

ARIZONA TRUST CODE

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- I. Background and History.
 - A. NCCUSL is a nongovernmental organization that was established to draft model laws and promote enactment of legislation to achieve statutory consistency among all states.
 - B. In 2000, NCCUSL adopted the Uniform Trust Code (UTC). UTC is a comprehensive act that attempts to modernize the law regarding the establishment of trusts, appointment of trustees, duties and powers of trustees and legal remedies for breach of duties. NCCUSL has revised the original version of the UTC several times, with the most recent amendment occurring in 2005. Detailed information on the UTC can be found at www.utcproject.org and www.nccusl.org.
 - C. The UTC is primarily a default statute. Most of the provisions of the law can be overridden by the terms of the trust. The mandatory provisions of the UTC are specified in Article I.
 - D. Arizona is the 21st jurisdiction to enact a version of the UTC. The other jurisdictions that have enacted the UTC are Kansas, Wyoming, Nebraska, New Mexico, District of Columbia, Utah, Maine, Tennessee, New Hampshire, Missouri, Arkansas, Virginia, South Carolina, Oregon, North Carolina, Alabama, Florida, Ohio, Pennsylvania, and North Dakota.
 - E. Arizona previously enacted a version of the UTC on May 12, 2003, to be effective on January 1, 2004. There were several objections to the law and it was subsequently postponed in December 2003 and repealed in 2004. After that, the State Bar created the Arizona Trust Code Committee to draft new legislation.

- F. The Arizona Trust Code (ATC) was signed into law by the governor on May 27, 2008, with an effective date of January 1, 2009. The new law includes many of the provisions of the 2003 law with several modifications. Some of the changes:
1. Lengthen the rule against perpetuities to 500 years.
 2. Permit conversion of an income trust to a total return unitrust.
 3. Permit trust disputes to be settled by binding arbitration.
 4. Strike the requirement that comments of the Executive Council of the Probate and Trust Law section be given consideration when interpreting the law.
 5. Strike the requirement that trustees of all existing irrevocable trusts provide notice, within 60 days of the effective date of the ATC, to all qualified beneficiaries of the existence of the trust and the right to receive financial statements.
 6. Strike the provision the gives the settlor the power to agree with the beneficiaries to change or terminate an irrevocable trust.

II. Scope and Organization of the Arizona Trust Code.

A. Scope.

1. The ATC applies to express trusts, charitable or noncharitable trusts and trusts created pursuant to a statute, judgment or decree that requires the trust to be administered in the manner of an express trust.

B. The ATC is organized into 11 articles.

1. Article I: General provisions and definitions.
2. Article II: Judicial proceedings concerning trusts.
3. Article III: The representation of beneficiaries.
4. Article IV: The creation, validity, modification and termination of trusts.
5. Article V: Creditors' claims, spendthrift and discretionary trusts.
6. Article VI: Special rules relating to revocable trusts.

7. Article VII: The office of trustee.
 8. Article VIII: The duties and powers of the trustee and of a trust protector.
 9. Article IX: The Uniform Prudent Investor Act.
 10. Article X: The liability of trustees, the rights of persons dealing with trustees, the trustee's ability to convert a trust to a total return unitrust, and the application of the ATC to existing trusts.
 11. Article XI: Miscellaneous Provisions.
- III. Article I – General Provisions – Arizona Revised Statute §§14-10101 to 14-10112 (the Arizona Revised Statutes are hereafter referenced using the symbol “§”).
- A. Short Title. (§14-10101)
 1. This Chapter may be cited as the Arizona Trust Code (referred to as the “ATC” in this outline).
 - B. Scope. (§14-10102) See II.A. above.
 - C. Selected Definitions. (§14-10103)
 1. “Action” with respect to an act of a Trustee includes a failure to act.
 2. “Beneficiary” means a person who either:
 - a. Has a present or future beneficial interest in a trust, vested or contingent; or
 - b. In a capacity other than that of a trustee, holds a power of appointment over trust property.
 3. “Charitable Trust” means a trust, or a portion of a trust, created for a charitable purpose described in Section 14-10405.
 4. “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency or instrumentality, public corporation or any other legal or commercial entity.

5. “Power of withdrawal” means a presently exercisable general power of appointment.
6. “Qualified beneficiary” means 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 principal if the interests of the distributees describe in a. above terminated on that date; or
 - c. Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.
 - d. Qualified beneficiaries also include: (§14-10110)
 - i. A charitable organization that is expressly and irrevocably designated to receive distributions under the terms of a charitable trust.
 - ii. A person appointed to enforce a trust created for the care of an animal.
 - iii. A person appointed to enforce a noncharitable trust without an ascertainable beneficiary.
 - iv. For charitable trusts created after 12/31/08 and administered in Arizona, the Arizona Attorney General with respect to certain issues described in §14-10110.B.
 - e. Qualified beneficiaries include beneficiaries who take in default of an exercise of a power of appointment.
 - f. Examples:

Example 1: Trust provides for distributions of income to “A” for life. At A’s death, the trust property is to be distributed as A shall appoint by her Will, and absent the exercise of the power of appointment, to A’s children.

 - i. A is a qualified beneficiary because she is the current distributee of trust income.

- ii. A's children are also qualified beneficiaries because they are the takers in default of the exercise of a power of appointment.
- iii. Anyone else, including someone who may be appointed under A's Will, is not a qualified beneficiary because the definition does not include an appointee under a general power of appointment or the potential objects of an unexercised power of appointment.

Example 2: Trust provides that the trustee shall distribute all of the trust income to A and B for life. At A's death, 50% of the trust is to be distributed as A shall appoint by her Will, and absent any valid exercise of the power of appointment, the trust property will be distributed to B if living, if not, to B's issue. On B's death, 50% of the trust property is to be distributed to B's issue by right of representation.

- i. Pursuant to a. above, A and B are qualified beneficiaries.
- ii. Pursuant to b. above, with respect to A's interest, you ignore the testamentary power of appointment, and if A dies first, B is the remaining qualified beneficiary. With respect to B's interest, if B dies first, his issue will take by right of representation so each of B's then living children and the children of any deceased child will be qualified beneficiaries.

Example 3: Credit shelter family trust pays mandatory income to surviving spouse and discretionary principal to spouse and issue. In the event spouse dies with no issue, 50% of trust is paid to siblings *per stirpes* of deceased spouse and 50% is paid to siblings *per stirpes* of surviving spouse.

- i. Surviving spouse and issue are qualified beneficiaries pursuant to a. above.
- ii. Pursuant to b. above, all siblings of deceased spouse and surviving spouse are also qualified beneficiaries.

- g. If a minor, incapacitated or unknown person is a qualified beneficiary, then representation and virtual representation may be employed to represent the person's interest.
 - 7. "Settlor" means a person, including a testator who creates or contributes property to a trust. If more than one person creates or contributes property, each person is a settlor with respect to that person's contribution to the trust except to the extent another person has the right to revoke or withdraw that portion.
 - 8. "Special needs trust" means a trust established for the benefit of one or more disabled persons if one of the purposes of the trust is to allow the disabled person to qualify for public, charitable or private benefits that might otherwise be available to the disabled person.
 - 9. "Spendthrift Provision" means a term of a trust that restricts both voluntary and involuntary transfer of a beneficiary's interest.
 - 10. "Terms of a trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence.
 - 11. "Trust instrument" means an instrument executed by the settlor that contains the terms of the trust, including any amendments.
 - 12. "Trustee" includes an original, additional and successor trustee and a co-trustee.
- D. Knowledge. (§14-10104)
- 1. A person has knowledge of a fact if any of the following apply:
 - a. The person has actual knowledge;
 - b. The person has received a notice or notification; or
 - c. From all the facts and circumstances known to the person at that time, the person has reason to know the fact.
 - 2. An organization that conducts activities through employees has notice or knowledge of a fact involving a trust only from the time the information was received by an employee having responsibility to act for the trust or would have been brought to the employee's attention if the organization had exercised reasonable diligence.

- E. Default and Mandatory Rules. (§14-10105)
1. Except as otherwise provided in the terms of the trust, this chapter governs:
 - a. The duties, powers, exercise of powers, resignation and appointment of a trustee.
 - b. Conflicts of interest of a trustee.
 - c. Relations among trustees.
 - d. Mergers of divisions of trusts.
 - e. The rights and interests of a beneficiary.
 2. The terms of a trust prevail over any provision of the ATC except:
 - a. The requirements for creating a trust.
 - b. The duty of a trustee to act in good faith and in accordance with the purposes of the trust.
 - c. The requirements that a trust be for the benefit of beneficiaries, the trust have a lawful purpose, the trust not be contrary to public policy and the trust purposes be possible to achieve.
 - d. The power of the court to modify or terminate trust.
 - e. The effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust (e.g., child support and Arizona and federal taxes.)
 - f. The authority of the court to require, dispense with, modify or terminate a bond.
 - g. The power of the court to adjust a trustee's compensation specified in the terms of the trust that is unreasonable low or high.
 - h. The duty to respond to the request of a qualified beneficiary of an irrevocable trust for the trustee's reports and other information reasonably related to the administration of a trust. (Note: Arizona has removed the mandatory duty to

notify qualified beneficiaries who have attained age 25 of the existence of the trust.)

- i. The effect of an exculpatory term (i.e., limits on trustee liability.)
- j. The rights of third parties when dealing with a trust.
- k. The periods of limitation for commencing a judicial proceeding.
- l. The power of the court to take action and exercise jurisdiction as may be necessary in the interests of justice.
- m. The subject matter jurisdiction of the court and venue for commencing a proceeding.
- n. The §14-10110.b. notice provisions regarding charitable trusts. (New provision.)

F. Common Law of Trusts; Principal of Equity. (§14-10106)

- 1. Common law is intended to supplement the ATC.
- 2. Courts shall look to the Restatement (Second) of Trusts to interpret common law and not to subsequent restatements of trusts to determine issues specified in §14-10106.B. (New provision.)

G. Governing Law. (§14-10107)

- 1. The meaning and effect of the terms of a trust are determined by the law of the jurisdiction designated in the terms of the trust instrument.
- 2. In the absence of a controlling designation, the law of the jurisdiction where the trust was executed determines the validity of the trust, and the laws of descent and the law of the principal place of administration determine the administration of the trust. (New provision.)
 - a. Query: What does the reference to the laws of descent mean?
 - b. Unless the trust specifies otherwise, trust accounting rules will be controlled by the place of administration rather than the governing law in the trust document. The duty to

inform and report to beneficiaries will be controlled by the laws of the place of administration.

H. Principal Place of Administration. (§14-10108)

1. The principal place of administration is important to determine in which state the trust is subject to income tax and to establish which state's courts have primary jurisdiction concerning trust administration.
 - Arizona will tax a trust based on the residence of the fiduciary. If a corporate trustee is a fiduciary, then the place where the corporate trustee conducts administration will determine whether the trust is subject to Arizona income tax. (§43-1301. 5)
2. The terms of the trust will control the principal place of administration if either the trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction or all or part of the administration occurs in the designated jurisdiction.
3. A trustee has a continuing duty to administer the trust at a place appropriate to its purposes, its administration and the interests of the beneficiaries.
4. Without precluding the right of a court to order, approve or disapprove a transfer, the trustee in furtherance of its duty to administer the trust at an appropriate place may transfer the trust's principal place of administration.
5. In order to transfer the place of administration, the trustee shall notify the qualified beneficiaries of a proposed transfer not less than 60 days before initiating the transfer.
 - a. Unless the corporate trustee indicates an intent to change the principal place of business in a notice to the qualified beneficiaries, a transfer by a corporate trustee of some of the functions of the trust to another state or states is not a transfer of the trust's principal place of business if the corporate trustee maintains an office in Arizona. (This is a change from the UTC.)
 - b. The ATC includes notice requirements in §14-10108 D.1.-5.

- c. The authority of a trustee to transfer a trust's principal place of administration terminates if a qualified beneficiary objects to the proposed transfer on or before expiration of the 60-day notice period.

I. Methods and Waiver of Notice. (§14-10109)

1. Permissible methods of notice under ATC include first class mail, personal delivery, delivery to the person's last known place of residence or place of business or a properly directed electronic message.
2. Notice need not be provided to a person whose identity or location is unknown to and not reasonably ascertainable by the trustee.
3. Notice may be waived.
4. Notice of a judicial proceeding must be given in the appropriate manner.

J. Others Treated as Qualified Beneficiaries. (§14-10110)

1. See discussion at III. C. 6. d.
2. For charitable trusts (trusts recognized as IRC §501(c)(3) charities) created after 12/31/08, a trustee must notify the Arizona Attorney General of the following:
 - a. Within 60 days after creation, the terms of the trust that describe the charitable purpose;
 - b. Within 60 days after accepting trusteeship, the trustee's name, address and telephone number; and
 - c. At least 30 days in advance, any changes in the place of administration, dissolution of the trust, changes in charitable purpose, court proceedings and changes in the method or rate of trustee compensation.

K. Nonjudicial Settlement Agreement. (§14-10111)

1. For trusts that become irrevocable after 12/31/2008, interested persons may enter into a binding, nonjudicial settlement agreement with respect to matters permitted under section 4 below.

2. Interested persons are defined in §14-1201(26) and include the trustee.
3. A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved the court.
4. The nonjudicial settlement agreement may resolve the following matters:
 - a. The interpretation or construction of the terms of the trust.
 - b. The approval of a trustee's report or accounting.
 - c. A direction to a trustee to refrain from performing a particular act or to grant to a trustee any necessary or desirable power. (Query: What about delegation of decision-making over trust investments?)
 - 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 that the court approve a nonjudicial settlement agreement.
6. Nonjudicial settlement agreements will initially see infrequent use because of the limited application to irrevocable trusts created after 12/31/08.

L. Rules of Construction. (§14-10112) The rules of construction that apply to the interpretation and disposition of property by Will also apply as appropriate to the interpretation and disposition of property by trust.

IV. Article II – Judicial Proceedings - §§14-10201 to 14-10205.

A. Role of Court in Administration of Trust. (§14-10201)

1. The court may intervene in the administration of trust to the extent its jurisdiction is invoked by an interested person or as provided by law.

2. A trust is not subject to continuing judicial supervision unless ordered by the court.
 3. A judicial proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and an action to declare rights.
- B. Jurisdiction over Trustee and Beneficiary. (§14-10202)
1. If the principal place of administration is in Arizona, the trustee submits personally to the jurisdiction of the courts of Arizona regarding any matter involving the trust.
 2. The beneficiaries of a trust having its principal place of administration in Arizona are subject to the jurisdiction of the courts of Arizona regarding any matter involving the trust.
- C. Subject Matter Jurisdiction. (§14-10203)
1. The Superior Court has exclusive jurisdiction of proceedings in Arizona concerning the administration of a trust.
 2. The Superior Court has concurrent jurisdiction with other courts of Arizona of other proceedings involving a trust.
- D. Venue. (§14-10204)
1. Venue for a judicial proceeding is the Arizona County in which the trust's principal place of administration is or will be located.
 2. If a trust has no trustee, venue shall be in the Arizona County in which a beneficiary resides, trust property is located or the county in which the decedent's estate was or is being administered.
- E. Alternative Dispute Resolution. (§14-10205) (New provision)
1. A trust instrument may provide mandatory, exclusive and reasonable procedures to resolve issues between the trustee and interested persons or among interested persons with regard to the administration or distribution of the trust.
 2. This provision may have little initial impact until attorneys begin to incorporate its use into trust agreements.

V. Article III – Representation – §14-10301. Arizona makes the provisions on representation applicable to both estates and trusts. Thus, the specific rules on representation are specified in §§14-1404 to 14-1408.

A. Representation; Basic Effect. (§14-1404)

1. Notice to a person who may represent and bind another person has the same effect as if notice were given directly to the other person.
2. The consent of a person who may represent and bind another person is binding on the person represented unless the person represented objects to the representation before the consent is given.
3. A person who may represent a settlor who lacks capacity may receive notice and give a binding consent on the settlor's behalf except as provided for revocation and amendment of a revocable trust pursuant to §14-10602.E.
4. A person who receives notice on behalf of another is not liable to the other person unless the person who receives notice acts with gross negligence or the intent to harm.

B. Representation by Holder of General Power of Appointment. (§14-1405)

1. The holder of a general power of appointment may represent and bind persons whose interests as permissible appointees, takers in default, or otherwise, are subject to the power.
2. This provision differs from the UTC, which provides that holders of a testamentary general power of appointment may bind only those whose interests are subject to the power if there is no conflict of interest.

C. Representation by Fiduciaries and Parents. (§14-1406)

1. Absent a conflict of interest between the representative and the person being represented:
 - a. A conservator may represent and bind the estate the conservator controls.
 - b. A guardian may represent and bind the ward if a conservator has not been appointed.

- c. An agent having authority to act with respect to the particular matter or dispute may represent and bind the principal. (Agent under a Power of Attorney)
 - d. A trustee may represent and bind the beneficiaries of the trust.
 - e. A personal representative of a decedent's estate may represent and bind persons interested in the estate.
 - f. A parent may represent and bind the parents' minor or unborn children if neither a conservator nor guardian for the children has been appointed.
- D. Representation by Person having Substantially Identical Interest; Virtual Representation. (§14-1407)
- 1. The doctrine of virtual representation is a common law rule that allows some members of a class of beneficiaries to represent other beneficiaries who have or may acquire similar or identical interests.
 - 2. The UTC and the ATC permit a virtual representative to represent and bind someone otherwise not represented.
 - 3. Virtual representation may be used to give notice to or bind persons who are otherwise not represented and are minors, incapacitated, or unborn or whose identity or location is unknown and not reasonably ascertainable.
 - 4. The virtual representative must have a substantially identical interest with respect to a particular matter or dispute.
 - 5. Virtual representation is available only to the extent (a) the person is not otherwise represented and (b) there is no material conflict of interest between the virtual representative and the person represented.
- E. Appointment of Representative. (§14-1408) (Court appointed guardian ad litem)
- 1. The court may appoint a representative to receive notice, give consent and otherwise represent, bind and act on behalf of a minor, incapacitated person, unborn child or person whose identity or location is unknown, if the court determines an interest is not represented or is inadequately represented.

2. A court-appointed representative may act whether or not a judicial proceeding is pending.
3. In making decisions, the court-appointed representative can consider general benefits accruing to members of the family of the person represented.

VI. Article IV – Creation, Validity, Modification and Termination of Trust – §§14-10401 to 14-10417.

A. Creation of a Trust. (§§14-10401 to 14-10409)

1. Methods of creating. (§14-10401)
 - a. Transfer of property to a trustee during settlor's lifetime or other disposition to take effect at settlor's death.
 - b. Declaration of property owner that owner is holding property as trustee.
 - c. Exercise of a power of appointment in favor of a trustee.
2. Requirements for creation. (§14-10402)
 - a. The settlor must have the capacity to create a trust.
 - b. The settlor must indicate an intention to create the trust.
 - c. The trust must have a definite beneficiary, or the trust must be:
 - i. A charitable trust
 - ii. A trust for the care of an animal.
 - iii. A trust for a noncharitable purpose without an ascertainable beneficiary.
 - d. The trustee must have duties to perform.
 - e. The same person may not be the sole trustee and sole beneficiary (this is the typical grantor revocable trust).
 - f. A power in a trustee to select a beneficiary from an indefinite class is valid. The power must be exercised within reasonable time or the power will fail.

3. Trusts created in other jurisdictions. (§14-10403)
 - a. 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.
 - b. Settlor who creates a trust must have some connection to the jurisdiction where the trust is executed (domicile, home, location of trustee or location of trust property).
4. Trust purposes. (§14-10404)
 - a. A trust may be created only to the extent its purposes are lawful, not contrary to public policy and possible to achieve.
 - b. The trust must be for the benefit of its beneficiaries,
5. Charitable purposes, enforcement. (§14-10405)
 - a. A charitable trust may be created for the relief of poverty, the advancement of education, religion or science, the promotion of health, governmental or municipal purposes or other purposes, the achievement of which is beneficial to the community, or for one or more organizations that have the purposes prescribed in this section.
 - b. The court may select one or more charitable purposes or beneficiaries if the terms of a charitable trust do not indicate a particular charitable purpose or beneficiary; the charity selected must be consistent with the settlor's intention, to the extent it can be determined.
 - c. The settlor of a charitable trust, among others, may maintain a proceeding to enforce the trust.
6. Creation of trust induced by fraud, duress, or undue influence. (§14-10406)
 - a. A trust is void to the extent its creation was induced by fraud, duress, or undue influence.
7. Evidence of oral trust. (§14-10407)
 - a. Unless otherwise required under Arizona law, a trust need not be evidenced by a trust instrument, but the creation of

an oral trust may be established only by clear and convincing evidence and its terms established by a preponderance of evidence.

8. Trust for care of an animal. (§14-10408)
 - a. A trust may be created to provide for the care of an animal or animals that are alive during the settlor's lifetime. Such a trust will terminate on the death of the animal or on the death of the last surviving animal.
 - b. The trust shall be enforced by the person specified in the trust agreement or by a person appointed by the court. A person having an interest in the welfare of the animal may request the court to appoint a person to enforce the trust or to remove a person appointed to care for the animal.
 - c. To the extent the court determines that the value of the trust property exceeds the amount required for its intended use, except as otherwise provided in the trust agreement, property not required for the intended use for the animal must be distributed to the settlor, if living, or otherwise to the settlor's successors in interest.

9. Noncharitable trust without ascertainable beneficiary. (§14-10409)
 - a. A trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the trustee. Such a trust may not be enforced for more than 90 years after its creation. (New provision.)
 - b. The trust shall be enforced by the person specified in the trust agreement or by a person appointed by the court.
 - c. To the extent the court determines that the value of the trust property exceeds the amount required for its intended use, except as otherwise provided in the trust agreement, property not required for the intended use must be distributed to the settlor, if living, or otherwise to the settlor's successors in interest.

- B. Modification or Termination of Trust. (§§14-10410 – 14-10417)
 1. Termination by its terms; proceedings for approval or disapproval. (§14-10410)

- a. A trust terminates to the extent the trust is revoked or expires pursuant to its terms, no purpose of the trust remains to be achieved or purposes of trust have become unlawful, contrary to public policy or impossible to achieve.
- b. A proceeding to approve or disapprove a proposed modification or termination under §§14-10411 to 10417 may be commenced by a trustee or a beneficiary.
- c. A proceeding to approve or disapprove a proposed modification or termination by consent under §14-10411 may be commenced by the settlor.
- d. The settlor of a charitable trust may maintain a proceeding under §14-10413 to modify the trust under the doctrine of *cy pres*.

2. Modification or termination by consent. (§14-10411)

- a. A noncharitable irrevocable trust may be terminated on consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. A noncharitable irrevocable trust may be modified on consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust. (New provision.)
 - Note: Modification or termination by consent requires court approval. Some states permit modification or approval by consent of the settlors and all of the beneficiaries without court approval.
- b. Upon termination by consent, the trustee shall distribute the trust as agreed by the beneficiaries.
- c. If not all of the beneficiaries consent, the modification or termination may be approved by the court if the court is satisfied that:
 - i. If all of the beneficiaries had consented, the trust could have been modified or terminated; and
 - ii. The interest of a beneficiary who does not consent will be adequately protected.

- d. The UTC includes a provision that a spendthrift provision in the terms of a trust is not presumed to constitute a material purpose. This provision is not applicable in Arizona since modification or termination by consent requires court approval.
3. Modification or termination because of unanticipated circumstances or inability to administer trust. (§14-10412)
- a. The court may modify the administrative or dispositive terms of a trust or terminate the trust if because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust.
 - i. Modification should be consistent with the settlor's probable intent.
 - ii. On termination, the trustee must distribute the property consistent with trust purposes.
 - b. The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impractical or wasteful or would impair the trust administration.
4. *Cy pres*. (§14-10413)
- a. *Cy pres* is a common law doctrine that applies when the exact intention of the settlor cannot be carried out. It allows the court to carry out the settlor's intention as nearly as possible. The doctrine is peculiar to charitable trusts and permits a court to direct the application of trust property to a different charitable purpose from that designated by the settlor.
 - b. If a particular charitable purpose becomes unlawful, impractical, impossible to achieve or wasteful:
 - i. The trust does not fail in whole or in part.
 - ii. The trust property does not revert to the settlor or the settlor's successors in interest.
 - iii. The court may apply *cy pres* to modify or terminate the trust by directing that the trust property be

applied or distributed in whole or in part in a manner consistent with the settlor's charitable purposes.

- c. A provision in the terms of a charitable trust that would result in a distribution of the trust property to a noncharitable beneficiary prevails over the power of the court to apply *cy pres* to modify or terminate the trust only if, when the provision takes effect:
 - i. The trust property is to revert to the settlor and the settlor is still living; and
 - ii. Fewer than 21 years have elapsed since the date of the trust's creation.
 - d. States that adopt the Uniform Prudent Management of Institutional Funds Act may have similar provisions under that law to permit modification of charitable trusts.
5. Modification or termination of uneconomic trust. (§14-10414)
- a. After notice to the qualified beneficiaries, the trustee of a trust consisting of property having a total value of less than \$100,000 or that is uneconomical to administer may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration.
 - Query: What is M&I Trust's position on termination of uneconomic trusts?
 - b. The court may modify or terminate a trust or remove the trustee and appoint a different trustee if it determines that the value of the trust is insufficient to justify the cost of administration.
 - c. On termination under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.
 - d. The ATC limit of \$100,000 is an increase from the UTC recommended limit of \$50,000.
6. Reformation to correct mistakes. (§14-10415)

- a. The court may reform the terms of a trust, even if unambiguous, to conform the terms of the trust to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law.
7. Modification to achieve settlor's tax objectives. (§14-10416)
 - a. To achieve the settlor's tax objectives, the court may modify the terms of a trust in a matter that is not contrary to the settlor's probable intention. The court may make this modification retroactive.
8. Combination and division of trusts. (§14-10417)
 - a. Unless the trust instrument indicates that notice is not required, after notice to the qualified beneficiaries, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts if the result does not impair the rights of any beneficiary or adversely affect achievement of the purposes of the trust.
 - Note: Court approval is not required to combine or divide trusts.

VII. Article V – Creditors Claims, Spendthrift and Discretionary Trusts – §§14-10501 to 14-10507.

A. Rights of a Beneficiary's Creditor or Assignee. (§14-10501)

1. General rule. The court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's present or future interest by attachment of a present or future distribution to or for the benefit of the beneficiary.
2. This rule does not apply and the trustee has no liability to pay creditors to the extent the beneficiary's interest is protected by a spendthrift provision or the interest is a discretionary trust interest. (ATC has clarified the similar UTC provision.)

B. Spendthrift Provision. (§14-10502)

1. A spendthrift provision is valid if it restrains either voluntary or involuntary transfers of a beneficiary's interest (i.e., a settlor may allow a beneficiary to assign interests while prohibiting a beneficiary's creditors from collecting, or vice versa). (New

provision – UTC requires both voluntary and involuntary interests to be restrained.)

2. A term of trust providing that the interest of a beneficiary is held subject to a spendthrift trust, or similar words, is sufficient to restrain both voluntary and involuntary transfers of the beneficiary's interest.
3. A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision. Except as otherwise provided in this section, a creditor or assignee of the beneficiary of a spendthrift or discretionary trust may not attach, garnish, execute on or otherwise reach the interest of a beneficiary before its receipt by the beneficiary.
4. The ATC considers a spendthrift provision to be a material purpose of the trust. (Compare ATC §14-10411 to UTC §411(c).)

C. Exceptions to Spendthrift Provision. (§14-10503)

1. A spendthrift provision is not valid against a beneficiary's child who has a judgment or court order against the beneficiary for child support or maintenance, or a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust (e.g., attorney's fees). Either may obtain a court order attaching current or future distributions to or for the beneficiary only for these matters. (New provision – ATC deleted alimony claims of a former spouse.)
2. The above exceptions are not enforceable against a special needs trust. (New provision.)
3. A spendthrift provision is unenforceable against a claim of Arizona to the extent an Arizona statute so provides (e.g., state income taxes.)
4. A spendthrift provision is unenforceable against a claim of the United States to the extent a federal law so provides (e.g., federal income taxes.)

D. Discretionary Trusts; Effect of Standard. (§14-10504)

1. Whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion.

2. To the extent a trustee has not complied with a standard of distribution or has abused its discretion:
 - a. A distribution may be ordered by the court for support or maintenance of the beneficiary's child. (ATC deleted alimony claims of a former spouse.)
 - b. The court shall direct the trustee to pay to the child an amount as is equitable under the circumstances but not more than the amount the trust would have been required to distribute had the trustee complied with the discretionary distribution standard or had not abused the discretion.
 - c. This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution provided that this right may not be exercised by a creditor of the beneficiary.
 3. Whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution of insurance proceeds payable to a trust if such payments are exempt from attachment or garnishment pursuant to state law. (New provision.)
 4. A creditor of a beneficiary cannot reach a beneficiary's interest even if the beneficiary is the trustee or a co-trustee and the trustee's discretion is purely discretionary or limited by an ascertainable or other standard.
- E. Creditor's Claims Against Settlor. (§14-10505) The following are additional exceptions to a spendthrift provision.
1. During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.
 2. With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. This does not apply to any trust from which a distribution can be made pursuant to a power of appointment by a third party. A creditor may not reach:
 - a. Any amount that may be payable to the settlor to pay or reimburse income taxes or any other taxes payable to a taxing authority; or

- b. Distributions to the beneficiary of a special needs trust.
(New provision.)
 - 3. The property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, cost of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains and statutory allowances to surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses and allowances. This does not apply to specific bequests.
 - 4. For purposes of creditor's claims, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power. Upon the lapse of the power to withdraw, the holder is no longer treated as the settlor.
 - 5. A trust established and/or funded by a corporation or other institutional entity is not deemed to have been established by its officers, directors, shareholders, partners, employees, beneficiaries or agents. Thus, creditors of directors, officers, etc., cannot reach an institutional trust for any reason unless the trust has no valid business purpose and its principal purpose is the evasion of creditor claims or the trust is a grantor trust (except for QSST trusts.)
 - 6. Amounts held in a QTIP Marital Trust or General Power of Appointment Marital Trust are not deemed to be created by the settlor even if the beneficiary is the surviving spouse. (New provision)
- F. Overdue Distributions. (§14-10506)
- 1. Whether or not the trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal, including a distribution on termination of the trust, if the trustee has not made the distribution within a reasonable time after the mandated distribution date, unless the terms of the trust expressly authorize the trustee to delay distributions to protect the beneficiary.
 - 2. Mandatory distributions do not include distributions subject to the trustee's discretion, even if based on an ascertainable or other form of standard.
- G. Personal Obligations of Trustee. (§14-10507)

1. Trust property is not subject to the personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt.

VIII. Article VI – Revocable Trusts – §§14-10601 to 14-10604.

A. Capacity to Establish a Revocable Trust. (§14-10601)

1. §14-10601 has been left blank in the ATC.
2. Under the UTC, a settlor’s capacity to establish, amend or revoke a revocable trust is the same as testamentary capacity.
3. Some states have rejected this standard because a person with testamentary capacity may have a conservator or some other third party create a trust for the benefit of the settlor.

B. Revocation or Amendment of a Revocable Trust. (§14-10602)

1. The default rule is that a trust is revocable. The settlor may revoke or amend the trust unless the terms of the trust expressly provide that the trust is irrevocable.
2. If a revocable trust is created or funded by more than one settlor:
 - a. To the extent the trust consists of community property, the trust may be revoked by either spouse acting alone to the extent of that spouse’s interest in community property, but may be amended only by joint action of both spouses.
 - b. To the extent the trust consists of property other than community property, each settlor may revoke or amend the trust with regard to the portion of the trust attributable to that settlor’s contribution.
3. The settlor may revoke or amend a revocable trust by:
 - a. Substantial compliance with a method provided in the terms of the trust.
 - b. If the terms of the trust do not provide a method, by:
 - i. A later Will or codicil that expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust; or

- ii. Any other method manifesting clear and convincing evidence of the settlor's intent.
 4. The trustee shall deliver the trust property as the settlor directs upon revocation of a revocable trust.
 5. A settlor's power with respect to revocation, amendment or distribution may be exercised by an expressly authorized agent under a power of attorney (must be expressly authorized under the terms of the trust or if the trust is silent, under the terms of the power of attorney), by a conservator with the approval of the court or by a guardian with the approval of the court.
 6. A trustee who does not have actual knowledge that a trust has been revoked or amended is not liable to the settlor or the settlor's successors in interest for actions taken on the assumption that the trust has not been revoked.
- C. Settlor's Powers; Powers of Withdrawal. (§14-10603)
1. The rights of the beneficiaries, and the duties of the trustee, are subject to the control of the settlor while a trust is revocable. This includes the right to receive information about the trust.
 2. The holder of a power of withdrawal has the rights of a settlor of a revocable trust.
- D. Limitation on Actions Contesting Validity of Revocable Trust; Distribution of Trust Property. (§14-10604)
1. A person may commence a judicial proceeding to contest the validity of trust that was revocable at the settlor's death within the earlier of:
 - a. One year after the settlor's death. (New provision – original ATC used 2 years, and UTC uses 3 years.)
 - b. Four months after the trustee sends the person a copy of the trust instrument and a notice informing the person of the trust's existence, the trustee's name and address and the time allowed for commencing a proceeding.
 2. Upon the death of the settlor, the trustee may proceed to distribute the trust property in accordance with the terms of the trust without liability for doing so unless either:

- a. The trustee knows of a pending judicial proceeding contesting the validity of the trust.
 - b. A potential contestant has notified the trustee in writing of a possible judicial proceeding and a judicial proceeding has commenced within 60 days after the contestant sent the notification.
3. A beneficiary of a trust that is determined to have been invalid is liable to return any distribution received unless the beneficiary is a bona fide purchaser for value without notice.

IX. Article VII – Office of Trustee – §§14-10701 to 14-10709.

A. Accepting or declining trusteeship. (§14-10701)

1. A trustee accepts the trusteeship by either:
 - a. Substantially complying with a method of acceptance provided in the terms of the trust.
 - i. For example, by signing the trust instrument as trustee.
 - ii. However, if the trust is not funded until later, the trustee who signed the instrument may not be able to reject the trusteeship without a formal resignation. There is a duty to resign responsibly.
 - b. By accepting delivery of the trust property, exercising powers or performing duties as trustee or otherwise indicating acceptance of the trusteeship.
2. A person designated as trustee who has not accepted the trusteeship may reject the trusteeship. This can be accomplished by:
 - a. A formal rejection of the trusteeship; or
 - b. Failure to accept the trusteeship within a reasonable time after knowing of the designation.
3. A person designated as trustee may, without accepting the trusteeship:

- a. Act to preserve the trustee property if within a reasonable time after acting, the person sends a rejection of the trusteeship to the settlor or to a qualified beneficiary.
- b. Inspect or investigate trust property to determine potential liability under environmental or other laws.

B. Trustee's Bond. (§14-10702)

1. A trustee shall give bond to secure performance of the trustee's duties only if the court finds that a bond is needed to protect the interests of the beneficiaries, or a bond is required by the terms of the trust and the court has not dispensed with the requirement.
2. The court may modify or terminate a bond at any time.
3. Certain entities are not required to give a bond, including a national banking association, a trust company holding a certificate to engage in trust business from the Arizona superintendent of banks and the public fiduciary.

C. Co-Trustees. (§14-10703)

1. The majority rule. Co-trustees who are unable to reach a unanimous decision may act by a majority decision.
2. If a vacancy occurs in a co-trusteeship, the remaining co-trustees may act for the trust.
3. A co-trustee must participate in the performance of the trustees' duties unless the co-trustee is unable to perform because of absence, illness, disqualification or other temporary incapacity or because the co-trustee has properly delegated the performance to another trustee.
4. If a co-trustee is unable to perform its duties, and prompt action is necessary, the remaining co-trustees or a majority of the remaining co-trustees may act for the trust.
5. A trustee may delegate to a co-trustee performance of a function unless the terms of the trust provide that the trustees perform jointly. A trustee may revoke a delegation, unless the delegation was irrevocable.

- This is a change from the UTC, which states that a trustee may delegate to a co-trustee only the performance of a

function that the settlor did not reasonably expect the co-trustees to perform personally.

6. A trustee who does not join in an action of another trustee is not liable for the action. However, each trustee must exercise reasonable care to:
 - a. Prevent a co-trustee from committing a serious breach of trust.
 - b. Compel a co-trustee to redress a serious breach of trust.
 - The term “serious breach of trust” is not defined.
7. A dissenting trustee who joins in an action at the direction of the majority of the trustees and who notified any co-trustee of the dissent at or before the time of action is not liable for the action unless the action is a serious breach of trust.

D. Vacancy in Trusteeship; Appointment of Successor. (§14-10704)

1. A vacancy in a trusteeship need not be filled if one or more co-trustees remain in office.
2. A vacancy in a trusteeship must be filled if the trust has no remaining trustee.
3. A vacancy in a trusteeship of a noncharitable trust must be filled in the following order of priority:
 - a. By a person designated in the terms of the trust; then
 - b. By a person appointed by unanimous agreement of the qualified beneficiaries; and then
 - c. By a person appointed by the court.
4. A vacancy in a trusteeship of a charitable trust must be filled in the following order:
 - a. By a person designated in the terms of the trust; then
 - b. By a person selected by the charitable organizations expressly designated to receive distributions under the terms of the trust (ATC removes consent by the Arizona Attorney General); and then

- c. By a person appointed by the court.
 5. The court may appoint an additional trustee or special fiduciary whenever the court considers the appointment necessary for the administration of the trust.
- E. Resignation of Trustee. (§14-10705)
 1. A trustee may resign either:
 - a. On at least 30 days' notice to the qualified beneficiaries, to the settlor if living, and to all co-trustees.
 - b. With the approval of the court.
 2. Any liability of a resigning trustee for acts or omissions by the trustee is not discharged or affected by the trustee's resignation. The trustee has a duty to resign responsibly.
- F. Removal of Trustee. (§14-10706)
 1. The document may provide a procedure for the removal of a trustee. This will control over any statutory procedure.
 2. If the trust instrument does not provide for a removal procedure, the settlor, a co-trustee or a beneficiary may request the court to remove a trustee or a trustee may be removed by the court on its own initiative.
 3. The court may act to remove a trustee if:
 - a. The trustee has committed a material breach of trust (ATC changed this from a "serious breach").
 - b. Lack of cooperation among co-trustees substantially impairs the administration of the trust.
 - c. The trustee is unfit or unwilling to administer the trust effectively and the court determines that the removal of the trustee serves the best interest of the beneficiaries.
 - d. The trustee persistently fails to administer the trust effectively and the court determines that removal serves the best interest of the beneficiaries.

- e. There has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal best serves the interests of the beneficiaries, removal is not inconsistent with a material purpose of the trust and a suitable successor trustee is available.

G. Delivery of Property by Former Trustee. (§14-10707)

1. Unless a cotrustee remains in office or the court orders otherwise, until the trust property is delivered to a successor trustee, a trustee who has resigned or been removed has the continuing duties of a trustee and the power necessary to protect the trust property.
2. A trustee who has resigned or has been removed shall proceed expeditiously to deliver the trust property to the successor trustee.

H. Compensation of Trustee. (§14-10708)

1. A trustee is entitled to compensation that is reasonable under the circumstances if the trust does not specify the trustee's compensation.
2. The trustee is entitled to compensation as specified under the terms of trust or by reference to another ascertainable source for determining that compensation. The court may allow more or less compensation to the trustee if either:
 - a. The duties of the trustee are substantially different from that contemplated when the trust was created; or
 - b. The compensation specified by the terms would be unreasonably low or high.
 - Reference to another ascertainable source is an addition made by the ATC. The intention is to permit compensation to a corporate trustee based on its standard fee schedule.

I. Reimbursement of Expenses. (§14-10709)

1. A trustee is entitled to be reimbursed out of the trust property, with reasonable interest:
 - a. For expenses that were properly incurred in the administration of the trust.

- b. To the extent necessary to prevent unjust enrichment of the trust.
 - 2. An advance by the trustee of money for the protection of the trust gives rise to a lien against trust property to secure reimbursement with reasonable interest.
- X. Article VIII - Duties and Powers of Trustee and Trust Protector – §§14-10801 to 14-10818.
 - A. There are 13 specific duties of the trustee specified in Article VIII. §§14-10801 to 14-10813.
 - 1. Duty to administer the trust. (§14-10801)
 - a. The trustee shall administer the trust in good faith, in accordance with its terms and purposes, in the interests of the beneficiaries and in accordance with the ATC.
 - 2. Duty of loyalty. (§14-10802)
 - a. The trustee shall administer the trust solely in the interests of the beneficiaries.
 - b. A sale, encumbrance or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or that is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary unless:
 - i. The transaction was authorized by the terms of the trust.
 - ii. The court approved the transaction.
 - iii. The beneficiary does not commence a judicial proceeding within the period of limitations (generally one year after notice or two years after termination of the trust.)
 - iv. The beneficiary consented to the trustee's conduct, ratified the transaction or released the trustee.

- v. The transaction involved a contract entered into by the trustee before the person became or contemplated becoming the trustee.
- c. A sale, encumbrance or other transaction involving the investment or management of trust property is presumed to be affected by a conflict between a personal and fiduciary interest if it is entered into by the trustee with:
 - i. The trustee's spouse.
 - ii. The trustee's descendants, siblings, parents or their spouses.
 - iii. An agent or attorney of the trustee.
 - iv. A corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment.
- d. A transaction between a trustee and a beneficiary from which the trustee obtains an advantage is voidable by the beneficiary unless the trustee establishes that the transaction was fair to the beneficiary.
- e. A transaction not concerning trust property in which the trustee engages in the trustee's individual capacity involves a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust.
- f. Mutual Fund Investments. A investment by a trustee in securities of a mutual fund to which the trustee or its affiliates provides services in a capacity other than as trustee is not presumed to be affected by a conflict between personal and fiduciary interests if the investment complies with the Prudent Investor Rule. The trustee may be compensated by the mutual fund for providing those services if the trustee at least annually notifies persons entitle to notice under §14-10813 (the qualified beneficiaries and other beneficiaries who request it) that the bank or trust company provides services for and receives fees from the mutual fund. This notification may be made in the trustee's statements of the fiduciary account.

- This is a slight change from the UTC, which requires the trustee to disclose the rate of extra compensation received by it and the method by which this compensation was determined.
 - This section cross-references to §6-246, which permits a bank or trust company that is acting in a fiduciary capacity to invest and reinvest in its own open-end or closed-end investment companies or investment trusts, provided that it disclose that it provides services to and receives fees from the open-end or closed-end investment company or investment trust.
- g. The trustee shall act in the best interest of the beneficiaries in voting shares of stock. If the trust is the sole owner of the corporation or other enterprise, the trustee shall elect or appoint directors or other managers who will manage the corporation or enterprise in the best interests of the beneficiaries.
- h. The duty of loyalty does not preclude the following transactions if fair to the beneficiaries:
- i. Agreement between a trustee and beneficiary relating to the appointment or compensation rate of the trustee.
 - ii. Payment of reasonable compensation to the trustee.
 - iii. Transaction between a trust and another trust, an estate or a conservatorship of which the trustee is a fiduciary or in which a beneficiary has an interest.
 - iv. Deposit of trust money in a regulated financial institution operated by the trustee.
 - v. Advance of money by the trustee for the protection of the trust.
- i. The court may appoint a special fiduciary to make a decision with respect to any proposed transaction that may violate this section.
- j. ATC also included §14-5652 that requires attorneys who act as personal representative or trustee to disclose potential

conflicts of interest. Attorneys must disclose in writing to all adult persons who have an interest in an estate or trust the extent to which the attorney previously or currently rendered legal services to any of the interested persons.

3. Duty to be impartial. (§14-10803)
 - a. If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing and distributing the trust property.
 - b. This requires the trustee to give due regard to the respective interests of an income beneficiary and a remainder beneficiary.
4. Duty to act prudently. (§14-10804)
 - a. A trustee shall administer the trust as a prudent person would by considering the purposes, terms, distribution requirements and other circumstances of the trust.
 - b. In satisfying the standard, the trustee shall exercise reasonable care, skill and caution.
5. Duty to incur reasonable costs. (§14-10805)
 - a. The trustee may incur only costs that are reasonable in relation to the trust property, the purposes of the trust and the skills of the trustee.
 - b. The duty to incur reasonable costs applies when the trustee decides to delegate certain functions to an agent. To protect a beneficiary against excessive costs, the trustee should be alert to adjusting its compensation for delegated functions. (UTC comment.)
6. Duty to use special skills. (§14-10806)
 - a. A trustee who has special skills or expertise, or who is hired in reliance on those special skills or expertise, must use those special skills or expertise.
 - b. Professional trustees are held to a prudent professional standard.
7. Duty to properly delegate. (§14-10807)

- a. A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill and caution in:
 - i. Selecting an agent.
 - ii. Establishing the scope and terms of the delegation consistent with the purposes and terms of the trust (i.e., contracting with the agent).
 - iii. Periodically reviewing the agent's action in order to monitor the agent's performance and compliance with the terms of the delegation.
 - b. An agent who has been delegated to owes the trust a duty to exercise reasonable care to comply with the terms of the delegation.
 - c. A trustee who complies with this section is not liable to the beneficiaries or to the trust for an action of the agent to whom a function was delegated.
 - d. By accepting a delegation of powers or duties from the trustee of a trust that is subject to Arizona law, an agent submits to the jurisdiction of the courts of Arizona.
8. Powers to direct; duty to follow directions. (§14-10808)
- a. While the trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.
 - b. Directed Trust. If the trust provides that the assets in the trust are subject to the direction of the settlor or a co-trustee, beneficiary or third party, the trustee has no duty to review the directions it is directed to make or to notify the beneficiaries regarding any investment action taken pursuant to the direction. The trustee is not responsible for the purchase, monitoring, retention or sale of assets that are subject to the direction of the settlor or a co-trustee, beneficiary or third party. The trustee is not subject to liability if the trustee acts pursuant to the direction, even if the actions constitute a breach of fiduciary duty, unless the trustee acts in bad faith or reckless indifference. (New

provision – prior version would have required the trustee to not act if the directions would constitute a serious breach of trust. This provision gives a directed trustee much greater liability protection when serving in that capacity.)

- c. The terms of the trust may confer on a trustee or other person a power to direct the modification or termination of the trust. (New provision)
 - d. 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 trust and the beneficiaries. Such a person is liable for any loss that results from breach of a fiduciary duty.
9. Duty to control and protect trust property. (§14-10809)
- a. The trustee shall take reasonable steps to take control of and protect the trust property.
 - b. This duty may be overridden by the terms of the trust, for example, the trust may provide that a beneficiary may occupy a residence rent free.
 - c. This section normally requires the trustee to take possession of tangible personal property and securities belonging to the trust. (UTC comment.)
10. Duty to keep records and identify trust property. (§14-10810)
- a. A trustee shall keep adequate records of the administration of the trust.
 - b. A trustee shall keep trust property separate from the trustee's own property.
11. Duty to enforce and defend claims. (§14-10811)
- a. A trustee must take reasonable steps to enforce claims of the trust and to defend claims against the trust.
 - b. It may be reasonable to not enforce a claim depending on the likelihood of recovery and the cost of suit and enforcement. (UTC comment.)

- c. It may be reasonable to settle an action or suffer a default rather than to defend an action. (UTC comment.)
- 12. Duty to collect trust property. (§14-10812)
 - a. A trustee must take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee and to redress a breach of trust known to the trustee to have been committed by a former trustee.
 - b. This duty may include a claim against a predecessor trustee for breach of trust. This section is an application of §14-10811 on the duty to enforce claims.
 - c. Beneficiaries may release the trustee from potential liability for acts of a predecessor or other fiduciary. (See §14-11009.)
 - d. The trustee's duty to redress a breach of trust applies only if the trustee has knowledge of the breach. (See §14-10104.)
- 13. Duty to inform and report to beneficiaries. (§14-10813)
 - a. Unless the trust instrument provides otherwise, a trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and the material facts necessary for them to protect their interests. Unless the trustee determines that it is unreasonable under the circumstances to do so, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust.
 - b. A trustee:
 - i. Upon request of a beneficiary, shall promptly furnish to the beneficiary a copy of the portions of the trust instrument that are necessary to describe the beneficiary's interest. (UTC requires the trustee to furnish the beneficiary with a copy of the trust document.)
 - ii. Within 60 days after accepting a trusteeship, shall notify the qualified beneficiaries of the acceptance and of the trustee's name, address and telephone number.

- iii. Within 60 days after the trustee acquires knowledge of the creation of an irrevocable trust or that a revocable trust has become irrevocable, whether by the death of the settlor or otherwise, shall notify the qualified beneficiaries of the trust's existence, the identity of the settlor, the trustee's name, address and phone number and the right to request a copy of the relevant portions of the trust instrument and the trustee's report.
- iv. The trustee shall notify the qualified beneficiaries not less than 30 days in advance of any change in the method or rate of the trustee's compensation. (UTC only requires advance notice.)
- c. A trustee shall send to the distributees or permissible distributees of trust income or principal and to other beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets, and if feasible, their respective market values. On a vacancy in trusteeship, unless there is a co-trustee, the former trustee must send a report to the qualified beneficiaries. A personal representative, conservator or guardian may send qualified beneficiaries a report on behalf of a deceased or incapacitated beneficiary.
- d. A beneficiary may waive the right to a trustee's report or other information required to be furnished. With respect to future reports and other information, a beneficiary may subsequently withdraw a waiver previous given.
- e. The requirements of subparagraph b, items ii and iii above, apply only to a trustee who accepts a trusteeship on or after January 1, 2009, to an irrevocable trust created on or after January 1, 2009, and to a revocable trust that becomes irrevocable after January 1, 2009. (New provision – consistent with UTC.)
- f. §14-3913 provides that a personal representative who distributes to a trustee may require the trustee to send the notice required under subparagraph b, item iii, to the beneficiaries before the estate proceeds are distributed to the trustee.

B. Discretionary Powers; Tax Savings. (§14-10814)

1. This section deals with how a trustee shall exercise its discretionary power to distribute income and/or principal.
2. The trustee has the general duty to exercise a discretionary power in good faith, in accordance with the terms and purposes of the trust, in the interest of the beneficiaries and creditors of the trust (but not creditors of the beneficiaries except as provided in §14-10504) and in accordance with the trustee's other duties.
3. Unless the terms of the trust expressly indicate that the following rule does not apply, a person other than a settlor who is a beneficiary and a trustee with 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 health, education, support or maintenance.
4. Unless the terms of the trust expressly indicate that the following rule does not apply, a trustee may not exercise a power to make discretionary distributions to satisfy a legal obligation of support that the trustee personally owes another person.
5. A discretionary distribution power whose exercise is limited or prohibited by the rules above may be exercised by a majority of the remaining trustees whose exercise of the power is not so limited or prohibited.
6. The rules provided above do not apply to:
 - a. A power held by the settlor's spouse who is trustee of a trust for which a marital deduction was claimed (e.g., QTIP trust.)
 - b. Any trust during any period that the trust may be revoked or amended by its settlor.
 - c. A trust if contributions to the trust qualify for the annual exclusion under IRC §2503(c) (trust for the benefit of a minor).

C. General Powers of Trustee. (§14-10815)

1. This section is intended to grant trustees with the broadest possible powers to be exercised without court approval, but to be exercised in accordance with any limitations stated in the terms of the trust.

D. Specific Powers of Trustee. (§14-10816)

1. This section lists 26 specific powers of a trustee. This statutory language may supplant the lengthy trustee powers language currently used in most trust documents. The specific powers include the following:
2. [8] With respect to an interest in real property, construct or make ordinary or extraordinary repairs to, alterations to or improvements in new buildings or other structures, demolish improvements, raise existing or erect new party walls or buildings, subdivide or develop private land, etc.
3. [11] Insure the property of the trust against damage or loss and insure the trustee, the trustee's agents and beneficiaries against liability arising from the administration of the trust.
4. [12] Abandon or decline to administer property of no value or of insufficient value to justify its collection or continued administration.
5. [15] Pay taxes, assessments, compensation of the trustee and of employees and agents of the trust and other expenses incurred in the administration of the trust.
6. [17] Select a mode of payment under any employee benefit or retirement plan, annuity or life insurance payable to the trustee, etc. This would include the power to select the IRA required minimum distribution method.
7. [18] Make loans out of trust property, including loans to a beneficiary on terms and conditions the trustee considers to be fair and reasonable under the circumstances, and the trustee has a lien on future distributions for repayment of those loans.
8. [19] Pledge trust property to guarantee loans made by others to the beneficiary.
9. [21] Pay an amount distributable to a beneficiary who is under a legal disability by paying it directly to the beneficiary or applying it for the beneficiary's benefit by:

- a. Paying it to the beneficiary's conservator or guardian.
 - b. Paying it to the beneficiary's custodian under the Uniform Transfers to Minor Act, to a custodial trustee under the Uniform Custodial Trust Act, and for that purpose creating a custodianship or custodial trust.
 - c. Paying it to an adult relative or other person having legal or physical care or custody of the beneficiary.
 - d. Managing it as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdrawal the distribution.
10. [22] When distributing or providing trust property, make distributions in divided or undivided interests, allocate particular assets, including community property, in proportionate or disproportionate shares, value the trust property for those purposes and adjust for resulting differences in valuation. In making a division or distribution of community property, the trustee may consider community property held outside the trust so that the division of community property held in the trust and outside the trust is made based on equal value but not necessarily proportionately.
11. [23] Resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration or other procedure for alternative dispute resolution.

E. Distribution on Termination. (§14-10817)

1. On termination or partial termination of a trust, the trustee may send to the beneficiaries a proposal for distribution. The right of any beneficiary to object to the proposed distribution terminates if the beneficiary does not notify the trustee of an objection within 30 days after the proposal was sent, but only if the proposal informed the beneficiary of the right to object and of the time allowed for objection.
2. This provision suggests that the best trustee practice will be to put any proposed trust distribution plan in writing and to provide at least 30 days' notice prior to making any distributions pursuant to such a plan.
3. Upon trust termination, the trustee shall within a reasonable time distribute the trust property to the persons entitled to it. The

trustee has the right to retain a reasonable reserve for the payment of debts, expenses and taxes. Query: What is M&I Trust policy on distribution of trust property after the settlor's death?

4. A release by a beneficiary of a trustee from liability for breach of trust is invalid to the extent:
 - a. It was induced by the improper conduct of the trustee.
 - b. The beneficiary at the time of the release did not know of the beneficiary's rights or of the material facts relating to the breach. This suggests that any receipt and release obtained from a beneficiary upon a distribution may have no effect in releasing the trustee from liability.

F. Trust Protector. (§14-10818) (New provision.)

1. A trust agreement may provide for the appointment of a trust protector.
2. A trust protector has the powers conferred by the trust agreement including the powers to:
 - a. Remove and appoint a trustee.
 - b. Modify or amend the trust instrument for any valid purpose, including to achieve favorable tax status or to respond to any changes in tax law or rulings by taxing authorities.
 - c. Increase, decrease, modify or restrict the interests of any beneficiary of the trust.
 - d. Modify the terms of a power of appointment granted by the trust.
 - e. Change the applicable law governing the trust.
3. Unless the trust provides otherwise, the trust protector may not modify the beneficiaries unless the class of beneficiaries is specifically provided in the trust agreement or modify the beneficial interest of a government unit in a special needs trust.
4. Unless the trust provides otherwise, the trust protector is not a trustee or fiduciary and is not liable or accountable as a trustee or fiduciary.

5. The trust protector provisions are not applicable to trusts that became irrevocable before the effective date of this section (presumably 1/1/2009.)

XI. Article IX - Prudent Investor Rule – §§14-10901 to 14-10909.

A. Prudent Investor Rule. (§14-10901)

1. A trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the Prudent Investor Rule.
2. The Prudent Investor Rule is a default rule and may be expanded, restricted, eliminated or otherwise altered by the provisions of a trust.
3. A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the terms of the trust.

B. Standard of Care; Portfolio Strategy; Risk and Return Objectives. (§14-10902)

1. A trustee shall invest and manage trust assets as a prudent investor would by considering the purposes, terms, distribution requirements and other circumstances of the trust. The trustee shall exercise reasonable care, skill and caution in satisfying the standard.
2. A trustee's investment and management decisions respecting individual assets shall not be evaluated in isolation but in the context of the trust portfolio as a whole and as part of an overall investment strategy having risk and return objectives reasonably suited to the trust.
3. Circumstances that a trustee shall consider in establishing an overall investment strategy include any of the following relevant factors:
 - a. General economic conditions.
 - b. Inflation or deflation.
 - c. Expected tax consequences.
 - d. Role that each investment plays within the overall trust portfolio, including financial assets, closely-held business

interests, tangible and intangible personal property and real property.

- e. Expected total return from income and appreciation of capital.
- f. Other beneficiary resources.
- g. Needs for liquidity, regularity of income and preservation or appreciation of capital.
- h. An asset's special relationship or special value to the purposes of the trust.

4. The trustee may invest in any kind of property or any type of investment consistent with the Prudent Investor Rule.

C. Diversification. (§14-10903)

- 1. A trustee shall diversify the investments of the trust unless the trustee reasonably determines that because of special circumstances, the purposes of the trust are better served without diversifying.

D. Duties at Inception of Trusteeship. (§14-10904)

- 1. The trustee shall, within a reasonable time after accepting a trusteeship or receiving trust assets:
 - a. Review the trust assets.
 - b. Develop a strategy concerning the retention and disposition of assets in order to bring the trust portfolio into compliance with the Prudent Investor Rule.
 - c. Implement the investment strategy.

E. Reviewing Compliance. (§14-10905)

- 1. Compliance with the Prudent Investor Rule is determined in light of the facts and circumstances existing at the time of the trustee's decision and not by hindsight.

F. Language to Invoke the Prudent Investor Rule. (§14-10906)

1. Any of the following terms are or comparable language shall invoke the Prudent Investor Rule:
 - a. “Investments permissible by law for the investment of trust funds”
 - b. “Legal investments”
 - c. “Authorized investments”
 - d. “Using the judgment and care under the circumstances then prevailing that persons of prudence would exercise in the management of their own affairs”
 - e. “Prudent man rule”
 - f. “Prudent trustee rule”
 - g. “Prudent person rule” – This may affect our analysis of the Uniform Principal and Income Act.
 - h. “Prudent investor rule”

- G. Delegation of Investment and Management Functions; Duties; Limitations. (§14-10907)
 1. A fiduciary may delegate investment and management functions that a prudent investor of comparable skills might delegate under the circumstances.
 2. A fiduciary is not responsible for the investment decisions or actions of the investment agent to which the investment functions are delegated if the fiduciary exercises reasonable care, skill and caution in selecting the investment agent, in establishing the scope and specific terms of the delegation and in reviewing periodically the investment agent’s actions in order to monitor the investment agent’s performance and compliance with the scope and specific terms of the delegation.
 3. The investment agent must comply within the scope and terms of the delegation and exercise the delegated function with reasonable care, skill and caution and is liable to the trust if the agent fails to do so. An investment agent who represents that the agent has special investment skills must exercise those skills.

4. An investment agent who accepts the delegation of a fiduciary's function from a fiduciary who is subject to the jurisdiction of a court of this state is deemed to have submitted to the jurisdiction of that court even if the delegation agreement provides for a different jurisdiction or venue.
 5. A cofiduciary may delegate investment and management functions to another cofiduciary if the delegating cofiduciary believes the other cofiduciary has greater skills.
 6. Investment in a mutual fund is not a delegation of investment function and neither the mutual fund nor its advisor is an investment agent. (New provision)
 7. For limitations of liability on directed trustees, see §14-10808.
- H. Life Insurance on Settlor; Liability of Trustee. (§14-10908) (New provision.)
1. A trustee may acquire or retain a contract of life insurance on the life of a settlor or the settlor's spouse, or both, without liability for a loss arising from the trustee's failure to:
 - a. Determine whether the contract is or remains a proper investment.
 - b. Investigate the financial strength of the life insurance company.
 - c. Exercise nonforfeiture provisions available under the contract.
 - d. Diversify the contract.
- I. Application to Existing Trusts. (§14-10909)
1. The Prudent Investor Rule applies to all trusts existing on or created after July 20, 1996. With respect to trusts that existed on July 20, 1996, the Prudent Investor Rule only governs decisions or actions taken after that date.
- XII. Article X – Liability of Trustees and Rights of Persons Dealing with Trustee – §§14-11001 to 14-11014.
- A. Remedies for Breach of Trust. (§14-11001)

1. A breach of trust is any violation by a trustee of a duty the trustee owes to a beneficiary.
 2. A court may remedy a breach of trust by:
 - a. Compelling the trustee to perform the trustee's duties.
 - b. Enjoining the trustee from committing a breach of trust.
 - c. Compelling the trustee to redress a breach of trust by paying money, restoring money or other means.
 - d. Ordering a trustee to account.
 - e. Appointing a special fiduciary to administer the trust.
 - f. Suspending the trustee.
 - g. Removing the trustee under §14-10706.
 - h. Reducing or denying compensation to the trustee.
 - i. Voiding an act of the trustee, imposing a lien or constructive trust on trust property, and recovering the property or its proceeds from the beneficiary or other party.
 - j. Any other appropriate relief.
- B. Damages for Breach of Trust. (§14-11002)
1. A trustee who commits a breach of trust is liable to the beneficiaries for the greater of:
 - a. The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or
 - b. The profit the trustee made by reason of the breach.
 2. If more than one trustee is liable to the beneficiaries for a breach of trust, the trustee who pays is entitled to contribution from the other trustees. A trustee is not entitled to contribution if the trustee was substantially more at fault than the other trustees or if the trustee committed the breach of trust in bad faith or with reckless indifference. A trustee who benefited from the breach is not entitled to contribution to the extent of the benefit received.

C. Damages in Absence of Breach. (§14-11003)

1. Absent breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit. A trustee is not an insurer.
2. A trustee is accountable for any profit made during administration, even absent a breach of trust.

D. Attorneys Fees and Costs. (§14-11004) (New provision.)

1. A trustee (or nominated trustee) is entitled to reimbursement from the trust for the person's reasonable fees, expenses and disbursement, including attorney fees and costs, that arise out of and that relate to the good faith defense or prosecution of a judicial or alternative dispute resolution proceeding involving the administration of the trust, regardless of whether the defense or prosecution is successful.
2. A court or arbitrator may order that a party's reasonable fees, expenses and disbursements be paid by any other party that is the subject of the judicial proceeding.

E. Limitation of Action Against Trustee. (§14-11005)

1. A beneficiary may not commence a proceeding against a trustee for breach of trust more than one year after the date the beneficiary or a representative of the beneficiary is sent a report that adequately discloses the existence of a potential claim for breach of trust and informs the beneficiary of the time allowed for commencing a proceeding.
2. To trigger the running of the one-year statute of limitations, the beneficiary must be sent a report adequately disclosing the facts constituting the claim and informing the beneficiary of one-year limitation period.
 - Query: Does the M&I Trust account statement currently include this notice?
3. A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence.

4. If the beneficiary is not notified of the time to file a claim, the period of limitations for a breach of trust is extended until two years after the first to occur of the following:
 - a. Removal, resignation or death of the trustee;
 - b. Termination of the beneficiary's interest in the trust; or
 - c. Termination of the trust.

➤ This two-year statute of limitations is a change from the UTC five-year statute of limitations. The two-year statute is based on existing Arizona case law.
5. The period of limitation for commencing a judicial proceeding is a mandatory rule that overrides any contrary term of the trust. (§14-10105 B. 11.)

F. Reliance on Trust Instrument. (§14-11006)

1. A trustee who acts in reasonable reliance on the terms of the trust is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.

G. Event Affecting Administration or Distribution. (§14-11007)

1. A trustee who has exercised reasonable care to ascertain the happening of an event (e.g., marriage, divorce, performance of educational requirements or death) is not liable for a loss resulting from the trustee's lack of knowledge.

H. Exculpation of Trustee. (§14-11008)

1. A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent it either:
 - a. Relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference; or
 - b. Was inserted as a result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.
2. An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves the exculpatory term is fair under the

circumstances and that its existence and contents were adequately communicated to the settlor.

3. This provision does not apply to an irrevocable trust created before 1/1/2009 or to a revocable trust that was created before 1/1/2009 and that is not amended after 12/31/2008.
4. M&I Trust does not require an exculpatory term be included in the trusts that we administer.

I. Beneficiary's Consent, Release or Ratification. (§14-11009)

1. A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach or ratified the transaction constituting the breach, unless:
 - a. The beneficiary was induced by improper conduct of the trustee; or
 - b. The beneficiary did know of the beneficiary's rights or of the material facts relating to the breach.

J. Limitation on Personal Liability of Trustee. (§14-11010)

1. A trustee is not personally liable on a contract if the trustee in the contract discloses the fiduciary capacity.
2. This section protects a trustee who reveals the fiduciary relationship by either signing as trustee or by referring to the trust in the contract.
3. A trustee is personally liable for a tort committed in the course of administering a trust or for obligations arising from ownership or control of trust property only if the trustee was personally at fault. .
4. A claim based on a contract entered into by a trustee in the trustee's fiduciary capacity, on an obligation arising from ownership or control of trust property or on a tort committed in the course of administering a trust may be asserted in a judicial proceeding against the trustee in the trustee's fiduciary capacity, whether or not the trustee is personally liable for the claim.

K. Interest as General Partner. (§14-11011)

1. A trustee who holds an interest as a general partner is not personally liable on a contract entered into by the partnership after the trust's acquisition of the interest if the fiduciary capacity was disclosed in the contract or in a statement previously filed pursuant to the Uniform Partnership Act or the Uniform Limited Partnership Act.
3. If the trustee of a revocable trust holds an interest as general partner, the settlor is personally liable for contracts and other obligations of the partnership as if the settlor were a general partner.

L. Protection of Person Dealing with Trustee. (§14-11012)

1. A person other than a beneficiary who in good faith assists a trustee or who in good faith deals with a trustee without knowledge that the trustee is exceeding or improperly exercising the trustee's powers is protected from liability as if the trustee properly exercised the power.
2. A person other than a beneficiary who in good faith deals with a trustee is not required to inquire into the extent of the trustee's powers or the propriety of their exercise.
3. A person who in good faith delivers assets to a trustee need not ensure their proper application.
4. A person other than a beneficiary who in good faith assists a former trustee or who in good faith deals with a former trustee, without knowledge that the trusteeship has terminated, is protected from liability as if the former trustee were still a trustee.
5. Comparable protective provisions of other laws relating to commercial transactions or transfers of securities by fiduciaries prevail over the protection provided in this section.
6. A person who wants assurances that the trustee has the necessary authority should request a certificate of trust as provided in §14-11013.

M. Certification of Trust. (§14-11013)

1. This section is based on California law, which protects the privacy of a trust instrument by reducing requests by third parties for complete copies of the trust instrument when verifying a trustee's authority to engage in a particular transaction.

2. Instead of furnishing the third party with a complete copy of the trust instrument, the trustee may furnish to the third party a certification of the trust that includes certain required information specified in the statute. Standard attorney practice may be to prepare a certification of trust along with the trust instrument.
3. Persons demanding a trust instrument despite having been offered a certification may be liable for damages if their refusal is determined not to have been made in good faith.
4. A person who acts in reliance on the certification of trust without knowledge that the representations contained in the certification are incorrect is not liable to any person for so acting.

N. Total Return Trusts. (§14-11014) (New provision.)

1. A trustee, other than an interested trustee, or if two or more persons are acting as trustee, a majority of the trustees who are not an interested trustee, in its sole discretion and without the approval of the probate court may:
 - a. Convert an income trust to a total return unitrust.
 - b. Reconvert a total return unitrust to an income trust.
 - c. Change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust, or both, if:
 - i. The trustee adopts a written policy for the trust.
 - ii. The trustee sends written notice of its intention to take the action, along with copies of the written policy and this section to;
 - the settlor, if living,
 - all living persons who are currently receiving or eligible to receive distributions of income from the trust,
 - Without regard to the exercise of a power of appointment, all living persons who would receive principal of the trust if the trust were to terminate at the time of giving notice and all living persons would receive or be eligible to receive distributions of

income or principal if the interests of the beneficiaries currently eligible to income were to terminate at the time of giving notice.

- All persons acting as advisor or trust protector of the trust.

iii. No person receiving notice objects to the proposed action of the trustee by submitting a written instrument delivered to the trustee within thirty days after receipt of the notice.

2. If there is no trustee of a trust other than an interested trustee, the interested trustee may convert the trust to a total return unitrust, reconvert the unitrust back to an income trust, or change the percentage or method of calculating fair market value with the same notice requirements if the interested trustee appoints a disinterested person who, in its sole discretion but acting in a fiduciary capacity, determines for the trustee:
 - a. The percentage to be used to calculate the unitrust amount.
 - b. The method to be used in determining the fair market value of the trust.
 - c. Which assets, if any, are to be excluded in determining the unitrust amount.
3. The trustee may petition the court for an order converting an income trust to a total return unitrust, to reconvert a total return unitrust back to an income trust, or other action as the trustee deems appropriate.
4. The court, in its discretion, or upon the petition of any trustee, or person interested in the trust, may appoint a disinterested person who, acting in a fiduciary capacity, shall present information to the court necessary to enable the court to make its determinations.
5. The fair market value of the trust shall be determined at least annually, using a valuation date or dates or averages of valuation dates as deemed appropriate. Assets used by a trust beneficiary, such as residential real estate or tangible personal property may be excluded from fair market value for computing the unitrust amount.

6. The percentage to be used in determining the unitrust amount shall be a reasonable current return from the trust, but not less than three percent nor more than 5 percent taking into account the intentions of the settlor of the trust as expressed in the trust instrument, the needs of the beneficiaries, general economic conditions, projected current earnings an appreciation for the trust, and projected inflation and its impact on the trust.
7. The statute indicates that a trust in which both income and principal has been permanently set aside for charity can be converted to a total return unitrust.
8. Following conversion of an income trust to a unitrust, the trustee:
 - a. Shall consider the unitrust amount as paid from net accounting income determined as if the trust were not a unitrust.
 - b. Shall then consider the unitrust amount as paid from ordinary income not allocated to net accounting income.
 - c. After calculating the trust's capital gain net income, may consider the unitrust amount as paid from net short term capital gain and then from net long term capital gain.
 - d. Shall then consider the unitrust amount as coming from the principal of the trust.
9. In administering a total return unitrust, the trustee, in its sole discretion but subject to the terms of the governing instrument, may determine:
 - a. The effective date of the conversion.
 - b. The timing of the distributions, including prorating the distributions in a short year.
 - c. Whether distributions are to be made in cash or in kind.
 - d. If the unitrust is reconverted to an income trust, the date of the reconversion.
 - e. Any other administrative issues that may be necessary or appropriate.

10. Conversion to a total return unitrust does not affect other provisions in the governing instrument regarding distributions of principal.
11. A spouse who is entitled to income from a trust for which a marital deduction has been claimed has the right, by written instrument delivered to the trustee, to prohibit conversion to a total return unitrust and to compel the reconversion back to an income trust.
12. This section applies to any trust administered in Arizona or whose governing instrument specifies Arizona law, unless:
 - a. The governing instrument reflects an intention that the current beneficiary or beneficiaries are to receive an amount other than a reasonable current return from then trust.
 - b. The trust is a pooled income fund or a charitable remainder trust.
 - c. The governing instrument expressly prohibits the use of this section or expressly states the settlor's intent that the net income not be calculated as a unitrust amount.
13. Any trustee or disinterested person who in good faith takes or fails to take action under this section is not liable to any person affected by that action or inaction.
14. This section is available to trusts in existence on October 1, 2008 or created after that date.
15. Selected definitions.
 - a. "Disinterested person" is a person who is not a related or subordinate party as defined in the Internal Revenue Code with respect to the person then acting as trustee and excludes the settle of the trust and any interested trustee.
 - b. "Income Trust" means a trust that is created by either an inter vivos or testamentary instrument and that directs or permits the trustee to distribute the net income to one or more persons regardless of whether the trust instrument directs or permits principal distributions.
 - c. "Interested Trustee" means:

- i. An individual trustee to whom net income or principal of the trust can currently be distributed or would be distributed if the trust were to then terminate and be distributed.
 - ii. Any trustee who may be removed and replaced by an interested distribute.
 - iii. An individual trustee whose legal obligation to support a beneficiary may be satisfied by distributions of income or principal of the trust.
- d. “Unitrust Amount” means an amount computed as a percentage of the fair market value of the trust.

XIII. Article XI – Miscellaneous and Effective Date Provisions.

A. Electronic Records and Signatures. (§14-11101)

1. The legal effect, validity or enforceability of electronic records or electronic signatures shall conform to the federal law on electronic signatures.

B. Severability Clause. (§14-11102)

1. If any provision of this chapter is held to be invalid, the invalidity does not effect the other provisions of the ATC.

C. Effective Dates. (Section 18 of House Bill 2806)

1. ATC is effective from and after 12/31/2008.
2. ATC applies to all trusts created before, on or after 1/1/2009.
3. ATC applies to all judicial proceedings that commence after 12/31/2008 and to proceedings that commenced before 1/1/2009, provided that application of ATC would not be unfair as determined by the court.
4. Any act done prior to 1/1/2009 is not affected by ATC.
5. The statute of limitations that existed prior to 1/1/2009 shall apply to any right that had begun to run before 1/1/2009.

XIV. Extension of the Rule Against Perpetuities. (§14-2901 and §14-2905) (New provision)

- A. §14-2901 provides that a nonvested property interest is invalid unless at least one of the following is true:
1. At the time the interest is created it is certain to vest or terminate not later than 21 years after the death of a person who is then alive.
 2. The interest either vests or terminates within five hundred years after its creation.
 3. The interest is under a trust whose trustee has the expressed or implied power to sell the trust assets and at one or more times after the creation of the interest one or more persons who are then living when the trust is created have an unlimited power to terminate the interest.
- B. §14-2905 includes instructions on the validity of both general and limited powers of appointment.