises concerning the trust. Otherwise, trust administration proceeds without judicial involvement.⁴⁶⁵

By making the Trust Code a separate chapter of the Iowa Code and changing Iowa Code section 633.10, the legislature removed jurisdiction over most trusts from the district court sitting in probate, including the issuance of letters of trusteeship to trusts not subject to jurisdiction of the court.⁴⁶⁶ Therefore, for most trusts, letters of trusteeship are no longer necessary and are not issued. This is in accordance with the notion that, unless necessary, trust administration proceeds without court

In *Dulin*, the court refused to charge the beneficiary’s attorney’s fees personally to the trustee who was removed on the ground the former trustee was found not to have breached his fiduciary duty. *In re Trust #2 Under Will of Dulin*, No. TRPR 14677, slip op. at 19 (Iowa Dist. Ct. Mar. 13, 2007) (on file with author). The court ruled the attorney’s fees incurred, which were for work in preparing accountings, would have been paid from the trusts if the reports had been prepared annually, and the fees were properly charged to the trust. *Id.*

461. *Himes v. Runyan*, No. 07-0637, 2008 WL 2746328, at *4 (Iowa Ct. App. July 16, 2008).

462. *Id.* (citing *Haupt v. Miller*, 514 N.W.2d 905, 909 (Iowa 1994)).

463. *Id.* at *5.

464. See Begleiter, *supra* note 1, at 293–94.

465. *Id.*

466. 2005 Iowa Acts 114; see also *id.* at 119 (specifying trusts subject to the Probate Code and subordinating inconsistent Trust Code sections for specified trusts).

involvement.⁴⁶⁷ Thus, under the Trust Code, most trusts—except those still subject to continuing probate court supervision—are not issued letters of trusteeship. Rather, the certification of trust under this section is used to evidence the trustee's authority.

Given the recalcitrance of some transfer agents to adapt to the new system, the decision was made to affirmatively state letters of trusteeship were no longer necessary and to give trustees of such trusts tools similar to those possessed by agents acting under financial powers of attorney. The comment to the proposal describes the approach:

The amendments to Trust Code sections 633A.4604 and 633A.6101 are offered to give trustees of non-court-supervised trusts similar tools as those available to agents acting under financial powers of attorney for the purpose of compelling compliance with trustees' requests for transfers of property. Currently, there is no provision in the probate or trust codes affirmatively stating that the court is not required to issue letters of appointment to trusts which are not under continuous court supervision. The certification of trust, currently existing under 633A.4604, has been chosen for this purpose. For purposes of transferring property to or from a trust, a transfer agent may request a certification of the trust's existence and the identity of the trustee. If the certification is properly acknowledged, it may be recorded.

The transfer agent is offered both a carrot and a stick to encourage acceptance of the certification. Under subsection 5, the transfer agent is protected from liability for reliance on the certification (after a 1 week period to verify the identity of the trustee). If the transfer agent refuses to pay, deliver or transfer the property to the trustee or pursuant to the trustee's instructions after receiving a certification, the penalties provided in new subsection 7 come into play.

The Committee hopes this combination will encourage transfer agents to accept certifications of trust and cease requesting letters of appointment.⁴⁶⁸

The Committee also proposed an addition to section 633A.6101 to

467. See IOWA CODE § 633A.4401 (2009).

468. Probate & Trust Law Section, The Iowa State Bar Ass'n, Proposed Amendments to the Iowa Trust Code 3 (2010) (on file with author).

affirmatively state no letters of appointment are necessary for trusts subject to the Trust Code.⁴⁶⁹ The Section approved the proposal, and it was enacted by the legislature.⁴⁷⁰

469. See *infra* part XVI.A (discussing section 633A.6101).

470. 2010 Iowa Acts 487–88. Section 633A.4604 was amended as follows:

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~~ trust's existence or terms or the trustee's authority.
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 proof of the trustee's identity and 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~~ after taking reasonable steps to verify the identity of the trustee and 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. The period of time to verify the identity of the trustee shall not exceed ten business days from the date the person received the certification of trust. 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. a. If a trustee has provided a certification of trust and a person refuses to pay, deliver, or transfer any property owed to or owned by the trust within a reasonable time thereafter, the trustee may bring an action under this

XII. SECTION 633A.4701—SURVIVORSHIP WITH RESPECT TO FUTURE INTERESTS UNDER TERMS OF TRUST—SUBSTITUTE TAKERS

A. *General Approach of this Article with Respect to Sections 633A.4701 and 633A.4702*

In both this Article and my prior article,⁴⁷¹ I have used Roman numerals to separate major parts or subparts of the Trust Code, with subsections—designated by capital letters—devoted to each specific section. I depart from this organization for the next sections for two reasons. First, these two sections have generated a great deal of discussion in the Probate and Trust Law Section, and to fully explore the concepts involved, a separate section for each is required. Second, the complexity of the subject—in the case of section 633A.4701—and the intense controversy surrounding the subject—in the case of section 633A.4702—require a more detailed treatment of the developments since 2000.

B. *General Considerations Involved in Section 633A.4701*

In my previous article, I devoted perhaps more space to this section than to any other.⁴⁷² Even so, as the developments discussed below will show, this extensive treatment was apparently insufficient. Accordingly, I need to begin with the basic principle of subsection 1 and some treatment of the reasons lawyers and courts have trouble with the concepts involved.

subsection and the court may award any or all of the following to the trustee:

- (1) Any damages sustained by the trust.
- (2) The costs of the action.
- (3) A penalty in an amount of not less than five hundred dollars and not more than ten thousand dollars.
- (4) Reasonable attorney fees, based on the value of the time reasonably expended by the attorney and not on the amount of the recovery on behalf of the trustee.

b. An action shall not be brought under this subsection more than one year after the date of the occurrence of the alleged violation.

~~7.~~ 8. 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.

Id.

471. See Begleiter, *supra* note 1.

472. See *id.* at 284–89.

Let us begin with the basic rule of section 633A.4701. Except as provided in the section or as explicitly provided by the terms of the trust, **ALL BENEFICIARIES MUST SURVIVE UNTIL THE BENEFICIARY BECOMES ENTITLED TO POSSESSION OR ENJOYMENT OF THEIR INTEREST.**⁴⁷³ If the beneficiary does not survive until the date of possession, the beneficiary's interest is distributed to the other takers specified in the statute.⁴⁷⁴ It does not matter if the interest is classified as vested, vested subject to divestment, contingent, executory, springing, or shifting. It does not matter whether the trust instrument does not require the beneficiary to survive until the date of possession. All that matters is whether the beneficiary is alive on the date the beneficiary's interest becomes possessory.⁴⁷⁵ Perhaps some examples will prove helpful.

Example 1. The trust provides for income to be paid to A for life, remainder to B. B predeceases A. The remainder interest *does not* pass through B's will or to B's intestate takers; rather, it passes under section 633A.4701(2).⁴⁷⁶ In this case, if B has issue surviving A, it would pass to B's issue living on A's death under section 633A.4701(3) because no alternate beneficiary was named who would take under subsection 2.⁴⁷⁷ If B had no issue who survived A, the remainder would be distributed under section 633A.4701(5) as a part of the settlor's—not the beneficiary's—residuary estate or, if the settlor's residuary estate passed entirely to the trust, as a resulting trust via section 633A.2106.⁴⁷⁸ B's interest *will not* pass as a part of B's estate.

Example 2. The trust provides for income to be paid to A for life, then, on A's death, the corpus is to be paid to B, but if Gloversville becomes a city during A's lifetime, the corpus is to be paid to C on A's death.⁴⁷⁹ If Gloversville becomes a city during A's lifetime, the trust corpus

473. See IOWA CODE § 633A.4701 (2009). I put the rule in capital letters so readers can easily locate it, because the tendency is to lose sight of the basic rule in the analysis. The exception, for cases when the trust instrument explicitly states the rule does not apply, will be discussed later in this section.

474. *Id.* § 633A.4701(2)–(6).

475. *See id.*

476. *See id.* § 633A.4701(2).

477. *Id.* § 633A.4701(3).

478. *See id.* § 633A.4701(5).

479. This is the classic vested remainder subject to divestment—using the “but if” form—because the divesting condition is not part of the original grant to B but is

is paid to C on A's death—not to B or to B's estate—if C survives A.

Example 3. The trust provides income is to be paid to A for life, and on A's death, to B if Gloversville does not become a city during A's lifetime, otherwise to C. If Gloversville becomes a city during A's lifetime, on A's death the trust becomes payable to C only if C survives A. If C does not survive A, the corpus is disposed of in accordance with section 633A.4701(2)–(5).⁴⁸⁰ If Gloversville does not become a city during A's lifetime, the corpus is paid to B on A's death only if B survives A.⁴⁸¹

Example 4. The trust provides income is to be paid to A for life, and on A's death, the corpus is to be paid to B, but if B does not survive A, the remainder is paid to C. This is a vested remainder subject to divestment just like Example 2. However, the condition subsequent is an express condition of survival contained in the instrument. Section 633A.4701 does not apply by virtue of subsection 8.⁴⁸²

Example 5. The trust provides income is payable to A for life, and on A's death, the trust principal is payable to B if B survives A and, if B does not survive A, to C. This is an example of alternative contingent remainders similar to Example 3, with the same result. If neither B nor C survives A, the corpus of the trust is disposed of in accordance with section 633A.4701(2)–(5).⁴⁸³ It *does not* pass as part of either B's estate or C's estate.

Example 6. The trust provides income is payable to A for life, and on A's death, the trust principal is payable to B if B survives C. Both B and C predecease A, but B survives C. The trust is payable to neither B's estate nor to C's estate; rather, it is payable in accordance with section 633A.4701(2)–(5).⁴⁸⁴

subsequent to the grant. See THOMAS F. BERGIN & PAUL G. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 71–72 (2d ed. 1984). This example will shortly become important in the discussion.

I use the “if Gloversville becomes a city” example because it was used incessantly in the law school I attended and has become implanted in my brain. I use “if Gloversville becomes a city during A's lifetime” to avoid problems with the rule against perpetuities, which is beyond the scope of this Article.

480. IOWA CODE § 633A.4701(2).

481. This is the classic contingent remainder. See THOMAS F. BERGIN & PAUL G. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 76 (1966).

482. IOWA CODE § 633A.4701(8).

483. *Id.* § 633A.4701(2).

484. *Id.*

Return for a moment to Example 1, which provided income to A for life, remainder to B on A's death. Many courts have said the remainder of this trust will pass to B's estate if B predeceases A, noting B's remainder is vested.⁴⁸⁵ But this explanation is clearly erroneous. Focusing on Example 2, we have a remainder that is clearly vested but does not pass to B's estate in all cases. This is because the instrument contains a divesting condition. To make this crystal clear: Example 4 is a vested remainder subject to divestment on B's failure to survive A. The divesting condition is failure to survive the life income beneficiary. Thus, in both examples—but most clearly in Example 4—we have a vested remainder that does not pass to B's estate if the remainderman fails to survive the income beneficiary.

This analysis makes two conclusions inescapable. First, classifying the remainder as vested *does not* mean that if the remainderman fails to survive the income beneficiary, the remainder passes to the remainderman's estate. Second, the result that the remainder passes to the remainderman's estate, reached by many courts, *must* be due to something other than the remainder being classified as vested.

To take the second conclusion first, if there is no express condition of survivorship, as in Example 1, income to A for life, on A's death, corpus to B, the court must then inquire if anything—such as the form of the trust or other matter in the will or trust instrument—creates conditions such that the court should *imply* a condition of survivorship.⁴⁸⁶ This was discussed extensively in my prior article.⁴⁸⁷ Some of what I said there is:

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 [the testator's] heirs. If the court

485. See *Uchtorff v. Hanson (In re Will of Uchtorff)*, 693 N.W.2d 790, 797–98 (Iowa 2005); Begleiter, *supra* note 1, at 285–88. “Vested” means (1) there is “no condition precedent to the interest's becoming a present estate other than the *natural expiration* of” the prior interests and (2) it is “*theoretically possible*” to identify the person who would take the interest regardless of when the interest becomes possessory. See BERGIN & HASKELL, *supra* note 481, at 66–67.

486. This inquiry has a long history, most of which is beyond the scope of this Article.

487. See Begleiter, *supra* note 1, at 285–88.

does not require that B survive A to take, the trust property will pass through B's will or if he dies intestate, [the trust property will pass] to B's, not [the testator's] heirs. Often, courts have treated the question of whether B must survive A to take the trust property as depending on whether B's remainder is vested or contingent. Thus, since B's interest in our problem is indefeasibly vested, a condition that B survive to take is not implied. 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. Whether the non-vested interest is also subject to an implied condition of survival is unclear. 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.

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 multigenerational classes—have the courts consistently required survival. 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. The draftsperson could have done this, but the courts do not believe it is proper for them to do so. In many cases, implying a condition of survival would cut off a line of descent which courts are extremely reluctant to do. 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. 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.⁴⁸⁸

The conclusion drawn from this analysis is the courts at common law

488. *Id.* at 285–87 (footnotes omitted).

refuse to imply a condition of survival in cases—except for remainders and executory interests to multigenerational classes—not because the interest is vested, but because of their reluctance to inadvertently cut off a line of descent.

Moving to the first conclusion: If the remainderman predeceases the income beneficiary, classifying the remainder as vested does not guarantee the remainder passes to the remainderman's estate. We now know this is not because the remainder is vested, but because the discussion above indicates this result was due to the reluctance of common law judges to inadvertently cut off a line of descent. The best the common law judges could do was to refuse to imply a condition of survival, hold the trust property should pass to the remainderman's estate, and hope the remainderman would will it, or it would pass by intestacy, to his or her issue.⁴⁸⁹

In addition, the settlor of the trust can ensure that if the remainderman predeceases the income beneficiary, the remainder does not go to the remainderman's estate. The settlor can easily accomplish this by drafting into the trust instrument a divesting condition—if the remainderman predeceases the income beneficiary, the remainder will be paid to another. This is Example 4 in our previous discussion.⁴⁹⁰ Here, the fact B's remainder is vested does not mean the remainder goes to B's estate if B predeceases the life-income beneficiary. The settlor has imposed an express condition of survival in the instrument.

Subsection 1 of section 633A.4701 writes into every trust instrument a statutorily imposed express condition of survival on the beneficiary of each interest created by the trust until the date the interest becomes possessory.⁴⁹¹ We have already seen it is universally accepted the settlor can impose such conditions. To say the statute is not effective to do the same thing is to say the settlor can expressly impose a condition that a

489. Often this did not work. *See, e.g., Bd. of Trs. of the Leland Stanford Junior Univ. v. Reynolds (In re Estate of Stanford)*, 315 P.2d 681, 683–89 (Cal. 1957) (holding the result of refusing to imply a condition of survival, because the interest was “vested,” was a portion of the trust passed to one Ruth Barton, who was not related to the settlor, rather than to Stanford University).

490. Income to A for life, on A's death remainder to B, but if B predeceases A, remainder to C.

491. IOWA CODE § 633A.4701 (2009). This condition is the default unless otherwise specifically stated by the terms of the trust.

statute is forbidden from imposing. I know of no legal principle that would support such a conclusion.

C. *In re Will of Uchtorff*

Alfred Uchtorff's will exercised a power of appointment over a trust established by his father, providing the funds should pass to a bank and his wife as trustees, to pay the income to his wife for life.⁴⁹² If his wife predeceased him, remarried after his death, or died after his death without having remarried, the fund was payable to his son Richard "as an indefeasibly vested interest in fee."⁴⁹³ The will provided an alternate disposition if Richard predeceased Alfred.⁴⁹⁴ Alfred's wife and Richard survived Alfred.⁴⁹⁵ Richard, however, predeceased Alfred's wife, Pearl, the life-income beneficiary.⁴⁹⁶ Richard's will left his entire estate to his second wife, disinheriting his three children.⁴⁹⁷

When Pearl died in 2003, the bank, as surviving cotrustee, petitioned for a construction of the will.⁴⁹⁸ Richard's second wife argued Richard's remainder interest "vested" on Alfred's death and passed to her through Richard's will.⁴⁹⁹ Richard's children argued his interest did not pass through his will because he did not survive Pearl.⁵⁰⁰ The district court held Alfred's will did not specify what happened if Richard predeceased Pearl, and in accordance with the Iowa Trust Code, it passed to Richard's children.⁵⁰¹

The Iowa Supreme Court reversed, noting the question depended on whether Richard had a vested or a contingent remainder once he survived Alfred.⁵⁰² In accordance with the classic rule that no condition of survival will be implied when the remainder is to a named beneficiary, the court

492. *Uchtorff v. Hanson (In re Will of Uchtorff)*, 693 N.W.2d 790, 792 (Iowa 2005).

493. *Id.*

494. *Id.*

495. *Id.*

496. *Id.*

497. *Id.*

498. *Id.*

499. *Id.*

500. *Id.*

501. *Id.* at 792–93.

502. *Id.* at 793.

held Richard's interest was vested.⁵⁰³ The conditions in the will were dismissed as merely conditioning Richard's possession of the corpus, not the nature of his interest.⁵⁰⁴ As to section 633A.4701, the court pointed to the fact the will provided "Richard took 'an indefeasibly vested interest in fee.'"⁵⁰⁵ The court held the words "indefeasibly vested interest in fee" were sufficient to specifically state the Trust Code section did not apply because Alfred Uchtorff's will was executed prior to the passage of the Trust Code.⁵⁰⁶ The court held the statute does not require statements such as "the interest of each beneficiary is *not* 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."⁵⁰⁷

Until the court's discussion of the Trust Code, its opinion was absolutely correct in the classic sense.⁵⁰⁸ The interest was, in form, a vested remainder.⁵⁰⁹ Whether reasoning no condition of survival should be implied because the remainder was indefeasibly vested or because it was to a named individual, the overwhelming majority of common law cases would not have implied a condition that Richard survive Pearl on these facts.⁵¹⁰

However, when the court moves to a discussion of section 633A.4701, it is on far shakier grounds.⁵¹¹ The section begins: "Unless otherwise *specifically stated* by the terms of the trust," the beneficiary must survive until the date of possession to take.⁵¹² It is noteworthy the section does *not* state: "Unless otherwise provided by the terms of the trust," which would allow more room for the kind of construction the court made in *In re Uchtorff*. The statute requires the contrary rule be *stated* in the trust terms. "Stated" means "explicitly set forth; declared as fact."⁵¹³ Moreover, the

503. *Id.*

504. *Id.* at 794.

505. *Id.* at 797.

506. *Id.* at 798.

507. *Id.*

508. *See id.* at 799 (stating the new Trust Code reversed the common law rule).

509. *Id.* at 798.

510. *See* Begleiter, *supra* note 1, at 285–89 (discussing caselaw on implied conditions of survival).

511. *In re Uchtorff*, 693 N.W.2d at 797–98.

512. IOWA CODE § 633A.4701(1) (2009) (emphasis added).

513. WEBSTER'S UNABRIDGED DICTIONARY 1861 (2d ed. 2001).

section requires not just a statement in the trust terms, but an explicit statement.⁵¹⁴ As demonstrated in Part XII.B of this Article, to say someone has an “indefeasibly vested interest in fee” is *not* equivalent to saying the beneficiary need not survive until the date of possession to take. What section 633A.4701 requires, and what was intended by the drafter of the section, is an explicit statement such as “to Richard E. Uchtorff, whether or not he survives my wife.”⁵¹⁵ The requirement of an explicit statement was intended to do away with any connection between vesting and survival because, correctly understood, no such connection exists.⁵¹⁶ To “explicitly state otherwise” in the terms of the trust, the trust must express the remainderman need not survive until the interest becomes possessory. Simply terming the interest “indefeasibly vested” or “in fee” is not sufficient because the purpose of the statute was to do away with the confusion that had arisen in caselaw between vesting and survivorship. The familiarity of the court with common law analysis led it, understandably, to dilute and weaken the “express statement” requirement.⁵¹⁷

D. *New Section 633A.4701(6)*

A comment to the Iowa Trust Code 2002 Amendments noted that when the remainderman has predeceased the income beneficiary and an alternate beneficiary is named who also predeceases the income beneficiary, but both the named beneficiary and the alternate beneficiary

514. IOWA CODE § 633A.4701(1) (requiring the statement to be specifically stated in the trust).

515. This is not the only way to “explicitly state otherwise.” What is required is a reference to the fact the remainderman need not survive the life income beneficiary. Phrases such as “regardless of when Richard E. Uchtorff dies” or similar language would be sufficient.

516. BERGIN & HASKELL, *supra* note 479, at 73.

517. The problem is similar to the problem of a decedent directing against recovery of estate tax based on the inclusion of a QTIP trust in the surviving spouse’s gross estate. Internal Revenue Code (IRC) section 2207A(a)(2) originally provided the right of recovery would not apply “if the decedent otherwise directs by will.” Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 403, 95 Stat. 172, 405. It was unclear under this wording how definite the will provision waiving the right of recovery needed to be. In 1997, Congress revised the section to require the surviving spouse’s will “specifically indicate[] an intent to waive any right of recovery.” Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 1302, 111 Stat. 788, 1039. After the amendment, a general provision specifying the estate will pay all taxes no longer waives the right of recovery. *See id.*

have issue who survive the life income beneficiary, it was unclear who took the remainder.⁵¹⁸ This called for a policy decision. The Section decided the issue of the named beneficiary should take in this situation rather than the issue of the alternate beneficiary, and the legislature approved.⁵¹⁹ This situation may be illustrated by the following example: The trust provides that income be paid to A for life, then to B, but if B shall not survive A, to C. B and C both predecease A, but B leaves three children—1, 2, and 3—surviving A. C also leaves 3 children—4, 5, and 6—surviving A. Solution: 1, 2, and 3 take the remainder in equal shares. Even if C survives B, C is also required to survive A by section 633A.4701.⁵²⁰ Subsection 6 provides the children of the named beneficiary prevail over the children of the alternate beneficiary.⁵²¹

E. *New Section 633A.4701(7)*

In a memorandum to the Trust Code Committee dated October 25, 2001, Professor Sheldon F. Kurtz raised the question of whether appointees under an exercised power of appointment and takers in default of appointment are alternate beneficiaries under the section.⁵²² After discussion, Professor Kurtz and I agreed that appointees should be considered “beneficiaries” under the section and that takers in default of appointment should be considered alternate beneficiaries.⁵²³ The new subsection adopted by the Legislature in 2003 gives the correct result. If the power of appointment is exercised, the appointees take the remainder if they survive the life-income beneficiary, and the takers in default of appointment are eligible to take the remainder if the power of appointment

518. Probate & Trust Law Section, The Iowa State Bar Ass’n, Proposed Amendments to the Iowa Trust Code 25 (2002) (on file with author).

519. 2003 Iowa Acts 200 (“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 both the beneficiary and the alternate beneficiary have issue who are living on the date the interest becomes possessory, the issue of the beneficiary succeed to the interest of the beneficiary. The issue of the alternate beneficiary shall not succeed to any part of the interest of the beneficiary.”).

520. IOWA CODE § 633A.4701(1), (6) (2009).

521. *Id.* § 633A.4701(6).

522. Memorandum from Sheldon F. Kurtz, Professor, Univ. of Iowa College of Law, to the Trust Code Comm. (Oct. 25, 2001) [hereinafter Kurtz Memo] (on file with author).

523. *See id.*

is not exercised.⁵²⁴

F. *New Section 633A.4701(8)—Conditions Subject to an Express Condition of Survivorship*

Professor Kurtz also asked in his memorandum whether the section covered express conditions of survivorship.⁵²⁵ This is actually two questions. The first question—whether the section covers an express condition of surviving the life-income beneficiary—is covered here. The second—whether an express condition of surviving someone other than the life beneficiary makes surviving until date of possession unnecessary—is covered in Part XII.G.

The classic example of a case covered by subsection 8 is a trust providing the income be paid to A for life, and then corpus to B if B survives A, if not, corpus to C. B predeceases A, leaving issue who survive A. C survives A. The question is: who takes between B's issue and C? The answer, under both prior Iowa law and this subsection, is C takes rather than B's issue—not because of section 633A.4701, but because of the express terms of the instrument. Section 633A.4701 was drafted to deal with implied conditions of survivorship, not express conditions of survivorship.

The section also settles a controversy that arose in the early 1990s when the Uniform Probate Code (UPC) added section 2-707. That section, relating to survivorship regarding future interests under trusts, was an early effort to accomplish what is accomplished by Iowa Trust Code section 633A.4701. However, UPC section 2-707(b)(3) reversed well-settled common law in most states by providing words of survivorship, without additional evidence, are not sufficient to demonstrate an intent contrary to the operation of the section.⁵²⁶ In simple terms, a trust stating “income to

524. 2003 Iowa Acts 200 (“For the purposes of this section, persons appointed under a power of appointment shall be considered beneficiaries under this section and takers in default of appointment designated by the instrument creating the power of appointment shall be considered alternate beneficiaries under this section.”).

525. Kurtz Memo, *supra* note 522.

526. UNIF. PROB. CODE § 2-707(b)(3) (amended 2008) (“For the purposes of Section 2-701 [which allows a contrary intention to defeat a rule of construction such as section 2-707], words of survivorship attached to a future interest are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section.”).

A for life, and on A's death, corpus to my surviving children" does not defeat the rule in UPC section 2-707; instead, it gives the trust property, in part, to the issue of predeceased children.⁵²⁷ The vast majority of the caselaw held words of survivorship evidenced a contrary intent to the application of the antilapse statute and the same rule should likewise apply to survivorship under section 633A.4701 of the Trust Code. The Section agreed, and the legislature enacted the new subsection in 2003.⁵²⁸

527. The UPC's rationale for this rule is actually provided in the comment to UPC section 2-603, the UPC's antilapse statute for wills. The comment argues many cases have been litigated on this question with divided results, and those courts that hold words of survivorship indicate a contrary intention find

the testator thought about the matter and intentionally did not provide a substitute gift to the devisee's descendants. At best, this is an inference only, which may or may not accurately reflect the testator's actual intention. An equally plausible inference is that the words of survivorship are in the testator's will merely because the testator's lawyer used a will form with words of survivorship. . . .

Even a lawyer's deliberate use of mere words of survivorship to defeat the antilapse statute does not guarantee that the lawyer's intention represents the client's intention. Any linkage between the lawyer's intention and the client's intention is speculative unless the lawyer discussed the matter with the client.

Id. § 2-603 cmt. This section and the reasons for it have been heavily criticized. See Mark L. Ascher, *The 1990 Uniform Probate Code: Older and Better, or More like the Internal Revenue Code?*, 77 MINN. L. REV. 639 (1993). The criticisms have mainly been:

1. Although there are a few cases to the contrary, the vast majority of cases have held words of survivorship automatically constitute an intent contrary to the antilapse statute.
2. The UPC comment reflects a disparaging and highly inaccurate view of how this affects lawyers practicing probate.
3. The reversal of such a well-known and relied-upon rule will result in a large amount of malpractice litigation.

Martin D. Begleiter, *Article II of the Uniform Probate Code and the Malpractice Revolution*, 59 TENN. L. REV. 101, 126-30 (1991).

528. 2003 Iowa Acts 200. A good argument can be made the section does not apply to express conditions of survivorship under subsection 1 because the terms of the trust expressly provide otherwise. The comment to the proposal notes this argument but states it does no harm to clarify the answer, as subsection 8 does. New subsection 8 provides:

G. *Section 633A.4701(9)—The Statutory Response to Uchtorff*

Subsection 9 was drafted while the *Uchtorff* case was still in the district court in Scott County.⁵²⁹ The comment on the proposal provided as follows:

To simplify the problem, a question arises for a trust in the following form: Testator leaves his residuary estate in trust with income to A for life, on A's death to B if B survives C. B survives C but predeceases A. The question is whether B's estate succeeds to B's interest, on one hand, or whether any alternate beneficiary named, B's issue who survive A, or testator's estate (as a resulting trust) receives B's interest, on the other.

On one hand, the provision that B takes if B survives C could be considered as negating the survival requirement imposed by subsection 1 of the section (that is, by including the requirement that B survive C, testator has "otherwise specifically provided by the terms of the trust") or as an express condition of survivorship (thus making subsection [1] inapplicable [by virtue of subsection 8]). On the other hand, the section could be read as requiring an express negation of the requirement that B survive A in order to make the section inapplicable. The terms of subsections 7 and 8 are not totally clear as to which reading is correct.

Such a case has arisen in Scott County. In the case (*In the Matter of Trust Fund A and the Trust Under Item VI, Both Under the Will of Alfred E. Uchtorff*, Probate No. 46011), A was testator's wife, Pearl E. Uchtorff, and B was testator's son, Richard. C was testator. Richard survived testator but predeceased Pearl. Richard's will left his estate

Subsections 2, 3, 4, 5, 6, and 7 do not apply to any interest subject to an express condition of survivorship imposed by the terms of the trust. For the purposes of this section, words of survivorship including, but not limited to, "my surviving children", [sic] "if a person survives" a named period, and terms of like import, shall be construed to create an express condition of survivorship. Words of survivorship include language requiring survival to the distribution date or to any earlier or unspecified time, whether those words are expressed in condition precedent, condition subsequent, or any other form.

IOWA CODE § 633A.4701(18) (2009).

⁵²⁹. See *Uchtorff v. Hanson* (*In re Will of Uchtorff*), 693 N.W.2d 790 (Iowa 2005); Probate & Trust Law Section, The Iowa State Bar Ass'n, Proposed Amendments to the Iowa Trust Code 11 (2005) (on file with author).

to this wife, who was the step-mother (not the mother) of his children. The [lower] court held that the corpus of the trust was payable to Richard's three children who survived Pearl. However, both the arguments of the attorneys, and to some extent, the court's opinion, indicate that it was unclear how the statute applied in this case. I thank Hap Volz for making me aware of and keeping me up to date on this case.

The amendment clarifies that in this case the beneficiary (B) is required to survive the life income beneficiary (A) to take. It does so by stating that such a provision does not remove the case from the statute. In reaching this result, I consulted with Professor Edward C. Halbach, Jr., reporter for the Restatement (Third) of Trusts and one of (if not) the most knowledgeable experts on future interests today, who agrees with the result in this draft.⁵³⁰

The proposal clearly provided a future case like *Uchtorff* should be decided opposite to the result in *Uchtorff*. Neither requiring survival of a beneficiary other than the life-income beneficiary, nor phrases describing the interest of the remainderman, such as "an indefeasibly vested remainder in fee," constitute language "otherwise specifically stated by the terms of the trust" so as to defeat the requirement of survival until the date of possession. Nor do they constitute "express conditions of survival" to which the section does not apply under subsection 8. The legislature approved subsection 9 in 2005.⁵³¹

H. Section 633A.4701(10)—Class Gifts

The question of the application of the section to class gifts was also raised by Professor Kurtz in his 2001 memorandum.⁵³² This subsection was subsection 9 when enacted in 2003⁵³³ and relocated as subsection 10 when a new subsection 9 was added in 2005.⁵³⁴ Subsection 10 provides that, as to class gifts, the living members of the class on the date the class becomes entitled to possession take because they are considered alternate

530. Probate & Trust Law Section, The Iowa State Bar Ass'n, Proposed Amendments to the Iowa Trust Code 11–12 (2005) (on file with author).

531. 2005 Iowa Acts 121.

532. Kurtz Memo, *supra* note 522.

533. See 2003 Iowa Acts 200.

534. 2005 Iowa Acts 121. New subsection 9 was mistakenly referred to as subsection 8A in the 2005 Iowa Acts. *Id.*

beneficiaries under section 633A.4701.⁵³⁵ That is, if the gift is to testator's children following the surviving spouse's life-income interest, and testator had four children—A, B, C, and D—at his death, two of whom—A and B—die during the surviving spouse's life and two of whom—C and D—survive the surviving spouse, the surviving children take the entire remainder. This is because A and B died prior to the estate becoming possessory and C and D, as alternate beneficiaries under subsection 2, take the corpus to the exclusion of any issue of A and B and to the exclusion of the estates of A and B. The latter is made clear by the provisions that neither the residuary beneficiaries under the settlor's will nor the settlor's heirs are considered alternative beneficiaries under this section.⁵³⁶ Some classes—"issue," "heirs," "next of kin," "relatives," "family," or terms of similar import—are not covered by subsection 10 because these terms substitute the issue of predeceased members by their terms. A condition of survival was required for these classes at common law and the section need not, and does not, apply to such classes.⁵³⁷

535. IOWA CODE § 633A.4701(10) (2009).

536. However, the settlor's residuary beneficiaries or heirs could take under section 633A.4701(5) if all the children had predeceased the surviving spouse and none left issue surviving the surviving spouse. The Issue Papers note this will be left to caselaw. MARTIN D. BEGLEITER, ISSUE PAPER, IOWA CODE SURVIVORSHIP WITH RESPECT TO FUTURE INTERESTS UNDER TERMS OF TRUST, SUBSTITUTE TAKERS.

537. Section 633A.4701(10) provides:

If an interest to which this section applies is given to a class, other than a class described as "issue", "descendants", "heirs of the body", "heirs", "next of kin", "relatives", "family", or a class described by language of similar import, the members of the class who are living on the date on which the class becomes entitled to possession or enjoyment of the interest shall be considered as alternate beneficiaries under this section. However, neither the residuary beneficiaries under the settlor's will nor the settlor's heirs shall be considered as alternate beneficiaries for the purposes of this section.

IOWA CODE § 633A.4701(10).

The comment to the proposal provided, in part:

New subdivision [10] was not in the "Issue" papers. It was added based on a subsequent conversation with Professor Kurtz, which made clear that some definition of "alternate beneficiary" was necessary. Professor Kurtz believes that if all members of a class die before the interest becomes possessory, the residuary beneficiary under settlor's will or settlor's heirs should take even if some of the class members have issue. For example, in a trust providing for income to A for life, corpus to A's children at A's death, if all of A's children

XIII. SECTION 633A.4702—DISCRETIONARY LANGUAGE PREVAILS
OVER OTHER STANDARD—THE *STROJEK* SCENARIO

A. *Introduction*

Perhaps no other issue stimulated the Probate and Trust Law Section of The Iowa State Bar Association as much as the problem of what to do about the “discretionary support trust.” The issue first arose in the case of *Strojek v. Hardin County Board of Supervisors* and has continued through a series of cases that will be discussed later in this section.⁵³⁸

I will proceed mostly in chronological order by first discussing the *Strojek* case and then *McKinnon v. McCabe*.⁵³⁹ I will then move to the development of Trust Code section 633A.4702—the attempt to statutorily overrule *Strojek* and eliminate, or at least reduce significantly, the importance of the discretionary support trust. The last subsection will discuss the two supreme court cases and one court of appeals case on this subject, one of which was in process while the statute was being developed; detail the analysis that should have been employed—but was not—in the two most recent cases; and mention portions of several district court cases on this subject.

predecease him leaving issue, Professor Kurtz believes that the takers of A’s residuary estate or A’s heirs should take the corpus as opposed to A’s issue who survive A. I think such a result is inconsistent with the theory of the section and therefore did not draft the result advocated by Professor Kurtz. If we decide that Professor Kurtz’s theory is correct, a simple change to the last sentence of subsection [10] will accomplish this. The sentence would be changed to read: “If no members of the class are living on the date on which the class becomes entitled to possession or enjoyment of the interest, the residuary beneficiaries under the settlor’s will or, if none, the settlor’s heirs, shall be considered as alternate beneficiaries for the purpose of this section.” Professor Kurtz also believes that the same result should occur if the interests are subject to an express condition of survivorship and no member of the class survives. Since express conditions of survivorship are excluded from the operation of the statute by new subsection 7 this question will be left to case law.

Probate & Trust Law Section, The Iowa State Bar Ass’n, Proposed Amendments to the Iowa Trust Code 25 (2002) (on file with author).

538. *Strojek v. Hardin Cnty. Bd. of Supervisors*, 602 N.W.2d 566, 568 (Iowa Ct. App. 1999).

539. *McKinnon v. McCabe* (*In re Trust of McCabe*), No. 01-1972, 2002 WL 31757533 (Iowa Ct. App. Dec. 11, 2002).

B. Strojek v. Hardin County Board of Supervisors

Marie Strojek, a mentally handicapped adult, had resided in Opportunity Village in Clear Lake since 1981.⁵⁴⁰ The county paid about \$21,900 per year for her care there, including her participation in a work-activity center.⁵⁴¹ Marie was the beneficiary of a trust under her father's will, which provided:

My trustee *shall*, from time to time, pay to or apply for the benefit of my daughter, Marie Helen Strojek, such sums from the income and principal as my trustee in the exercise of her *sole discretion* deems necessary or advisable, to provide for her proper care, support, maintenance and education.⁵⁴²

In 1996, the county enacted a plan, under which Marie was not qualified for county assistance.⁵⁴³ She was denied benefits, and the Hardin County Board of Supervisors affirmed the decision.⁵⁴⁴ Marie filed a petition to overturn the decision.⁵⁴⁵ The district court held the assets of the trust could be used to determine Marie's eligibility for county support, ruling "the trust was not truly discretionary, but rather a trust for Marie's support with a spendthrift provision."⁵⁴⁶ The court of appeals affirmed.⁵⁴⁷ After reviewing support trusts and discretionary trusts as recognized by the common law, the court noted in a support trust the beneficiary's interest can be reached for necessary services.⁵⁴⁸ In a discretionary trust, the trustee has full discretion in determining whether any trust income or principal is distributed to the beneficiary and creditors cannot reach any of the trust.⁵⁴⁹ After noting particular trusts often have characteristics of both discretionary and support trusts, the court determined it would not decide the case by classifying the trust as one or the other.⁵⁵⁰ The court stated it disliked emphasizing some terms of the trust, such as "sole discretion" or

540. *Strojek*, 602 N.W.2d at 568.

541. *Id.*

542. *Id.*

543. *Id.*

544. *Id.*

545. *Id.*

546. *Id.*

547. *Id.* at 571.

548. *Id.* at 568–69 (citing *In re Dodge*, 281 N.W.2d 447, 450 (Iowa 1979)).

549. *Id.* at 569.

550. *Id.*

“shall,” stating, “Any attempt by this court to hammer the language of this particular trust provision into one of these rigid categories would only breed further inconsistencies in the law.”⁵⁵¹ In place of such an effort, the court offered a “discretionary support trust,” which had been adopted in Nebraska.⁵⁵² It noted, “A discretionary support trust is created when the settlor combines explicit discretionary language ‘with language that, in itself, would be deemed to create a pure support trust.’”⁵⁵³ More importantly, the court characterized the effect of a discretionary support trust as establishing “the minimal distributions a trustee must make in order to comport with the settlor’s intent of providing basic support, while retaining broad discretionary powers in the trustee.”⁵⁵⁴ This creates a right in the beneficiary to, by judicial action, compel the trustee to make distributions from the trust for minimal support.⁵⁵⁵ It follows from the existence of such a right in the beneficiary that a creditor can attach that right.⁵⁵⁶ Noting Marie’s father knew she was mentally handicapped because she was born that way, and her future needs were apparent, the court found the *Strojek* trust was a discretionary support trust. The testator “established the trust to prevent his impaired daughter from becoming destitute.”⁵⁵⁷ The court called the recognition of the discretionary support trust “the next logical step in the maturation of this state’s trust law,” and it remanded the case to determine the exact amount necessary for Marie’s care.⁵⁵⁸

To complete the case discussion prior to discussing the statute, we need to go just slightly out of order to discuss *McKinnon v. McCabe*. Daniel McCabe executed a revocable trust, appointing his daughter, Suzanne, as trustee.⁵⁵⁹ On Daniel’s death, the trust was divided into two

551. *Id.*

552. *Id.* at 569–70.

553. *Id.* at 570 (quoting Evelyn Ginsberg Abravanel, *Discretionary Support Trusts*, 68 IOWA L. REV. 273, 279 n.26 (1983)).

554. *Id.* (citations omitted).

555. *Id.*

556. *Id.* at 571.

557. *Id.* This, stated the court, accounted for the mandatory language. *Id.* Needless to say, this chain of assumptions was a huge leap by the court, which clearly had no evidence on the exact reason the testator used “shall” rather than “may.”

558. *Id.*

559. *McKinnon v. McCabe* (*In re Trust of McCabe*), No. 01-1972, 2002 WL 31757533, at *1 (Iowa Ct. App. Dec. 11, 2002).

trusts.⁵⁶⁰ The income from the first trust was to be paid to Daniel's second wife, Delores, for life.⁵⁶¹ In addition, the trustee could pay as much of the principal to Delores "as the trustee from time to time believe[d] desirable for the health, support in reasonable comfort, best interests, and welfare of [Delores], considering all circumstances and factors deemed pertinent by the trustee."⁵⁶² The second family trust provided the net income and principal could be paid to Delores in the same language as the first trust directed payment of principal.⁵⁶³ Delores suffered a stroke and moved to Florida to live with her son by a previous marriage.⁵⁶⁴ Suzanne began sending Delores the income from the first trust but informed Delores the trust would no longer pay any of Delores's expenses and expected her to fund her needs from the monthly check.⁵⁶⁵ When Delores entered a nursing home, the trustee refused to pay the nursing home bills unless Delores verified her income, assets, and expenses.⁵⁶⁶ Delores applied for an order directing the trustee to pay the nursing home expenses.⁵⁶⁷

The court held, and the parties did not dispute, the trust was a discretionary support trust under *Strojek* and the beneficiary could compel distribution for minimal support if the trustee abused her discretion.⁵⁶⁸ On that question—whether the insistence on an accounting was an abuse of discretion—the court found unpersuasive the trustee's insistence she would have violated her duty had she not obtained the information concerning Delores's financial assets. It concluded the trustee had sufficient knowledge of Delores's assets, and that even if Delores had other assets, nothing in the trust agreement required those assets be used prior to receiving trust principal.⁵⁶⁹

560. *Id.*

561. *Id.*

562. *Id.*

563. *Id.*

564. *Id.*

565. *Id.*

566. *Id.*

567. *Id.*

568. *Id.* (citing *Strojek v. Hardin Cnty. Bd. of Supervisors*, 602 N.W.2d 566, 570–71 (Iowa Ct. App. 1999)).

569. *Id.* at 2. This is a far more complicated question than the opinion makes it appear. In fact, this question—whether in exercising her discretion the trustee must or may consider outside resources of the beneficiary—is a very difficult and recurring problem. See RESTATEMENT (THIRD) OF TRUSTS § 50 cmts. e, e(1), e(2)–e(4), rptr. notes (2007).

McCabe is, in a sense, more worrisome than *Strojek*. *Strojek* concerned Medicaid and similar payments.⁵⁷⁰ Medicaid and estate recovery have special restrictions and special benefits under Iowa and federal laws, setting them apart from other creditors.⁵⁷¹ *McCabe* involved the nursing home as a creditor enforcing the limited right of a beneficiary created in *Strojek*.⁵⁷² Thus, the right of creditors to attach the beneficiary's right to minimum support was not limited to state authorities or programs.⁵⁷³ Any creditor providing "necessary support" could attach the beneficiary's right to challenge the trustee for abuse of discretion in a discretionary support trust.⁵⁷⁴

C. *The Statutory Response*

In my more than thirty years of involvement as an advisor and resource person for the Probate and Trust Law Section of The Iowa State Bar Association, I have never seen an issue galvanize the membership as this one did. Michel Nelson of Carroll first wrote about *Strojek* in his newsletter in February of 2000.⁵⁷⁵ Additional comments appeared in his newsletters in 2001 and 2002. Unfortunately, I am unable to recall exactly when the Section first became concerned about the matter, but I suspect it was early in 2002. Certainly, by the spring of 2002, the concern had become such that I was requested to draft additions to the Trust Code specifically aimed at overruling the *Strojek* case. Although no other Issue Papers are included in full in this Article, I am making an exception in this case. The Appendix to this Article includes a copy of my letter to Gregory W. Neumeyer, Chair of the Probate and Trust Law Section in 2002, and four proposals to be discussed for addition to the Trust Code. I do this for two reasons. The first is to make it clear to anyone reading this Article the intention of the drafters of section 633A.4702 was to overrule *Strojek*. The letter and the comments of the first three proposals explicitly state this. The second reason for the inclusion is to illustrate how difficult a task this

570. *Strojek*, 602 N.W.2d at 568.

571. This topic is well beyond the scope of this Article. See 42 U.S.C. §§ 1396, 1396a (2006); IOWA CODE § 249A (2009).

572. *In re McCabe*, 2002 WL 31757533, at *1 (citing *Strojek*, 602 N.W.2d at 570).

573. *Id.*

574. *Id.*

575. IOWA SAVINGS BANK NEWSL. (Iowa Savings Bank, Carroll, Iowa), Feb. 2000.

was to accomplish.

Before describing the statute, I want to make it absolutely certain no one doubts the purpose of the statute was to overrule *Strojek*. In addition to the proposals in the Appendix, the minutes of the Probate and Trust Section meeting of August 22, 2003, state: “Proposal to add section 633[A].4702 to the Iowa Trust Code: Tim Anderson led a discussion of this proposed statute to define discretionary support trusts and legislatively overturn the *Strojek* decision.”⁵⁷⁶ There is simply no question the overwhelming majority of the Section members intended to overrule *Strojek* by statute, or if that could not be done, restrict and limit the effect of the decision.

The first proposal in the Appendix attempted to classify discretionary support trusts as discretionary trusts by requiring the language indicating the purpose of the trust be mandatory in order for creditors to reach it.⁵⁷⁷ The comment provided a possible explanation of *Strojek* and attempted to limit the language creating a right in the beneficiary to mandatory “purpose” words.⁵⁷⁸

The second proposal—labeled “Alternative New Section 633.4702”—required a discretionary support trust include the words “discretionary” and “support,” and noted similar or equivalent language was not sufficient to create a discretionary support trust.⁵⁷⁹ This was an attempt to limit the types of trusts that would be classified as discretionary support trusts. The comments noted the effects of this approach, the primary one being a court could create other categories of trusts that gave beneficiaries rights—and that would be subject to creditors’ claims—using different designations.⁵⁸⁰

The third alternative, which had no comments, required that in order for a trust to be a discretionary support trust, this fact must be indicated by the specific use of the term “discretionary support trust.”⁵⁸¹ A succeeding section stated if the magic words were not used, mandatory language, such

576. Probate & Trust Law Section, The Iowa State Bar Ass’n, Minutes of the Meeting of Aug. 22, 2003 (on file with author).

577. Letter from Martin D. Begleiter, Reporter, Trust Code Comm., to Gregory W. Neumeyer (Aug. 19, 2002) (on file with author).

578. *Id.*

579. *Id.*

580. *Id.*

581. *Id.*

as “shall pay . . . for support,” was presumed to make it a discretionary trust, not reachable by creditors.⁵⁸² This presumption was rebuttable only by clear and convincing evidence. It should be noted that while this decision would overrule *Strojek*, it would not eliminate the discretionary support trust.

The final proposal attempted to define what the court had held to be a discretionary support trust and conclusively deemed that trust to be a discretionary trust solely for Medicaid purposes.⁵⁸³

The problem in drafting a statute to deal with this issue is that the court created discretionary support trusts from the common law.⁵⁸⁴ No matter how a statute tried to deal with this category, there was nothing to prevent a court from holding a beneficiary had a right under certain trust language that a creditor could attach.⁵⁸⁵ At any rate, at its meeting on August 22, 2003, the Section passed a variant of the third proposal.⁵⁸⁶ This language was enacted by the Legislature in 2004 as Trust Code section 633A.4702, providing as follows:

In the absence of clear and convincing evidence to the contrary, language in a governing instrument granting a trustee discretion to make or withhold a distribution shall prevail over any language in the governing instrument indicating that the beneficiary may have a legally enforceable right to distributions or indicating a standard for payments or distributions.⁵⁸⁷

After describing subsequent judicial developments, I will illustrate how a case should be analyzed under this statute.

582. *Id.*

583. *Id.* The limit for Medicaid purposes was to avoid such a trust being deemed a fully discretionary trust for federal estate tax purposes, and thus constituting a general power of appointment under IRC section 2041. Looking back on the proposal now, it should have included a reference to Iowa Code Chapter 249A. This proposal would have reversed a case like *Strojek*, but it would not have affected a case with facts like *McCabe*. Also, as noted by the comments, it is difficult—and may not be permissible—to define language one way for one purpose and differently for other purposes.

584. *See Strojek v. Hardin Cnty. Bd. of Supervisors*, 602 N.W.2d 566, 569–71.

585. Thus, it was almost impossible to kill the beast.

586. Probate & Trust Law Section, The Iowa State Bar Ass’n, Minutes of the Meeting of Aug. 22, 2003 (on file with author).

587. 2004 Iowa Acts 34–35.

D. *Subsequent Judicial Developments—The Gist of the Matter*

The Iowa Supreme Court's first experience with discretionary support trusts was *In re Barkema Trust*.⁵⁸⁸ George Barkema's will contained a trust for one of his children, Lois, directing: "If possible, only the income from said share shall be used for Lois, however, if necessary for her proper support and maintenance, then the corpus of said trust may be invaded to the extent said trustees deem necessary."⁵⁸⁹ Lois began living in a nursing home many years after the testator's death, for which she received Medicaid benefits.⁵⁹⁰ When she died, the Iowa Department of Human Services (DHS) filed a claim against the trust for the Medicaid payments after the trustee filed a final report.⁵⁹¹

After reviewing Iowa Code section 249A.5(2), the court, relying on the sources discussed in *Strojek* and citing *Strojek*, held the trust was a discretionary support trust.⁵⁹² The court then turned to the question of the beneficiary's interest in a discretionary support trust to determine if it was the kind that created a debt to DHS under Iowa Code section 249A.5(2).⁵⁹³ The court noted that, although "interests in trusts" is not defined in chapter 249A, the legislature attempted to define the term broadly by including more than legal title.⁵⁹⁴ The court held, "[A] person has an 'interest' in the trust to the extent the assets of a trust are actually available to a trust beneficiary."⁵⁹⁵ The court continued by noting, "In order for an asset to be considered an actually available resource, an applicant must have a legal ability to obtain it."⁵⁹⁶ The court then held the language in the Barkema trust "gave Lois the legal ability to compel the trustee to invade the corpus of the trust and make distributions to her for her support."⁵⁹⁷ Thus, she

588. *Torgerson v. Barkema (In re Barkema Trust)*, 690 N.W.2d 50 (Iowa 2004). Because this case was brought prior to the enactment of section 633A.4702, it made no reference to that provision.

589. *Id.* at 52.

590. *Id.*

591. *Id.* at 53.

592. *Id.* at 53–54.

593. *Id.* at 55.

594. *Id.* (citations omitted).

595. *Id.* (citing *Linser v. Office of Attorney Gen.*, 672 N.W.2d 643, 646 (N.D. 2003)).

596. *Id.* (quoting *Hecker v. Stark Cnty. Soc. Serv. Bd.*, 527 N.W.2d 226, 237 (N.D. 1994)).

597. *Id.* at 56.

had an interest in the trust. DHS “acquired Lois’s ‘right that the trustee pay [her] the amount which in the exercise of reasonable discretion is needed for [her] support.’”⁵⁹⁸

The initial importance of *Barkema* is that the supreme court recognized discretionary support trusts. Second, in order for a beneficiary to have an interest in the trust that a creditor can attach, the beneficiary “‘must have a legal ability to obtain it’”—a right to compel a distribution.⁵⁹⁹ Third, the standard of *Strojek* may have been changed from a minimum support to an amount “needed for support.”⁶⁰⁰

In re Trust of Swenson, a recent district court opinion, illustrated exactly how hard it is to draft a statute overruling or restricting *Strojek* and the discretionary support trust.⁶⁰¹ Gordon Swenson’s will and codicil created a trust, most of the assets of which were in the stock of Rake Bancorporation, Inc.⁶⁰² The testator’s wife, Marlys, received the net income for life, with the remainder to the testator’s four children equally.⁶⁰³

Article III of the will, creating the trust, provided in part:

A. During the life of my wife, Marlys Swenson:

1. My Trustee shall pay to my wife in yearly, or other convenient installments as she may direct, the net income derived from the GORDON E. SWENSON TRUST.
2. In addition to the income from this GORDON E. SWENSON TRUST, there shall be paid to my wife or applied for her benefit such sums of principal from said Trust as my Trustee, in the exercise of his sole discretion, deems necessary or advisable to maintain her in the station of life to which she has

598. *Id.* (alteration by the court) (quoting BOGERT & BOGERT, *supra* note 221, § 229).

599. *Id.* at 55–56 (quoting *Hecker*, 527 N.W.2d at 237).

600. *Id.* at 54 (quoting BOGERT & BOGERT, *supra* note 221, § 229). First, this may have been dicta because the point was conceded. Second, the court was quoting Bogert and may not have recognized or been concerned with the actual amount DHS could collect.

601. *In re Trust of Swenson*, No. TRPR009209, slip op., (Iowa Dist. Ct. Apr. 22, 2008).

602. *Id.* at 2.

603. *Id.*

become accustomed.⁶⁰⁴

The spouse and one of Swenson's children were named trustees.⁶⁰⁵ The child paid the trust \$70,600 for a "stock option," which was questioned by the remaindermen.⁶⁰⁶ The remaindermen also questioned a sale of stock by Marlys to the same child.⁶⁰⁷

After deciding Gordon Swenson's other three children, as contingent beneficiaries, were "beneficiaries" under Trust Code section 633A.1102(2) and thus had the right to petition the court on the question of the conflict of interest and self-dealing by the trustees, the court noted the cotrustees had argued their actions were not subject to challenge by the remaindermen or the courts.⁶⁰⁸ The court rejected this contention, and rightly so. As I have previously stated, no trust is beyond court supervision.⁶⁰⁹ A court always has the power to intervene if the trustee has utterly disregarded the interests of the beneficiaries.⁶¹⁰ If the court did not have this power, there would be no trust.⁶¹¹ This is an important part of Trust Code section 633A.1104, and the court was correct in rejecting the contention of the trustees. In addition, the court correctly noted sections 633A.4214 and 633A.4202 limit the trustee's conduct.⁶¹²

The trustees cited section 633A.4702 of the Trust Code as the basis for their contention.⁶¹³ Had the court ended its analysis after the portion of the opinion noted above, it would have been absolutely correct. The court, however, continued:

For several reasons I disagree with the co-trustees on this issue. First, the co-trustees would have [s]ection 633A.4702 totally vitiate the operation of a support standard in a trust when the same trust grants

604. *Id.*

605. *Id.*

606. *Id.* at 3.

607. *Id.* The details of the transaction are not particularly crucial to this analysis and are not further presented here.

608. *Id.* at 6-7; *see* IOWA CODE § 633A.6202 (2009).

609. Begleiter, *supra* note 1, at 185 (discussing the retention of the common law of trusts as a limitation on trust instruments).

610. *Id.* (citing *Stix v. Comm'r*, 152 F.2d 562, 563 (2d Cir. 1945)).

611. *Id.*

612. *In re* Trust of Swenson, No. TRPR009209, slip op. at 9-10.

613. *Id.* at 7.

the trustee discretion to make or withhold a distribution. I do not believe that is the purpose of [s]ection 633A.4702.

To be sure, the meaning and operation of [s]ection 633A.4702 are difficult to decipher. It indicates that where there is language granting the trustee discretion, that language “shall prevail” over any language indicating that the beneficiary may have a legally enforceable right to distributions or indicating a standard for payments or distributions.

Typically the word “prevail” is used where there are two mutually inconsistent and repugnant terms or positions. For example, where statutes provide that the “prevailing party” is entitled to an award of reasonable attorney fees, “prevailing” means success on the merits. Or, to give another example, where Drake beats Iowa in basketball, Drake is the “prevailing party.”

In the area of construction of statutes, there is a concept that specific language dealing with a particular subject will “prevail” over general language. This is a guide of statutory instruction for judges.

Strojek addressed a situation where the language of a trust is equivocal. That is to say, it addressed the type of trust that has terms attempting to provide for the care and education of the beneficiary as well as terms granting the trustee discretion in determining whether and to what extent any of the trust’s income or principal should be distributed to the beneficiary. Relying on a Nebraska case, the Court referred to the trust in *Strojek* as a “discretionary support trust,” noting that:

The characterization of the *Strojek* trust as a discretionary support trust best remedies the paradoxical nature of the language. A discretionary support trust harmonizes the seemingly inconsistent terms of the trust. The discretionary language grants Mills wide latitude in determining *Strojek*’s core needs, thus protecting the trust from wasteful depletion; while insuring, by way of mandatory language coupled with support standards, that *Strojek* will never be left destitute. More importantly, however, the identification of this trust as a discretionary support trust best contemplates the intent of the settlor (emphasis supplied).

To blindly apply [s]ection 633A.4702 to a trust containing both a support standard and a discretionary standard so as to eliminate the support standard would probably, in most cases, run counter to the

intent of the settlor. A statute should not operate to frustrate the private ordering of one's affairs.⁶¹⁴

Although the court was absolutely correct in most of its analysis concerning the question of the authority of the court over the trustees, its analysis of section 633A.4702 was faulty. The purpose of section 633A.4702 is to make a support standard in a trust subordinate to the trustee's discretion. It creates a presumption the settlor's intent was *not* to create a right in the beneficiary to receive a minimum amount of support or, in the *Swenson* case, a right to receive a distribution "to maintain her in the station of life to which she [was] accustomed."⁶¹⁵ The beneficiary receives distributions in the trustee's discretion, which can be challenged by the beneficiary, but there will be no entitlement to a specific distribution, such as for a minimum amount of support or for the amount equal to the amount the beneficiary required to maintain her lifestyle. This presumption can be rebutted by clear and convincing evidence located in the trust's terms.⁶¹⁶

The court interprets section 633A.4702 as having no effect on a discretionary support trust as provided in *Strojek* and *Barkema*.⁶¹⁷ It is hard to fathom exactly what the court believed section 633A.4702 accomplishes, although it did note the statute was a legislative response to *Strojek*.⁶¹⁸

Particularly difficult is the last paragraph of the quote from *Swenson* above. The court states that using section 633A.4702 "to eliminate the support standard would probably, in most cases, run counter to the intent of the settlor."⁶¹⁹ Leaving aside the question as to the basis for that statement, if the settlor intends the support standard to prevail, the statute permits proof of that intent by clear and convincing evidence. The court

614. *Id.* at 7–9.

615. *See id.* at 2.

616. *See* IOWA CODE § 633A.4702 (2009).

617. *See* Torgerson v. Barkema (*In re* Barkema Trust), 690 N.W.2d 50, 53–55 (Iowa 2004); *Strojek v. Hardin Cnty. Bd. of Supervisors*, 602 N.W.2d 566, 568–71 (Iowa Ct. App. 1999); *In re* Trust of Swenson, No. TRPR009209, slip op. at 8–9. *Barkema* is not mentioned in the *Swenson* opinion.

618. *In re* Trust of Swenson, No. TRPR009209, slip op. at 7 n.1. Presumably, a legislative statute enacted in response to a case is intended to change the interpretation made by that case.

619. *Id.* at 9.

went on to say, “A statute should not operate to frustrate the private ordering of one’s affairs.”⁶²⁰ The statute, however, does no such thing. All the statute requires is the settlor make his or her intent clear.⁶²¹ The problem is, in cases like *Strojek*, *Barkema*, and *Swenson*, the intention of the settlor is not clear. In such cases, the legislature is entitled to create a presumption regarding the settlor’s intent. That is what section 633A.4702 does.

The recent case of *In re Estate of Gist* provides food for thought, or perhaps, despair.⁶²² The Iowa Department of Human Services filed a lien against a spendthrift trust to recover benefits received by a trust beneficiary under the Iowa medical assistance program.⁶²³ Alice and Glenn Piries’ joint will bequeathed all the assets to the surviving spouse, or if none, in trust for their daughter, Elenore Gist, then to Elenore’s children.⁶²⁴ Alice was the surviving spouse and the trust became effective following her death.⁶²⁵ Elenore was not receiving Medicaid benefits at the time the trust became effective but, some twelve years later, she began receiving benefits that continued until her death.⁶²⁶ The trust provided as follows:

The trustee shall pay to Elenore for so long as she shall live at quarterly intervals, or more often the income from the trust assets or so much thereof as may be necessary to provide her with a reasonable standard of living, considering any other means of support or resources which she may have. If the income shall be insufficient to provide her with a reasonable standard of living the trustee may invade the principal or corpus of the trust assets. While provision is hereinafter made for the disposition of any trust assets which may remain at Elenore’s death it shall not be an objective of this trust to preserve the trust estate intact for the remaindermen beneficiaries nor to deny Elenore a reasonable standard of living for the purpose of enhancing

620. *Id.*

621. IOWA CODE § 633A.4702; *see also id.* § 633A.1105 (noting trust terms prevail over Trust Code provisions). A possible example of such a case is *Estate of Gist*, discussed next.

622. Iowa Dep’t of Human Servs. v. Eral (*In re Estate of Gist*), 763 N.W.2d 561 (Iowa 2009).

623. *Id.* at 563.

624. *Id.*

625. *Id.*

626. *Id.*

the value of the trust estate or even preserving it for the benefit of the beneficiaries. The discretion of the trustees shall therefore extend to disbursing the whole of the trust estate for Elenore's benefit during her lifetime but, if possible, the trustee shall make provision for her burial expenses.⁶²⁷

The trust also contained a relatively standard spendthrift clause.⁶²⁸

The court analyzed the language under *Barkema* and found the trust was a discretionary trust with standards, formerly referred to as a discretionary support trust, giving the beneficiary an interest in the trust that was subject to recovery under Iowa Code section 249A.5.⁶²⁹ The court then moved to the question of whether the spendthrift clause protected the trust assets from creditors' claims, including Medicaid-recovery claims.⁶³⁰ Noting the Iowa common law of trusts provides an exception to the spendthrift clause for necessities that still applied, the court held the spendthrift provision did not prevent the state from collecting for Medicaid expenditures.⁶³¹

Most remarkable in this opinion is the fact section 633A.4702 is not mentioned at all. Surely this omission is curious.⁶³² The statute is directly applicable to the facts. The analysis in *Gist* should have proceeded as follows: The trust is a discretionary trust with a standard. Under section 633A.4702, the discretion provision presumptively prevailed over the station-in-life standard.⁶³³ Therefore, presumptively, the trustee had full discretion,⁶³⁴ subject to a standard of reasonableness in exercising that discretion that the beneficiary could challenge.⁶³⁵ The beneficiary had no right to receive a specific amount of distribution, and no creditor—

627. *Id.* at 563–64.

628. *Id.* at 564.

629. *Id.* at 565–66 (citing *In re Barkema Trust*, 690 N.W.2d 50, 53–56 (Iowa 2004)). *Gist* applies the analytical framework of *Barkema*. *Id.*

630. *Id.* at 566–67.

631. *Id.* at 567 (citing *In re Estate of Dodge*, 281 N.W.2d 447, 451–52 (Iowa 1979)).

632. I have heard speculation as to why section 633A.4702 was not mentioned but have no definitive answer to the question.

633. See IOWA CODE § 633A.4702 (2009). A discretionary trust with a standard is functionally indistinguishable from a discretionary support trust, except that the trust has a standard other than support.

634. *Id.*

635. *Id.* § 633A.4203.

including DHS—could attach the beneficiary’s right to a distribution because the beneficiary did not have a right. The presumption could have been rebutted—and the station-in-life standard held to create a right in the beneficiary—on the presentation of clear and convincing evidence that the terms of the trust indicated the settlor intended the beneficiary to have a legally enforceable right.⁶³⁶

Having established the correct analysis of *Gist* under the statute, it is possible the result in *Gist* was correct even though the analysis was faulty. The trust contained the following provisions, in addition to the discretion and the standard:

While provision is hereinafter made for the disposition of any trust assets which may remain at Elenore’s death it shall not be an objective of this trust to preserve the trust estate intact for the remaindermen beneficiaries nor to deny Elenore a reasonable standard of living for the purpose of enhancing the value of the trust estate or even preserving it for the benefit of the beneficiaries. The discretion of the trustees shall therefore extend to disbursing the whole of the trust estate for Elenore’s benefit during her lifetime but, if possible, the trustee shall make provision for her burial expenses.⁶³⁷

This is certainly evidence the settlor intended for Elenore to obtain a legal right to distributions necessary to maintain a reasonable standard of living. This could possibly constitute clear and convincing evidence of such an intent.⁶³⁸ The point is the correct analysis might well have led to the same result as found by the court, without the question raised by the court’s failure to cite and discuss the statute. The analysis described above should govern this type of case when it arises in the future.

The most recent case decided on this subject is *In re Trust Established Under the Last Will and Testament of Kinsel*.⁶³⁹ Orville Kinsel established a testamentary trust of his residuary estate “for [his] sister, Faye Kinsel, as

636. *Id.* § 633A.4702.

637. Iowa Dep’t of Human Servs. v. Eral (*In re Estate of Gist*), 763 N.W.2d 561, 564 (Iowa 2009).

638. However, Elenore’s other means of support and resources were to be considered by the trustees in making distributions, which argues against establishing a legally enforceable right. *Id.*

639. *In re Trust Established Under the Last Will and Testament of Kinsel*, No. 08-1625, 2010 WL 446551 (Iowa Ct. App. Feb. 10, 2010).

beneficiary, to be used for her care and support . . . according to the best discretion of [his] Trustee.”⁶⁴⁰ Upon the death of Faye, any assets remaining in the trust were to go to his nephew, Darrin Schappert, to be his absolutely.⁶⁴¹ After Orville’s death, Faye moved into a nursing home and began collecting Medicaid benefits.⁶⁴² She received benefits of \$376,628.89 over the course of eleven years.⁶⁴³ After Faye’s death, the DHS and the testator’s nephew claimed the remaining corpus of the trust—about \$100,000.⁶⁴⁴ The district court held the trust was a discretionary support trust, the DHS could recover the Medicaid debt from the trust, and section 633A.4702 did not change the outcome.⁶⁴⁵ After noting the Restatement (Third) of Trusts termed a discretionary support trust “a discretionary trust with standards”⁶⁴⁶ and reviewing *Barkema* and *Gist*, the court affirmed, finding clear and convincing evidence established the support obligation prevailed over the discretionary language.⁶⁴⁷ The opinion would be unremarkable except for the court’s analysis of Trust Code section 633A.4702. After quoting the statute, the court remarked:

As the district court observed, there have been no Iowa appellate cases interpreting this provision. We are also unaware of such a statute having been enacted in any other jurisdiction. To us, the statute raises a number of potential questions. What constitutes language “granting a trustee discretion to make or withhold a distribution”? Does such language “prevail” over language providing for a right to distributions even if the two are not in conflict, i.e., both can be given effect and reconciled? What is “clear and convincing evidence to the contrary”? Does such “evidence” reside in the trust instrument itself or can it come from extrinsic evidence? Is section 633A.4702 intended to apply only to specific instances where a beneficiary is trying to compel a distribution, or can it transform the overall characterization of a trust (e.g., from a discretionary trust with standards to something else)? We do not see easy answers to many, if not all, of these questions. We

640. *Id.* at *1.

641. *Id.*

642. *Id.*

643. *Id.*

644. *Id.*

645. *Id.*

646. *See id.* at *1 n.3 (citing Iowa Dep’t of Human Servs. v. Eral (*In re Estate of Gist*), 763 N.W.2d 561, 565 (Iowa 2009)).

647. *Id.* at *2–4.

agree with Darrin that section 633A.4702 has to mean *something*.⁶⁴⁸

This opinion is extraordinary. The job of the legislature is to enact statutes. The job of the Governor is to approve or disapprove the statutes. The job of a court is to interpret the statutes. The job of a court is *not* to raise questions without answering them. The opinion abdicates the court's responsibility to interpret the statute.

Nevertheless, out of respect for the court and in the hope future courts will be aided by the information, I will answer the court's questions in the order they were asked.

Question 1. "What constitutes language 'granting a trustee discretion to make or withhold a distribution?'"⁶⁴⁹

Answer: Any language giving the trustee direction as to any payment or the amount of any payment constitutes language granting a trustee discretion. By way of example, the language in the instruments involved in all the cases discussed in Part XIII of this Article, including *Strojek*, *Barkema*, *Gist*, and *Kinsel*, constitute language granting a trustee discretion to make or withhold a distribution.⁶⁵⁰

Question 2. "Does such language 'prevail' over language providing for a right to distributions even if the two are not in conflict, i.e., both can

648. *Id.* at *4.

649. *Id.*

650. See *In re Estate of Gist*, 763 N.W.2d at 563–64 ("The trustee shall pay to Elenore for so long as she shall live at quarterly intervals, or more often the income from the trust assets or so much thereof as may be necessary to provide her with a reasonable standard of living, considering any other means of support or resources which she may have."); *Torgerson v. Barkema (In re Barkema Trust)*, 690 N.W.2d 50, 52 (Iowa 2004) ("If possible, only the income from said share shall be used for Lois, however, if necessary for her proper support and maintenance, then the corpus of said trust may be invaded to the extent said trustees deem necessary."); *In re Kinsel*, 2010 WL 446551, at *1 ("[F]or my sister, Faye Kinsel, as beneficiary, to be used for her care and support . . . according to the best discretion of my Trustee. Upon the death of the said Faye Kinsel, any assets remaining in said Trust shall go to my nephew, Darrin R. Schappert, to be his absolutely."); *Strojek v. Hardin Cnty. Bd. of Supervisors*, 602 N.W.2d 566, 568–71 (Iowa Ct. App. 1999) ("My trustee shall, from time to time, pay to or apply for the benefit of my daughter, Marie Helen Strojek, such sums from the income and principal as my trustee in the exercise of her sole discretion deems necessary or advisable, to provide for her proper care, support, maintenance and education.").

be given effect and reconciled?”⁶⁵¹

Answer: Yes, such language prevails. This was the entire purpose of section 633A.4702, as demonstrated in the discussion above. It does not matter if the language of discretion, and the standard language can be reconciled. The discretion language prevails, and no support right is created in the beneficiary.

Question 3. “What is ‘clear and convincing evidence to the contrary?’”⁶⁵²

Answer: I have demonstrated this analysis above in connection with the discussion of *Gist*. However, I suppose the court would prefer a more authoritative source. How about Reporter’s Note 6 to section 12.1 of the Restatement (Third) of Property: Wills and Other Donative Transfers? That Note essentially provides clear and convincing evidence is more than a preponderance of the evidence but less than beyond a reasonable doubt; it is evidence so clear as to leave no substantial doubt.⁶⁵³

651. *In re Kinsel*, 2010 WL 446551, at *4.

652. *Id.*

653. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 rptr. note 6 (2003). Reporter’s Note 6 states:

6. *Comment e. Standard of proof—clear and convincing evidence.* On the clear-and-convincing-evidence standard of proof, see, e.g., *Cruzan v. Director, Missouri Dep’t of Health*, 497 U.S. 261, 282–85, 110 S.Ct. 2841, 2853–55, 111 L.Ed.2d 224 (1990); *Wendland v. Wendland (Conservatorship of Wendland)*, 28 P.3d 151, 172 (Cal. 2001) (“The ‘clear and convincing evidence’ test requires a finding of high probability, based on evidence so clear as to leave no substantial doubt [and] sufficiently strong to command the unhesitating assent of every reasonable mind”); 2 McCormick on Evidence § 340 (John W. Strong gen. ed., 5th ed. 1999) (“It has been persuasively suggested that [the clear-and-convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is ‘highly probable.’”). English courts sometimes use the terms “plain and conclusive” or “cogent and conclusive.” See, e.g., *Lister v. Smith*, 164 Eng. Rep. 1282 (P. Ct. 1863). On the beyond-a-reasonable-doubt standard, see *Victor v. Nebraska*, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994); Federal Judicial Center, *Pattern Criminal Jury Instructions* 28 (1988); Jon O. Newman, *Beyond “Reasonable Doubt,”* 68 N.Y.U. L. Rev. 979 (1993). On the functions of different standards of proof, see, e.g., *In re Winship*, 397 U.S. 358, 369–72, 90 S.Ct. 1068, 1075–76, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring); John Kaplan, *Decision Theory and the Factfinding Process*, 20 Stan. L. Rev. 1065, 1072 (1968).

Statutory definitions of clear and convincing evidence are rare. The only one uncovered was an Alabama statute on punitive damages in civil actions, which defines clear and convincing evidence as:

Alabama: Ala. Code § 6-11-20(b)(4). Evidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion. Proof by clear and convincing evidence requires a level of proof greater than a preponderance of the evidence or the substantial weight of the evidence, but less than beyond a reasonable doubt.

If the case is tried before a jury, the jurisdiction may have a pattern jury instruction on clear and convincing evidence. Following are pattern jury instructions on clear and convincing evidence collected from various jurisdictions:

Alabama: Ala. Pattern Jury Instructions—Civil 18.09 (Cum. Supp. 1992) (part of instruction on fraud and deceit—punitive damages): Clear and convincing evidence is evidence that, when weighed against evidence in opposition, will produce in the minds of the jury a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion. Proof by clear and convincing evidence requires a level of proof greater than a preponderance of the evidence or a substantial weight of the evidence, but less than beyond a reasonable doubt.

California: 1 Cal. Jury Instructions Civil BAJI 2.62 (Jan. 1994 Supp. to 7th ed. 1986): The plaintiff has the burden of proving by clear and convincing evidence all of the facts necessary to establish [the proposition in issue].

“Clear and convincing” evidence means evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the fact[s] for which it is offered as proof. Such evidence requires a higher standard of proof than proof by a preponderance of the evidence.

Louisiana: 18 H. Alston Johnson, III, La. Civ. L. Treatise, Civil Jury Instructions § 2.14 (1994): The first thing that you should know about the law is that the plaintiff in this action must prove his case by clear and convincing evidence. This is a standard of proof beyond the customary standard of a “preponderance of the evidence” which applies in most non-criminal cases. To prove a matter by clear and convincing evidence means to demonstrate that the existence of a disputed fact is highly probable, that is, much more probable than its non-existence. If plaintiff fails to prove any essential element of his case by clear and convincing evidence, then you must find that he has failed to prove his case sufficiently to recover.

[It may help you in your understanding of this concept to know that the law regards this standard of proof as between the lesser standard of preponderance of the evidence applicable in most non-criminal cases and the greater standard of beyond a reasonable doubt applicable in criminal cases.]

Maryland: Md. Civil Pattern Jury Instructions 1:8 (2d ed. 1984): To be clear and convincing, evidence should be “clear” in the sense that it is certain, plain to the understanding, and unambiguous and “convincing” in the sense that it is so reasonable and persuasive as to cause you to believe it.

Michigan: Mich. Standard Jury Instructions—Civil SJI2d 16.01 (1994 Supp.): When I say that a party has the burden of proving a proposition by clear and convincing evidence, I mean that the evidence must more than outweigh the evidence against it. To be clear and convincing, the evidence must satisfy you that the proposition has been established with a high degree of probability.

New York: 1 N.Y. Pattern Jury Instructions—Civil PJI 1:64 (2d ed. Cum. Supp. 1995): The burden is on the plaintiff to prove [here state the ultimate issue to be decided] (e.g., fraud, malice, mistake, a gift, [a] contract between plaintiff and the deceased, incompetency, addiction) by clear and convincing evidence. This means evidence that satisfies you that there is a high degree of probability that there was (e.g., fraud, malice, mistake, a gift, a contract between plaintiff and the deceased, incompetency, addiction), as I (have defined, will define) it for you.

To decide for the plaintiff it is not enough to find that the preponderance of the evidence is in plaintiff’s favor. A party who must prove his case by a preponderance of the evidence only need satisfy you that the evidence supporting his case more nearly represents what actually happened than the evidence which is opposed to it. But a party who must establish his case by clear and convincing evidence must satisfy you that the evidence makes it highly probable that what he claims is what actually happened.

If, upon all evidence, you are satisfied that there is a high probability that there was (e.g., fraud, malice, mistake, a gift, a contract between plaintiff and the deceased, incompetency, addiction) as I (have defined, will define) it for you, you must decide for the plaintiff. If you are not satisfied that there is such a high probability, you must decide for the defendant.

Ohio: 1 Ohio Jury Instructions 3.75 (1994): 1. *Clear and Convincing*. To be “clear and convincing” the evidence must have more than simply a greater weight than the evidence opposed to it and must produce in your minds a firm belief or conviction about (the facts to be proved) (the truth of the matter).

Federal Fifth Circuit: Pattern Jury Instructions (Civil Cases) 2.14 (1994): Clear and convincing evidence is evidence that produces in your mind a firm belief or conviction as to the matter at issue. This involves

Question 4. “Does such ‘evidence’ reside in the trust instrument itself or can it come from extrinsic evidence?”⁶⁵⁴

Answer: Such evidence can be found either in the trust instrument itself or it can come from extrinsic evidence. Trust Code section 633A.1102(17) defines “terms” of a trust to include concepts expressed directly in the instrument or from other admissible evidence.⁶⁵⁵

Question 5. “Is section 633A.4702 intended to apply only to specific instances where a beneficiary is trying to compel a distribution, or can it transform the overall characterization of a trust (e.g., from a discretionary trust with standards to something else)?”⁶⁵⁶

Answer: The section transforms the overall characterization of the trust from a discretionary trust with standards to a purely discretionary trust, unless clear and convincing evidence is found of the settlor’s intent to create a legally enforceable right in the beneficiary.

I hope these answers are helpful to courts in the future.

XIV. TRUST CONSTRUCTION—THE REMAINING SECTIONS

The remaining construction sections all arose from the recommendation of the Reconciliation Committee, chaired by Paul Morf of Cedar Rapids. That committee recommended language regarding abatement and requested the Trust Code Committee consider other matters. In March of 2004, I distributed a set of Issue Papers on these matters. Each section added will be discussed in order, followed by a final discussion of those areas not added to the Trust Code.

A. Section 633A.4703—General Order for Abatement

This section was adopted by the Section and the legislature in almost

a greater degree of persuasion than is necessary to meet the preponderance of the evidence standard; however, proof to an absolute certainty is not required.

Id. (alterations in original); see also Chapman v. Varela (*In re Estate of de Baca*), 213 P.3d 1109, 1114 (N.M. 2009) (“Clear and convincing evidence is evidence that would ‘instantly tilt[] the scales in the affirmative when weighed against the evidence in opposition’” (quoting *In re Locatelli*, 161 P.3d 252 (N.M. 2007) (alterations in original))).

654. *In re Kinsel*, 2010 WL 446551, at *4.

655. See IOWA CODE § 633A.1102(17) (2009).

656. *In re Kinsel*, 2010 WL 446551, at *4.

the exact form as proposed by the Reconciliation Committee.⁶⁵⁷ It provides an order of abatement in cases in which the trust needs to pay debts and charges, bequests, federal and state estate taxes, the spousal elective share, and payments to pretermitted heirs.⁶⁵⁸ The order of abatement is, with necessary adaptations, similar to the Probate Code.⁶⁵⁹ The section was amended slightly in 2007 to conform more closely to the Probate Code⁶⁶⁰ and in 2008 to eliminate state estate taxes from the causes for abatement.⁶⁶¹

B. Section 633A.4704—Simultaneous Death

Because the Uniform Simultaneous Death Act⁶⁶² does not apply to trusts, it was not clear whether any rule applied to the simultaneous deaths of the settlor and a beneficiary or several beneficiaries. Section 633A.4704 was adopted to clarify this rule and to provide similar rules to those

657. 2005 Iowa Acts 121.

658. *Id.*

659. IOWA CODE §§ 633.436–.437 (2009).

660. 2007 Iowa Acts 386 (adding provisions regarding the spousal elective share).

661. 2008 Iowa Acts 430. The section, as amended, provides:

Except as otherwise provided by the governing instrument, where necessary to abate shares of the beneficiaries of a trust for the payment of debts and charges, federal estate taxes, bequests, the share of the surviving spouse who takes an elective share, and the shares of children born or adopted after the execution of the trust, abatement shall occur in the following order:

1. Shares allocated to the residuary beneficiaries of the trust shall be abated first, on a pro rata basis.
2. Shares defined by a dollar amount, on a pro rata basis.
3. Shares described as specific items of property whether tangible or intangible shall be abated last, and such abatement shall be done as equitably by the trustee among the various beneficiaries as circumstances reasonably allow.
4. Notwithstanding subsections 1, 2, or 3, a disposition in favor of the settlor's surviving spouse who does not take an elective share shall not be abated where such abatement would have the effect of increasing the amount of federal estate or federal gift taxes payable by a person or an entity.

IOWA CODE § 633A.4703.

662. *Id.* §§ 633.523–.528.

provided in the Probate Code.⁶⁶³

C. Section 633A.4705—Principal and Income

The Reconciliation Committee recommended putting the Iowa Uniform Principal and Income Act⁶⁶⁴ in a separate chapter. The addition of a cross reference in the Trust Code will alert Iowa attorneys to refer to the Principal and Income Act when looking at the Trust Code.⁶⁶⁵ This cross reference furthers the goal of both the Reconciliation Committee and the Trust Code Committee by “allowing persons drafting and administering trusts to look at the Trust Code as a unified source for statutory guidance.”⁶⁶⁶

D. Section 633A.4706—Small Distributions to Minors—Payment

This section was proposed, without suggested language, by the Reconciliation Committee. The Trust Code Committee proposed a statute similar to Probate Code section 633.108,⁶⁶⁷ permitting the payment to a custodian for a minor—under any uniform transfers-to-minors act—any beneficial interest in a trust to which the minor becomes entitled, not exceeding \$25,000. The legislature enacted the section in 2005.⁶⁶⁸

663. *Id.* § 633A.4704. The section provides:

If the determination of the successor of a beneficial interest in a trust is dependent upon whether a beneficiary has survived the death of a settlor, of another beneficiary, or of any other person, the uniform simultaneous death Act, sections 633.523 through 633.528, shall govern the determination of who shall be considered to have died first.

Id.

664. *See id.* §§ 637.101–.701.

665. *Id.* § 633A.4705.

666. Letter from Paul P. Morf, Chairman, Probate & Trust Code Reconciliation Comm., to Trust Code Comm. (Jan. 26, 2004) (on file with author). The section, adopted in 2005, provides: “Chapter 637 shall apply to trusts subject to this chapter.” 2005 Iowa Acts 122.

667. IOWA CODE § 633.108.

668. 2005 Iowa Acts 122. Section 633A.4706 provides:

When a minor becomes entitled under the terms of the trust to a beneficial interest in the trust upon the distribution of the trust fund and the value of the interest does not exceed the sum of twenty-five thousand dollars, the trustee may pay the interest to a custodian under any uniform transfers to minors Act. Receipt by the custodian shall have the same force and effect as though

E. *Section 633A.4707—Person Causing Death*

The last of the construction sections incorporates into the Trust Code a provision similar to subsection 1 of section 633.535 of the Probate Code. The provision prohibits “[a] person who intentionally and unjustifiably causes or procures the death of another” from receiving benefits from the trust.⁶⁶⁹ Distribution of the killer’s share is distributed as if the killer died before the person killed.⁶⁷⁰

F. *Construction Rules Not Recommended*

The primary construction rule in the Probate Code that was not recommended for inclusion in the Trust Code was an antilapse statute.⁶⁷¹ The reason for this omission is Trust Code section 633A.4701, although broader than an antilapse statute, performs the function of such a statute.⁶⁷²

payment had been made to a duly appointed and qualified conservator for the minor.

IOWA CODE § 633A.4706.

669. *Id.* § 633A.4707.

670. *Id.* The section provides:

A person who intentionally and unjustifiably causes or procures the death of another shall not receive any property, benefit, or other interest as a beneficiary of a trust by reason of such death. Any property, benefit, or other interest that such person would have received because of such death shall be distributed as if the person causing the death died before the person whose death was intentionally and unjustifiably caused or procured.

Id.

This section applies to property, benefits, or trust interests distributed on or after July 1, 2006. *Id.* This section was considered for inclusion in 2005 but was held up due to concerns of losing or recapturing the marital deduction in the case of irrevocable trusts. These concerns were resolved in discussions over the following year.

671. Section 633.273 saves bequests of devisees who predecease the testator if the devisee leaves issue who survive the testator, unless the terms of the will provide clearly and explicitly to the contrary. *Id.* § 633.273(1). A class member of a class gift is treated as a devisee for this purpose if the class member died after the execution of the will. *Id.* § 633.273(2). Section 633.274 makes an exception to section 633.273 for devises to the spouse of the testator, which lapse regardless of whether the spouse leaves issue surviving the testator, unless the will clearly and explicitly provides otherwise. *Id.* § 633.274.

672. By requiring a beneficiary to survive until the interest becomes possessory and substituting the beneficiary’s issue for the beneficiary unless the settlor has named an alternate beneficiary, the purpose of an antilapse statute is accomplished. *See supra* Part XII. Therefore, I opined that no antilapse statute needed to be added to the Trust

XV. CHARITABLE TRUSTS

A. Section 633A.5102—Application of *Cy Pres*

It should first be noted this section did not accept two changes in the doctrine of *cy pres* made by the Restatement (Third) of Trusts and the UTC. The first is both the Restatement (Third) and the UTC permit *cy pres* to be applied if devotion of the fund to the specified purpose would be wasteful.⁶⁷³ The second, and much less controversial change that was not accepted, was to presume the settlor had a general charitable interest, rather than requiring this be proven.

As to the second change, in a previous article I noted the change may be merely one of semantics, as courts are highly motivated to find a general charitable interest in any case.⁶⁷⁴ As to the addition of “wasteful,” the word is problematic, as it is totally subjective in meaning. What is “waste” to one person is not “waste” to another.⁶⁷⁵ It would appear logical to let the settlor, rather than a judge, decide this question. This is the major reason “wasteful” was not included in section 633A.5102.

Although the statute has not changed, a case on *cy pres* was decided in 2002. In *Kolb v. City of Storm Lake*, a charitable trust was established to maintain a flower garden at a certain location in a city park.⁶⁷⁶ The trust was established in memory of a family member who died at a young age.⁶⁷⁷ The City of Storm Lake removed the garden as part of a major economic development project.⁶⁷⁸ The question before the court was whether *cy pres*

Code. The Section agreed.

673. See UNIF. TRUST CODE § 413 (amended 2004); RESTATEMENT (THIRD) OF TRUSTS § 67 (2003). The UTC does not define “wasteful.” See UNIF. TRUST CODE § 413. The Restatement (Third) is more restrained than the UTC, allowing *cy pres* only “to the extent it is or becomes wasteful to apply all of the property to the designated purpose.” RESTATEMENT (THIRD) OF TRUSTS § 67. Comment *c(1)* to section 67 repeats the restriction as to surplus funds and states, “The term ‘wasteful’ is used here neither in the sense of common-law waste nor to suggest that a lesser standard of merely ‘better use’ will suffice.” *Id.* § 67 cmt. c(1). The Reporter’s Notes offer no further help. See *id.* § 67 rptr. notes.

674. Begleiter, *supra* note 1, at 291 n.846.

675. For example, keeping land in a forested state may be viewed as wasteful to those interested in using the land for other purposes or harvesting the trees, but it may be viewed as absolutely essential to environmentalists.

676. *Kolb v. City of Storm Lake*, 736 N.W.2d 546, 548 (Iowa 2007).

677. *Id.*

678. *Id.*

could be used to modify the trust to permit trust funds to be used to maintain the garden in a different location in the park.⁶⁷⁹ During the negotiations, the trustee stated the garden and fountain could not be moved.⁶⁸⁰ The City said it could not change its plans.⁶⁸¹ The trustee requested a temporary and permanent injunction against the City, but it was denied.⁶⁸² On the same day, the City began to remove the garden.⁶⁸³ The Iowa Supreme Court decided review should be de novo because the issue involved applicability of *cy pres*.⁶⁸⁴ The court, after reviewing section 633A.5102, decided equitable deviation should not be applied here because “the specificity of the deeds regarding the location of the garden demonstrate that it is more of a substantive, as opposed to administrative, term of the trust.”⁶⁸⁵ Ruling that this section codified the common law of *cy pres*, the court first inquired whether the trust stated that the statute should not apply.⁶⁸⁶ Finding in the negative, the court correctly ruled the section established a presumption *cy pres* should apply.⁶⁸⁷ The trust clearly satisfied the requirements of being charitable.⁶⁸⁸ The court then turned to the crucial question of whether it was impractical or impossible to fund the fountain in its original location.⁶⁸⁹ The court agreed there was no precise definition of this standard; rather, the decision depended on the facts of each case.⁶⁹⁰ In this case, it was impossible to fulfill the particular purpose of the trust because the City destroyed the garden.⁶⁹¹ Recognizing the City caused the impossibility, the court held there was no per se rule against

679. *Id.* The many other interesting details of this case, which, as in many cases of this type, make the decision difficult, are omitted because they are beyond the scope of this Article.

680. *Id.* at 551.

681. *Id.*

682. *Id.*

683. *Id.*

684. *Id.* at 552. The court noted, “An abuse of discretion standard may be proper when the question is whether the [lower] court’s modification under *cy pres* is appropriate.” *Id.*

685. *Id.* at 554 n.7.

686. *See id.* at 553–55.

687. *Id.* at 555 (citing Begleiter, *supra* note 1, at 290–91, 291 n.844).

688. *Id.*

689. *Id.*

690. *Id.*

691. *Id.* at 557.

applying *cy pres* in such a case.⁶⁹² The court then moved to the question of whether the settlors had a “general charitable intent”—the settlors “would not reject the continuation of the trust when a particular purpose of the trust fails.”⁶⁹³ Through an analysis of the facts here, the court found the particular location of the garden was not essential to the donor’s intent.⁶⁹⁴ Thus, the settlors had a general charitable intent.⁶⁹⁵ The court then modified the trust to allow the garden to continue at a new location, close to the original site.⁶⁹⁶

B. Section 633A.5104—Interested Persons—Proceedings

In 2008, a very significant amendment was made to this section, and a related new section was enacted.⁶⁹⁷ Before discussing these developments, a significant case involving a person having a “special interest in a trust” should be discussed.

1. *Special Interest in Trust*

Generally, at least until recently, only the attorney general of a state had standing to bring an action for the enforcement of a charitable trust, with few exceptions.⁶⁹⁸ One exception, usually stated but rarely used, was that such a suit could be maintained by a person having a “special interest” in the trust.⁶⁹⁹ The concept is fairly vague. A member of the public has no special interest, nor does a person who is a potential recipient of benefits.⁷⁰⁰ The Restatement (Third) of Trusts has one of the more extensive

692. *Id.* The court held *cy pres* could apply “when a ‘natural and unavoidable change in conditions or circumstances’ causes the trustee or donee to” take the action that causes the impossibility. *Id.* (quoting *President & Fellows of Harvard Coll. v. Jewett*, 11 F.2d 119, 122 (6th Cir. 1925)). The court held this case fit under that rule. *Id.* at 557–58.

693. *Id.* at 558.

694. *Id.* at 559. The court found the testators’ dominant purpose was to perpetually honor their grandson and to benefit the City. *Id.*

695. *Id.* at 559–60.

696. *Id.* at 560.

697. 2008 Iowa Acts 430.

698. RESTATEMENT (THIRD) OF TRUSTS § 94(2) (Tentative Draft No. 5, 2009).

699. *Id.*

700. *Id.* § 94(2) cmt. g.

descriptions of the concept.⁷⁰¹ Basically, if the trust describes a reasonably limited group of persons to be benefitted, that group may sue for enforcement of the trust.⁷⁰² This “interested persons” concept was incorporated into section 633A.5104 of the Trust Code.⁷⁰³

In re Clement Trust involved a trust created by the will of Albert Clement “[t]o sponsor programs and activities, that will be able to serve the Senior Citizens of the Northeastern portion of Polk County, and the Northwestern portion of Jasper County, and including but not limited to, the towns of Maxwell, Farrar, Santiago, Valeria, Ira, Mingo, Colfax, and Mitchellville.”⁷⁰⁴ “[T]he trustees decided to contribute to community

701. Comment *g(1)* of section 94 provides, in part:

Charitable trusts are often designed so that a particular charitable institution or purpose is to receive benefits from the trust or so that one or more identifiable individuals will become entitled to benefits under the terms of the trust. Thus, if the terms of a charitable trust require that its income be paid periodically to a particular incorporated church, hospital, school, or the like, the corporation can maintain a suit against the trustee (with notice to the [a]ttorney [g]eneral) for enforcement of the trust. . . . Similarly, if the purpose of a charitable trust is to pay the salary of the pastor of a particular church, the pastor has special-interest standing (as does the church) to enforce the trust. In addition, a charitable institution that is designated in the trust terms to receive benefits upon particular circumstances has standing to enforce the trust so that the institution can protect (or assert) its interest under the trust

If a charitable trust is created to benefit the members of a described group of persons that is reasonably limited . . . , one or more members of that group may be allowed to maintain a suit, on behalf of its members generally, against the trustee for enforcement of the trust. . . . So, too, if a college is trustee of a trust the terms of which direct that its income be used to provide graduate-study scholarships each year to selected students graduating from the college, based on prescribed procedures and criteria, the trust purpose may be enforced by one or more of the current students who might reasonably expect to meet the criteria. The special-interest standing of members of a group described in this paragraph, however, would ordinarily be limited to suing to compel adherence to the trust’s designated charitable purpose(s)—that is, to enjoin or redress breach of trust by diversion of funds to another purpose—a matter of common concern to all members of the potential-recipient group.

Id. § 94(2) cmt. *g(1)*.

702. *Id.* § 94(2) cmts. *g, g(1)*.

703. See IOWA CODE § 633A.5104 (2009).

704. Mitchellville Cmty. Ctr., Inc. v. Vos (*In re Clement Trust*), 679 N.W.2d 31, 33 (Iowa 2004).

centers that housed a senior citizen center” in the area described.⁷⁰⁵ The trust also “contributed to the construction of buildings for such centers” and developed five requirements to guide the trustees’ discussions.⁷⁰⁶

In 1994, a Mitchellville community group presented a proposal to the trustees for a community building.⁷⁰⁷ One of the trustees told the Mitchellville city manager “the trust ‘would need to be heavily involved in the planning of the building,’” and after reviewing a proposed building plan, informed the community group no commitment of trust funds would be made until certain specified changes in the plan were made.⁷⁰⁸ The community group agreed to most, but not all, of the trustees’ suggestions.⁷⁰⁹ The trust offered to contribute \$50,000, contingent on community contributions of \$100,000 by a certain date and certain other conditions.⁷¹⁰ After that date, the trust revoked its offer because the community group failed to raise the \$100,000, but the community group was told it could reapply for funding.⁷¹¹ The group proceeded with construction under its original plan, periodically writing to the trustees, noting it had met the conditions and asking for the funds.⁷¹² One of the trustees responded to the request, stating the offer had been withdrawn.⁷¹³ About two years later, the trust decided to build its own community center in Mitchellville.⁷¹⁴

The community group sued the trustees, alleging the trustees “had unreasonably exercised their discretionary powers.”⁷¹⁵ The trustees moved to dismiss on the ground the community group lacked standing.⁷¹⁶ The court ruled the group had standing only as to the issue of whether “the trustees acted unreasonably in revoking their offer to” provide funds for the construction of the Mitchellville community center but had no “standing to protect the interests of senior citizens” of the area in the

705. *Id.*
706. *Id.*
707. *Id.* at 34.
708. *Id.*
709. *See id.*
710. *Id.*
711. *Id.*
712. *Id.*
713. *Id.*
714. *Id.*
715. *Id.* at 35.
716. *See id.*

general administration of the trust.⁷¹⁷ The court began with the “well-established” proposition that shared benefit by the public does not give entitlement to sue.⁷¹⁸ Even a possible beneficiary does not have standing to sue.⁷¹⁹ Special interest is difficult to show.⁷²⁰ However, the community group had special interest status here, based on the trustees’ offer to contribute.⁷²¹ The offer gave it an interest in holding the trustees to their promise.⁷²² The court then held the trustees neither acted unreasonably nor abused their discretion in denying the group funds.⁷²³

It should be noted the court’s requirements for special-interest standing in this case are a bit more stringent than those quoted above from the Restatement (Third).⁷²⁴ Of course, that is not surprising because that section of the Restatement (Third) had not been drafted when *Clement* was decided. It will be interesting to see if the court liberalizes its test in a future case. That being said, the court’s decision represents a careful and correct analysis in all aspects of the case.

2. Donor Standing

The question of whether a donor can sue to enforce his or her purpose in creating a trust has recently become one of the hottest issues in charitable trusts—and nonprofit law, more generally.⁷²⁵ The traditional

717. *Id.* at 36.

718. *Id.* at 37 (citations omitted). The attorney general enforces the interest of the public. *Id.* (citations omitted).

719. *Id.* (citations omitted).

720. *Id.* at 37–38.

721. *Id.* at 38.

722. *Id.*

723. *Id.* at 40.

724. *See id.* at 37 (citing *Kania v. Chatham*, 254 S.E.2d 528, 530 (N.C. 1979)). In *Kania*, the court refused to grant an unsuccessful candidate for a scholarship standing to challenge the decision in court, stating, “[T]he necessary indefiniteness of charitable trust beneficiaries will leave few situations in which courts will hold that individuals have sufficient interest to have standing to sue for enforcement.” *Kania*, 254 S.E.2d at 530 (citing *Charitable Trust Enforcement in Virginia*, 56 VA. L. REV. 716, 722 (1970)). *Kania* appears inconsistent with the Restatement (Third) example, which provided “the trust purpose may be enforced by one or more of the current students who might *reasonably expect* to meet the criteria.” *See* RESTATEMENT (THIRD) OF TRUSTS § 94(2) cmt. g(1) (Tentative Draft No. 5, 2009) (emphasis added).

725. Most of this subject, particularly the issue of whether the differences between nonprofit organizations, which are not charitable trusts, and charitable trusts

common law rule gave donors no right to enforce a charitable restriction.⁷²⁶ Section 633A.5104 already permitted the settlor to enforce the charitable trust. On reading *Smithers v. St. Luke's–Roosevelt Hospital Center*, I became convinced more needed to be done.⁷²⁷ In *Smithers*, a recovering alcoholic announced his intention to make a \$10 million gift to the Hospital over a period of years to establish an alcohol treatment center with a very specific treatment program, which required a separate facility.⁷²⁸ For years, the Hospital's officials had been secretly misappropriating the donor's gifts by adding these gifts to the Hospital's general fund.⁷²⁹ Following the donor's death, the Hospital abandoned the separate facility and refused to comply with the donor's restrictions.⁷³⁰ The donor's widow, who was also appointed special administratrix of his estate, repeatedly demanded the Hospital observe the donor's restrictions.⁷³¹ She also demanded an accounting, which revealed the misappropriations, and finally sued the Hospital.⁷³² Met with the Hospital and attorney general's argument that the widow had no standing, the court held the widow had standing to

are so significant that to allow donor standing in the latter is not necessarily determinative on the question of whether to allow donor enforcement of purpose in the former, is beyond the scope of this Article, except to explain why the issue arose in Iowa. See generally PRINCIPLES OF THE LAW OF NONPROFIT ORGANIZATIONS § 450 cmts., rptr. notes (Tentative Draft No. 2, 2009); Evelyn Brody, *From the Dead Hand to the Living Dead: The Conundrum of Charitable-Donor Standing*, 41 GA. L. REV. 1183 (2007); Ronald Chester, *Grantor Standing to Enforce Charitable Transfers Under Section 405(c) of the Uniform Trust Code and Related Law: How Important Is It and How Extensive Should It Be?*, 37 REAL PROP. PROB. & TR. J. 611 (2003). The most significant cases in the area are: *Smithers v. St. Luke's–Roosevelt Hosp. Ctr.*, 723 N.Y.S.2d 426 (N.Y. App. Div. 2001); *In re Milton Hershey Sch.*, 911 A.2d 1258 (Pa. 2006); *In re Barnes Found.*, No. 58,788, 2004 WL 1960204 (Pa. Ct. C.P. Jan. 29, 2004); *Tenn. Div. of the United Daughters of the Confederacy v. Vanderbilt Univ.*, 174 S.W.3d 98 (Tenn. Ct. App. 2005); *Dodge v. Trs. of Randolph–Macon Woman's College*, 661 S.E.2d 805 (Va. 2008). The major dispute on this issue concerns the Woodrow Wilson School of Princeton University. See *Robertson v. Princeton Univ.*, Civ. Action No. C-99-02, Mercer Co. (N.J. Super. Ch., June 20, 2003).

726. RESTATEMENT (THIRD) OF TRUSTS § 94 cmt. g(3). Enforcement rights granted in the instrument, however, were generally honored at common law.

727. The Issue Paper on this subject was written in 2006, prior to the draft of the Restatement (Third), which discusses this subject. See RESTATEMENT (THIRD) OF TRUSTS § 94 cmts., rptr. notes.

728. *Smithers*, 723 N.Y.S.2d at 427.

729. *Id.* at 428–29.

730. *Id.*

731. *Id.* at 429.

732. *Id.* at 429–30.

enforce the restrictions in her role as special administratrix, stating:

The donor of a charitable gift is in a better position than the Attorney General to be vigilant and, if he or she is so inclined, to enforce his or her own intent. . . . [T]he circumstances of this case demonstrate the need for co-existent standing for the Attorney General and the donor.⁷³³

In considering this subject, it is important to note the growing recognition that oversight by the attorney general is often not an adequate enforcement mechanism for charitable trusts. Many attorneys general devote little time or resources to charitable trusts.⁷³⁴ While this is understandable, it underscores the need for an independent enforcement mechanism.

The 2008 amendment allowed the settlor's designee named or designated pursuant to section 633A.5106 to enforce the trust's purpose if the settlor of the trust died or became incompetent.⁷³⁵

C. Section 633A.5105—Charitable Trusts

In reconciling the Trust Code and the Probate Code, it was noticed the private foundation rules were contained in Chapter 634 of the Iowa Code. To draw attention to this, a cross reference was added to the Trust Code.⁷³⁶

733. *Id.* at 433–35.

734. The reporter of the Restatement (Third) later recognized this. *See* RESTATEMENT (THIRD) OF TRUSTS § 94 cmt. g(3), rptr. notes (Tentative Draft No. 5, 2009).

735. 2008 Iowa Acts 430. The Iowa amendment read:

The settlor, or if the settlor is deceased or not competent, the settlor's designee named or designated pursuant to section 633A.5106, 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.

Id.

736. 2005 Iowa Acts 122 (“In addition to the provisions of this chapter, a charitable trust that is a private foundation shall be governed by the provisions of chapter 634.”). The language is now found at section 633A.5105. IOWA CODE § 633A.5105 (2009).

D. *New Section 633A.5106—Settlor—Enforcement of Charitable Trust—Designation*

This new section was the second part of the broadening of donor standing discussed in the treatment of section 633A.5104.⁷³⁷ This section, building on the right of the settlor or settlor's designee to enforce the purpose of a charitable trust, provides a procedure for the settlor to designate "a person or persons, by name or by description . . . to enforce the charitable trust if the settlor is deceased or not competent."⁷³⁸ The designation may be made "either in the agreement establishing the trust or in a written statement signed by the settlor and delivered to the trustee."⁷³⁹

The section will probably be most useful for settlors who wish to designate a "trust enforcer" following their death, such as their surviving spouse or a descendant. The statute permits the designation of a person when the designation is executed.⁷⁴⁰ A separate written designation is permitted to allow for thought by the settlor as to the proper designee.⁷⁴¹ In cases in which the designation is overlooked in the details of planning the gift, the trustee is protected by requiring a separate designation to be signed by the settlor and delivered to the trustee.⁷⁴²

This designation will be extremely useful to settlors and will help ensure someone—either the settlor or his designee—is monitoring the trust to verify it is adhering to the settlor's purpose. The drafters had no intention to enable the settlor or his designee to interfere with the ongoing management of the trust.⁷⁴³

737. *See supra* Part XV.B.2.

738. IOWA CODE § 633A.5106.

739. *Id.* The section provides:

A settlor may maintain an action to enforce a charitable trust established by the settlor and may designate, either in the agreement establishing the trust or in a written statement signed by the settlor and delivered to the trustee, a person or persons, by name or by description, whether or not born at the time of such designation, to enforce the charitable trust if the settlor is deceased or not competent.

Id.

740. *Id.*

741. *Id.*

742. *Id.*

743. *See* RESTATEMENT (THIRD) OF TRUSTS § 94 cmt. (g)(2), rptr. notes (Tentative Draft No. 5, 2009).

Before closing, I should note in my many years of work on the Iowa Trust Code, there was more enthusiasm and uniformity of support for donor standing than for any other Trust Code issue, with the exception of overruling *Strojek*.⁷⁴⁴

E. *New Section 633A.5107—Filing Requirements*

Recently, the attorney general in Iowa hired an assistant attorney general—John McCormally—to oversee charitable gifts and trusts, and private foundations. To obtain information necessary to conduct his duties, the attorney general proposed two additions to the Trust Code. Section 633A.5107 identifies the types of trusts for which information must be filed with the attorney general. The first draft of this proposal was quite broad, calling for filings from any “charitable trust in which one or more beneficiaries has a noncontingent vested interest.”⁷⁴⁵ The early version also required existing charitable trusts to register and file a copy of the trust instrument and perhaps an annual report, although the date for that filing was not clear.⁷⁴⁶

Through many comments from Section members and wonderful cooperation from Mr. McCormally, the provision as finally enacted was far better crafted and narrowed from the original version. First, only charitable trusts having assets in excess of \$25,000 are required to comply with the provisions of the section.⁷⁴⁷ Second, and perhaps more significant, the types of charitable trusts required to file was narrowed and refined. Only nonprofit entities, charitable remainder trusts, and charitable lead trusts are required to file.⁷⁴⁸ Such trusts, if created after July 1, 2009, must register with the attorney general within sixty days on a form provided by the attorney general and submit a copy of the trust instrument “as required by the attorney general.”⁷⁴⁹ Existing charitable trusts shall annually file a copy of the trustee’s annual report,⁷⁵⁰ but registration of the trust and

744. *See supra* Part XIII.

745. S. Study B. 1026, § 1(1), 83d Gen. Assemb., Reg. Sess. (Iowa 2009).

746. *Id.* § 2.

747. 2009 Iowa Acts 96–97.

748. *Id.* (noting the terms are as defined in IRC sections 501(c)(3), 664(d), 2055(e)(2)(b), and 2522(c)(2)(b)).

749. *Id.* at 97. Presumably, this means the attorney general can dispense with the submission of a copy of the trust instrument.

750. *Id.* At the Section meeting on May 22, 2009, Mr. McCormally said this would consist of a one- or two-page form derived from Form 990 or other IRS tax

submission of a current copy of the trust instrument and the financial report are due 135 days after the close of the trust's next fiscal year after July 1, 2009.⁷⁵¹ The attorney general may require electronic filing and electronic signatures.⁷⁵² The documents provided under this section are not public records, at least as to charitable lead or remainder trusts.⁷⁵³ Mr. McCormally said all filings will be held strictly confidential and the forms are to be filed with the attorney general at the same time they are filed with the IRS. The statute authorizes administrative rule making, and Mr. McCormally stated the results of noncompliance with the section will be dealt with by rule. There may also be a rule regarding whether extensions of time for filing IRS reports extend filing times under this section too.

There are a couple of ambiguities under this section. First, subsection 1 provides the section only applies to charitable trusts, but subsection 1(a) states it applies to nonprofit entities organized under IRC section 501(c)(3).⁷⁵⁴ Although it is unclear, a possible explanation would be that nonprofit entities not created by a trust—like many private foundations—would not be subject to the section. Second, under subsection 3, only documents provided as to a charitable remainder trust or a charitable lead trust are not considered public records under Chapter 22 of the Iowa Code.⁷⁵⁵ The statute is not clear regarding documents submitted by a 501(c)(3) organization.⁷⁵⁶ In addition, the statute requires the trustees to

forms or from the annual report prepared by the trustee. There will be no fees for this filing. These statements come from the Reporter's notes of Mr. McCormally's remarks. Neither Mr. McCormally nor the attorney general is responsible for the accuracy of the Reporter's transcription of these remarks.

The statute also provides the report may be in one of three forms: the report under section 633A.4213, the trust's most recent annual tax filing, or the report completed on an attorney general form. *Id.*

751. *Id.* The registration form is available on the Internet. STATE OF IOWA DEP'T OF JUSTICE, STATE OF IOWA CHARITABLE TRUST REGISTRATION FORM, available at http://www.iowa.gov/government/ag/protecting_giving/CharitableTrust_registration_form.pdf.

752. 2009 Iowa Acts 97.

753. *Id.*

754. *Id.* at 96.

755. *Id.* at 97.

756. *Id.* at 96–97. The entire section provides:

1. The provisions of this section apply to the following charitable trusts administered in this state with assets in excess of twenty-five thousand dollars:
 - a. A nonprofit entity as defined in section 501(c)(3) of the Internal Revenue Code, as defined in section 422.3.

file an annual report.⁷⁵⁷ There is no provision specifying what other entities must file.

b. A charitable remainder trust as defined in section 664(d) of the Internal Revenue Code, as defined in section 422.3.

c. A charitable lead trust as defined in sections 2055(e)(2)(b) and 2522(c)(2)(b) of the Internal Revenue Code, as defined in section 422.3.

2. a. Within sixty days from the creation of a charitable trust, as described in subsection 1, the trustee shall register the charitable trust with the attorney general. The trustee shall register the charitable trust on a form provided by the attorney general. The trustee shall also submit a copy of the trust instrument to the attorney general as required by the attorney general.

b. The trustee of a charitable trust, as described in subsection 1, shall annually file a copy of the charitable trust's annual report with the attorney general. The annual report may be the same report submitted to the persons specified in section 633A.4213, the charitable trust's most recent annual federal tax filings, or an annual report completed on a form provided by the attorney general.

c. The attorney general may require that documents be filed electronically, including forms, trust instruments, and reports. In addition, the attorney general may require the use of electronic signatures as defined in section 554D.103.

3. Any document provided to the office of the attorney general in connection with a charitable remainder trust or a charitable lead trust, as described in subsection 1, shall not be considered a public record pursuant to chapter 22. The attorney general shall keep the identities and interests of the noncharitable beneficiaries confidential except to the extent that disclosure is required by a court.

4. The attorney general is authorized to adopt administrative rules in accordance with the provisions of chapter 17A for the administration and enforcement of this chapter.

5. For a charitable trust described in subsection 1, created prior to the effective date of this Act and still in existence, the trustee shall register the trust with and submit a current copy of the trust instrument and financial report to the attorney general not later than one hundred thirty-five days after the close of the trust's next fiscal year following the effective date of this Act. The trustee shall comply with the remainder of this Act as if the charitable trust were created on or after the effective date of this Act.

Id. (footnote omitted). The legislature modified the last sentence during the same session to read: "The trustee shall comply with the remainder of this section as if the charitable trust were created on or after the effective date of this Act." *Id.* at 789.

757. *Id.* at 97.

F. *New Section 633A.5108—Role of the Attorney General*

This new section is really a restatement of the attorney general's common law duties. Primarily, it provides the attorney general may investigate a charitable trust to see if it is being administered lawfully and in accordance with the trust purpose, and he or she may apply to the district court for any necessary orders.⁷⁵⁸ The one-year limitation on actions against a trustee under section 633A.4504 following the receipt of a report applies to the attorney general.⁷⁵⁹

XVI. PROCEEDINGS CONCERNING TRUSTS

A. *Section 633A.6101—Subject Matter Jurisdiction*

This section was adopted from an early version of UTC section 203.⁷⁶⁰ It was realized early on that some words were omitted from that version in adapting the statute to the Iowa Trust Code and the statute, as enacted, made no sense. Because the district court has jurisdiction over actions concerning both the internal affairs of a trust and between trusts and third parties, the two subsections could be combined into one. This was one of the first amendments proposed to the Section, and it was adopted by the Section and the legislature in 2002.⁷⁶¹ The comments to the proposal

758. *Id.* at 97. Section 633A.5108 provides:

The attorney general may investigate a charitable trust to determine whether the charitable trust is being administered in accordance with law and the terms and purposes of the trust. The attorney general may apply to a district court for such orders that are reasonable and necessary to carry out the terms and purposes of the trust and to ensure the trust is being administered in accordance with applicable law. Limitation of action provisions contained in section 633A.4504 apply.

Id.

759. *Id.*

760. UNIF. TRUST CODE § 203 (amended 2004).

761. 2002 Iowa Acts 196. Section 633A.6101 now provides:

The district court sitting in probate has exclusive jurisdiction of proceedings concerning the internal affairs of a trust and of actions and proceedings to determine the existence of a trust, actions and proceedings by or against creditors or debtors of a trust, and other actions and proceedings involving a trust and third persons. Such jurisdiction may be invoked by any interested party at any time.

stated: “This section is not intended to prevent decisions in these matters by the Associate Probate Judge for those counties having that office.”⁷⁶²

In connection with the amendments to section 633A.4604 concerning recalcitrant transfer agents, as previously discussed,⁷⁶³ a new subsection was added to section 633A.6101 to affirmatively state that no letters of trusteeship shall be issued for trusts covered by the Trust Code.⁷⁶⁴

B. Section 633A.6105—*Transfer of Jurisdiction*

The change to this section was primarily a clarification. Originally, the section was in the alternative and allowed transfer of the place of administration if any of three conditions existed. On rereading this section, I opined the true basis of transfer was in former subsection 1(a)—a transfer will promote the best interests of the trust—and former subsections 1(b) and 1(c) stated effects of the transfer rather than alternate conditions permitting the transfer. Therefore, former subsection 1(a) became subsection 1, former subsection 1(b) became subsection 2, former subsection 1(c) became subsection 3, and former subsections 2 and 3 became subsections 4 and 5, respectively.⁷⁶⁵ This rewriting, which made no true change in the substance of the section, was adopted in 2002.⁷⁶⁶

IOWA CODE § 633A.6101 (2009). The legislature added the last sentence in 2005 as a clarification with no substantive change intended. *See* 2005 Iowa Acts 122.

In *In re Estate of Falck*, the court held section 633.6101 prevailed over Probate Code section 633.10, under the law in effect at that time, and it had jurisdiction over a claim against the trust. *In re Estate of Falck*, 672 N.W.2d 785, 791 (Iowa 2003). Section 633.10(4)(a) conferred jurisdiction when the original claim was filed, and section 633.6101 confirmed subject matter jurisdiction when the amended claim and amended final report were filed and heard. *Id.*

762. Probate & Trust Law Section, The Iowa State Bar Ass’n, Proposed Amendments to the Iowa Trust Code 28 (2002) (on file with author).

763. *See supra* Part XI.B.

764. 2010 Iowa Acts 488. New section 633A.6101(2) reads:

Unless a trust is under continuous court supervision pursuant to section 633.10, subsection 4, the trust shall not be subject to the jurisdiction of the probate court and the court shall not issue letters of appointment.

Id.

765. *Compare* 1999 Iowa Acts 257–58 (including the former format of section 633.6105), *with* 2002 Iowa Acts 196–97 (including the revised format of section 633.6105).

766. 2002 Iowa Acts 196–97. The rewriting was as follows:

1. The court may transfer the place of administration of a trust to or from this

This change was not controversial. However, two other new subsections were also proposed: one allowing the trustee to unilaterally transfer the principal place of business without court order but with notice to the qualified beneficiaries, and another addressing the issue of whether transfer of the trust's place of business to another state would constitute an automatic reason to remove the trustee.⁷⁶⁷ Both proposals—particularly the notice to qualified beneficiaries—generated substantial discussion, both within the Trust Code Committee and within the Section. The opposition to allowing transfer of the trust's principal place of business has previously been discussed.⁷⁶⁸ Opponents of the notice requirement took note of the difficulty of determining the principal place of business and agency agreements of some banks that allow services to be performed at a different location. Advocates of this position saw no reason to have any provisions concerning the transfer of the principal place of administration. They believed trustees already had the authority to do so and thought any

state or transfer some or all of the trust property to a trustee in or outside this state if it finds that the transfer of the trust property to a trustee in this or another jurisdiction, or the transfer of the place of administration of a 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 qualified beneficiaries.

2. A new trustee to whom the trust property is to be transferred shall be qualified, willing, and able to administer the trust or trust property under the terms of the trust.

3. If the trust or any portion of the trust property is 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 must have approved the transfer in order for the transfer to be effective.

4. 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 specified in the order.

5. If the court grants a petition to transfer a trust or trust property to this state, the court shall require the trustee to give a bond, if necessary under the law of the other jurisdiction or of this state, and may require bond as provided in section 633.4102.

Id.

767. *See supra* Part VIII.C.

768. *Id.*; *see also* Begleiter, *supra* note 1, at 238.

provision might apply restrictions on the right to do so. Ultimately, the Section voted to include a provision permitting transfer of the principal place of business but voted against requiring notification to the qualified beneficiaries.⁷⁶⁹

C. Section 633A.6202—Petitions—Purposes of Proceedings

Subsection 1 of this section provides: “Except as otherwise provided in section 633A.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.”⁷⁷⁰ In *In re Grandquist Revocable Trust*, the court held a contingent remainderman was a “beneficiary” under then-section 633.1102(1)—now section 633A.1102(2)—for purposes of section 633.6202.⁷⁷¹ The court noted the same rule applied at common law.⁷⁷² This decision was absolutely correct, despite former common law restrictions on a contingent remainderman bringing a legal action against a trustee and cases in which “the contingent interest is dependent upon the discretionary exercise of a power of appointment.”⁷⁷³

D. Section 633A.6301—Definition and Applicability

The first set of Issue Papers noted that the effect of notice to a representative of the person represented was never stated in the Iowa Trust Code. I only recommended a provision be added regarding the effect

769. 2003 Iowa Acts 200. Subsection 6 provided:

Without precluding the right of the court to order, approve, or disapprove a transfer, the trustee, in furtherance of the trustee’s duty to administer the trust at a place appropriate to its purpose or administration, and the interests of the beneficiaries, may transfer the trust’s principal place of administration to another state or to a jurisdiction outside the United States.

Id. The UTC does require notice to the qualified beneficiaries of transfer of the place of administration. UNIF. TRUST CODE § 108(d) (amended 2004).

770. IOWA CODE § 633A.6202(1) (2009).

771. *Grandquist v. Grandquist (In re Grandquist Revocable Trust)*, No. 03-1688, 2005 WL 1962554, at *2–3 (Iowa Ct. App. Aug. 17, 2005). Section 633A.1102(2) defines a beneficiary as “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.” IOWA CODE § 633A.1102(2).

772. *Grandquist*, 2005 WL 1962554, at *3.

773. *Id.*

of notice to a representative of the person represented.⁷⁷⁴ Other members of the Committee favored an additional provision to make the consent of a representative binding on the person represented.⁷⁷⁵ Both sections were approved by the Iowa Legislature.⁷⁷⁶

Subsection 4—previously subsection 5—allowing the consent of the representative to bind the person he or she could represent, is pernicious. I should mention that between 2001 and 2002, when this was considered, I had just begun researching the subject of virtual representation and was not nearly as familiar with it as I am now.⁷⁷⁷ This probably accounts for the fact that although I did not propose the addition of what is now subsection 4, I did not oppose its inclusion as strongly as perhaps was warranted. The most significant matter to be aware of as to consents and similar matters, such as ratifications and acquiescences, is they are usually given in a nonjudicial context. That is, no judicial proceeding is pending when a person consents to an action.

Perhaps an illustration will help to show the problem: suppose T creates a trust with income payable to his living descendants from time to time until the death of his last child, at which time the trust terminates and the corpus is payable to T's descendants then living, per stirpes. At the time the consent is given, T has four living children and sixteen grandchildren—some of whom are adults and some of whom are minors—plus several great-grandchildren. Suppose the children desire the trust to

774. This recommendation was based on the UTC. *See* UNIF. TRUST CODE § 301(a).

775. This provision was also based on the UTC. *See id.* § 301(b).

776. 2002 Iowa Acts 197. This amendment created new subsections 4 and 5, which were later renumbered as subsections 3 and 4. *Compare* 2002 Iowa Acts 197 (including subsections 4 and 5), *with* IOWA CODE § 633A.6301 (including the revised format). Section 633A.6301 currently provides, in part:

3. Notice to a person who may represent and bind another person under this trust code has the same effect as if notice were given directly to the person represented.

4. The consent of a person who may represent and bind another person under this trust code is binding on the person represented unless the person represented objects to the representation before the consent would otherwise have become effective.

IOWA CODE § 633A.6301.

777. *See* Begleiter, *supra* note 126 (containing the results of my research).

invest in an investment that will cause the trust to be undiversified.⁷⁷⁸ Each of T's four children consents to the transaction and signs the appropriate consent—releasing the trustee from liability—without consulting an attorney.

Some years later, after the last of T's children dies, the trustee prepares the trust's final account, proposes to settle it in court, and requests its discharge. Two of T's grandchildren—one who was a minor at the time of the consent and one who was not born at the time of the consent—object to the investment, which has lost substantial value. The trustee defends the investment on the ground the consent by the children bound their descendants.

A detailed analysis of this matter is beyond the scope of this Article,⁷⁷⁹ but under common law, T's children could not virtually represent T's grandchildren—born or unborn—because the children and grandchildren did not have similar interests in the trust.⁷⁸⁰ The children had only income interests, while the grandchildren and other descendants had income and contingent remainder interests. Therefore, the children could not represent their descendants in a judicial proceeding.⁷⁸¹

The major problem with allowing consent by a representative to bind a represented party is there is no judicial arbiter present to decide if the representation is valid when the consent is given.⁷⁸² Consent is often given without the advice of a lawyer. But even if a lawyer's advice is sought, decisions on whether the representative and the person sought to be represented have similar interests is difficult. Even if the lawyer is versed in these distinctions, a decision is problematic. If the party, T's children in our example, or the lawyer guesses wrong, the resulting transaction is not binding on the party represented.⁷⁸³ In a judicial proceeding, the problem is ameliorated by the presence of a judge to determine the answer to these

778. Other situations could also cause this problem, such as mortgaging real estate in the trust or borrowing rather than selling trust assets.

779. *But see* Begleiter, *supra* note 126 (providing in-depth treatment of the issue).

780. *Id.* at 319–22.

781. *See id.* at 327–37.

782. *Id.* at 349–51.

783. *See id.* at 331–34 (citing *In re Estate of Silver*, 340 N.Y.S.2d 335, 338–41 (Sur. Ct. 1973)).

questions.⁷⁸⁴

Extending representation to nonjudicial consents is a huge risk for the trustee.⁷⁸⁵ The risks are discussed in much greater detail elsewhere.⁷⁸⁶ The only positive element in such an extension of representation is convenience for the attorney and costs because any action desired to be accomplished by nonjudicial agreement could be obtained through a judicial proceeding—with a *guardian ad litem* appointed to represent minors and unborns if necessary.⁷⁸⁷ Subsection 4 of 633A.6301 should be rethought and probably repealed.

The repeal of subsection 4 was discussed at the August 2009 meeting of the Section. After much discussion, the Section approved the repeal of subsection 4 *prospectively only*. This was accomplished by the legislature.⁷⁸⁸ The enactment strikes former subsection 4 of section 633A.6301 and substitutes the following: “Section 633A.6301, subsection 4, Code 2009, applies to written consents executed prior to July 1, 2010.”⁷⁸⁹

This means if consent of a person who can bind another person is executed prior to July 1, 2010, the consent is effective to bind the person who could be represented—assuming the representation was correct under the Trust Code. Any consent obtained after July 1, 2010, will not be effective to bind such a person.

This does not mean all informal agreements, such as agreements settling accounts, will vanish. It does mean that after July 1, 2010, the trustee may no longer argue consent by one person to such a nonjudicial settlement binds a minor, unborn, or incapacitated person if the informal agreement is later challenged. If the trustee is willing to do so, he or she can have an informal agreement executed by the likely beneficiaries, believing nobody will later challenge the agreement.

Perhaps an example will help: T in his will creates a trust with income to A for life, remainder to B, or if B predeceases A, to B’s issue living on A’s death, per stirpes. Assume B has no issue. Prior to July 1, 2010, the

784. *Id.* at 349.

785. *Id.* at 348–51.

786. *E.g., id.*

787. *Id.* at 351.

788. 2010 Iowa Acts 488.

789. *Id.*

trustee would settle his account by obtaining the agreement of A and B. This would bind B's issue because on most issues, B could virtually represent his issue. After July 1, 2010, the trustee could do the same nonjudicial settlement. If B survived A, there would be no challenge to the agreement, and the trustee would be protected by the agreement. If B predeceased A and no issue of B challenged the agreement after A's death, the trustee would suffer no liability. But after A's death, any living issue of B who would take on A's death could challenge any matter in the agreement without being bound by B's consent.

I know trustees routinely relied on such agreements in the past, when little or caselaw supported extending virtual representation to nonjudicial consents.⁷⁹⁰ There is no reason to believe that practice will change. What will change is that the trustee will be aware of the risk of a later challenge and will not rely on his or her—or his or her attorney's—evaluation of the adequacy of the virtual representation in his or her analysis.⁷⁹¹

In 2003, subsection 3 of section 633A.6301 was repealed because the subject of that subsection—nonjudicial settlements—was expanded and moved to a separate section.⁷⁹²

Lastly, a new subsection prohibiting a settlor from representing a beneficiary in a proceeding to modify or terminate a trust was added in 2006.⁷⁹³ This addition was based on an amendment to the UTC, which was, in turn, based on a concern expressed by the American College of Trust and Estate Counsel—that allowing such representation could cause inclusion of the trust in the settlor's gross estate for estate tax purposes.⁷⁹⁴

E. *Section 633A.6303—Representation by Fiduciaries and Parents—and Section 633A.6304—Representation by Holders of Similar Interests*

These subjects are beyond the scope of this Article. Those interested in a more detailed treatment may consult my articles on these subjects.⁷⁹⁵

790. See Begleiter, *supra* note 126, at 340–46 (discussing the uncertainty regarding this proposition).

791. The trustee can also consider a nonjudicial settlement under section 633A.6308. See *infra* Part XVI.F.

792. 2003 Iowa Acts 200. That legislation also replaced the word “chapter” with the words “trust code” in newly renumbered subsections 3 and 4. *Id.*

793. 2006 Iowa Acts 248.

794. See UNIF. TRUST CODE §§ 301(d) & cmt., 411 & cmt. (amended 2004).

795. See Begleiter, *supra* note 126; see also Martin D. Begleiter, *The Guardian*

However, I will say a word on section 633A.6303(4), which permits a parent to represent his or her minor child if no conservator has been appointed.⁷⁹⁶ This idea was unknown at common law.⁷⁹⁷ As I have mentioned elsewhere, this may increase “do nothing” representation, which is not a result to be desired.⁷⁹⁸ It also raises some questions on which very little or no authority exists. For example, if the parents are divorced, which parent may represent the minor child? Either? Both? The custodial parent? The parent most closely related to the settlor? This subject was considered by the Section at its August 2009 meeting. The Section determined parental representation should be retained in the Trust Code without change.

F. *New Section 633A.6308—Nonjudicial Settlement Agreements*

As previously related, the Trust Code Committee recognized early on that subsections 1 through 3 of section 633.6301—now 633A.6301—were vague and uncertain in scope.⁷⁹⁹ I found, after research, former subsection 3 came from an early draft of the UTC dealing with nonjudicial settlements.⁸⁰⁰ When the UTC was promulgated, the section on this subject—UTC section 111—had been expanded considerably. My first thought was to substitute UTC section 111 for section 633.6301, but that would mean relocating subsections 4 and 5 of section 633.6301, which were quite important. Instead, the decision was made to repeal subsection 633.6301(3), renumber subsections 633.6301(4) and (5) as (3) and (4) respectively, and add a section similar to UTC section 111 as a new section 633.6308.⁸⁰¹ The enactment of a new provision had the added benefit of explaining both the meaning and scope of a nonjudicial settlement agreement, which was referred to in section 633.6307 but not fully

Ad Litem in Estate Proceedings, 20 WILLAMETTE L. REV. 643 (1984).

796. IOWA CODE § 633A.6303(4) (2009).

797. Begleiter, *supra* note 126, at 362–63.

798. *Id.* at 366–67.

799. *See supra* Part XVI.D.

800. Former section 633.6301(3) provided:

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.

IOWA CODE § 633A.6301(3) (2003).

801. 2003 Iowa Acts 200–01; *see also supra* Part XVI.D.

described. In addition, it was pointed out by a member of the Committee that former section 633.6301(3) was quite broad and could be interpreted to include the power to modify or terminate a trust without a court proceeding. The Committee agreed the section was not intended to allow the modification or termination of a trust without a court order unless the settlor was alive, and it agreed to the modification or termination under 633.2202. Section 633A.6308 is much more limited in the types of actions allowed under nonjudicial settlement than former section 633.6301(3). Section 633A.6308—then-section 633.6308—was adopted in 2003.⁸⁰²

802. 2003 Iowa Acts 200. Section 633A.6308 provides:

1. For purposes of this part, “*interested persons*” means persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court.
2. Except as otherwise provided in subsection 3, or as to a modification or termination of a trust under section 633A.2203, interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust.
3. A nonjudicial settlement is valid only to the extent the settlement does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this trust code or other applicable law.
4. Matters that may be resolved by a nonjudicial settlement agreement include any of the following:
 - a. The interpretation or construction of the terms of the trust.
 - b. The approval of a trustee’s report or accounting.
 - c. Direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power.
 - d. The resignation or appointment of a trustee and the determination of a trustee’s compensation.
 - e. The transfer of a trust’s principal place of administration.
 - f. The liability of a trustee for an action relating to the trust.
5. Any interested person may request the court to approve a nonjudicial settlement agreement, to determine whether the representation provided was adequate, and to determine whether the agreement contains terms and conditions the court could have properly approved.

IOWA CODE § 633A.6308 (2009). The only substantive difference between section 633A.6308 and UTC section 111 is the addition of the phrase “or as to a modification or termination of a trust under section 633A.2203” in subsection 2. *Compare* IOWA

Section 633A.6308 provides a method by which disputes may be resolved by nonjudicial means, yet have the same effect as if approved by a court.⁸⁰³ However, this procedure is limited by the requirement in subsection 3 that the terms of the agreement be terms and conditions a court could approve.⁸⁰⁴ “Under this section, a nonjudicial settlement cannot be used to produce a result not authorized by law.”⁸⁰⁵

I previously noted a major problem of applying virtual representation to consents, releases, and similar transactions was the lack of certainty as to whether the representation was adequate.⁸⁰⁶ For the matters covered by section 633A.6308, that problem is alleviated to some degree. Subsection 5 permits a request for a court “to determine whether the representation provided was adequate,”⁸⁰⁷ thus allowing the agreement to have binding application when minors, unborns, and incapacitated persons are involved.⁸⁰⁸ This is true even if the agreement is not submitted to the court for approval.⁸⁰⁹ Of course, there are two detrimental factors involved in using subsection 5. First, asking the court to determine “whether the representation provided was adequate” involves additional delay and court costs. Second, the parties—or their attorneys—may fear the court will find the representation is inadequate, leaving them with choosing between the cost and delay of using a special representative appointed by the court or not making the request to the court and taking the risk no represented party will later challenge the agreement. Nevertheless, the alternative given by section 633A.6308 is far better than the possibility of a voidable judgment by inadvertence.

The matters that may be resolved by a nonjudicial agreement include:⁸¹⁰ “interpretation or construction of the terms of the trust,” approval of the trustee’s report or accounting, “transfer of a trust’s principal place of administration,” trustee liability for an action of the

CODE § 633A.6308(2) (including the phrase), *with* UNIF. TRUST CODE § 111(b) (amended 2004) (lacking the phrase).

803. *See* UNIF. TRUST CODE § 111 cmt.
804. IOWA CODE § 633A.6308(3).
805. UNIF. TRUST CODE § 111 cmt.
806. *See supra* Part XVI.D.
807. IOWA CODE § 633A.6308(5).
808. *See* UNIF. TRUST CODE § 111 cmt.
809. *See id.*
810. Use of the words “may” and “include” support the assertion in the UTC comment that the list is nonexclusive. *Id.* Nevertheless, it is probable a court will not stray far from the statutory list.

trustee concerning the trust, resignation or appointment of a trustee, determination of the trustee's compensation, granting the trustee any necessary or desirable power, and directing "a trustee to refrain from performing a particular act."⁸¹¹ In my experience, the most common type of action settled nonjudicially is the trustee's report or accounting, and I expect this will be the most frequent use of the section.

XVII. SECTION 633.7101—DIVISION PREVAILS

Until the resolution of the issue of what sections of the Probate Code would be repealed, a provision holding the Trust Code would prevail over any other Code section was required. Such a section was enacted in 2002.⁸¹² The Supreme Court of Iowa applied the section to rule the Trust Code prevailed over section 633.10(4) of the Probate Code as to an amended claim in *In re Estate of Falck*.⁸¹³ The legislature repealed section 633.7101 as unnecessary in 2005 when it reconciled the Trust Code and the Probate Code—separating the Trust Code into a separate chapter—and amended section 633.1107 to provide the same rule.⁸¹⁴

XVIII. RETROACTIVITY OF THE TRUST CODE—SECTION 633A.1106

A. *Preliminary Matters*

Section 633A.1106 states:

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.

This trust code applies to all proceedings concerning trusts within the scope of this trust code commenced on or after July 1, 2000.

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

811. IOWA CODE § 633A.6308(4).

812. 2002 Iowa Acts 197. The section provided: "Notwithstanding any Code provision to the contrary, the provisions of this Division XX shall prevail over any other applicable Code provision." *Id.*

813. *In re Estate of Falck*, 672 N.W.2d 785, 791 (Iowa 2003).

814. 2005 Iowa Acts 120, 122.

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.⁸¹⁵

Readers of this Article will immediately notice discussion of this section is out of order—it is not discussed in the numerical order followed throughout this Article. This is because I originally did not intend to discuss this section. This section has not been amended since its original adoption, and retroactivity is a constitutional law subject. I am not a constitutional lawyer, so I originally intended to leave this topic to others. However, very late in the development of this Article, I determined something needed to be said about retroactivity. The reason is that in dicta in a recent case, the Iowa Court of Appeals raised questions about section 633A.1106(1). In *In re Trust Established Under the Last Will and Testament of Kinsel*, the court stated: “First, we do not believe the legislature intended in 2004 to make a substantive change in existing beneficiaries’ rights. If it had, serious constitutional questions would be raised.”⁸¹⁶

This statement, if not commented on, would leave a serious question concerning the applicability of the Trust Code extant without guidance. Thus, some observations regarding the problem were added.

However, the limits of this discussion should be clearly noted. As previously stated, I am not a constitutional lawyer. I have not read every case decided on retroactivity, nor will I do so. There are many persons better versed in the problem than me. I was informed this is not an easy question.⁸¹⁷ My purpose here is only to discuss decided retroactivity questions in closely related areas to narrow the parameters of the

815. IOWA CODE § 633A.1106. This section is based on, and is substantially the same as, UTC section 1106(a)(1)–(3). See *infra* Part XVIII.B (discussing UTC section 1106).

816. *In re Trust Established Under the Last Will and Testament of Kinsel*, No. 08-1625, 2010 WL 446551, at *5 (Iowa Ct. App. Feb. 10, 2010) (citing *In re Will of Uchtorff*, 693 N.W.2d 790, 797 (Iowa 2005)). The case concerned section 633A.4702. *Id.* See *supra* Part XIII (discussing *Kinsel*).

817. This information comes from my colleague Mark Kende, James Madison Chair Professor of Constitutional Law at Drake University Law School and Director of the Constitutional Law Center. I thank Professor Kende for his help on this section. See also John M. Gradwohl & William H. Lyons, *Constitutional and Other Issues in the Application of the Nebraska Uniform Trust Code to Preexisting Trusts*, 82 NEB. L. REV. 312, 322, 330, 364 (2003).

discussion and to show certain terms involved in the discussion, such as “vested” and “accrued” rights, do not have the same meaning normally given to such terms by practitioners in estate planning.⁸¹⁸

B. *UTC Section 1106 and Optional Section 112*

Section 1106 of the Uniform Trust Code provides:

(a) Except as otherwise provided in this [Code], on [the effective date of this [Code]];

(1) this [Code] applies to all trusts created before, on, or after [its effective date];

(2) this [Code] applies to all judicial proceedings concerning trusts commenced on or after [its effective date];

(3) this [Code] applies to judicial proceedings concerning trusts commenced before [its effective date] unless the court finds that application of a particular provision of this [Code] would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of this [Code] does not apply and the superseded law applies;

(4) any rule of construction or presumption provided in this [Code] applies to trust instruments executed before [the effective date of the [Code]] unless there is a clear indication of a contrary intent in the terms of the trust; and

(5) an act done before [the effective date of the [Code]] is not affected by this [Code].

(b) If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before [the effective date of the [Code]], that statute continues to apply to the right even if it has been repealed or superseded.⁸¹⁹

818. See, e.g., *Uchtorff v. Hanson (In re Will of Uchtorff)*, 693 N.W.2d 790, 797 (Iowa 2005) (stating one party’s contention that under article I, section 21 of the Iowa Constitution, retroactive legislation that divests vested rights may be unconstitutional).

819. UNIF. TRUST CODE § 1106 (amended 2004). Iowa Code section 633A.1106 is similar to subsections (a)(1) through (3) of UTC section 1106. See IOWA CODE § 633A.1106. Subsection (a)(4) of UTC section 1106, which provides application of contrary intent in the trust terms will negate an application of a rule of construction, is accomplished in Iowa by the specific sections stating the rules of construction. See

The official comment to that section states, in part:

The Uniform Trust Code is intended to have the widest possible effect within constitutional limitations. Specifically, the Code applies to all trusts whenever created, to judicial proceedings concerning trusts commenced on or after its effective date, and unless the court otherwise orders, to judicial proceedings in progress on the effective date. In addition, any rules of construction or presumption provided in the Code apply to preexisting trusts unless there is a clear indication of a contrary intent in the trust's terms. . . .

This Code cannot be fully retroactive, however. Constitutional limitations preclude retroactive application of rules of construction to alter property rights under trusts that became irrevocable prior to the effective date.⁸²⁰

This is all the UTC says about retroactivity.⁸²¹

UNIF. TRUST CODE § 1106(a)(4); IOWA CODE §§ 633A.4701(1), 633A.4702, 633A.4703.

820. UNIF. TRUST CODE § 1106 cmt.

821. The UTC also has an optional section entitled "Rules of Construction." *Id.* § 112 ("The rules of construction that apply in this State to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of trust property."). The comment to that section, after arguing the constructional rules for wills should apply to trusts, particularly revocable trusts, states:

Because of the wide variation among the States on the rules of construction applicable to wills, this Code does not attempt to prescribe the exact rules to be applied to trusts but instead adopts the philosophy of the Restatement that the rules applicable to trusts ought to be the same, whatever those rules might be.

Rules of construction are not the same as constructional preferences. A constructional preference is general in nature, providing general guidance for resolving a wide variety of ambiguities. An example is a preference for a construction that results in a complete disposition and avoid[s] illegality. Rules of construction, on the other hand, are specific in nature, providing guidance for resolving specific situations or construing specific terms. Unlike a constructional preference, a rule of construction, when applicable, can lead to only one result. *See* Restatement (Third) of Property: Donative Transfers Section 11.3 and cmt. b (Tentative Draft No. 1, approved 1995).

Rules of construction attribute intention to individual donors based on assumptions of common intention. Rules of construction are found both in enacted statutes and in judicial decisions. Rules of construction can involve the meaning to be given to particular language in the document, such as the

C. UPC Section 8-101

The effective-date provisions of the UPC assume significance in this analysis because most of the cases considering the retroactivity of estate and trust statutes involve UPC provisions—particularly UPC section 2-804—or UPC-like provisions. UPC section 8-101 provides, in part:

- (a) This Code takes effect on January 1, 19.
- (b) Except as provided elsewhere in this Code, on the effective date of this Code:
 - (1) the Code applies to governing instruments executed by decedents dying thereafter;
 - (2) the Code applies to any proceedings in Court then pending or thereafter commenced regardless of the time of the death of decedent except to the extent that in the opinion of the Court the former procedure should be made applicable in a particular case in the interest of justice or because of infeasibility of

meaning to be given to “heirs” or “issue.” Rules of construction also address situations the donor failed to anticipate. These include the failure to anticipate the predecease of a beneficiary or to specify the source from which expenses are to be paid. Rules of construction can also concern assumptions as to how a donor would have revised donative documents in light of certain events occurring after execution. These include rules dealing with the effect of a divorce and whether a specific devisee will receive a substitute gift if the subject matter of the devise is disposed of during the testator’s lifetime.

Instead of enacting this section, a jurisdiction enacting this Code may wish to enact detailed rules on the construction of trusts, either in addition to its rules on the construction of wills or as part of one comprehensive statute applicable to both wills and trusts. For this reason and to encourage this alternative, the section has been made optional. For possible models, see Uniform Probate Code, Article 2, Parts 7 and 8, which was added to the UPC in 1990, and California Probate Code Sections 21101–21630, enacted in 1994.

Id. § 112 cmt.

Iowa chose not to adopt anything like UTC section 112 and instead extended *selected* rules of construction—and created some new rules of construction—to trusts. This raises the question of which of the Trust Code’s provisions are rules of construction. An extended discussion of this topic is unnecessary here because I concede section 633A.4701 is a rule of construction, as is the rule in section 633A.4703. Section 633A.4704, referring to the Uniform Simultaneous Death Act, should qualify as a rule of construction. An argument might be made section 633A.4702 is a characterization rule, not a rule of construction, but for the purposes of this analysis, I will treat section 633A.4702 as a rule of construction.

application of the procedure of this Code;

. . . .

(4) an act done before the effective date in any proceeding and any accrued right is not impaired by this Code. If a right is acquired, extinguished or barred upon the expiration of a prescribed period of time which has commenced to run by the provisions of any statute before the effective date, the provisions shall remain in force with respect to that right;

(5) any rule of construction or presumption provided in this Code applies to governing instruments executed before the effective date unless there is a clear indication of a contrary intent.⁸²²

D. *The Iowa Constitution and Retrospective Application of Legislation*

Article I, section 9 of the Iowa Constitution reads: “The right of trial by jury shall remain inviolate; but the general assembly may authorize trial by a jury of a less number than twelve men in inferior courts; but no person shall be deprived of life, liberty, or property, without due process of law.”⁸²³

Article I, section 21 of the Iowa Constitution provides: “No bill of attainder, ex post facto law, or law impairing the obligation of contracts, shall ever be passed.”⁸²⁴

The Iowa Supreme Court has held the Iowa “legislature has the power to pass retrospective or retroactive laws, and that they will be declared [unconstitutional] only when they disturb or interfere with vested rights.”⁸²⁵ “A citizen has no vested rights in a particular course of practice in the courts, nor to a particular remedy.”⁸²⁶ The court has also held Iowa

822. UNIF. PROBATE CODE § 8-101(a), (b)(1), (2), (4), (5) (amended 2008).

823. IOWA CONST. art. I, § 9.

824. *Id.* art. I, § 21. Technically, this section, which prohibits the impairment of the obligations of contract, is not relevant to this discussion because trusts are donative instruments and not contracts. *But see* John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625 (1995). However, most of the retroactivity discussions in the cases involve the contract clause, and some of those shed light on the meaning of the due process clause, so I mention it here.

825. Iowa R.R. Land Co. v. Soper, 39 Iowa 113, 117 (1874) (finding the legalization of a tax does not interfere with vested rights).

826. Tilton v. Swift & Co., 40 Iowa 78, 80 (1874) (citation omitted).

has no constitutional prohibition on retrospective laws.⁸²⁷

E. *Previous Analysis of Retroactivity*

1. *Preliminary Observations*

Clearly, the crucial words in the Iowa Constitution, the UPC, and the UTC are “vested rights,”⁸²⁸ “accrued right[s],”⁸²⁹ and “property rights”⁸³⁰ that accrued under trusts that became irrevocable prior to the Trust Code’s effective date. Some of the cases use each of these terms. For the purpose of this analysis, I will treat these terms as synonymous—recognizing the term “property rights,” as often used, is broader than the other two terms—because the cases have done so.

2. *The Gradwohl and Lyons Article*

In an article published in 2003, two professors at the University of Nebraska College of Law explored the problems of applying the Nebraska version of the UTC to preexisting trusts.⁸³¹ In the course of that examination, after analyzing UTC section 1106, the authors concluded that, although it is far from clear which provisions of the UTC are rules of construction, any UTC rule that has an effect on beneficial interests in preexisting trusts or creates a presumption similar to the comments in UTC section 112 is a rule of construction.⁸³² The authors went on to identify several provisions of the UTC they would tentatively clarify as rules of construction.⁸³³ The authors then proceed to conclude any UTC section

827. State *ex rel.* Turner v. Limbrecht, 246 N.W.2d 330, 334 (Iowa 1976), *overruled on other grounds by* State *ex rel.* Miller v. Hydro Mag, Ltd., 436 N.W.2d 617 (Iowa 1989).

828. See *id.*; *Tilton*, 40 Iowa at 80; *Soper*, 39 Iowa at 117.

829. UNIF. PROBATE CODE § 8-101(b)(4) (amended 2008).

830. UNIF. TRUST CODE § 1106 cmt. (amended 2004).

831. Gradwohl & Lyons, *supra* note 817.

832. *Id.* at 324–27, 337–40.

833. *Id.* at 364. The authors identified UTC sections 411(c), 412(a), 413(a) and (b), 503(b), 504(c), 814(b)(1), and possibly 111 as constructional provisions potentially subject to constitutional limitations. *Id.* The Iowa equivalents to these sections are:

UTC	Iowa
§ 411(c)	None, although a proposal was submitted to the Section in May 2010 to explicitly reverse the UTC rule and restate the common law rule.
§ 412(a)	Section 633A.2204, but provision language is very different than the comparable UTC provision.
§ 413(a) and (b)	Section 633A.5102; though some provisions of comparable UTC sections were omitted or changed.
§ 503(b)	Section 633A.2302; though it contains different provisions than comparable UTC provisions.
§ 504(c)	None.
§ 814(b)(1)	Section 633A.4214(3)(a).
§ 111	Section 633A.6308.

The authors based this conclusion on the fact Nebraska did not adopt optional UTC section 112, and they then tried to determine what the UTC authors meant by “rules of construction” under UTC section 1106 without considering UTC section 112. *See id.* at 336–37. In my opinion, this is not possible. It is also an incorrect approach because it omits consideration of the following crucial portion of the comments to UTC section 112:

Because of the wide variation among the States on the rules of construction applicable to wills, this Code does not attempt to prescribe the exact rules to be applied to trusts but instead adopts the philosophy of the Restatement that the rules applicable to trusts ought to be the same, whatever those rules might be.

...

Instead of enacting this section, a jurisdiction enacting this Code may wish to enact detailed rules on the construction of trusts

UNIF. TRUST CODE § 112 cmt.

In my opinion, the drafters of the UTC did not intend for any provisions of the UTC to be considered rules of construction. Furthermore, only additional rules fitting the definition in the comment to optional section 112 and adopted by an enacting state should be considered rules of construction. *See supra* (describing the comment to optional section 112). Why else would the comment read the way it does? If the UTC

“having an effect on beneficial interests in preexisting trusts cannot avoid constitutional scrutiny by being identified as ‘rules of construction.’”⁸³⁴ In short, the authors assert any UTC provision changing beneficial interests in a preexisting trust is constitutionally suspect and most of those provisions cannot be constitutionally applied to trusts or rights created prior to the effective date.⁸³⁵

Unfortunately, as we shall see shortly, the analysis in the article is not sufficiently discerning and the existing caselaw has analyzed the crucial language with a sharper scalpel than the article’s authors.

F. *The Caselaw on the Crucial Language in Retroactivity*

As noted above, the crucial words involved in the Iowa Constitution, the UPC, and the UTC are “vested rights,” “accrued right[s],” and “property rights.”⁸³⁶ Gradwohl and Lyons correctly stated:

Nebraska law, like that of most or all states, is nebulous and speculative concerning potential constitutional limits on the retroactive application of the UTC to preexisting irrevocable trusts. The most frequently stated Nebraska rule is that a legislative act will not be permitted to operate retroactively where it invalidates or impairs contractual obligations or interferes with vested rights. But this language does not fit well with respect to trusts and trust law. The relationships among the settlor, trustee, and beneficiaries are not contractual in an ordinary sense. The term “vested right” is especially confusing as applied to a preexisting irrevocable trust since one principle of sound trust planning is to avoid establishing the sort of descendible, inheritable interests which are considered “vested” under normal property law rules. The difficulty in applying a “vested rights” analysis in this context becomes clear when we realize that, in one sense, the total sum of the beneficial interests in a trust is “vested” in the group of beneficiaries. Thus, whatever changes the beneficial interests existing in an irrevocable trust when the UTC becomes

considered some of its sections to be rules of construction, would it not have been logical to list them in the comment to section 112? The tenor of the comment makes this the most likely explanation.

Further examination of this question is beyond the scope of this Article because I have previously conceded Iowa Code sections 633A.4701 through 633A.4703 are rules of construction.

834. Gradwohl & Lyons, *supra* note 817, at 338.

835. *See id.* at 363–64.

836. *See supra* Part XVIII.E.1.

operative “interferes with vested rights” in a constitutional sense.⁸³⁷

Moreover, because the UTC is such a recent statute—it was finalized in 2000—there are no decisions testing the constitutional limitations on applying rules of construction passed in enacting states to preexisting trusts. So we must look to analogous situations.

1. *The Divorce-Will-Substitute Cases*

A number of cases have been decided on the following, typical facts. An individual buys a life insurance policy, naming his or her spouse as beneficiary.⁸³⁸ Some years later, the individual and the spouse divorce, but the individual—through neglect or inadvertence—does not change the listed beneficiary. Later, the UPC is adopted by the state legislature. Then, the individual dies.

The UPC contains a provision providing a divorce revokes all dispositions to the former spouse in a governing instrument.⁸³⁹ “Governing instrument” is defined in UPC section 1-201(18) as “a deed, will, trust, insurance or annuity policy, account with POD designation, security registered in beneficiary form (TOD), pension, profit-sharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a dispositive, appointive, or nominative instrument of any similar type.”⁸⁴⁰ The spouse claims the proceeds under the beneficiary designation. The alternate beneficiary—or if none, the decedent’s executor—claims the statute revoked the beneficiary designation. The spouse claims the statute is unconstitutional because the beneficiary designation and the divorce occurred prior to the effective date of the statute. The crucial word in UPC section 8-101 is “accrued right.”⁸⁴¹ The early cases of this type typically held the retrospective application of such statutes to a life insurance policy was unconstitutional as an impairment of a contractual obligation.⁸⁴² Most of the more recent decisions have disagreed, finding the application of

837. Gradwohl & Lyons, *supra* note 817, at 320 (citations omitted).

838. Alternatively, the individual creates a different will substitute.

839. UNIF. PROBATE CODE § 2-804(b) (amended 2008).

840. *Id.* § 1-201(18).

841. *Id.* § 8-101(b)(4). *See supra* Part XVIII.C.

842. *See Whirlpool Corp. v. Ritter*, 929 F.2d 1318, 1323 (8th Cir. 1991); *Aetna Life Ins. Co. v. Schilling*, 616 N.E.2d 893, 894–95 (Ohio 1993); *Parsonese v. Midland Nat’l Ins. Co.*, 706 A.2d 814, 818–19 (Pa. 1998).

retroactive statutes valid and constitutional, even though the beneficiary designation and the divorce occurred prior to the effective date of the statute.⁸⁴³

One such case deserves a more extensive discussion because of its analysis of the crucial terms of the retroactivity statutes. The case is *In re Estate of DeWitt*.⁸⁴⁴ *DeWitt* was a typical divorce case involving a life insurance policy in which the beneficiary designation and the divorce occurred prior to the enactment of the UPC, but the insured died after the UPC was enacted in Colorado.⁸⁴⁵ The court first distinguished retroactive legislation, which may be constitutional, from retrospective legislation, which describes a statute with retroactive application that is unconstitutional.⁸⁴⁶ The court stated the test for whether a statute is retrospective is whether “it “takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.””⁸⁴⁷ Considering the “vested rights” prong of retrospectivity, the court noted, “[A] finding that a statute impairs a vested right, although significant, . . . is not dispositive as to retrospectivity; such a finding may be balanced against the public interest in the statute.”⁸⁴⁸ The court then characterized a vested right:

A vested right is one that is not dependent on the common law or statute but instead has an independent existence. There is no bright-line test for determining whether a right is vested. . . . [W]e consider (1) whether the public interest is advanced or retarded; (2) whether the statute gives effect to or defeats the bona fide intentions or reasonable expectations of the affected individuals; and (3) whether

843. See *Stillman v. Teachers Ins. & Annuity Ass’n Coll. Ret. Equities Fund*, 343 F.3d 1311, 1318–19 (10th Cir. 2003); *Hill v. DeWitt (In re Estate of DeWitt)*, 54 P.3d 849, 854 (Colo. 2002); *Fasi v. Becker (In re Estate of Becker)*, 32 P.3d 557, 561–62 (Colo. App. 2000); *In re Estate of Sharek*, 930 A.2d 388, 392 (N.H. 2007); *Bielat v. Bielat*, 721 N.E.2d 28, 32 (Ohio 2000); *Buchholz v. Storsve*, 740 N.W.2d 107, 113–14 (S.D. 2007).

844. *In re Estate of DeWitt*, 54 P.3d 849. The case was a consolidation of two cases. *Id.* at 852.

845. *Id.*

846. *Id.* at 854.

847. *Id.* (quoting *Denver S. Park & Pac. Ry. Co. v. Woodward*, 4 Colo. 162, 167 (1878)).

848. *Id.* at 855.

the statute surprises individuals who have relied on a contrary law.⁸⁴⁹

Later in the analysis, the court stated: “A vested right is described as one that is ‘something more than a mere expectation based upon an anticipated continuance of the existing law.’”⁸⁵⁰ The court noted a life insurance beneficiary does not have a vested interest in that contract; rather, he or she has “an expectancy, or contingent, interest.”⁸⁵¹ Noting the insurance industry and the probate process are both regulated by statute, the court held both the beneficiaries and the insured in these cases could anticipate the possibility of a statute addressing changes in beneficiary designation.⁸⁵² Thus, the court held neither the rights of the beneficiaries nor the rights of the insured were vested in the constitutional sense.⁸⁵³

2. *Other Cases*

The characterization of vested rights in *DeWitt* is echoed in other types of cases. In *In re Marriage of Balanson*, a divorce case, the wife’s parents created a revocable trust that became irrevocable when the wife’s mother died in 1990.⁸⁵⁴ The wife and husband were divorced in 1997, but proceedings on the divorce court order were appealed to the Colorado Supreme Court, then remanded.⁸⁵⁵ After a hearing in the trial court on remand, but before the trial court’s ruling, Colorado enacted a new statute providing the property held in revocable trusts created by others would not be considered assets of the party to the divorce who was a beneficiary.⁸⁵⁶ The statute was effective for existing judicial proceedings.⁸⁵⁷ The trial court held the wife had a vested interest in part of her parents’ trust and considered that interest in dividing the property.⁸⁵⁸ The court held the statute could be applied constitutionally, rebutting the husband’s contention that doing so would confiscate his vested property right.⁸⁵⁹

849. *Id.* (citations omitted).

850. *Id.* at 856 (quoting *Ficarra v. Dep’t of Regulatory Agencies*, 849 P.2d 6, 16 (Colo. 1993)).

851. *Id.* (citations omitted).

852. *Id.* at 857–58.

853. *Id.* at 856–58.

854. *In re Marriage of Balanson*, 107 P.3d 1037, 1040 (Colo. App. 2004).

855. *Id.* at 1040–41.

856. *Id.* at 1041.

857. *Id.* (citing COLO. REV. STAT. § 14-10-113(7)(b), (c) (2003)).

858. *Id.*

859. *Id.* at 1044–45.

After quoting *DeWitt*, the court stated that because no final order was entered prior to the enactment of the statute, the husband had no vested interest for due process purposes.⁸⁶⁰ In the course of its analysis, the court was careful to note cases defining “vested” for future interest purposes were distinguishable because of the different contexts and because “vested” had a different meaning in due-process analysis.⁸⁶¹ The court ruled because the appellate process was not complete at the time of the statute’s enactment, “the new rule of law prohibiting characterization of wife’s revocable trust interest as property may be fairly applied even if it may reduce the eventual award to husband.”⁸⁶²

Perhaps the most significant case for this analysis is *In re Estate of Smith* because it showed a right granted by common law or a statute is not vested if it is reasonable for the holder of the right to anticipate a possible change in the law, either by statute or court decision.⁸⁶³ Here, the decedent executed a will, and shortly before her death, met with her church pastor and executed a handwritten document in Korean.⁸⁶⁴ The beneficiaries under the handwritten document petitioned to have the document admitted to probate as a codicil.⁸⁶⁵ On a motion for summary judgment, the dispositive question was whether an amendment to a statute that allowed extrinsic evidence on whether testamentary intent existed, which took effect after the decedent’s death, could be applied in the case.⁸⁶⁶ The probate court held it could not because it would impair an accrued right that arose on the decedent’s death—the right of the decedent’s heirs to inherit the funds.⁸⁶⁷ The appellate court reversed, holding that although the statute did not define “accrued,” it was closely analogous to vested.⁸⁶⁸ The court defined “accrued” as

equivalent, in its meaning, to the word “vested,” which necessarily implies that something has been imparted to, or conferred upon a third

860. *Id.* at 1045.

861. *Id.* at 1046.

862. *Id.* (citing *In re Marriage of Wolford*, 789 P.2d 459 (Colo. App. 1989)).

863. See *Korean New Hope Assembly of God v. Haight (In re Estate of Smith)*, 651 N.W.2d 153, 158 (Mich. Ct. App. 2002).

864. *Id.* at 154.

865. *Id.*

866. *Id.* at 154–55.

867. *Id.* at 155–56.

868. *Id.* at 157.

person, over which he may have the immediate control by possession, or the present right to future possession, of which he can not be deprived of without his assent. *It must be a right he can legally assert, independent of any future condition of things, as well as any subsequent change of the existing law.*⁸⁶⁹

Noting bequests under a will are “to some extent” vested on a testator’s death, the court nevertheless held the right of beneficiaries

is not an “accrued right” under the act because it is not so fixed that it cannot be changed. Rather, it can be changed in conjunction with a showing under the [new statute] that there is a more recent will, or a partial or complete revocation, or an addition or alteration of the decedent’s will, or a partial or complete revival of a formerly revoked will or a formerly revoked portion of a will. . . . [A]n “accrued right” must mean something other than a right under a will upon the testator’s death. Rather, in the context of the act, an “accrued right” is a legal right to the exclusion of any other right or claim to it. The rights outlined in a testamentary instrument involved in probate do not so definitely belong to a person that they cannot be impaired or taken away without the person’s consent.⁸⁷⁰

The cases discussed and quoted above teach us: (1) Persons know and expect probate and trust proceedings are heavily controlled by statute; (2) beneficiaries and grantors of trusts should know statutes in this area can be changed; (3) rights of beneficiaries in a will are not “accrued” or “vested” in a constitutional sense even when testator dies; and (4) the possibility of an amendment to a statute or a change in the law does not render the rights of beneficiaries “accrued” or “vested” in a constitutional due-process sense. Translating this into the Iowa Trust Code context, the Trust Code—particularly sections 633A.4701, 633A.4702, and 633A.4703—can be applied to existing trusts on the effective date of the Trust Code because the rights of beneficiaries were not vested or accrued in a constitutional sense.

The policy aspect of retroactivity was examined in *In re Marriage of Bouquet*.⁸⁷¹ California changed its community property law to provide the

869. *Id.* (quoting *In re Finlay Estate*, 424 N.W.2d 272 (Mich. 1988)) (emphasis added).

870. *Id.* at 157–58 (citations omitted).

871. *Bouquet v. Bouquet (In re Marriage of Bouquet)*, 546 P.2d 1371 (Cal.

earnings and accumulations both spouses obtained while they lived apart was community property, whereas before the amendment, the wife's earnings and accumulations were separate property.⁸⁷² The California Supreme Court applied the amendment to a case where the act took effect after the filing of the petition in a divorce case but before the entry of the interlocutory judgment dissolving the marriage.⁸⁷³ The court first noted that even an act that impairs vested rights is constitutional if the "change reasonably could be believed to be sufficiently necessary to the public welfare as to justify the impairment."⁸⁷⁴ The court, in concluding retroactive application was justified by the state's interest in the equitable distribution of marital property in divorces, considered:

the significance of the state interest served by the law, the importance of the retroactive application of the law to the effectuation of that interest, the extent of reliance upon the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions.⁸⁷⁵

Similarly, Iowa's interest in regulating trusts justifies applying provisions of the Trust Code to trusts in existence on the effective date of the act, even if property rights are impaired. I have previously discussed the advantages of a rule requiring survival until date of possession.⁸⁷⁶ They include avoidance of:

1. Unnecessary estate and inheritance taxation;
2. The possibility of property going to individuals not in the testator's bloodline; and
3. Reopening estates of persons long ago deceased and tracing beneficiaries.⁸⁷⁷

Similarly, retrospective application of section 633A.4702 would clarify the interpretation of trusts that contain an ambiguity, provide certainty and

1976).

872. *Id.* at 1372.

873. *Id.*

874. *Id.* at 1376 (quoting *Addison v. Addison*, 399 P.2d 897, 902 (Cal. 1965)).

875. *Id.* at 1376-78 (citations omitted).

876. Begleiter, *supra* note 1, at 287-88.

877. *Id.* (citations omitted).

predictability when drafting trusts, and further the probable intent of more testators.

There are, of course, contrary opinions. A Kansas court held a double-damages provision in the UTC could not be applied to acts by the trustee that occurred prior to the effective date of the statute.⁸⁷⁸ No less of an authority than the late Professor Jesse Dukeminier agreed: “Very likely any legislature adopting [UPC] section 2-707 would make it prospective only, inasmuch as retroactive application might be held to be an unconstitutional taking of property from the current owners of transmissible remainders.”⁸⁷⁹ However, the case Professor Dukeminier cited as support for that statement—dealing with Virginia’s “wait and see” statute on the rule against perpetuities—holds only that retroactive application of the statute would destroy a vested property right, giving no analysis or reason to support its decision.⁸⁸⁰

The purpose of this analysis was not to argue it is absolutely constitutional to apply constructional provisions of the Iowa Trust Code to trusts existing on its effective date where to do so would change a formerly “vested” remainder to a “contingent” remainder. Nor was it to change a court-determined “right” of a beneficiary of a discretionary support trust into a distribution being subject to the trustee’s discretion. The law in this area is uncertain and difficult to apply. Thus, my purpose was to inform the reader about respectable authority that supports the position the Trust Code can constitutionally apply to existing trusts in such cases, to emphasize “vested rights” and “accrued rights” have a different meaning in the constitutional inquiry for retroactivity than they do in future interests, and to answer certain dicta in several Iowa cases.

Before concluding this examination, mention must be made of a recent Iowa decision on retroactivity: *In re Estate of Serovy*.⁸⁸¹ Frank and Mary Serovy owned a home in joint tenancy.⁸⁸² On Frank’s death, Mary became the sole owner in fee simple.⁸⁸³ When Mary’s health began to

878. McCabe v. Duran, 180 P.3d 1098, 1099 (Kan. Ct. App. 2008).

879. Jesse Dukeminier, *The Uniform Probate Code Upends the Law of Remainders*, 94 MICH. L. REV. 148, 165 (1995) (citing *Lake of the Woods Ass’n v. McHugh*, 380 S.E.2d 872 (Va. 1989)).

880. See *McHugh*, 380 S.E.2d at 875–76.

881. *In re Estate of Serovy*, 711 N.W.2d 290 (Iowa 2006).

882. *Id.* at 295.

883. *Id.*

deteriorate, she contracted with her son, Allan, and his wife to remain in the home as long as possible.⁸⁸⁴ Allan and his wife agreed to build an addition to the home at their expense, move into the home, and care for Mary in return for her execution of a warranty deed conveying the residence to herself, Allan, and his wife as joint tenants with right of survivorship.⁸⁸⁵ This was all accomplished by 1989.⁸⁸⁶ In 1997, Mary's condition necessitated moving her to a nursing home.⁸⁸⁷

In 1994, section 249A.5 of the Iowa Code was passed, indebting Medicaid recipients to the Iowa Department of Human Services and allowing the DHS to recover from the estate of a Medicaid recipient, including joint tenancy property.⁸⁸⁸ When Mary died, the DHS asserted a claim to the house, which had been conveyed in joint tenancy five years prior to the enactment of section 249A.5.⁸⁸⁹ Allan and his wife asserted the application of section 249A.5 to Mary's house was unconstitutional.⁸⁹⁰ The Iowa Supreme Court, however, held retroactive application of the statute in this case was constitutional and did not impair the obligation of a contract.⁸⁹¹ The court held the statute did not change the contract between "the parties, it simply affected the subject matter of the agreement after it had been fully performed."⁸⁹² Going further, even if Mary had agreed to transfer the property in fee simple without encumbrance, the court held the Medicaid legislation did not discharge the obligation—"[i]t simply made it impossible for [Mary] to perform the contract, but under circumstances in which the impossibility would not discharge the obligation."⁸⁹³ The court did not discuss the Due Process Clause.

This statute certainly affected the property rights of Mary's son and his wife. The court presented an ultimatum: Either allow the personal representative to sell a one-third joint interest in the property or force the

884. *Id.*
885. *Id.*
886. *Id.*
887. *Id.*
888. *Id.* at 293 (citing 1994 Iowa Acts 279–80).
889. *Id.* at 292–93.
890. *Id.* at 294.
891. *Id.*
892. *Id.* at 295.
893. *Id.*

son and his wife to buy out the estate recovery's debt.⁸⁹⁴ Despite having this effect on property rights, the legislation was still constitutional. The reason for this is that application of section 633A.4702 to an existing discretionary support trust, so as to characterize it as a discretionary trust, could similarly be viewed as not changing the beneficiary's property rights. Indeed, it is extremely difficult, after *Serovy*, to imagine the court coming to any other conclusion. But, as I have mentioned previously, this is a difficult area.

XIX. CONCLUSION

The Iowa Trust Code has no legislative history. Thus, the courts and attorneys—unless they were involved in the drafting process—will have only the words of the statute to guide them as they attempt to apply the statute to the facts of individual cases. Legislative history does not change the words of the statute, nor can—or should—it replace the words of the statute. What it can do is give the perspective on changes and additions from the point of the drafters. What problems did they see? What were they trying to accomplish? What precipitated changes in the statute?

This Article and my previous one⁸⁹⁵ attempt to provide legislative history for the Iowa Trust Code, along with my analysis of how the amendments and new sections should work. This process would have been impossible without the work of numerous Iowa attorneys who contributed their time and effort to improving the Trust Code. I have mentioned some of these in this Article. I refrain from listing all the contributors both because I am afraid I might forget some and because this Article is long enough already. You know who you are, and I thank you.

There will no doubt be more amendments to the Trust Code. As far as I am concerned, however, by the time you read this there will be very little left to do. All the ambiguities have been discussed and either solved statutorily or foregone. The policy arguments have been debated and resolved—not always as I would like, but always in good spirit. I do not anticipate writing another article, nor authoring many more Trust Code Issue Papers and proposals.

I hope readers find the two articles useful in their practice. After all, that is what they are for. One final reminder is the two articles need to be

894. *Id.* at 296.

895. Begleiter, *supra* note 1.

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The Iowa Trust Code After Ten Years

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read together. Now I can say: “The end.”

APPENDIX

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Drake Law Review

[Vol. 59]

Drake

DRAKE UNIVERSITY

THE LAW SCHOOL

August 19, 2002

Mr. Gregory W. Neumeyer
Vice President
Regional Trust Manager
Private Client Service
Wells Fargo
101 Third Avenue Southwest
Post Office Box 1967
Cedar Rapids, IA 52406

Re: Strojek

Dear Greg:

I enclose the drafts of 4 possible amendments to the Trust Code to legislatively overrule Strojek. The three I prepared have comments. The last draft was prepared by Tim Anderson. Tim requested that you place these matters on the agenda for the October meeting.

I would appreciate your forwarding a copy of this letter and the attachments to Tim as I do not have his address handy.

Sincerely yours,

Martin D. Begleiter
Professor of Law

MDB/kw
Enclosure

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NEW SECTION 633.4702—DISCRETIONARY TRUSTS

Amend the Trust Code by adding a new section 633.4702 to provide as follows:

633.4702. Discretionary Trust

1. A trust created for the benefit of beneficiaries other than the settlor granting the trustee discretion as to the distribution of the income or the principal of the trust, or both, if not modified by any mandatory statement of the purpose for which the income or corpus may be distributed, shall be a discretionary trust and shall not be characterized as a support trust or a discretionary support trust. A discretionary trust shall not be reachable by the creditors of any of the beneficiaries.

2. For the purposes of this section, words including, but not limited to, “support,” “education,” “maintenance” and “proper care,” shall be considered words indicating the purpose for which the income or principal of the trust may be distributed. However, words such as “best interests” of the beneficiary shall not be considered words indicating the purpose for which the income or principal of the trust may be distributed.

3. If the settlor indicates in precatory language or language which is not mandatory the purposes which the trustees may consider in

determining whether or not to distribute trust property, the trust shall be considered a discretionary trust if it would be so considered under this section if such precatory language was not included in the trust instrument.

COMMENT

This proposal is in response to the request of a number of section members to overrule (or at least clarify) the case of *Strojek ex rel. Mills v. Hardin County Board of Supervisors*, 602 N.W.2d 566 (Iowa App. 1999). The idea is to protect as discretionary trusts properly drawn special needs trusts. I say properly drawn because the will in *Strojek* was, to put it charitably, ambiguous. The provision in question was as follows:

My trustee shall, from time to time, pay to or apply for the benefit of my daughter, Marie Helen Strojek, such sums from the income and principal as my trustee in the exercise of her sole discretion deems necessary or advisable, to provide for her proper care, support, maintenance and education.

It is at least arguable that the discretion of the trustee relates only to the amount to be paid to or applied for Marie above the minimum necessary for her care and support and that the payment of at least the minimum necessary for support is mandatory. This interpretation is reinforced by the use of the mandatory word “shall.” In short the court, not unreasonably, interpreted the discretion to apply only to the amount distributed (above the minimum required for support) and not to the

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purposes for which the payment is made. It is probable that the court would have decided the case differently if “may” had been substituted for “shall” and had the words “to provide for her proper care, support, maintenance and education” not been included.

The proposal clarifies that a trust which contains no words indicating the purpose of distributions, or includes only precatory language indicating purpose, is a discretionary trust and that discretionary trusts are not reachable by creditors of the beneficiaries. Section 2 details some language which will and will not be construed as words indicating the purpose of the distribution. Most notably “best interests” will not be construed as a “purpose” word. Thus, for example, a trust giving the trustee sole discretion to distribute income and corpus to or for the benefit of the beneficiary will be a discretionary trust even if the trust also states something like “without intending to bind the trustee, it is my intention that the trust make distributions to permit the beneficiary to enjoy luxuries, to take trips, or to purchase things that will improve the quality of his life.” In addition, a statement indicating the grantor’s intention that no trust funds be used for services paid for by the government should be given effect under this proposal.

**ALTERNATIVE NEW SECTION 633.4702—DISCRETIONARY
SUPPORT TRUSTS**

Amend the Trust Code by adding a new section 633.4702 to provide as follows:

633.4702 Discretionary Support Trust

1. A discretionary support trust created for the benefit of beneficiaries other than the settlor is subject to the claims of the creditors of the beneficiary who provide items necessary for the support of the beneficiary. Support of the beneficiary is measured by the beneficiary's accustomed standard of living.
2. A discretionary support trust for a beneficiary must include both the words "discretionary" and "support" in describing the interest of the beneficiary. If the description of the beneficiary's interest does not include the words "discretionary" and "support," the trust is not a discretionary support trust.
3. A trust containing words similar to "discretionary" and "support" in describing the beneficiary's interest shall not be held or construed to create a discretionary support trust.
4. A discretionary support trust must require that the trustee

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make payments for the support of the beneficiary. If the trustee may, but need not make such payments, the trust is not a discretionary support trust.

Comment

This proposal is an alternative to the previous proposal, requested by a number of section members, to overrule (or at least limit) the case of Strojek ex. re. Mills v. Hardin County Board of Supervisors, 602 N.W.2d 566 (Iowa App. 1999). The idea is to narrow the definition of a discretionary support trust to those trusts containing the words “discretionary” and “support” and to provide that no other trust would be construed as a discretionary support trust. In addition, in accordance with Strojek, the trust must mandate distributions for the support of the beneficiary. Permissive language would not be enough.

Notice that this provision would not have saved the trust in Strojek because it did contain both the words “support” and “discretionary” and mandate payments. However, under this proposal, a trust giving the trustee discretion to make payments for the beneficiary’s maintenance, or luxuries, or comfort, would not be discretionary support trusts.

I am indebted to Tim Anderson for suggesting this approach, but I am solely responsible for the language.

Questions on this approach are:

1. Should the beneficiary's standard of living be considered? The proposal says yes but this could be argued both ways.
2. The proposal does not define what is included in support. Note that Strojek says a trust for education of the beneficiary can be a discretionary support trust.
3. A court could create a new category of trusts like "discretionary maintenance trusts" and subject the assets of these trusts to creditors claims.
4. Do you require that the trust has no purpose word other than support, e.g., is a trust for support and maintenance in the trustee's discretion a discretionary support trust? Doing this might encourage a court to create other categories of trusts subject to the claims of the beneficiary's creditors.

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633.4702 Discretionary Support Trust

In order to be characterized as a “discretionary support trust”, the trust instrument or will creating the trust must specifically state that it is the settlor’s desire that the trust be so characterized by using the term “discretionary support trust”.

633.4703 Discretionary Trust

1. Any trust which is not characterized as a “discretionary support trust” under Section 633.4702, and which contains language such as “absolute discretion”, “sole discretion”, “absolute determination”, or “sole determination” in describing the trustee’s authority to make distributions, regardless of the use of mandatory language, such as “shall”, shall be presumed to be a discretionary trust. This presumption shall be rebuttable only by clear and convincing evidence.

2. A discretionary trust shall not be reachable by the creditors of any of the beneficiaries.

NEW SECTION 633.4702—DISCRETIONARY SUPPORT TRUSTS

Amend the Trust Code by adding a new section 633.4702 to provide as follows:

633.4702 Discretionary Support Trusts

1. This section applies only to trusts (sometimes referred to as “discretionary support trusts”) created for beneficiaries other than the settlor that:
 - a. Grant the trustee discretion, by words such as absolute discretion, sole and absolute discretion, or discretion, in the distribution of the income or principal of the trust, or both, and
 - b. Mandate that the trustee distribute the income or principal of the trust, or both, by using words such as “shall” or “must,” and
 - c. Provide that the trust may be distributed for the beneficiary’s health, education, support or maintenance.
2. For the purposes of Title 42 United States Code, Chapter 7, subchapter 19, and any program or payment authorized thereunder, a trust satisfying the provisions of paragraph 1 of this section shall be conclusively deemed to be a discretionary trust and shall not be considered to be a support trust.
3. For all other purposes, a trust satisfying the provisions of paragraph one

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of this section shall be considered as having an ascertainable standard.

COMMENT

This is the fourth try at a provision overruling the *Strojek* case. The other three attempts are attached for comparison. The comments to my previous two attempts give the *Strojek* language. My first try (entitled New Section 633.4702) approached the problem by attempting to limit the words that would be purpose words. My second attempt (entitled “Alternative New Section 633.4702”) and Tim Anderson’s draft (untitled) tried to limit the types of trusts characterized as discretionary support trusts. After about two hours of discussion at the Council Meeting on October 25, I was directed to draft a statute along the lines above.

Honestly, I think this statute will not work. I don’t think it is legitimate to characterize the same language one way for one purpose and a different way for all other purposes. However, I am simply following the Council’s directive. There are probably some other alternatives out there. I hope someone comes up with a workable approach that does not violate the rules of statutory drafting the way I believe this one does.