THE OREGON UNIFORM TRUST CODE:
WHAT IT IS AND THE EXTENT TO WHICH IT CHANGES OREGON LAW
(Section References Are to Sections of SB 275)

February 3, 2005

This document was submitted to the House and Senate legislative committees considering enactment of the Oregon Uniform Trust Code. It is important as legislative history. During the course of transmission it has been converted from Word to WordPerfect and re-formatted, so the paging does not follow the paging of the document originally presented to the committees. However, the content remains the same.

An updated version of this document reflecting the Oregon Uniform Trust Code as enacted is being prepared. Also, an updated version of the Comments to the Oregon Uniform Trust Code, which will include references to Oregon Revised Statute section numbers, will be published by the Willamette Law Review, and will be the most useful resource for those wanting to see what the final Oregon Uniform Trust Code says and means.

The Uniform Trust Code (the "UTC"), approved by the National Conference of Commissioners on Uniform State Laws in 2000, reflects the work of trusts and estates scholars and practitioners from around the country. The goal of the UTC project was to create a national codification of trust law, providing "precise, comprehensive, and easily accessible guidance on trust law questions." UTC Prefatory Note. The UTC also includes some innovative provisions that, in the view of the drafters, push the law in the direction it should be going. Nine states (Kansas, Maine, Missouri, Nebraska, New Hampshire, New Mexico, Tennessee, Utah, and Wyoming) and the District of Columbia have adopted some version of the UTC and most, if not all, states have taken up consideration of the UTC.

In Oregon, Professor Valerie Vollmar convened a Study Committee in the fall of 2002 to consider adoption of the UTC. Professor Vollmar and Professor Susan Gary chair the Study Committee, which includes members of the Executive Committees of the Estate Planning and Administration, Elder Law, and Taxation Sections of the Oregon State Bar, representatives from the Oregon Bankers Association, probate judges, and lawyers from around the state. The Study Committee did some preliminary work in the fall of 2002 and then broke into subcommittees for a detailed review of the UTC. Each subcommittee had responsibility for one or more articles of the UTC and, after reviewing the provisions in those articles, made recommendations to the Study Committee. Study Committee members each participated in at least one subcommittee, and each subcommittee also included additional members. These additional members brought with them expertise in trust litigation, supervision of charities (an assistant attorney general participated), state reimbursement issues, and other areas.

In the fall of 2003, the Study Committee reconvened and began reviewing the subcommittees' recommendations. The Study Committee analyzed the entire UTC as amended through 2004, finishing its review in August 2004. The Study Committee then recommended a somewhat modified version of the UTC for adoption in Oregon (the "Oregon Code" or the "Code"). In making its recommendations, the Study Committee adopted some changes to Oregon law when the Committee determined that the UTC approach improved the existing law. For the most part, however, the Committee chose not to change current Oregon law and instead modified the UTC to reflect Oregon law. The Public Affairs Committee of the Board of Governors of the Oregon State Bar has approved the Oregon Code proposal. The bill has been introduced in the 2005 Oregon Legislature as SB 275.

This memorandum provides a brief description of each section of the Oregon Code and compares each section with existing Oregon law. The descriptions of some of the sections are taken from materials prepared by David English, the reporter for the UTC, as modified to reflect the Oregon changes. Information about the Oregon Code is summarized, and generally the actual language of each section is not provided.

The memorandum highlights any changes to current Oregon law that would be made by the proposed Oregon Code. On some issues, little direct Oregon law exists. For those situations, a court would look to the Restatement of Trusts as an explanation of the common law. Thus, the explanation of changes to Oregon law depends, with respect to some issues, on assumptions about Oregon's interpretation of the common law.

OREGON UNIFORM TRUST CODE
SECTIONS 1-14 (UTC Article 1)
GENERAL PROVISIONS AND DEFINITIONS

Section 1 (UTC 101). Short Title. The Act may be cited as the Oregon Uniform Trust Code.

Section 2 (UTC 102). Scope. This section describes the types of trusts to which the Oregon Code applies.

Effect on Current Oregon Law: The Oregon Code excludes from the statute certain arrangements that are currently excluded from coverage under Oregon's version of the Uniform Trustees' Powers Act (ORS 128.003-128.051). For example, the Oregon Code excludes employee benefit trusts, IRAs, Section 509 trusts, a variety of business trusts, and certain other arrangements. The Comment to Section 2 indicates that a court can look to the Oregon Code in interpreting other law that governs these arrangements. For example, the Committee does not intend to suggest that fiduciary duties no long apply to persons or entities that manage these funds.

Section 3 (UTC 103). Definitions. This section defines terms used in the Oregon Code. Terms of particular interest are the following:

> "Ascertainable standard" means an ascertainable standard relating to an individual's health, education, support, or maintenance within the meaning of the Internal Revenue Code.
>
> "Beneficiary" means a person with a beneficial interest in a trust, vested or contingent, and a person other than a trustee who holds a power of appointment.

Effect on Current Oregon Law: Putting vested and contingent beneficiaries in the same category and adding the holder of a power of appointment to the definition of beneficiary are changes from existing law. The effect of the changes is explained in the discussion of Section 71, which covers the rights of beneficiaries to notice, information, and reports about a trust.

"Financially incapable" is included as a defined term. This term is used throughout the Oregon Code to be consistent with the language used in existing Oregon statutes.

"Qualified beneficiary" means a beneficiary currently eligible to receive distributions of trust income or principal, whether mandatory or discretionary (a "permissible distributee"); a beneficiary who would be next in line if the interests of the permissible distributees terminated; and a person who would be a permissible distributee if the trust terminated.

Different rights attach to the two levels of beneficiaries (beneficiaries and qualified beneficiaries). The Oregon Code limits certain rights to “qualified beneficiaries” so that beneficiaries whose interests are contingent or remote do not have all the rights that a qualified beneficiary has. Section 10 expands the definition of qualified beneficiary.

“Power of withdrawal” means a presently exercisable general power of appointment but does not include a power exercisable by a trustee that is limited by an ascertainable standard, or a power exercisable by someone else only with the consent of the trustee or a person holding an adverse interest.

“Revocable trust” means a trust that can be revoked by the settlor without the consent of the trustee or a person holding an adverse interest. This definition is described in the Comment to this section as a clarification of existing law.

“Settlor” (rather than “trustor”) is used to describe a person, including a testator, who creates or contributes property to a trust.

Section 4 (UTC 104). Knowledge. This section, which is adapted from a proposed revision to Article 1 of the Uniform Commercial Code, describes when a person is deemed to know a fact and also addresses the special problem of giving notice to organizations with employees.

Effect on Current Oregon Law: No discussion of “knowledge” appears in Oregon case law on trusts. ORS 128.444 states that a showing of “actual knowledge” is required to establish injury from reliance on a certification of trust.

Section 5 (UTC 105). Default and Mandatory Rules. The Oregon Code is primarily a default statute, meaning that a trust is controlled by its terms and that the provisions of the Oregon Code apply only when the trust is silent. By expressing this principle in Section 5 and making it applicable to the entire Oregon Code, the drafters were able to avoid use of language such as “except as otherwise provided in the terms of the trust” throughout the Code.

Section 5(2) lists the provisions of the Oregon Code that cannot be overridden in the terms of a trust. All of the listed provisions other than subsections (2)(h) and (i) simply state the common law. The provisions that cannot be overridden, other than (2)(h) and (2)(i), are:

(a) the requirements for creating a trust;

(b) the duty of the trustee to act in good faith and in accordance with the purposes of the trust;

(c) the requirement that a trust be for the benefit of its beneficiaries and have a purpose that is lawful, not contrary to public policy, and possible to achieve;

(d) the power of a court to modify or terminate a trust under Sections 30-36;

(e) the effect of a spendthrift provision and the rights of creditors under Sections 39-44;

(f) the power of the court under Section 51 to require, dispense with, or modify or terminate a bond;

(g) the power of the court under Section 57(2) to adjust a trustee’s compensation;

(h) the effect of an exculpatory term under Section 90;

(i) the rights under Sections 92-95 of a person other than a trustee or beneficiary;

(j) periods of limitation for commencing a judicial proceeding;

(k) the power of the court to take actions and exercise jurisdiction in the interests of justice;

(l) the subject-matter jurisdiction of the court and venue for commencing a proceeding as provided in Sections 14 and 15.

Subsections (2)(h) and (i) limit the settlor's ability to reduce or eliminate the rights of beneficiaries to receive notice, information, and reports about the trust. The Study Committee changed these two subsections of the UTC in order to provide the settlor with as much control as possible, while still requiring the trustee to report to someone — either a beneficiary or a third party — who can enforce the trust. The Oregon Code versions of subsections (2)(h) and (i), plus a new subsection (3), read as follows:

> (2) The terms of a trust prevail over the provisions of Sections 1 to 95 of this 2005 Act except:
>
> . . . .
>
> (h) Subject to subsection (3) of this section, the duty under section 71(2)(b) and (c) of this 2005 Act to notify qualified beneficiaries of an irrevocable trust of the existence of the trust, of the identity of the trustee and of their right to request trustee reports;
>
> (i) Subject to subsection (3) of this section, the duty under section 71(1) of this 2005 Act to respond to the request of a qualified beneficiary of an irrevocable trust for trustee reports and other information reasonably related to the administration of a trust;
>
> . . . .
>
> (3) The settlor, in the trust instrument or in another writing delivered to the trustee, may waive or modify the duties of a trustee under section 71 of this 2005 Act to give notice, information and reports to qualified beneficiaries by:
>
> (a) Waiving or modifying those duties during the period that either the settlor is alive and financially capable, or the settlor's spouse, if a qualified beneficiary, is alive and financially capable; or
>
> (b) Designating a person or persons to act in good faith to protect the interests of qualified beneficiaries and to receive any notice, information or reports required under section 71(1), 2(b) and (2)(c) of this 2005 Act in lieu of providing the notice, information or reports to the qualified beneficiaries.

Effect on Current Oregon Law: Subsections (2)(a)-(g) and (j)-(n) do not change current Oregon law. With respect to subsections (2)(h) and (i), under current Oregon law a trustee has a duty to report that probably cannot be waived, at least as to some beneficiaries. Subsections (2)(h) and (i) clarify what the settlor can and cannot waive and may permit greater power on the part of the settlor to waive the duty to report than exists under present law.

Section 6 (UTC 106). Common Law of Trusts; Principles of Equity. This section states that the common law and principles of equity continue to apply except as modified by the Oregon Code.

Sections 7-8 (UTC 107-108). Governing Law; Principal Place of Administration. These sections deal with such issues as the effect to be given to governing law provisions and the procedure for transferring the principal place of administration to another state, country, or other jurisdiction. Before the trustee transfers a trust's principal place of administration, the trustee must notify the qualified beneficiaries about the proposed transfer. The trustee cannot transfer the administration if a qualified beneficiary objects.

Section 9 (UTC 109). Methods of Giving Notice; Waiver of Notice. This section addresses methods for giving notice, particularly the giving of notices outside of court. The Study Committee added specific requirements to this section because of concern that the Oregon Rules of Civil Procedure are too generalized to address the issues of notice to minors and financially incapable adults.

Section 10 (UTC 110). Other Persons Treated as Qualified Beneficiaries. This section grants the rights of qualified beneficiaries to three additional categories of beneficiaries and nonbeneficiaries: a charitable organization expressly designated to receive distributions, if the charitable organization satisfies the definition of qualified beneficiary in Section 3(14); a person designated as an enforcer for a pet trust or a trust with a noncharitable purpose; and the Attorney General with respect to the enforcement of a charitable trust, unless contingencies make the charitable interest negligible.

Effect on Current Oregon Law: These provisions are in keeping with current Oregon law, although the concept of a trust for a noncharitable purpose is new. ORS 128.009(4) provides that termination of a trust requires notice to the Attorney General if a charity is a current or remainder beneficiary of the trust. ORS 128.177(2)(d) makes the Attorney General a necessary signatory of an agreement to modify a charitable trust. Section 10 goes beyond those two statutory provisions, allowing the Attorney General to obtain information about a trust even if a charity is not a current income beneficiary. In conversations with a representative of the Attorney General's office, the Study Committee concluded that this approach is consistent with current law.

Section 11 (UTC 111). Nonjudicial Settlement Agreements. This section authorizes interested persons to enter into nonjudicial settlement agreements with respect to any matter a court could properly approve. The section defines "interested persons" as the settlor, if living, all beneficiaries who have an interest in the subject of the agreement, any acting trustee of the trust, and the Attorney General if the trust is a charitable trust subject to the enforcement or supervisory powers of the Attorney General. Examples of matters that can be resolved nonjudicially are listed, and interested persons are authorized to request the court to confirm an agreement or to determine whether representation was adequate.

Effect on Current Oregon Law: This section tracks the provisions of ORS 128.177 and does not change existing law. The Study Committee modified this section of the UTC slightly so that Section 11 would not change Oregon law.

SECTIONS 12-15 (UTC Article 2)
JUDICIAL PROCEEDINGS

These four sections only deal with selected jurisdictional issues, based on the assumption that jurisdictional issues generally are better addressed elsewhere, such as in the rules of civil procedure. These sections do not contain a list of possible judicial proceedings.

Effect on Current Oregon Law: Little Oregon trust law relates directly to these sections, which do not appear to change Oregon law.

SECTIONS 16-20 (UTC Article 3)
REPRESENTATION

These sections contain a set of comprehensive provisions on representation of beneficiaries with respect both to the receipt of notices and to the giving of consents. These sections address not only actual representation (e.g., representation by a conservator) but also virtual representation, which is representation of a beneficiary by another beneficiary with a substantially identical interest. Section 20 authorizes the court to appoint a special representative to receive notice, give consents, and otherwise represent persons incapable of representing themselves, whether the issue to be resolved is in or out of court.

Effect on Current Oregon Law: These sections are similar to the provisions of ORS 128.135 relating to modification but apply the concepts more broadly, permitting representation in other situations. Section 19 also extends virtual representation to minors and financially incapable adults. ORS 128.135 already provides for representation by fiduciaries and for virtual representation of unborn or unascertainable beneficiaries.

ORS 128.179 currently permits the appointment of a special representative. Language from ORS 128.179 was incorporated into Section 20 to provide more guidance and more safeguards in connection with the appointment of a special representative.

SECTIONS 21-38 (UTC Article 4)
CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUST

Sections 21-29 largely codify traditional doctrine.

Section 21 (UTC 401). Methods of Creating Trust. This section states that trusts can be created by transfer of property, by self-declaration, by exercise of a power of appointment, by an agent under a power of attorney that expressly grants authority to create a trust, or pursuant to a statute or judgment that requires property to be administered in the manner of an express trust.

Subsections (2) and (3) incorporate ORS 128.460-128.500, providing for trusts for death benefits.

Effect on Current Oregon Law: This section does not change Oregon law.

Section 22 (UTC 402). Requirements for Creation. Subsections (1) and (2) lay out the basic common law requirements for the creation of a trust (capacity, intention, definite beneficiary, duties, avoidance of merger). Subsection (3) states: "A power of a trustee to select a beneficiary from an indefinite class is valid." This approach is consistent with the Restatement (Third) of Trusts.

Effect on Current Oregon Law: Subsection (3) changes Oregon law by allowing a settlor to empower the trustee to select the beneficiaries even if the class from which the beneficiaries will be selected cannot be ascertained. This type of trust provision is valid if at least one person can meet the description and if the trustee exercises the power within a reasonable time.

Section 23 (UTC 403). Trusts Created in Other States, Countries, or Jurisdictions. This section, drawing from comparable provisions on the execution of wills, validates trusts created in compliance with the law of any jurisdiction with which a settlor had a significant contact. The common law rule was that the law of the state with the most significant contacts governs the question of valid creation.

Effect on Current Oregon Law: Section 23 is comparable to ORS 112.255, which validates wills executed in compliance with the law of a variety of places with which the testator had a significant contact. To the extent that this section extends the common law rule on the creation of trusts, the section changes Oregon law.

Section 24 (UTC 404). Trust Purposes. Trusts must not have a purpose that is unlawful, against public policy, or impossible to achieve. In addition, a trust and its terms must be for the benefit of the trust beneficiaries.

Effect on Current Oregon Law: This section does not change Oregon law.

Section 25 (UTC 405). Charitable Purposes; Enforcement. Subsection (1) lists the traditional purposes for which a charitable trust can be created. Subsection (2) permits the court to select a charitable purpose or beneficiary if the terms of the trust are not sufficiently definite. Subsection (3) authorizes a settlor to enforce a charitable trust, which is a change from the common law. Subsection (3) also authorizes enforcement by the Attorney General, which is consistent with the common law.

Effect on Current Oregon Law: Subsections (1) and (2) do not change Oregon law.

Subsection (3) changes Oregon law by authorizing a settlor to enforce a charitable trust. Under current Oregon law, only the Attorney General has that authority. In *Associated Students of University of Oregon v. Oregon Inv. Council*, 82 Or. App. 145, 148-49, 728 P.2d 30 (1986), the court stated that "plaintiffs must show that their interest is 'sufficiently' special to distinguish their interest from that of society generally, which, as a whole, is the primary beneficiary of charitable trusts." *See also Agan v. U.S. Nat. Bank*, 227 Or. 619, 363 P.2d 765 (1961). No Oregon case has found a sufficient special interest to permit a suit to enforce a charitable trust.

Section 26 (UTC 406). Creation of Trust Induced by Fraud, Duress or Undue Influence. This section lists the grounds for contesting a trust.

Effect on Current Oregon Law: This section applies the rule stated in Restatement (Second) of Trusts § 333 (1959) and does not change Oregon law.

Section 27 (UTC 407). Evidence of Oral Trust. This section does not require that a trust be in writing, instead leaving this issue to other law. However, Section 27 does provide that an oral trust may be established only by clear and convincing evidence.

Effect on Current Oregon Law: Oregon's Statute of Frauds, ORS 93.020, requires that a trust involving real property be in writing. *Smiley v. King*, 278 Or. 555, 564 P.2d 1348 (1977) held that an oral trust involving the transfer of real property was voidable, not void.

Oregon cases do recognize oral trusts of personal property. Three cases in Oregon are cited for the proposition that "A trust in personal property may be created by parol." *Mowrey v. Jarvy*, 228 Or. 96, 363 P.2d 733 (1961); *Allen v. Hendrick*, 104 Or. 202, 45 P. 296 (1922); *Cooper v. Thomason*, 30 Or. 161, 206 P. 733 (1896).

The clear and convincing evidence standard likely is higher than the standard in effect in Oregon, but the Study Committee decided that the higher standard was appropriate given the potential for abuse in connection with oral trusts.

Section 28 (UTC 408). Pet Trust. This section validates a trust created for the care of an animal.

Effect on Current Oregon Law: Oregon recently enacted ORS 128.308 (Pet Trusts). The Study Committee incorporated desirable provisions from ORS 128.308 into the UTC version of Section 28, so Oregon Code Section 28 substantially follows existing Oregon law. Section 28 does modify the existing statute on pet trusts in a few ways. First, ORS 128.308 provides that a settlor may establish a trust for a "domestic or pet" animal. Section 28 simply uses the word "animal," and the Comment explains that the section applies to "exotic" animals as well as to domestic and pet animals.

The second change is more significant. Section 28(3) provides in part:

> Trust property not required for the intended use must be distributed to those persons designated in the trust. In the absence of a designation, the property shall be distributed to the settlor if the settlor is living when the distribution is made, or to the settlor's successors in interest if the settlor is not living when the distribution is made.

ORS 128.308(6) does not provide for distribution of excess funds prior to the date the trust terminates. However, the Study Committee concluded that no reason exists for retaining property in a pet trust if a court determines that the amount in the trust exceeds the amount necessary to carry out the trust purposes.

The third change is that Section 28(2) provides: "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." ORS 128.308(2) provides for enforcement by a person designated in the document or by the court, but does not expressly permit enforcement by someone else.

Section 29 (UTC 409). Noncharitable Trust Without Ascertainable Beneficiary. This section validates a trust created for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose (for example, a benevolent purpose) to be selected by the trustee. Consistent with the period of the Oregon Statutory Rule Against Perpetuities, a trust given effect under Section 29 can be enforced for up to 90 years.

Effect on Current Oregon Law: This section changes current Oregon law, which requires that a beneficiary be ascertainable within the period of the Rule Against Perpetuities (see discussion under Section 22). At least one provision for a trust without an ascertainable beneficiary already exists under Oregon law, because ORS 97.730 authorizes trusts for cemeteries.

Sections 30-37 (UTC 410-417). Modification and Termination of Trusts (Other than Cy Pres). The Oregon Code contains comprehensive provisions on trust modification and termination.

Effect on Current Oregon Law: Oregon has enacted modification provisions as Proceedings and Agreements Relating to Trust Administration, ORS 128.135, 128.145, and 128.177. Thus, the Oregon Code makes only minor changes to current Oregon law.

Section 30 (UTC 410). Modification or Termination of Trust; Proceedings for Approval or Disapproval.

Subsection (1) lists the grounds on which trusts usually terminate.

Subsection (2) specifies the trustees and beneficiaries as the persons who have standing to seek court approval or disapproval of modification or termination of a trust, provides that a settlor may commence a proceeding to modify or terminate a trust under Section 31, and provides that a settlor can petition the court under Section 33 to apply cy pres to modify the settlor's charitable trust.

Effect on Current Oregon Law: Subsection (1) does not change Oregon law.

With respect to subsection (2), ORS 128.135(2)(d) similarly provides that any beneficiary or trustee may petition the court concerning modification or termination. Although ORS 128.177 allows a settlor to participate in modification or termination by agreement, ORS 128.135(2) does not give the settlor standing to commence a proceeding. Oregon law does not appear to give a settlor standing in cy pres proceedings.

Section 31 (UTC 411). Modification or Termination of Irrevocable Trust by Consent.

Subsection (1) allows beneficiaries acting *with* the settlor to modify or terminate a trust, even if the modification or termination is inconsistent with a material purpose. The Attorney General must consent to any modification or termination of a charitable trust, unless contingencies make the charitable interest negligible. Section 16(4) provides that a settlor cannot represent a beneficiary under the representation provisions of Sections 16-20 for purposes of modifying or terminating a trust under Section 31(1). The Comment to Section 31 indicates that a settlor concerned about possible adverse tax consequences may waive the settlor's right to join the beneficiaries in modifying or terminating the trust.

Subsection (2) allows a court to modify or terminate a trust, if all the beneficiaries consent, but only if the modification or termination is not inconsistent with a material purpose. Approval of the Attorney General is required if a charity is a beneficiary, unless contingencies make the charitable interest negligible.

Subsection (3) presumes that a spendthrift clause is a material purpose.

Subsection (5) allows a court to modify a trust even if all beneficiaries do not consent, if the interests of all beneficiaries are protected.

Subsections (6), (7), and (8) incorporate ORS 128.181-128.185 allowing a trustee, or any other person interested in a trust, to file an agreement under subsection (1) or (2) with the court.

Effect on Current Oregon Law: Subsection (1) merely restates the common law rule that a settlor and all the beneficiaries can agree to modify or terminate a trust. However, ORS 128.177 requires that a modification or termination accomplished by agreement not be "inconsistent with any dominant purpose or objective of the trust," and the section appears to include modification or termination with settlor consent. It is not clear whether this statutory rule is in addition to the common law rule or whether the statutory rule restricts the common law rule. If ORS 128.177 limits the application of the common law rule, then Section 31(1) would change Oregon law.

Subsection (2) is similar to ORS 128.135 except that the Oregon statute requires that the trustee agree to modification or termination by the beneficiaries. This subsection requires court approval and does not permit the beneficiaries to modify a trust by agreement after the settlor's death, as does ORS 128.177, if the trustee consents and "if the modification is not inconsistent with a dominant purpose or objective of the trust . . . ."

Subsection (3) probably does not change Oregon law, although no Oregon cases considering whether a spendthrift clause is a material purpose have been found. Courts in other states have held a spendthrift clause to constitute a material purpose.

Subsection (5) and ORS 128.135 seem to reach the same result. ORS 128.135(2) gives any beneficiary or trustee the authority to petition the court for modification or termination. Under ORS 128.135(6), the court must act in the best interests of all beneficiaries, but presumably can act without the consent of all beneficiaries.

Section 32 (UTC 412). Modification or Termination Because of Unanticipated Circumstances or Inability to Administer Trust Effectively. This section broadens the court's ability to modify trust terms. Section 32 gives the court the authority to modify administrative or dispositive terms of the trust or terminate the trust because of circumstances unanticipated by the settlor (whether or not the circumstances existed on creation), if the modification or termination will further the settlor's broader purposes. In addition, the court may modify administrative terms if the existing terms are impractical or wasteful or impair the trust's administration. The Comment to Section 32 explains that a settlor cannot place unreasonable restrictions on the use of trust property.

Effect on Current Oregon Law: No comparable provision seems to exist under Oregon law, but Section 32 appears to be consistent with ORS 128.135 and ORS 128.177.

Section 33 (UTC 413). Cy Pres. This section liberalizes the doctrine of cy pres in ways believed more likely to carry out the average settlor's intent. First, subsection (1) expands the ability of the court to apply cy pres. The court may apply cy pres not only if the original scheme becomes impossible, unlawful, or impracticable, but also if it becomes wasteful. Further, this section presumes general charitable intent that permits application of cy pres, whereas under the common law a court had to determine that the settlor had general charitable intent. A court cannot divert property in a charitable trust to a noncharity unless the terms of the trust expressly so provide.

Section 33 also changes the doctrine of cy pres to eliminate an administrative inefficiency. Provisions diverting property to a noncharity which take effect far in the future often cause more mischief than benefit, necessitating detailed searches for heirs and the running of property through numerous estates. To limit this difficulty, subsection (2) provides that a gift over to a noncharity upon failure or impracticality of the original charitable purpose is effective only (a) for the settlor's lifetime, if the trust property is to revert to the settlor, or (b) if fewer than 50 years have elapsed since creation of the trust.

Effect on Current Oregon Law: Oregon follows the common law doctrine of cy pres, so this section will change Oregon law in the ways described.

Section 34 (UTC 414). Modification or Termination of Uneconomic Trust. The trustee may terminate a trust, without a court proceeding, if the property held by the trust is insufficient to justify further administration. However, a trustee may not terminate a trust under this section if the trustee is a beneficiary of the trust or has a duty of support for a beneficiary of the trust. Subsection (2) allows judicial modification or termination of uneconomic trusts.

Effect on Current Oregon Law: Section 34 does not change Oregon law. The Study Committee changed the UTC version of Section 34 (UTC 414) to make this section of the Oregon Code consistent with ORS 128.009(4).

Section 35 (UTC 415). Reformation to Correct Mistakes. This section allows a court to reform the terms of a trust, even if unambiguous, if clear and convincing evidence proves the settlor's intent and establishes that a mistake of law or fact affected the terms being construed. The clear and convincing evidence standard protects against fraud.

Effect on Current Oregon Law: This section probably does not change Oregon law.

Section 36 (UTC 416). Modification to Achieve Settlor's Tax Objectives. To achieve the settlor's tax objectives, the court may modify the terms of the trust as long as the modification does not violate the settlor's probable intention. The court may also give the modification retroactive effect.

Effect on Current Oregon Law: Oregon law has no provision stating this reason for modification, but ORS 128.135 and 128.177 probably permit this sort of modification.

Section 37 (UTC 417). Combination and Division of Trusts. The trustee can combine or divide a trust without court approval, even if doing so affects rights of beneficiaries but only "if the result does not materially impair rights of any beneficiary or adversely affect achievement of the purposes of the trust."

Effect on Current Oregon Law: Oregon law has no comparable provision, but many trust documents probably do permit this.

Section 38. In Terrorem Clause. This section incorporates ORS 128.255 on in terrorem clauses.

SECTIONS 39-44 (UTC Article 5))
CREDITOR'S CLAIMS; SPENDTHRIFT AND DISCRETIONARY TRUSTS

This article addresses the validity of a spendthrift provision and the rights of creditors, both of the settlor and of beneficiaries, to reach a trust to collect a debt.

Section 39 (UTC 501). Rights of Beneficiary's Creditor or Assignee. In the absence of a spendthrift provision, a court may authorize garnishment or other execution against present or future distributions to or for the benefit of a beneficiary. This provision applies to mandatory distributions and to discretionary distributions after the trustee exercises discretion.

Effect on Current Oregon Law: Oregon law reaches the same results.

Section 40 (UTC 502). Spendthrift Provision. This section states the general rule that, to the extent a trust is protected by a spendthrift provision, a beneficiary's creditors may not reach the beneficiary's interest until distribution is made by the trustee. This section also provides that a trust term saying that a beneficiary's interest is held subject to a "spendthrift trust" is sufficient to cause the trust to be treated as a spendthrift trust.

Effect on Current Oregon Law: This section does not change Oregon law, except for the provision in Section 40(2) that using the words "spendthrift trust" (or words of similar import) in a trust is sufficient to create a spendthrift trust.

Note that ORS 23.170(2) creates a conclusive presumption that a retirement plan is a valid spendthrift trust.

Section 41 (UTC 503). Exceptions to Spendthrift Provisions. Section 41 identifies special creditors who may assert a claim against a beneficiary's interest in a spendthrift trust. The rights of these special creditors are limited, extending only to distributions required by the express terms of the trust, such as mandatory payments of income, and to distributions the trustee has otherwise decided to make, such as through the exercise of discretion. These special creditors cannot *compel* a discretionary distribution under Section 41.

Subsection (2) identifies the special creditors who may be able to assert a claim under Section 41. These creditors include the holder of a judgment, court order, or administrative order against a beneficiary for support or maintenance of the beneficiary's child, spouse, or former spouse, and a judgment creditor who had provided services for the protection of a beneficiary's interest in the trust.

A special creditor making a claim under subsection (2) may obtain a court order authorizing garnishment or other execution against present or future distributions to or for the benefit of the beneficiary. The amount of the garnishment or execution is limited to an amount that is equitable under the circumstances.

Subsection (3) makes a spendthrift provision unenforceable against a claim of this State or a federal claim to the extent an Oregon statute or federal law so provides.

Effect on Current Oregon Law: Section 41 is consistent with *Shelley v. Shelley*, 223 Or. 328, 354 P.2d 282 (1960), which addresses the rights of former spouses and children to reach trust assets to satisfy a claim for support against a trust beneficiary. The court held that the trust's spendthrift provision was not effective to bar claims against the beneficiary's mandatory income interest, but the court could consider various factors in making equitable adjustments between the claimants and the beneficiary. On the other hand, the court noted that the beneficiary had no right to demand discretionary distributions.

Retirement plans, which are presumed to be spendthrift trusts under ORS 23.170(2), are subject to support claims. *See Hobson v. Hobson*, 136 Or. App. 516, 901 P.2d 914 (1995).

No cases have been found agreeing or disagreeing with the language protecting creditors who provided services for protection of a beneficiary's interest in the trust. However, this principle comes from the common law and likely does not change Oregon law.

Section 41 does not include the common law rule that suppliers of "necessaries" can reach spendthrift assets.

Note that the Oregon Code does not include Section 504 of the UTC, which permits certain creditors of a trust beneficiary to compel a distribution from a discretionary trust under some circumstances.

Section 42 (UTC 505). Creditor's Claim Against Settlor. Creditors can reach a revocable trust during the settlor's lifetime or after death. Creditors can reach an irrevocable trust to the extent distributions can be made to the settlor. Generally, creditors of a holder of a power of withdrawal can reach property subject to the power. However, if the trustee of a trust is not the settlor, the trustee's creditors cannot reach property the trustee can withdraw for the trustee's own benefit, if the trustee's power is limited by an ascertainable standard.

Effect on Current Oregon Law: This section is consistent with ORS 128.256-128.300 and has been limited to conform to those sections. In Oregon, creditors can reach a revocable trust during the settlor's lifetime or after death. *Johnson v. Commercial Bank*, 284 Or. 675, 682-83, 588 P.2d 1096 (1978). *See also* ORS 128.256-128.300 (providing procedures for bringing claims against revocable trusts after the settlor's death).

Johnson v. Commercial Bank did not address the rights of the settlor's creditors to reach an irrevocable trust. However, the case states in dictum that creditors could not reach interests in an irrevocable trust over which the settlor retained no powers (citing a case in which the settlor had a life estate but had no control over a remainder interest, making the remainder interest beyond the reach of the settlor's creditors). No cases addressing the issue of property subject to a power of withdrawal (Section 42(2)) were found.

Section 43 (UTC 506). Overdue Distribution. A creditor can reach a mandatory distribution that is overdue.

Effect on Current Oregon Law: This section is similar to Restatement (Third) of Trusts Section 58 cmt. d (2003).

Section 44 (UTC 507). Personal Obligations of Trustee. This section protects trust assets against the personal obligations of the trustee.

Effect on Current Oregon Law: This is a basic principle of trust law.

SECTIONS 45-49 (UTC Article 6)
REVOCABLE TRUSTS

The Comment to this article explains: "This article deals with issues of significance not totally settled under prior law." Little Oregon law has been found directly addressing the issues raised in Sections 45-49. These sections change or clarify the common law, and thus change Oregon law in some respects.

Section 45 (UTC 601). Capacity of Settlor of Revocable Trust. This section provides that the standard of capacity required to create a revocable trust is the same as that required to execute a will.

Effect on Current Oregon Law: This section lowers the standard of capacity for revocable trusts in Oregon.

Section 46 (UTC 602). Revocation or Amendment of Revocable Trusts. This section contains comprehensive default procedures for revoking or amending a revocable trust. These procedures apply if the settlor failed to address this issue in the terms of the trust.

Subsection (1) changes the existing presumption that a trust is irrevocable to a presumption that the trust is revocable, unless the trust provides otherwise.

Subsection (2) provides default rules for revocation of trusts having more than one settlor. The trust document can modify these rules.

Subsection (3) provides that the settlor may revoke or amend a revocable trust by substantial compliance with a method provided in the terms of the trust or, if the terms of the trust do not provide a method, by any method manifesting clear and convincing evidence of the settlor's intent, except for execution of a will or codicil.

Subsection (4) provides that on revocation the trustee must deliver the trust property as the settlor directs.

Subsection (5) provides that an agent acting under a durable power of attorney can exercise powers of revocation or amendment only if the trust expressly authorizes the agent to do so.

Subsection (6) permits a conservator to exercise a settlor's power to revoke a trust, but only with court approval.

Subsection (7) provides that a trustee who does not know that a trust has been revoked or amended is not liable for actions taken on the assumption that the trust had not been revoked or amended.

Effect on Current Oregon Law: Subsection (1) changes Oregon law.

Subsection (3) follows the traditional rule that a settlor must comply with procedures specified in the trust instrument in order to revoke the trust. However, this subsection probably loosens the Oregon rules a bit by permitting substantial compliance with those specified procedures. If the terms of the trust are silent as to revocation, subsection (3) permits revocation by any other method manifesting clear and convincing evidence of the settlor's intent, other than by execution of a will or codicil.

It appears that subsection (6) does not change Oregon law. Oregon's conservatorship statutes allow a conservator to "take possession of all the property of substantial value of the protected person" (ORS 125.420), and to create revocable or irrevocable trusts (ORS 125.440(2)). ORS 125.460 directs the conservator and the court to consider the estate plan of the protected person when "utilizing powers of revocation or withdrawal available for the support of the protected person and exercisable by the conservator or the court . . . ." ORS 125.025(4) states that a court can exercise all powers that the protected person could, except the power to make a will. Although the statute does not specifically address the question of whether a conservator can revoke a revocable trust, the broad grants of power suggest that the conservator can do so, with court approval.

Section 47. Effective Date. Section 46(1), creating a presumption that a trust is revocable, does not apply to trusts executed before the effective date of the Oregon Code.

Section 48 (UTC 603). Settlor's Powers; Powers of Withdrawal. Subsection (1) provides that while the settlor of a revocable trust is alive, all rights of the beneficiaries are subject to the settlor's control, and the trustee owes duties only to the settlor. Beneficiaries other than the settlor have no right to receive notice, information, or reports about the trust. Subsection (2) provides that all rights of beneficiaries are subject to the control of a holder of a power of withdrawal. Section 3(12) of the Oregon Code defines power of withdrawal to exclude a power exercisable by a trustee that is limited by an ascertainable standard, and a power exercisable by someone else only with the consent of the trustee or a person holding an adverse interest.

Effect on Current Oregon Law: The provision that the trustee owes duties only to the settlor while the settlor is alive likely changes Oregon law because fiduciary duties generally are owed to all beneficiaries.

Section 49 (UTC 604). Limitation on Action Contesting Validity of Revocable Trust; Distribution of Trust Property. This section creates a statute of limitations of three years running from the settlor's death, allows a trustee to shorten the statute to four months by giving notice to a potential contestant, and protects a trustee unaware of a possible contest who makes distribution prior to the expiration of the contest period.

Effect on Current Oregon Law: The four-month period is consistent with the period under Oregon law for contesting wills after notice has been given. The three-year period is different from Oregon law applicable to wills, but the Study Committee concluded that three years from the date of death was an appropriate limitations period for a revocable trust.

SECTIONS 50-58 (UTC Article 7)
OFFICE OF TRUSTEE

Section 50 (UTC 701). Accepting or Declining Trusteeship. This section specifies the method for accepting or declining a trusteeship, including acceptance by assumption of duties. The section also clarifies that a failure to accept within a reasonable time is deemed a rejection of the trusteeship. Finally, a trustee may act to preserve trust property or inspect trust property without being deemed to have accepted the trusteeship.

Effect on Current Oregon Law: This section follows the Restatement and does not change Oregon law.

Section 51 (UTC 702). Trustee's Bond. This section makes the requirement of a bond and the terms of any bond discretionary with the court and clarifies that bond need not be provided by a trust company acting as trustee.

Effect on Current Oregon Law: This section follows the Restatement and does not change Oregon law.

Section 52 (UTC 703). Cotrustees. This section sets out in detail the rights and responsibilities of cotrustees. Cotrustees may act by majority decision and may delegate certain of their duties to their cotrustees. However, despite a delegation a cotrustee remains responsible for exercising reasonable care to prevent a cotrustee from committing a serious breach of trust and to compel a cotrustee to redress a serious breach of trust.

Effect on Current Oregon Law: Subsections (1), (2), (4), (6), (7), and (8) are comparable to the provisions of ORS 128.015 and ORS 128.026. Subsection (3) is similar to ORS 128.026(3) in requiring a trustee to participate in trust administration but extends the circumstances under which a trustee will not be liable for failure to participate. Subsection (5) appears to permit a trustee to delegate more than is currently permitted under ORS 128.015.

Section 53 (UTC 704). Vacancy in Trusteeship; Appointment of Successor. This section specifies the circumstances under which a vacancy can occur, and provides a procedure for filling vacancies, including appointment by unanimous agreement of the qualified beneficiaries, if the terms of the trust fail to designate a successor.

Effect on Current Oregon Law: Subsection (2), providing that no successor trustee need be appointed if at least one trustee remains in office, is consistent with ORS 128.026(2). The other Oregon statutes that address vacancies in trusteeship are consistent with the approach taken in Section 53. ORS 128.135(2)(b) provides that a beneficiary or the trustee may petition the court for the purpose of appointing a successor trustee or additional trustee. ORS 93.190 states that a vacancy may be filled as provided in the trust, but a court may fill the vacancy according to established rules of equity.

Section 54 (UTC 705). Resignation of Trustee. Subject to the right of the settlor to specify the method for resigning (*see* Section 5), this section allows a trustee to resign upon notice to the settlor, if living, the cotrustees, and the qualified beneficiaries. Alternatively, a trustee may resign with the approval of the court.

Effect on Current Oregon Law: ORS 128.009(3)(bb) provides that a trustee can resign if the trustee obtains approval of the court, or if the trust instrument expressly authorizes the resignation and provides for a successor trustee and if the successor trustee agrees to serve. ORS 128.135(2)(b) provides that a beneficiary or the trustee may petition the court for the purpose of accepting a resignation of a trustee. Thus, Section 54 changes Oregon law to make it easier for the trustee to resign without court approval, in accordance with standard drafting practice.

Section 55 (UTC 706). Removal of Trustee. This section allows a trustee to be removed for a variety of specified grounds. Some of the grounds are traditional, including serious breach of trust, lack of cooperation among trustees, or unfitness, unwillingness, or persistent failure to administer the trust effectively. Other grounds are new. These include changed circumstances or the unanimous request of the qualified beneficiaries, coupled with findings by the court that (1) removal best serves the interests of all the beneficiaries and is not inconsistent with a material purpose of the trust, and (2) a suitable successor trustee is willing to act.

Effect on Current Oregon Law: Subsection (1) changes the common law by allowing the settlor of an irrevocable trust to petition for removal of the trustee. Some of the other grounds described above also may change existing law.

Section 55 changes Oregon law by no longer requiring a beneficiary to post a bond as a prerequisite to petitioning the court for removal of a trustee or any other action. ORS 128.155 now requires a bond.

Section 56 (UTC 707). Delivery of Property by Former Trustee. This section deals with the obligations of a resigning or removed trustee.

Effect on Current Oregon Law: This section does not appear to change Oregon law.

Section 57 (UTC 708). Compensation of Trustee. This section states the most common test for trustee compensation. Unless specified in the terms of the trust, the trustee is to receive reasonable compensation. However, even if the trustee's compensation is specified in the terms of the trust, the court may adjust a compensation provision that turns out to be unreasonably low or high.

Effect on Current Oregon Law: This section is consistent with ORS 128.051, which provides that a court can review the reasonableness of compensation of a trustee and that a trustee may be ordered to refund excessive compensation.

Section 58 (UTC 709). Reimbursement of Expenses. This section restates the common law rule entitling a trustee to be reimbursed for expenses incurred and advances made to the trust. Expenses properly incurred are reimbursable in full. Expenses improperly incurred are reimbursable only to the extent necessary to prevent unjust enrichment.

Effect on Current Oregon Law: This section does not change Oregon law.

SECTIONS 59-76 (UTC Article 8)
DUTIES AND POWERS OF TRUSTEE

Section 59 (UTC 801). Duty to Administer Trust. This section restates the trustee's common law duty to administer a trust in good faith and in accordance with its terms and purposes.

Effect on Current Oregon Law: Oregon has codified this common law duty at ORS 128.055 and ORS 128.065, and many Oregon cases affirm this duty.

Section 60 (UTC 802). Duty of Loyalty. This section comprehensively addresses the duty of loyalty. In addition to stating the general obligation, the section specifies the circumstances when a violation is presumed, lists defenses, provides a special rule for proprietary funds, and enumerates the transactions to which the duty does not generally apply, such as an agreement with respect to the payment of a trustee's compensation.

Effect on Current Oregon Law: Most of this section restates common law rules followed in Oregon. Many Oregon cases agree with these basic rules.

No Oregon cases were found relating to Section 60(4), which makes certain transactions between a trustee and beneficiary voidable even if the transactions do not concern trust property. *Masters v Bissett*, 101 Or. App. 163, 790 P.2d 16 (1990) agrees with the approach in subsection (6). ORS 709.175 authorizes trustees to invest in funds from which the trustee might derive additional compensation, a concept included in subsection (6). Oregon cases have upheld trust provisions requiring voting as provided in subsection (7). Based on general fiduciary principles, Oregon law presumably would follow the rule in subsection (7) whether or not the trust included an express term addressing voting. The exceptions in subsection (8) also fit within the general approach of Oregon law.

Section 61 (UTC 803). Impartiality. This section restates the common law duty to treat the beneficiaries impartially.

Effect on Current Oregon Law: The Uniform Prudent Investor Act ("UPIA"), enacted at ORS 128.204, includes this duty. Oregon case law agrees.

Section 62 (UTC 804). Prudent Administration. This section restates the trustee's general duty to act with prudence, employing language used in UPIA. This section is not directed specifically at investments.

Effect on Current Oregon Law: This UPIA provision is enacted at ORS 128.196(1).

Section 63 (UTC 805). Costs of Administration. This section restates the trustee's common law duty to incur only reasonable costs.

Effect on Current Oregon Law: A similar provision is enacted at ORS 128.206 as part of UPIA.

Section 64 (UTC 806). Trustee's Skills. This section restates the trustee's common law duty to apply special skills or expertise.

Effect on Current Oregon Law: A similar provision is enacted at ORS 128.196(6) as part of UPIA.

Section 65 (UTC 807). Delegation by Trustee. This section is drawn from UPIA but expanded to address all aspects of trust administration.

Effect on Current Oregon Law: ORS 128.212 contains the UPIA provision. ORS 128.015, providing that a trustee cannot delegate the entire administration of the trust, is consistent with Section 65.

Section 66 (UTC 808). Powers to Direct. This section deals with the various types of powers to direct. Included are directions of the settlor of a revocable trust, powers to terminate or modify a trust, and advisory powers, such as the power to direct investments. The trustee is protected in honoring the exercise of a power to direct unless the trustee knows the exercise constitutes a serious breach of fiduciary duty.

Effect on Current Oregon Law: *Masters v. Bissett*, 101 Or. App. 163, 790 P.2d 16 (1990) agrees with subsection (1). The other subsections do not appear to be contrary to Oregon law, but no cases have been found.

Sections 67-68 (UTC 809-810), Control and Protection of Trust Property; Recordkeeping and Identification of Trust Property. These sections codify a variety of standard trust duties.

Effect on Current Oregon Law: Oregon cases have applied these fiduciary duties. Section 68(4) appears to have no corollary in Oregon law but is consistent with duties under Oregon law to keep records and manage trusts efficiently.

Section 69 (UTC 811). Enforcement and Defense of Claims. This is another standard duty.

Effect on Current Oregon Law: ORS 128.009, listing specific powers of a trustee, includes this duty in ORS 128.009(3)(s) and (z).

Section 70 (UTC 812). Collecting Trust Property. This section requires a trustee to take reasonable steps to collect trust property and to redress a breach of trust known to have been committed by a former trustee.

Effect on Current Oregon Law: This duty is well established in Oregon case law.

Section 71 (UTC 813). Duty to Inform and Report. This section deals with a beneficiary's right to information, including the rights to be informed of the trust's existence and of the identity of the trustee, and the rights to receive annual reports and a copy of the trust instrument. The duty to inform and report is a common law duty, necessary to the proper functioning of a trust. Section 71 balances the need for someone to have information about the trust in order to enforce the trust with the possible desire of a settlor to limit the knowledge of certain beneficiaries about the trust.

The Study Committee modified the UTC version of Section 71 to limit the rights of beneficiaries who are not qualified beneficiaries. Some of the provisions of UTC Section 71 modified by the Study Committee have generated controversy in other states. The Study Committee considered information from these other states as well as its members' own understanding of Oregon law in reaching what the Study Committee believes to be a good balance.

Under subsection (1) of Section 71, the trustee has the duty to keep "qualified beneficiaries" reasonably informed about the trust. Qualified beneficiaries are beneficiaries currently eligible to receive distributions of trust income or principal, whether mandatory or discretionary ("permissible distributees"); beneficiaries who would be next in line if the interests of all the permissible distributees terminated; and beneficiaries who would or might take if the trust terminated on the date in question. *See* Section 3(14). The duties under Section 71 run only to this more limited group of qualified beneficiaries and not to all beneficiaries (e.g., not to those with contingent remainder interests, unless the contingency would be resolved in their favor if the trust terminated on the date in question). Under Section 48(1), no beneficiary of a revocable trust other than the settlor has a right to information while the settlor is alive.

Note that under Section 10(3), the Attorney General steps up to the level of a qualified beneficiary with respect to a charitable trust, unless contingencies make the charitable interest negligible. For example, the Attorney General probably would not be entitled to reports under Section 71 if a charity is designated to take only if all the members of a large family have died. However, if a charity is third-in-line to take an interest (to A for life, then to B if B is living on A's death, and if B is not then living to Charity), the Attorney General, but not the charity, would be entitled to reports while A and B are both alive.

In addition to the duty to keep qualified beneficiaries reasonably informed, subsection (1) permits, but does not require, the trustee to respond to reasonable requests for information from a nonqualified beneficiary.

Under subsection (2), a trustee must provide a copy of the trust instrument to a qualified beneficiary who requests one.

Further, when a trustee accepts a trusteeship, the trustee must notify the qualified beneficiaries of the acceptance and of contact information for the trustee. When a trustee becomes aware that an irrevocable trust has been created, or that a revocable trust has become irrevocable, the trustee must notify the qualified beneficiaries of the trust's existence, the identity of the settlor, the right to request a copy of the trust instrument, and the right to a trustee's report. These duties of notification do not apply retroactively to trustee acceptances that occurred or to trusts that became irrevocable prior to the effective date of the Oregon Code.

Under subsection (3), a trustee must send annual reports to the permissible distributees of trust income or principal, and to other qualified beneficiaries who request reports. Subsection (4) provides that a qualified beneficiary can waive the right to reports or other information.

Under subsection (5), if the trustee decides to send the information requested, the trustee may charge a reasonable fee for its efforts. Subsection (6) provides that, if a beneficiary requests information, the request must be with respect to a specific trust and not a general "let me know about any interests I have in any trust you manage."

Subsection (8) provides that information, notice, and reports will be given only to the settlor's spouse if (1) the spouse survives the settlor, (2) the spouse is financially capable, (3) the spouse is the only permissible distributee of the trust, and (4) all of the other qualified beneficiaries are descendants of the spouse. This provision was added to take care of situations in which two spouses want to control their property until the death of the survivor and would rather not have their children know about the assets in a trust (for example, a credit-shelter trust) while the survivor is still alive. Unless the terms of the trust provide otherwise, if the spouse becomes financially incapable, notice must be provided to others so that someone can keep an eye on the trustee.

Note that the duties under Section 71 can be waived or modified by the settlor in writing, either during the lifetimes of the settlor and the settlor's spouse or by designating a person to receive the required information, notice, and reports. Thus, the settlor can direct that no information be sent to anyone other than the surviving spouse, as long as the surviving spouse remains financially capable, regardless of the identity of the other beneficiaries. Also, if the settlor creates a trust for an irresponsible child, the settlor can provide that all information, notice, and reports will be sent to a responsible third party who will act in good faith to protect the interests of the child and any other beneficiaries. *See* Oregon Code Section 5(3).

Effect on Current Oregon Law: The Study Committee redrafted Section 71 of the UTC to make the Oregon Code similar to current Oregon law. The participation of a bank officer who serves as trustee of many trusts guided the Committee's work on this section.

The duty to keep the beneficiaries reasonably informed about the administration of the trust is a fundamental duty of a trustee. *See* Restatement (Second) of Trusts Section 173 (1959). In some respects the Oregon Code restricts the trustee's duty to provide information more than current Oregon law does, because under the Code the trustee's duty is owed only to qualified beneficiaries. However, with respect to the duty of the trustee under Section 71(2)(a) to provide a copy of the trust instrument to any qualified beneficiary who requests it, the Oregon Code probably expands current

Oregon law. The requirement under Section 71(3) of the Oregon Code that a trustee send annual reports to permissible distributees and to qualified beneficiaries who request a report also creates an affirmative duty that probably does not exist under current Oregon law, but the settlor can limit this duty as long as someone has the right to receive information about the trust. *See* Section 105(3).

ORS 128.125(2) requires a trustee to respond to requests from a beneficiary for an itemized statement of receipts and disbursements or a statement of property held by the trustee. The beneficiary has a right to petition a court to obtain this information if the trustee fails to provide it (ORS 128.125(5)), and a right to petition for an accounting under ORS 128.135. Thus, current Oregon law focuses on the beneficiary's right to request information. The Oregon Code, on the other hand, emphasizes the trustee's common law duty to keep beneficiaries informed but also sets forth specific obligations rather than merely imposing a more generalized duty.

Section 72. Effective date. The requirements of Section 71(2)(b) and (c) that a trustee notify qualified beneficiaries after accepting a trusteeship and after learning about the creation of an irrevocable trust apply only to a trustee who accepts a trusteeship on or after the effective date of the Oregon Code and to irrevocable trusts created on or after the effective date.

Section 73 (UTC 814). Discretionary Powers; Tax Savings. This section deals with the construction of discretionary powers, both powers that purport to confer absolute discretion on a trustee and powers that might result in inclusion of a trust in the gross estate of a trustee who is also a trust beneficiary.

Effect on Current Oregon Law: Subsection (1) states the common law rule, which Oregon courts have affirmed. Subsections (2)–(4) contain tax savings clauses.

Section 74 (UTC 815). General Powers of Trustees. This section confers on a trustee broad powers, including all powers which an unmarried individual has over individually owned property as well as any other powers necessary for proper trust management.

Section 75 (UTC 816). Specific Powers of Trustee. This section contains a detailed list of specific trustee powers.

Effect on Current Oregon Law: Oregon adopted the Uniform Trustees' Powers Act, and ORS 128.009 lists trustees' powers. Some additions have been made to Section 75 to conform it to ORS 128.009(3). With these additions, Section 75 is consistent with Oregon law.

Section 76 (UTC 817). Distribution upon Termination. This section authorizes a trustee, upon termination of a trust, to send beneficiaries a proposal for distribution that gives the beneficiaries 30 days to object. The section requires a trustee to proceed expeditiously with final distribution and addresses the validity of releases from liability.

Effect on Current Oregon Law: *Lowery v. Evonuk*, 95 Or. App. 98, 767 P.2d 489 (1989) affirms the trustee's duty to distribute trust assets within a reasonable time after termination (Section 76(2)). *Stephan v. Equitable Sav. and Loan Ass'n*, 268 Or. 544, 522 P.2d 478 (1974) agrees with subsection (3) that, if consent was induced by improper conduct, the release of the trustee is invalid.

SECTIONS 77-82 (UTC Article 9)
UNIFORM PRUDENT INVESTOR ACT

This article codifies the Uniform Prudent Investor Act, which Oregon adopted in 1995. These sections reenact UPIA but without the provisions already addressed in Section 60, Duty of Loyalty;

Section 61, Impartiality; Section 63, Costs of Administration; Section 64, Trustee's Skills; and Section 65, Delegation by Trustee.

SECTIONS 83-95 (UTC Article 10)
LIABILITY OF TRUSTEES AND RIGHTS OF PERSONS DEALING WITH TRUSTEE

Section 83 (UTC 1001). Remedies for Breach of Trust. This section lists the remedies for breach of trust other than the measure of damages.

Effect on Current Oregon Law: This section codifies the common law and does not change Oregon law.

Section 84 (UTC 1002). Damages for Breach of Trust. Subsection (1) states the basic measure of damages. This subsection clarifies that a trustee who commits a breach of trust will be liable for damages sustained by a beneficiary as a result of the breach, regardless of whether the damages affect the beneficial interest in the trust. The Study Committee added language requiring the court to determine the comparative negligence of trustees by following the existing rules of Oregon's comparative negligence law.

Effect on Current Oregon Law: This section, as modified by the Study Committee, conforms to current Oregon law. An Oregon court explained that "[a] trustee is liable in damages for losses to the beneficiary caused by a breach of trust." *Ferluga v. U.S. Nat. Bank of Oregon*, 1988 WL 121247 D.Or., 1, 2 (1988) (citing Bogert, *The Law of Trusts* 562 (5th ed. 1973)).

Section 85 (UTC 1003). Damages in Absence of Breach. This section holds a trustee accountable for a profit made even in the absence of breach.

Effect on Current Oregon Law: This section applies the common law rule. The Study Committee created an exception tied to the provisions of Oregon's statute on affiliated mutual funds.

Section 86 (UTC 1004). Attorney Fees and Costs. This section recognizes the court's discretion in awarding attorney fees and costs.

Effect on Current Oregon Law: This section is consistent with Oregon law. ORS 128.155 ties court discretion in awarding fees to the outcome of the proceeding. Under Oregon case law, the court has "the inherent power" in equity to award attorney fees. *See Deras v. Myers,* 272 Or. 47, 535 P.2d 541 (1975). In *Schaad v. Lorenz*, the Oregon Court of Appeals explained: "[a]lthough the general rule is that attorney fees cannot be awarded unless provided by statute or contract, they may be awarded to a party who, at his own expense and not for his sole benefit, successfully brings suit to benefit an estate or trust as a whole." 69 Or.App. 16, 26, 688 P.2d 1342 (citing *State Land Board v. Sovenko, et al*, 202 Or. 571, 574-76, 277 P.2d 781 (1954)). The Oregon Supreme Court held that in order for a prevailing party to recover attorney fees, a suit must result in an increase in the estate or trust assets. *McCormick v. Rand,* 246 Or. 606, 425 P.2d 488 (1967).

Section 87 (UTC 1005). Limitation of Action Against Trustee. This section limits a trustee's potential liability to (1) six years from the time the act or omission is discovered or should have been discovered, (2) one year from the sending of a report that adequately discloses potential claims, or (3) the later to occur of 10 years from the date of the act or omission or two years from the termination of any fiduciary account established under the trust.

Effect on Current Oregon Law: The Study Committee revised this section to conform to ORS 12.274 for two of the periods of limitation. Subsections (1) and (3) restate the periods set forth in

ORS 12.274.

Subsection (2), which cuts off claims after one year if the trustee discloses specific information about the potential claim to the beneficiary, is new.

In *Lulay v. Lulay*, 247 Or. 497, 501, 429 P.2d 802 (1967), the court explained that "[a] beneficiary may be barred by his laches from holding the trustee liable for breach of trust."

Section 88 (UTC 1006). Reliance on Trust Instrument. This section protects a trustee who reasonably relies on the terms of the trust as expressed in the trust instrument even though extrinsic evidence may establish that the trustee's reliance was mistaken.

Section 89 (UTC 1007). Event Affecting Administration or Distribution. This section protects a trustee who in administering a trust is without knowledge of an event such as marriage, divorce, performance of educational requirements, or death, as long as the trustee exercised reasonable care to ascertain the happening of the event.

Effect on Current Oregon Law. At common law, a trustee is absolutely liable for misdelivery of trust property even if the trustee does not have notice of the happening of an event that affects distribution under the trust terms. The Oregon Code protects a trustee who does not have notice of such an event.

Section 90 (UTC 1008). Exculpation of Trustee. This section validates, but at the same time places limits on, the enforceability of an exculpatory provision. Of particular concern is an exculpatory clause drafted by the trustee of the trust. However, if the settlor is represented by independent counsel, the settlor's attorney will be considered the drafter of the trust instrument.

Section 91 (UTC 1009). Beneficiary's Consent, Release or Ratification. This section absolves a trustee from a beneficiary's claim if the beneficiary consented to or ratified the conduct or otherwise released the trustee. However, the trustee is not protected if the consent, release, or ratification was induced by improper conduct, or if the beneficiary did not know of the beneficiary's rights or of the material facts relating to the breach.

Effect on Current Oregon Law: This section does not change Oregon law.

Section 92 (UTC 1010). Limitation on Personal Liability of Trustee. This section protects a trustee from liability for contracts if the fiduciary capacity is disclosed in the contract, and protects a trustee from liability for torts or for obligations arising from ownership of trust property unless the trustee was personally at fault.

Effect on Current Oregon Law: ORS 128.102 is similar, except that the Oregon Code, in subsection (b), adds protection for liability under CERCLA unless the trustee is personally at fault.

Section 93 (UTC 1011). Interest as General Partner. This section, with some exceptions, protects a trustee from liability for contracts entered into by a partnership in which the trust owns a general partnership interest as long as the trustee disclosed the fiduciary capacity.

Effect on Current Oregon Law: ORS 128.047, which permits a trustee to enter into a partnership agreement and limits liability to the assets of the trust, addresses issues similar to those addressed in Section 93.

Section 94 (UTC 1012). Protection of Person Dealing with Trustee. This section protects third parties who deal with a trustee without knowledge that the trustee is exceeding or improperly exercising a power. Also protected are persons who deliver property to a trustee. The protections provided by the section extend to dealings with former trustees if the third person is without knowledge that the trusteeship has terminated.

Effect on Current Oregon Law: ORS 128.031 is similar.

Section 95 (UTC 1013). Certification of Trust. Instead of providing a third party with a copy of the trust instrument, this section allows a trustee to provide the third party with a certification of trust. The third party may assume that the representations made in the certification are correct.

Effect on Current Oregon Law: The Study Committee replaced the UTC version of Section 95 with the provisions of ORS 128.232-128.246 on certification of trusts, modified slightly by provisions from the Idaho statute.

SECTIONS 96-98 (UTC Article 11)
MISCELLANEOUS PROVISIONS

Section 96 (UTC 1101). Uniformity of Law. Section 96 states that the Oregon Code must be construed and applied to promote uniformity of law among the states that enact the Uniform Trust Code.

Section 97 (UTC 1102). Electronic Records and Signatures. Section 97 states that electronic records and signatures are governed by ORS 84.001 to 84.061.

Section 98 (UTC 1106). Application. Section 98 provides the effective date rules.

SECTIONS 98a-126
AMENDMENTS TO EXISTING OREGON STATUTES

Sections 98a-126. Amendments to Existing Oregon Statutes. Sections 98a-126 make conforming changes to existing Oregon statutes relating to trusts that do not have direct counterparts in the Uniform Trust Code. These provisions will be incorporated into the Oregon Code in appropriate places after enactment.