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The New Minnesota Trust Code: Out with (Most of) the Old and in with (Most of) the UTC

Jennifer A. Maas

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**THE NEW MINNESOTA TRUST CODE: OUT WITH
(MOST OF) THE OLD AND IN WITH (MOST OF) THE
UTC**

Jennifer A. Maas[†]

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[†] Jennifer A. Maas, C.P.A., J.D., is a tax supervisor in the estate, gift, and trust department of Henry and Horne, LLP. She began her career as a tax accountant at the national accounting firm of RSM US LLP. She then attended the University of Minnesota Law School, graduating magna cum laude. Before transitioning to her current position, she practiced as an associate attorney at the law firm of Chestnut Cambronne PA where she assisted clients with estate and trust administration and tax and business planning. This author thanks Bretta Hines of the *Mitchell Hamline Law Review* for her background research on this project.

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I. INTRODUCTION

The Minnesota Legislature adopted the Minnesota Trust Code during its 2015 session.¹ With the adoption of the Trust Code, Minnesota joins thirty-one other states and the District of Columbia that have enacted a version of the Uniform Trust Code (UTC).²

1. For a detailed discussion of the history of the events leading up to the enactment of the Trust Code, see Christopher Hunt, *A New Day in Minnesota Trust Law*, BENCH & B. MINN. (July 10, 2015), <http://mnbenchbar.com/2015/07/trustlaw>.

2. ALA. CODE ANN. §§ 19-3B-101 to -1305 (West, Westlaw through Act 2016-83 of the 2016 Reg. Sess.); ARIZ. REV. STAT. ANN. §§ 14-10101 to -11102 (West, Westlaw through Second Reg. Sess. of the 52d Leg.); ARK. CODE ANN. §§ 28-73-101 to -1106 (West, Westlaw through 2015 Reg. Sess. and 2015 1st Ex. Sess. of the 90th Ark. Gen. Assemb.); D.C. CODE ANN. §§ 19-1301.01 to -1311.03 (West, Westlaw through Mar. 31, 2016); FLA. STAT. ANN. §§ 736.0101–.1303 (West, Westlaw through 2016 2d Reg. Sess. of the 24th Leg.); KAN. STAT. ANN. §§ 58a-101 to -1107 (West, Westlaw through the 2015 Reg. Sess.); KY. REV. STAT. ANN. §§ 386B.1-010 to .11-050 (West, Westlaw through ch. 5 of the 2016 Reg. Sess.); ME. REV. STAT. ANN. tit. 18-B, §§ 101–1104 (West, Westlaw through ch. 402 of the 2015 Second Reg. Sess. of the 127th Leg.); MD. CODE ANN., EST. & TRUSTS §§ 14.5-101 to -1006 (West, Westlaw through the 2016 Reg. Sess. of the Gen. Assemb.); MASS. GEN. LAWS ANN. ch. 203E (West, Westlaw through ch. 69 of the 2016 2d Ann. Sess.); MICH. COMP. LAWS ANN. §§ 700.7101–7913 (West, Westlaw through P.A. 2016, No. 60 of the 2016 Reg. Sess., 98th Leg.); MINN. STAT. §§ 501C.0101–.1304 (Supp. 2015); MISS. CODE ANN. §§ 91-8-101 to -1206 (West, Westlaw through the end of the 2016 First Extraordinary Sess.); MO. ANN. STAT. §§ 456.1-101 to -1106 (West, Westlaw through emergency legislation approved through Feb. 18, 2016, of the 2016 Second Reg. Sess. of the 98th Gen. Assemb.); MONT. CODE ANN. §§ 72-38-101 to -1111 (West, Westlaw through the 2015 Sess.); NEB. REV. STAT. ANN. §§ 30-3801 to -38,110 (West, Westlaw through Mar. 10, 2016, of the 2d Reg. Sess. of the 104th Leg.); N.H. REV. STAT. ANN. §§ 564B:1-101 to -B:12-1206 (West, Westlaw through ch. 10 of the 2016 Reg. Sess.); N.J. STAT. ANN. § 3b (West, Westlaw through 2016); N.M. STAT. ANN. ch. 46A (West, Westlaw through the end of the 2d Reg. Sess. of the 52d Leg.); N.C. GEN. STAT. ANN. ch. 36C (West, Westlaw through the end of the 2015 Reg. Sess. of the Gen. Assemb.); N.D. CENT. CODE ANN. §§ 59-09-01 to 59-21-08 (West, Westlaw through ch. 484 of the 2015 Reg. Sess. of the 64th Leg. Assemb.); OHIO REV. CODE ANN. §§ 5801.01–5811.03 (West, Westlaw through files 1–52 of the 131st Gen. Assemb.); OR. REV. STAT. ANN. §§ 130.001–.910 (West, Westlaw through ch. 67 of the 2016 Reg. Sess.); 20 PA. STAT. AND CONS. STAT. ANN. §§ 7701–7799.3

The Trust Code became effective January 1, 2016, and marks a vast improvement on the existing statutes governing trusts. The Trust Code provides more guidance in the default rules that apply to trusts when the trust instrument is silent, more flexibility to modify or terminate a trust to align with the settlor's intent or deal with a change in circumstance, and more explicit directions on judicial proceedings and nonjudicial settlements.

Part II of this article provides an overview of the Trust Code. It outlines major provisions in each article of the Trust Code and notes modifications or changes to the UTC language. Part III of this article more fully discusses important concepts in the Trust Code. Part III also provides information about charitable trusts provisions that remained in Minnesota Statutes chapter 501B and about decanting under Minnesota Statutes section 502.851. Part IV of this article offers concluding remarks.

II. OVERVIEW OF THE TRUST CODE

A. *General Provisions*

Minnesota Statutes sections 501C.0101 through 501C.0112 contain general provisions and definitions that apply to all trusts governed by the Trust Code. The Trust Code applies to all express trusts, whether charitable or noncharitable, and any similar trusts created by statute, judgment, or decree.³ Minnesota limits the scope of application found in the UTC by including instances when the Trust Code does not apply.⁴ For example, the Trust Code does

(West, Westlaw through 2016 Reg. Sess. Act 4); S.C. CODE ANN. §§ 62-7-101 to -1106 (West, Westlaw through 2016 Act No. 147.); TENN. CODE ANN. §§ 35-15-101 to -1206 (West, Westlaw through 2016 Second Reg. Sess.); UTAH CODE ANN. §§ 75-7-101 to -1201 (West, Westlaw through 2015 First Spec. Sess.); VT. STAT. ANN. tit. 14A (West, Westlaw through Law No. 67 of the Adjourned Sess. of the 2015–2016 Vt. Gen. Assemb.); VA. CODE ANN. §§ 64.2-700 to -808 (West, Westlaw through the end of 2015 Reg. Sess.); W. VA. CODE ANN. ch. 44D (West, Westlaw through the 2016 Reg. Sess., S.B. 15); WIS. STAT. ANN. ch. 701 (West, Westlaw through 2015 Act 228, except for 2015 Acts 152–153, 161, 163, 170, 172, 176, 180–193, & 195–227); WYO. STAT. ANN. §§ 4-10-101 to -1103 (West, Westlaw through the 2015 Gen. Sess.).

3. MINN. STAT. § 501C.0102(a) (Supp. 2015) (effective Jan. 1, 2016).

4. Compare *id.* § 501C.0102(b)–(c), with UNIF. TRUST CODE § 102 (UNIF. LAW COMM'N 2000) (limiting the scope of the Trust Code to exclude mortgage trusts, etc., but adopting language from the UTC making “express trusts, charitable or noncharitable, and trusts created pursuant to a statute, judgment, or decree that

not apply to mortgage trusts or voting trusts, and only in limited instances covers trusts established in connection with bonds and corporate trusts.⁵

The Trust Code governs trusts whose settlors named Minnesota as the governing law in the trust instrument or, if the trust instrument is silent, when Minnesota has the most significant relationship to the matter at issue.⁶ A settlor of a trust has the ability to alter any default provision found in the Trust Code, except mandatory rules.⁷ A settlor cannot alter the requirements for creating a trust or create a trust with an unlawful purpose.⁸ A settlor also cannot alter the statute of limitations, jurisdictional, or venue decisions or restrict the court's ability to modify or terminate a trust.⁹ A trustee must act in good faith and administer the trust according to the trust instrument and cannot be exculpated in certain circumstances where the trustee acts in bad faith.¹⁰

The Trust Code allows interested parties to reach nonjudicial settlement agreements “with respect to any matter involving a trust” as long as the agreement does not violate “a material purpose of the trust.”¹¹ Prior Minnesota law only allowed nonjudicial settlements to resolve the approval of an accounting, the resignation of a trustee, the determination of the trustee's compensation, the transfer of the trust's situs, and the termination of a noncharitable trust when the trust's fair market value was less than \$50,000.¹² The expanded provision in the Trust Code reduces trust administration costs because noncontested issues can be settled outside of court.

Finally, the general provisions contain definitions, including the key concepts of “knowledge” and “qualified beneficiaries.”¹³ These key concepts are discussed in Part III of this article.

requires the trust to be administered in the manner of an express trust” subject to the Trust Code).

5. MINN. STAT. § 501C.0102(b)–(c).

6. *Id.* § 501C.0107.

7. *See id.* § 501C.0105. Minnesota did not adopt Uniform Trust Code section 105(b)(8) and (9) as mandatory rules. *See* UNIF. TRUST CODE § 105.

8. MINN. STAT. § 501C.0105.

9. *Id.*

10. *Id.*

11. *Id.* § 501C.0111(b)–(c).

12. MINN. STAT. § 501B.154 (2014) (repealed 2015).

13. *See* MINN. STAT. § 501C.104 (knowledge); *id.* § 501C.103(m) (qualified beneficiary).

B. *Judicial Proceedings*

Minnesota Statutes sections 501C.201 through 501C.0208 deal with judicial proceedings in trust matters. These sections greatly expand on the former law and make it easier for practitioners to understand what is required of them when bringing a lawsuit on behalf of an “interested person.”¹⁴

Any “interested person” can petition the court for an order relating to the subject matters outlined in section 501C.0202 of the Trust Code.¹⁵ The Trust Code allows the petitioning party to specify in its petition whether a proceeding will be an in rem proceeding or an in personam proceeding.¹⁶ If the petitioner fails to specify the type of jurisdiction it is invoking, in rem jurisdiction is presumed.¹⁷ In rem jurisdiction provides for continuing jurisdiction, while in personam jurisdiction does not.¹⁸ Different notice and appellate requirements apply based on the type of proceeding.¹⁹

Under prior Minnesota law, all proceedings involving a trust were in rem proceedings.²⁰ Under the UTC, the basis of jurisdiction is in personam jurisdiction.²¹ Since the Trust Code now provides for either basis of jurisdiction, this article of the Trust Code differs substantially from the UTC in order to facilitate the dual track for court jurisdiction.²²

C. *Representation*

Minnesota Statutes sections 501C.0301 through 501C.0305 outline who can represent and bind other parties. Notice given to a valid representative has the same effect as if notice were given directly to the person entitled to receive the notice.²³ A representative may bind a represented person, unless the

14. Compare, e.g., *id.* §§ 501C.0201–.0208 (Supp. 2015), with MINN. STAT. §§ 501B.16–.25 (2014) (repealed 2015).

15. MINN. STAT. § 501C.0201 (Supp. 2015); see also *id.* § 501C.0201(b) (providing a definition of an interested person).

16. *Id.* § 501C.0201(c).

17. *Id.* § 501C.0201(c)(1).

18. *Id.* § 501C.0201(c)(2)–(3).

19. *Id.* §§ 501C.0203–.0204.

20. MINN. STAT. § 501B.24 (2014) (repealed 2015).

21. UNIF. TRUST CODE § 201 (UNIF. LAW COMM’N 2000).

22. Compare MINN. STAT. §§ 501C.0201–.0208 (Supp. 2015), with UNIF. TRUST CODE §§ 201–04.

23. *Id.* § 501C.0301(a).

represented person affirmatively objects before the representative's consent would otherwise have been effective.²⁴ A person designated in a trust instrument to receive information from a trustee is the representative of all trust beneficiaries with respect to the statute of limitations period outlined in section 501C.1005 of the Trust Code.²⁵

A general power holder, or any party who could terminate the interests of another party, represents the party whose interests could be terminated.²⁶ Court-appointed representatives, such as a personal representative or a conservator, are representatives for those to whom they serve in a fiduciary capacity but only to the extent that there is no conflict.²⁷ An attorney-in-fact represents the principal.²⁸ If a minor is otherwise unrepresented, his or her parents can represent the minor.²⁹ When parents disagree about the representation of a minor beneficiary, the Trust Code gives priority to the parent-beneficiary who is a lineal descendant of the settlor.³⁰ In the absence of any other legal representative, a person having a substantially identical interest to the unrepresented person can represent the unrepresented person's interest, as long as no conflict of interest exists.³¹ The court can also act on behalf of an unrepresented person in an *in rem* proceeding or appoint a representative for an unrepresented person in any other matter.³²

D. Creation, Validity, Modification, and Termination of Trust

A settlor can create a trust for any lawful purpose if the settlor has capacity, intends to create a trust, specifies duties for the

24. *Id.* § 501C.0301(b).

25. *Id.* § 501C.0301(e).

26. *Id.* § 501C.0302. *But see id.* § 501C.0301(d) (limiting a settlor from representing and binding beneficiaries of an irrevocable trust with respect to a termination or modification of said trust under § 501C.0411(a)).

27. *Id.* § 501C.0303.

28. *Id.* § 501C.0303(a)(2). *But see id.* §§ 501C.0411(a), .0602(e) (limiting an attorney-in-fact from representing a principal unless the power of attorney document expressly authorizes the attorney-in-fact to act on the settlor's behalf with respect to irrevocable trust terminations or modifications and revocations, amendments, or distributions of trust property from a revocable trust).

29. *Id.* § 501C.0303(a)(5).

30. *Id.* § 501C.0303(b)(2).

31. *Id.* § 501C.0304.

32. *Id.* § 501C.0305(a).

trustee to perform, and names a definite beneficiary.³³ There are two exceptions to the requirement that the trust have a definite beneficiary. First, a power granted to a trustee to select beneficiaries from an indefinite class does not defeat the trust, as long as the power is exercised within a reasonable time.³⁴ Second, a noncharitable trust without an ascertainable beneficiary, but an otherwise valid purpose, may be enforceable for up to twenty-one years.³⁵ The Trust Code did not adopt UTC section 408, which allows a settlor to create a trust for his or her pet. The Minnesota State Bar Association Animal Law Section is championing efforts for the enactment of a similar provision.³⁶ Except in limited situations, oral trusts whose terms are established by clear and convincing evidence are enforceable.³⁷

The previous Minnesota trust statutes provided no guidance on when a court could terminate or modify a noncharitable trust. The Trust Code remedies this deficiency by specifying when a court can modify or terminate a noncharitable trust. A noncharitable irrevocable trust can be modified or terminated with the consent of the settlor and all beneficiaries, even if it is inconsistent with a material purpose of the trust.³⁸ A noncharitable irrevocable trust can be modified or terminated with the consent of all the beneficiaries if a court concludes that this is not inconsistent with a material purpose of the trust.³⁹ Even if one or more beneficiaries object, the court may still modify or terminate the trust if the nonconsenting beneficiaries' interests can be adequately protected.⁴⁰ A spendthrift provision may be considered by the court when deciding whether to modify or terminate a trust but does not, by itself, prevent the court from modifying or terminating the trust.⁴¹

One goal of the Trust Code is to act in accordance with the settlor's wishes and this goal is considered by the court when

33. *Id.* §§ 501C.0402–.0403.

34. *Id.* § 501C.0402(c).

35. *Id.* § 501C.0409(1).

36. *See* S.F. 1196, 89 Leg., Reg. Sess. (Minn. 2015); *see also* William J. Berens et al., *An Overview of Minnesota's New Trust Law*, in 2 41ST ANNUAL PROBATE AND TRUST SECTION CONFERENCE 15–16 (2015).

37. MINN. STAT. § 501C.0407.

38. *Id.* § 501C.0411(a).

39. *Id.* § 501C.0411(b).

40. *Id.* § 501C.0411(e).

41. *Id.* § 501C.0411(c).

making modifications to, or terminations of, trusts. The court can modify or terminate a trust to deal with unanticipated circumstances, if it determines that modification or termination will further the settlor's probable intent.⁴² The court can reform a trust to correct a mistake if the settlor's probable intention is proved by clear and convincing evidence.⁴³ It can also modify a trust, including retroactive modification, to achieve the settlor's tax objectives.⁴⁴

Another goal of the Trust Code is to prevent waste and inefficiencies. The trustee can unilaterally terminate a trust, after notice to the qualified beneficiaries, if the total value of the trust is less than \$50,000 and the trustee concludes that the value of the trust property is insufficient to justify continuing administration.⁴⁵ The trustee can also combine or separate trusts, after notice to the qualified beneficiaries, if the result does not impair the beneficiaries' rights or hinder the trust's purposes.⁴⁶ The court can terminate a trust or remove and appoint a successor trustee if the costs of trust administration are excessive relative to the value of the trust property.⁴⁷

E. Spendthrift Trusts; Creditor's Claims and Discretionary Trusts

Spendthrift provisions restrict voluntary and involuntary transfers.⁴⁸ The Trust Code deals with spendthrift provisions and creditor's rights in Minnesota Statutes sections 501C.0502 through .0507. Minnesota has strong protections for beneficiaries relative to other states because the Trust Code did not adopt UTC section 503. UTC section 503 allows some creditor claims, such as child or spousal support or federal and state creditors, to defeat the protections of spendthrift provisions. Under the Trust Code, creditors cannot compel a distribution from the trust to a beneficiary unless the trust provides for mandatory distributions

42. *Id.* § 501C.0412(a).

43. *Id.* § 501C.0415.

44. *Id.* § 501C.0416.

45. *See id.* § 501C.0414(a); *cf.* MINN. STAT. § 501B.154 (2014) (repealed 2015) (explaining how termination is allowed in this instance only by nonjudicial settlement agreement).

46. MINN. STAT. § 501C.0417 (Supp. 2015).

47. *Id.* § 501C.0414(b).

48. *Id.* § 501C.0502. A spendthrift provision is only valid if it encompasses voluntary and involuntary transfers. *See id.* § 501C.0502(a)(1).

and the trustee fails to make the distribution within a reasonable time after the designated distribution date⁴⁹ or when the beneficiary is also the trustee and the terms of the trust grant the trustee-beneficiary the power to make discretionary distributions that are not limited by an ascertainable standard.⁵⁰

Property in a settlor's revocable trust is subject to claims by the settlor's creditors during the settlor's lifetime.⁵¹ Property in a settlor's revocable trust is also subject to creditor claims at the settlor's death, if the probate estate is insufficient to satisfy all claims.⁵² Prior Minnesota law was silent on whether creditors were able to collect against assets in a settlor's revocable trust after the settlor's death.⁵³ With revocable trusts being used as a common will substitute, the inclusion of a provision resolving this issue was a necessary part of the Trust Code. The selected provision ensures that decedents who failed to plan their estate are not unfairly penalized relative to decedents who created trusts; it also ensures that creditors receive payment for the goods or services that they provided to the decedent.⁵⁴

Property in an irrevocable trust is subject to claims by the settlor's creditors only to the extent that distributions can be made to or for the settlor's benefits.⁵⁵ The Trust Code does not adopt UTC section 505(b), which allows creditors to reach property subject to withdrawal by a person holding a general power of appointment. The exclusion of UTC section 505(b) provides yet another beneficiary-favorable provision relative to creditor rights.

F. Revocable Trust

To create a revocable trust, a settlor must have the same capacity required to make a will.⁵⁶ Unless the trust specifies

49. *Id.* § 501C.0506.

50. *Id.* § 501C.0504.

51. *Id.* § 501C.0505(1).

52. *Id.* § 501C.0505(3). The Minnesota Uniform Probate Code (MINN. STAT. ch. 524 (2014 & Supp. 2015)) and the old Minnesota trust statutes (MINN. STAT. ch. 501B (2014) (repealed 2015)) provide no guidance on whether property of a settlor's revocable trust is subject to claims of the settlor's creditors at death.

53. *See generally* MINN. STAT. ch. 501B (repealed 2015).

54. *See id.* § 501C.0505.

55. *Id.* § 501C.0505(2).

56. *Id.* § 501C.0601; *see also In re Estate of Forsythe*, 221 Minn. 303, 306, 22 N.W.2d 19, 22 (1946) ("The law is well settled that mental capacity of a testatrix

otherwise, it is presumed to be irrevocable under the Trust Code, which differs from the UTC's default of revocability but codifies prior Minnesota case law based on the Restatement (Second) of Trusts.⁵⁷ In situations where a revocable trust has more than one settlor and consists of community property, it can be revoked by either spouse but can only be amended by joint action.⁵⁸ Where the trust consists of separate property, each settlor may revoke or amend the trust without the consent of the other settlor relative to the separate property the settlor has contributed.⁵⁹ A person wishing to contest the validity of a revocable trust must do so:

[W]ithin the earlier of three years after the settlor's death; or 120 days after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding.⁶⁰

If the trust is found to be invalid, the beneficiary is liable to return any distribution, to the extent the validity applies to that distribution.⁶¹ The trustee is not liable for making the distribution unless he knows of a pending judicial proceeding contesting the validity or he has received notice of a possible judicial proceeding to contest validity, set to commence within sixty days after notification.⁶²

sufficient to make a valid will requires that at the time of making the will she 'must understand the nature, situation and extent of her property and the claims of others upon her bounty, or her remembrance, and she must be able to hold these things in her mind long enough to form a rational judgment concerning them.'" (quoting *In re Estate of Jernberg*, 153 Minn. 458, 460, 190 N.W. 990, 991 (1922)).

57. Compare MINN. STAT. § 501C.0602(a) (Supp. 2015), with UNIF. TRUST CODE § 602(a) (UNIF. LAW COMM'N 2000), and *Dorcy v. First Trust Co. (In re Trust of Schroll)*, 297 N.W.2d 282, 284 (Minn. 1980) (citing RESTATEMENT (SECOND) OF TRUSTS §§ 330–33 (AM. LAW INST. 1959)).

58. MINN. STAT. § 501C.0602(b)(1).

59. *Id.* § 501C.0602(b)(1).

60. *Id.* § 501C.0605(a).

61. See *id.* § 501C.0605(c). While the statute does not explicitly address what happens if the beneficiary no longer has the asset(s) distributed, it is likely that the law of restitution would apply, based on the comments to section 604 of the UTC. Therefore, the beneficiary would still remain liable to return value equal to the improperly distributed amounts, even if the beneficiary no longer possesses the actual property distributed from the trust. See UNIF. TRUST CODE § 604.

62. MINN. STAT. § 501C.0605(b).

G. *Office as Trustee*

Minnesota Statutes sections 501C.0705 through 501C.0709 deal with the office of trustee, including vacancies, resignations, removals, and compensation of trustees.⁶³ A trustee may accept a trusteeship by complying with the acceptance terms in the trust instrument or by taking actions consistent with acceptance of the trusteeship.⁶⁴ When a vacancy in trusteeship occurs and at least one trustee remains in office, the vacancy need not be filled.⁶⁵ If a vacancy is required to be filled, section 501C.0704(c) provides the order of priority.⁶⁶ Co-trustees must act by majority decision, unless otherwise specified in the trust instrument or in the case of an emergency.⁶⁷

A trustee may resign upon notice to the qualified beneficiaries, settlor (if living), and co-trustees, or with court approval.⁶⁸ The removal provisions of the Trust Code track the removal provisions in the former Minnesota statute.⁶⁹ A trustee is entitled to reasonable compensation if the trust instrument does not specify the trustee's compensation and is also entitled to reimbursement for expenses of trust administration.⁷⁰

H. *Duties and Powers of Trustee*

Minnesota Statutes sections 501C.0801 through 501C.0817 define the trustee's duties and powers. A trustee's duties include the duty to administer the trust in good faith, the duty of loyalty, the duty of impartiality, the duty of prudent administration, and

63. *Id.* §§ 501C.0705–.0709.

64. *Id.* § 501C.0701(a)(1)–(2).

65. *Id.* § 501C.0704(b).

66. Minnesota Statutes section 501C.0704(c) provides the following order of priority for a noncharitable trust: (1) a person designated in the terms of the trust, (2) a person appointed by unanimous agreement of the qualified beneficiaries, (3) a person appointed pursuant to a nonjudicial settlement agreement, and (4) a person appointed by the court. *See id.* § 501C.0704(c).

67. *Id.* § 501C.0703. Under prior Minnesota common law, trustees were required to act by unanimous consent. *See* MINN. CONTINUING LEGAL EDUC., MINNESOTA TRUST ADMINISTRATION DESKBOOK 8–7 (Sheryl G. Morrison & Robert W. Mairs eds., 3d ed. 2014).

68. MINN. STAT. § 501C.0705.

69. *Compare id.* § 501C.0706, with MINN. STAT. § 501B.16(9) (2014) (repealed 2015).

70. MINN. STAT. §§ 501C.0708–.0709 (Supp. 2015).

the duty to keep adequate records and make reports to the beneficiaries of the trust.⁷¹

The duty to administer the trust in good faith requires the trustee to abide by the terms and purposes of the trust and in the interest of the beneficiaries.⁷² This duty is mandatory and cannot be altered by the terms of the trust.⁷³

The duty of loyalty means that the trustee cannot place his or her interest above the beneficiaries' interests.⁷⁴ A beneficiary can void a transaction resulting from the trustee's breach of the duty of loyalty unless the terms of the trust, the court, or the beneficiaries authorize the transaction.⁷⁵ Certain transactions entered into by the trustee are presumed to be effected by a conflict, such as transactions between the trustee and his or her close relatives or a controlled corporation.⁷⁶

The duty of impartiality requires the trustee to administer the trust in a manner that gives "due regard" to all beneficiaries' interests.⁷⁷ The duty of prudent administration requires the trustee to administer the trust as a prudent person would, with "reasonable care, skill, and caution."⁷⁸ Minnesota did not adopt UTC section 806, which would require a trustee with special skills or expertise to administer the trust with a heightened level of care and skill.⁷⁹

The trustee has a duty to maintain adequate records for the trust.⁸⁰ The Trust Code has a more limited reporting requirement than the UTC.⁸¹ Under the Trust Code, a trustee must keep beneficiaries of an irrevocable trust informed about the

71. *Id.* § 501C.0801 (Duty of Good Faith); *id.* § 501C.0802 (Duty of Loyalty); *id.* § 501C.0803 (Duty of Impartiality); *id.* § 501C.0804 (Duty of Prudent Administration); *id.* § 501C.0810 (Adequate Records); *id.* § 501C.0813 (Duty to Inform and Report).

72. *Id.* § 501C.0801.

73. *See id.* § 501C.0105(b)(2).

74. *Id.* § 501C.0802(a).

75. *Id.* § 501C.0802(b).

76. *Id.* § 501C.0802(c).

77. *Id.* § 501C.0803.

78. *Id.* § 501C.0804.

79. *Compare id.* §§ 501C.0801–.0817, *with* UNIF. TRUST CODE § 806 (UNIF. LAW COMM'N 2000) (demonstrating that Minnesota's Trust Code does not require a heightened level of care in administration from a trustee with special skills or expertise).

80. MINN. STAT. § 501C.0810(a).

81. *Compare* UNIF. TRUST CODE § 813, *with* MINN. STAT. § 501C.0813.

administration of the trust and disclose material facts.⁸² A settlor can limit this duty by explicitly stating that this provision does not apply and by naming an alternative person—who may be the settlor—to receive reports in lieu of the qualified beneficiaries.⁸³ This limitation may be important when the settlor wishes to limit or prevent dissemination of information to one or more qualified beneficiaries or would like to keep a trust a “secret” from some or all of the beneficiaries.

Similar to the prior Minnesota statutes, the Trust Code outlines specific powers granted to a trustee.⁸⁴ However, the powers granted under the Trust Code apply to trustees automatically, whereas the powers outlined in section 501B.81 had to be incorporated into the trust instrument by reference.⁸⁵ If a settlor wishes to limit the powers granted to the trustee under the Trust Code, he or she must include a limiting provision in the trust instrument.⁸⁶

The Trust Code requires the trustee to exercise discretionary powers in good faith, even if the trust terms contain words such as “absolute” or “sole.”⁸⁷ The Trust Code continues to include a tax savings clause that prevents trust assets from being included in a trustee-beneficiary’s gross estate for estate tax purposes and from being treated as a taxable gift if that trustee-beneficiary releases or exercises a power.⁸⁸ The tax savings clause does not apply to all trusts, including revocable trusts, trusts commonly referred to as “QTIP marital trusts,” and certain trusts created on or before May 14, 1993.⁸⁹

The provision that has advisors most excited about the Trust Code is the section allowing a settlor to create a directed trust. Directed trusts bifurcate a trustee’s duties and spread the duties

82. MINN. STAT. § 501C.0813(a).

83. *Id.* § 501C.0813(b).

84. *Id.* § 501C.0816.

85. MINN. STAT. § 501B.80 (2014) (repealed 2015).

86. MINN. STAT. § 501C.0815 (Supp. 2015).

87. *Id.* § 501C.0814(a).

88. *Id.* § 501C.0814(b)–(d).

89. *Id.* § 501C.0814(d). The tax savings clause does not apply to these types of trusts because it is likely that they will already be included in the trustee-beneficiary’s estate under another section of the Internal Revenue Code. *See* I.R.C. §§ 2036, 2038 (2012) (revocable trusts); *id.* § 2056 (marital trusts); *see also* MINN. STAT. § 501B.14 (2014) (repealed 2015) (providing similar provision under the prior Minnesota trust statutes).

amongst different people, rather than granting a trustee all powers authorized by the statutes.⁹⁰ Directed trusts are discussed in greater depth in Section III.B of this article.

I. Prudent Investors Act

Minnesota retained the language in the Minnesota Prudent Investors Act but renumbered it to align with the parallel UTC numbering.⁹¹

J. Liability of Trustees and Rights of Persons Dealing with Trustees

Minnesota Statutes sections 501C.1001 through 501C.1014 outline the liability of trustees and the rights of people dealing with trustees. Any violation of a duty “the trustee owes to a beneficiary is a breach of trust.”⁹² A beneficiary can consent to, release, or ratify a trustee’s course of conduct, and that consent releases a trustee from liability, absent improper conduct by the trustee or the trustee’s nondisclosure of a material fact.⁹³ A trustee acting within the terms of the trust has no personal liability for contractual claims arising against the trust if the trustee discloses its fiduciary capacity and if the contractual terms do not provide otherwise.⁹⁴ Likewise, a trustee is not personally liable in tort unless the trustee is personally at fault.⁹⁵

The court has a number of remedies it can grant to an injured party when a trustee breaches its fiduciary duty, including, but not limited to, removing or suspending the trustee, ordering the trustee to account, compelling the trustee to perform its duties, or ordering the trustee to provide restitution.⁹⁶ The court also has the discretion to award any party to a judicial proceeding involving trust administration costs and expenses related to the proceeding.⁹⁷

The Trust Code provides additional protections to trustees by shortening the statute of limitations for bringing an action against

90. MINN. STAT. §§ 501C.0807–.0808 (Supp. 2015).

91. Compare *id.* § 501C.0901, with MINN. STAT. § 501B.151 (2014) (repealed 2015), and UNIF. TRUST CODE art. 9 cmt. (UNIF. LAW COMM’N 2000).

92. MINN. STAT. § 501C.1001(a) (Supp. 2015).

93. *Id.* § 501C.1009.

94. *Id.* § 501C.1010(a).

95. *Id.* § 501C.1010(b).

96. *Id.* § 501C.1001(b).

97. *Id.* § 501C.1004.

a trustee.⁹⁸ Under prior case law, the general rule was that a six-year statute of limitations applied except in cases involving fraud or continued negligence.⁹⁹ If fraud was involved, the six-year statute of limitations applied from the date “the facts constituting fraud were discovered or, by reasonable diligence, should have been discovered.”¹⁰⁰ Under the Trust Code, a beneficiary has three years from the date the beneficiary (or its representative) was sent a report adequately disclosing the existence of a potential claim to commence a judicial proceeding against a trustee.¹⁰¹ Absent a disclosure, a beneficiary must act within six years of the removal, resignation, or death of the trustee; the termination of the beneficiary’s interest in the trust; or the termination of the trust, whichever occurs first.¹⁰²

Exculpatory provisions in a trust instrument that limit a trustee’s liability are allowed but are unenforceable if the trustee acts in bad faith or with reckless indifference to the terms of the trust or interests of the beneficiaries.¹⁰³ Exculpatory provisions are also unenforceable when their inclusion in the trust instrument is a result of an abuse of the trustee’s fiduciary or confidential relationship with the settlor, except when independent counsel represents the settlor or the trustee can prove the provision is fair and that its inclusion was disclosed to the settlor.¹⁰⁴

The Trust Code provides protections to third parties dealing with a trustee.¹⁰⁵ A third party who assists or provides value to a trustee is protected from liability, unless the third party had knowledge that the trustee exceeded or improperly exercised its powers.¹⁰⁶ A third party is under no obligation to inquire into the extent of a trustee’s powers.¹⁰⁷

98. *Id.* § 501C.1005.

99. *See* *Toombs v. Daniels*, 361 N.W.2d 801, 809 (Minn. 1985).

100. *Id.*

101. MINN. STAT. § 501C.1005.

102. MINN. STAT. § 501C.1005(c); *see also Toombs*, 361 N.W.2d at 809–10.

103. *See id.* § 501C.1008(a) (1).

104. *See id.* § 501C.1008(b) (1)–(2).

105. *See id.* § 501C.1012.

106. *Id.* § 501C.1012(a).

107. *Id.* § 501C.1012(b).

K. Uniform Principal and Income Act

Minnesota retained the language in the Uniform Principal and Income Act, and included it in the Trust Code.¹⁰⁸

L. Miscellaneous

Minnesota Statutes sections 501C.1201 through 501C.1208 act as a “catch-all” for items that are not found in any section of the UTC. All provisions have equivalent provisions in the prior Minnesota Statutes.¹⁰⁹ These sections include provisions for memorial funds and supplemental and special needs trusts.¹¹⁰

M. Application and Construction of the Trust Code

Sections 501C.1301 through 501C.1304 of Minnesota Statutes consist of other miscellaneous provisions, including the application of the Trust Code to existing trusts. The Trust Code is retroactive and applies to all trusts created before, on, or after January 1, 2016.¹¹¹ However, there are two situations where the Trust Code is not retroactively applied. First, if judicial proceedings were commenced before January 1, 2016, and the “application of a . . . provision [of the Trust Code]. . . would substantially interfere with the effective conduct of the judicial proceedings or unfairly prejudice the rights of the parties,” then the court must apply the prior Minnesota trust statutes.¹¹² Second, if there is “a clear indication of a contrary intent in the terms of the trust,” the terms of the trust instrument will control to the extent they differ from

108. Compare *id.* § 501C.1101, with MINN. STAT. § 501B.59 (2014) (repealed 2015).

109. See, e.g., MINN. STAT. § 501C.1201 (Supp. 2015) (corresponding to MINN. STAT. § 501B.012 (2014) (repealed 2015)); *id.* § 501C.1202 (corresponding to MINN. STAT. § 501B.09 (2014) (repealed 2015)); *id.* § 501C.1203 (corresponding to MINN. STAT. § 501B.87 (2014) (repealed 2015)); *id.* § 501C.1204 (corresponding to MINN. STAT. § 501B.88 (2014) (repealed 2015)); *id.* § 501C.1205 (corresponding to MINN. STAT. § 501B.89 (2014) (repealed 2015)); *id.* § 501C.1206 (corresponding to MINN. STAT. § 501B.895 (2014) (repealed 2015)); *id.* § 501C.1207 (corresponding to MINN. STAT. § 501B.90 (2014) (repealed 2015)); *id.* § 501C.1208 (corresponding to MINN. STAT. § 501B.12 (2014) (repealed 2015)).

110. *Id.* §§ 501C.1201, 501C.1205, 501C.1206.

111. *Id.* § 501C.1304(a)(1).

112. *Id.* § 501C.1304(a)(2)–(3).

any rule of construction or presumption found in the Trust Code.¹¹³

III. KEY CONCEPTS AND NOTEWORTHY ITEMS

A. *Key Concepts*

1. *Knowledge*

Knowledge is an important concept in the Trust Code because numerous provisions base results on the “knowledge” that a person had when taking action. Knowledge affects notice requirements,¹¹⁴ representation of unknown parties,¹¹⁵ liability protection for improper distributions,¹¹⁶ rejection of trusteeship,¹¹⁷ duties of the trustee,¹¹⁸ the statute of limitations period,¹¹⁹ and liability of third parties dealing with the trustee.¹²⁰

A person has knowledge of a fact if the person has actual knowledge of it, has received notification of it, or has reason to know of it based on all facts and circumstances, or if a title examination could disclose the fact (for real property conveyances).¹²¹ An organization has knowledge of a fact “only from the time the information was received by an employee having responsibility to act for the trust” or from the time that the fact “would have been brought to the employee’s attention if the organization had exercised reasonable diligence.”¹²² Reasonable diligence requires the organization to have “reasonable policies” in place for communication of facts and “reasonable compliance” with those policies.¹²³ Therefore, it is imperative for trust companies and other professional fiduciaries to ensure that their communication policies are updated and enforced.

113. MINN. STAT. § 501C.1304(4).

114. *Id.* §§ 501C.0109, .0203.

115. *Id.* §§ 501C.0304–.0305(a).

116. *Id.* §§ 501C.0602(g), 501C.0605(b)(1), 501C.1007, 501C.1009(b).

117. *Id.* § 501C.0701(b).

118. *Id.* § 501C.0801.

119. *Id.* § 501C.1005.

120. *Id.* § 501C.1012(a), (d).

121. *Id.* § 501C.0104.

122. *Id.* § 501C.0104(b).

123. *Id.*

2. *Qualified Beneficiary*

A qualified beneficiary is one who, on the applicable date, is an actual or permissible distributee of trust assets; a person who would be an actual or permissible distributee of trust assets if the distributees with a current interest terminated; or a person who would be an actual or permissible distributee of trust income or principal if the trust terminated on that date.¹²⁴ Additionally, any other beneficiary who has requested notice (including the attorney general in the case of a Minnesota charitable trust) is treated as a qualified beneficiary.¹²⁵ The Trust Code does not require the beneficiary's request for notice to take any particular form, so any writing received by the trustee that could reasonably be construed as requesting notice will likely suffice.

A qualified beneficiary is a subset of the more general term "beneficiary." A beneficiary is defined as any person with "a present or future beneficial interest in a trust, vested or contingent." For example, if a trust instrument granted a life estate to a surviving spouse, a vested remainder interest to the settlor's descendants, and a contingent remainder interest to a charity in the event that all of the settlor's descendants predeceased the surviving spouse, the charity would be a "beneficiary" but not a "qualified beneficiary." A beneficiary also includes any person holding a power of appointment in a non-fiduciary capacity, though as a practical matter, usually a power of appointment is held by a person who is also a qualified beneficiary.

Being a qualified beneficiary gives the beneficiary two rights: (1) the right to notice and information, and (2) the right to give or withhold consent for certain events.¹²⁶ The right to notice means that a qualified beneficiary has the right to receive notice of judicial proceedings,¹²⁷ notice of the termination of a trust whose value is less than \$50,000,¹²⁸ notice of the combination or division of trusts,¹²⁹ notice of a trustee's resignation,¹³⁰ and notice of a proposed trust decanting.¹³¹ Qualified beneficiaries are also entitled

124. *Id.* § 501C.0103(m).

125. *Id.* § 501C.0110.

126. *See infra* notes 127–35 and accompanying text.

127. *Id.* § 501C.0203.

128. *Id.* § 501C.0414(a).

129. *Id.* § 501C.0417.

130. *Id.* § 501C.0705.

131. MINN. STAT. § 502.851, subdiv. 11 (Supp. 2015) (effective Jan. 1, 2016).

to information about the trust, including all material facts necessary to protect their interests and any other reasonable requests for information related to the administration of an irrevocable trust.¹³²

Qualified beneficiaries have the power to give or withhold consent for certain items. For example, qualified beneficiaries can agree or object to the trustee changing the principal place of trust administration,¹³³ can appoint a successor trustee in the event of a vacancy in the trusteeship where the trust instrument does not designate a successor,¹³⁴ and can request the removal of a trustee.¹³⁵

B. *Directed Trusts*

The Trust Code now explicitly authorizes directed trusts.¹³⁶ Prior to the enactment of the Trust Code, Minnesota statutes had no provision for a directed trust. As noted in Section II.H, directed trusts bifurcate a trustee's duties and allow those not exercising those duties ("excluded fiduciaries") from being liable for following directions from those exercising the duties ("directing parties"). The Minnesota legislature adopted stronger protections for excluded fiduciaries than those provided under the UTC.¹³⁷ Under the UTC, an excluded fiduciary can still be liable for following the directions of the directing party if those directions are "manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust."¹³⁸ Under Minnesota law, an excluded fiduciary is not liable for acting in accordance with the directing party's directions except in cases of willful misconduct.¹³⁹ Under the

132. *Id.* § 501C.0813.

133. *Id.* § 501C.0108(d).

134. *Id.* § 501C.0704(c).

135. *Id.* § 501C.0706(b)(4).

136. *Id.* § 501C.0808.

137. *Compare id.*, with UNIF. TRUST CODE § 808 (UNIF. LAW COMM'N 2000). For a more detailed analysis of various approaches to the liability of excluded fiduciaries, see Richard W. Nenno, *Directed Trusts: Can Directed Trustees Limit Their Liability?*, 18 A.B.A. SEC. REAL PROP. PROB. & TR. L. 1 (2007), http://www.americanbar.org/content/dam/aba/events/real_property_trust_estate/symposia/2007/nenno.authcheckdam.pdf.

138. UNIF. TRUST CODE § 808(b).

139. MINN. STAT. § 501C.0808, subdiv. 6(a).

Trust Code, an excluded fiduciary has no duty to monitor items or review decisions within the purview of the directing party's authority and has no duty to communicate with the beneficiaries in situations where the excluded fiduciary disagrees with the directing party's directions.¹⁴⁰ The strong protections for excluded fiduciaries will make Minnesota a competitive place to situs a trust for those interested in limited liability through the use of a directed trust.

There are three types of directing parties with defined roles in the Trust Code. A distribution trust advisor has the authority to direct, consent to, or veto distribution powers and discretions of the trust.¹⁴¹ An investment trust advisor has the authority to direct, consent to, or veto investment decisions for trust assets.¹⁴² A trust protector has the authority to do a number of things relative to trust administration, including modifying or terminating the trust, removing and appointing trustees, and interpreting and advising other parties on trust interpretation.¹⁴³ A directing party becomes a fiduciary of the trust relative to the powers they are authorized to exercise.¹⁴⁴ The trust instrument can limit the directing party's liability but cannot eliminate the duty of the directing party to act in good faith and in the best interests of the trust.¹⁴⁵

C. Charitable Trusts

Minnesota retained the Supervision of Charitable Trusts and Trustees Act found in Chapter 501B of Minnesota Statutes. The Act continues to govern charitable trusts, and the registration and reporting requirements therein still apply to charitable trusts.

The Trust Code did not adopt two UTC provisions relating to charitable trusts. The first is section 405 of the UTC, which outlines the purposes for which a charitable trust can be created and provides the settlor and other unspecified parties with the power to maintain a proceeding to enforce the trust. The Act does not define particular purposes for which a charitable trust can be

140. *Id.* § 501C.0808, subdiv. 6(b).

141. *Id.* § 501C.0808, subdiv. 1(c); *see also id.* § 501C.0808, subdiv. 3 (listing the powers of the distribution trust advisor).

142. *Id.* § 501C.0808, subdiv. 1(g); *see also id.* § 501C.0808, subdiv. 2 (listing the powers of the investment trust advisor).

143. *Id.* § 501C.0808, subdiv. 1(i); *see also id.* § 501C.0808, subdiv. 4.

144. *Id.* § 501C.0808, subdiv. 5.

145. *Id.*

established.¹⁴⁶ Instead, the Act charges the court with determining the purpose and the charitable recipient where the settlor's expression is imperfectly expressed in the trust instrument.¹⁴⁷ The Act grants the attorney general the right to enforce charitable trusts.¹⁴⁸

The Trust Code also did not formally adopt section 413 of the UTC regarding cy pres in the event a particular charitable purpose becomes unlawful, impractical, impossible to achieve, or wasteful. Under the UTC, the court may modify or terminate the trust in a manner consistent with the settlor's charitable purpose.¹⁴⁹ That said, the Act—retaining part of chapter 501B—does allow a similar modification by the court under Minnesota Statutes section 501B.31, subdivision 2. The Act requires the attorney general to be notified of a trust modification under the doctrine of cy pres and grants the attorney general the right to participate in all court proceedings involving such trust modification.¹⁵⁰

D. *Decanting*

In the same bill where Minnesota adopted the Trust Code, it also adopted the ability for a trustee to decant. The decanting power is found in chapter 502 of Minnesota Statutes.¹⁵¹ Decanting is a type of special power of appointment where an authorized trustee appoints some or all of the trust property in one trust, called an invaded trust, to a new trust, called an appointed trust.¹⁵² The authority of a trustee to change the beneficiaries and terms of the appointed trust depends on whether the trustee has “unlimited discretion.”¹⁵³ Unlimited discretion means that the trustee has an “unlimited power to distribute principal.”¹⁵⁴ This determination is interpreted similar to interpretations under the Internal Revenue Code, so words like “welfare” and “happiness” do not limit the power to distribute principal, but an ascertainable standard (e.g.,

146. *Id.* § 501B.31, subdiv. 2.

147. *Id.*

148. *Id.* § 501B.34.

149. UNIF. TRUST CODE § 413(a) (UNIF. LAW COMM'N 2000).

150. MINN. STAT. § 501B.41, subdiv. 2.

151. *Id.* § 502.851.

152. *Id.*

153. *Id.* § 502.851, subdivs. 3–4.

154. *Id.* § 502.851, subdiv. 1(i).

health, education, support, and maintenance) limits the trustee's discretion.¹⁵⁵

If the authorized trustee has unlimited discretion, it can appoint all or part of the trust principal to an appointed trust for one, more than one, or all the current beneficiaries of the invaded trust, to the exclusion of any of the other current beneficiaries.¹⁵⁶ The remainder beneficiaries of the appointed trust do not need to be the same as the invaded trust, and in fact, the trustee can even exclude all of the remainder beneficiaries of the invaded trust.¹⁵⁷

If the authorized trustee does not have unlimited discretion, it can appoint all or part of the trust principal to an appointed trust, but the beneficiaries of the appointed trust must mirror the beneficiaries of the invaded trust.¹⁵⁸ The distribution language in the appointed trust must remain the same as the invaded trust.¹⁵⁹

When decanting, the trustee has a "fiduciary duty to exercise the power in the best interests of one or more proper objects of the exercise of the power and as a prudent person would exercise the power under the prevailing circumstances."¹⁶⁰ Decanting, at least in some situations, is a major exception to the duty of impartiality required by the Trust Code. In the event that a trustee is decanting to an appointed trust that excludes one or more beneficiaries from the invaded trust, a court order authorizing the transfer should be obtained.¹⁶¹

The trustee must provide all qualified beneficiaries of the invaded trust and all persons having the right to remove or replace the trustee with notice of and information related to the exercise of the trustee's power to decant.¹⁶² Beneficiaries receiving notice have sixty days to object to the proposed transfer of assets to the appointed trust.¹⁶³ If an objection is received, the trustee or any interested party can petition the court to proceed with the proposed transfer.¹⁶⁴ The person objecting has the burden of proof

155. *Id.*

156. *Id.* § 502.851, subdiv. 3(a).

157. *Id.*

158. *Id.* § 502.851, subdiv. 4(a).

159. *Id.* § 502.851, subdiv. 4(b).

160. *Id.* § 502.851, subdiv. 9.

161. *See id.* § 501C.0202(23).

162. *Id.* § 502.851, subdiv. 11.

163. *Id.*

164. *Id.*

to show why the transfer should not proceed.¹⁶⁵ If the trustee does not receive an objection with the sixty-day timeframe, it is not liable to any person who received notice of the decanting for the transfer of assets to the appointed trust.¹⁶⁶

The terms of an appointed trust cannot be altered (i) “to reduce, limit, or modify [a current] beneficiary’s right to . . . income or principal . . . ;” (ii) to “decrease . . . trustee[] liability . . . for failure to exercise reasonable care, diligence, and prudence;” (iii) to modify or eliminate provisions related to trustee removal and replacement; (iv) in a manner that violates the rule against perpetuities; or (v) in a manner that jeopardizes certain tax goals (e.g., marital and charitable deductions).¹⁶⁷

The decanting provisions apply to any trust governed by the laws of Minnesota, unless the trust instrument expressly provides otherwise.¹⁶⁸

V. CONCLUSION

No longer do trust advisors need to piece together a hodgepodge of thin case law on common situations that trustees and beneficiaries encounter. The Trust Code is a comprehensive statutory scheme that defines important terms and codifies common law rules. Even in situations where it does not address a substantive issue, the Trust Code provides judicial and nonjudicial methods to resolve the issue. The Trust Code represents a much needed update to the prior Minnesota trust statutes enacted over twenty years ago. The enactment of the UTC version of the statute facilitates mobility and allows Minnesota practitioners and judges to see how other states apply and interpret similar statutory provisions. Relative to other states that have adopted the UTC, Minnesota’s dual track litigation options, strong creditor protections for beneficiaries, ability to decant, and availability of directed trusts makes it a desirable place for trust administration.

165. *Id.*

166. *Id.*

167. *Id.* § 502.851, subdiv. 15.

168. *Id.* § 502.851, subdiv. 17.