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Oregon Uniform Trust Code (UTC): Getting Started

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Chapter 2

The Oregon Uniform Trust Code[1]

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[1] These materials are an updated version of a chapter in *Administering Oregon Trusts* (OSB Legal Pubs 2018), authored by Professor Gary. She thanks Professor Valerie Vollmar, the coauthor of a prior edition of that chapter, for contributions to the earlier edition and for leadership in the work of the Oregon Uniform Trust Code Study Committee.

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I. INTRODUCTION

A. Trust Law before the Uniform Trust Code

Prior to 2000, trust law in most states was based in the common law. In states like Oregon, case law was limited and failed to answer important questions about trusts. As a result, lawyers, trustees, trust beneficiaries, and others had to resort to secondary authorities such as the Restatement of Trusts and the Bogert and Scott treatises on trust law (*The Law of Trusts and Trustees and Scott on Trusts*).

B. Adoption of the Uniform Trust Code at the National Level

In 2000, the National Conference of Commissioners on Uniform State Laws, now called the Uniform Law Commission (ULC), adopted the Uniform Trust Code (UTC), providing the first national codification of trust law. The Prefatory Note to the uniform act explains that the UTC "will provide States with precise, comprehensive, and easily accessible guidance on trust law questions." Uniform Trust Code, Prefatory Note. The ULC last revised the UTC in 2010.

As of October 2022, 36 jurisdictions have enacted some version of the UTC: Alabama, Arizona, Arkansas, Colorado, Connecticut, District of Columbia, Florida, Hawaii, Illinois, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. Iowa, Texas, and Washington have incorporated many UTC provisions into their trust statutes, but the ULC does not list these states as adopting states because their trust codes do not meet the ULC's standard requiring state statutes to be "substantially similar" to the UTC. New York introduced a UTC bill in 2022.

C. Enactment of the Oregon Uniform Trust Code

1. The Study Process

The Oregon Uniform Trust Code ("Oregon UTC") was developed during a two-year period by the Oregon Uniform Trust Code Study Committee, a 12-member study committee organized by Professor Valerie J. Vollmar in September 2002 and chaired by Professor Vollmar and Professor Susan N. Gary. Committee members represented probate judges, the Oregon Bankers Association, and the Oregon State Bar Estate Planning and Administration, Elder Law, and Taxation sections. In addition, the committee included a representative of the Oregon State Bar with legislative expertise. The study committee consulted with several additional Oregon State Bar sections and with representatives of the Oregon Department of Justice. Subcommittees that reviewed portions of the UTC in depth included many members with relevant experience who were not on the study committee itself.

2. The Drafters' Fundamental Goals

Two fundamental goals guided the study committee in drafting the proposed Oregon UTC: (1) to retain existing Oregon law absent a very good reason to change it, and (2) to promote uniformity among the states by adopting as much of the UTC as seemed desirable. In most instances, the drafters were able to achieve both goals. However, the drafters changed Oregon law in some respects because the drafters concluded that the UTC approach was better than the existing Oregon approach.

3. Enactment in Oregon

The Oregon Legislature enacted SB 275, the Oregon UTC, in 2005. Testimony submitted to the Oregon Legislature in support of SB 275 included comments to the Oregon UTC, which were patterned after the comments to the UTC but modified to reflect the differences between the Oregon UTC and the

UTC. The Willamette Law Review published the full text of the Oregon UTC and comments as a special issue, 42 Willamette L Rev 187 (2006). Chapter 130, the Oregon UTC, has been amended a number of times, and those changes are discussed in these materials.

D. Effective Date and Scope of Application

The provisions of the Oregon UTC, ORS chapter 130, became effective on January 1, 2006. ORS 130.910 describes the Oregon UTC's scope of application (which is subject to exceptions described in 130.505(1) (the presumption that a trust is revocable); 130.710(2)(b) (duty to provide notice of acceptance of a trusteeship); and 130.710(2)(c) (duty to notify qualified beneficiaries that a trust has become irrevocable.

- The Oregon UTC applies to all trusts, whenever created.
- The Oregon UTC does not apply to judicial, administrative, and other proceedings concerning trusts commenced before January 1, 2006.
- Any rule of construction or presumption provided in the Oregon UTC applies to trust instruments executed before January 1, 2006, unless the terms of the trust clearly indicate a contrary intent.
- The Oregon UTC does not affect an act done before January 1, 2006.
- If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before January 1, 2006, that statute continues to apply to the right even if the Oregon UTC has repealed or superseded the statute.

E. Trusts Subject to the Trust Code

The Oregon UTC applies to all express trusts, "whether charitable or noncharitable, and to trusts created pursuant to a statute or a judgment that requires the trust to be administered in the manner of an express trust." ORS 130.005(1).

This general rule is subject to the exceptions found in ORS 130.005(2), which describes several types of trusts to which the Oregon UTC does not apply. Excluded trusts include those created under an employee benefit arrangement or individual retirement plan, trust accounts maintained by licensed service professionals (such as lawyers) on behalf of clients or customers, accounts established under the Oregon Uniform Transfers to Minors Act, trust funds held for a single business transaction or an escrow arrangement, bank account trusts, business trusts, voting trusts, and trusts established on behalf of a resident of a residential facility.

F. Statutes Included in ORS Chapter 130

The Oregon UTC covers subjects formerly addressed in ORS chapter 128 and also adds new provisions derived from the UTC. The following table summarizes the contents of the Oregon UTC and identifies *former* ORS chapter 128 provisions (if any) that dealt with the same subjects. Except for ORS 128.100 and 128.710, which remain in effect, all of the chapter 128 statutes listed in the right-hand column were either repealed or renumbered by SB 275. 2005 Or Laws ch 348, §§ 127–128.

Subject	**New ORS ch 130**	***Former* ORS ch 128**
General Provisions and Definitions	130.001 to 130.040	128.115; 128.175
Nonjudicial Settlement Agreements	130.045	128.177
Judicial Proceedings	130.050 to 130.065	128.021; 128.051; 128.125 to 128.175
Representation	130.100 to 130.120	128.135; 128.179

Subject	**New ORS ch 130**	***Former* ORS ch 128**
Creation and Validity of Trust	130.150 to 130.180	128.460 to 128.500; *128.710
Pet Trust and Purpose Trust	130.185 to 130.190	128.308
Modification and Termination of Trust	130.195 to 130.230	128.135; 128.177; 128.181 to 128.185
In Terrorem Clause	130.235	128.255
Marital Deduction Savings Provisions	130.240	128.398
Creditors' Claims; Spendthrift and Discretionary Trusts	130.300 to 130.325	
Claims Against Trust Based on Debts of Settlor	130.350 to 130.450	128.256 to 128.300
Revocable Trusts	130.500 to 130.515	
Rules Governing Revocable Trusts	130.520 to 130.575	128.370 to 128.397
Office of Trustee	130.600 to 130.640	128.015; 128.026; 128.051
Duties of Trustee	130.650 to 130.710	128.055; 128.065; 128.102; 128.125; 128.196; 128.204; 128.206; 128.212

Subject	**New ORS ch 130**	***Former* ORS ch 128**
Powers of Trustee	130.715 to 130.730	128.003 to 128.026; 128.035 to 128.045; *128.100
Uniform Prudent Investor Act	130.750 to 130.775	128.192 to 128.202; 128.208; 128.214 to 128.218
Liability of Trustees and Rights of Persons Dealing with Trustee	130.800 to 130.855	128.031; 128.047; 128.102; 128.175; 128.194
Certification of Trust	130.860	128.232 to 128.246
Uniformity of Application and Construction	130.900	
Electronic Records and Signatures	130.905	
Application of Trust Code	130.910	

NOTE: A "*" indicates that the statute is still in effect.

II. DEFAULT AND MANDATORY RULES

A. Default Law

Trust law has always been primarily default law, meaning that a trust is controlled by its terms. Generally, the provisions of trust law, either the common law or statutory law, apply only when the trust is silent. This basic rule continues to apply under the Oregon UTC. ORS 130.020.

B. Mandatory Rules

1. Common Law

Some basic principles apply to all trusts and cannot be overridden by a settlor. The Oregon UTC incorporates these principles from the common law. For example, a trustee must act in good faith and in accordance with the purposes of the trust; the trust purpose cannot be unlawful, contrary to public policy, or impossible to achieve; and the trust terms cannot override the power of a court to supervise the administration of a trust and to modify or terminate the trust under certain circumstances. The Oregon UTC provisions governing the rights of creditors and the effect of a spendthrift provision cannot be altered by the settlor. ORS 130.020(3)(e).

2. Duty to Provide Notice, Information, and Reports

Under the common law, a trustee has a fiduciary duty to the beneficiaries to provide information about the trust. The extent of the duty has not been clear, but the duty has often been considered to be merely a duty to respond to beneficiaries' requests for information.

The Oregon UTC, however, imposes an affirmative duty on the trustee to provide some information about the trust to someone. ORS 130.710 includes most of the rules governing notice, information, and reports, but ORS 130.020 also contains two mandatory rules regarding the trustee's duty.

Subject to two exceptions, a settlor cannot modify the trustee's duty to notify qualified beneficiaries of the existence of an irrevocable trust, the identity of the trustee, and the right to request trustee reports. ORS 130.020(3)(h). Subject to the same two exceptions, a settlor cannot modify the trustee's duty 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 the trust. ORS 130.020(3)(i).

The two exceptions to these mandatory rules are set forth in ORS 130.020(4). First, a settlor can modify the trustee's duties during the period that the settlor is alive and financially capable or, if the settlor's spouse is a qualified beneficiary, during the period the spouse is alive and financially capable. Second, the settlor can modify the trustee's duties by designating someone "to act in good faith to protect the interests of qualified beneficiaries and to receive [the required] notice, information or reports." ORS 130.020(4)(b). These exceptions to the mandatory rules are available only if the settlor has waived or modified the trustee's duties either in the trust instrument or in another writing delivered to the trustee. An exception to these exceptions is that the settlor cannot waive the requirement that the trustee provide reports relating to the termination of the trust. ORS 130.020(5).

ORS 130.020(2), added in 2019, confirms that the terms of the trust can permit the trustee to engage in "sustainable or socially responsible investment strategies …with or without regard to investment performance."

III. DEFINITIONS

A. Beneficiary

The UTC created definitions of *beneficiary* and *qualified beneficiary*, distinguishing the two categories of beneficiaries so that the duties of trustees could be appropriate to the two categories of beneficiaries. The Oregon UTC uses these two categories and, in 2013, added two additional categories: *remote interest beneficiary* and *secondary beneficiary*. Rights to receive notice and reports, and rights to receive notice of and participate in modification proceedings differ depending on the category of beneficiary.

The Oregon UTC defines *beneficiary* as a person with a beneficial interest in a trust, vested or contingent, or a person other than a trustee who holds a power of appointment. ORS 130.010(2). 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 prior Oregon law. The rights to notice, information, and reports about a trust thus extend to persons who may not have had those rights previously.

B. Qualified Beneficiary

Qualified beneficiary means a beneficiary who is currently eligible to receive distributions of trust income or principal, whether mandatory or discretionary (a *permissible distributee*, ORS 130.010(10)); a beneficiary who would be next in line if the interests of the permissible distributees terminated; or a beneficiary who would be a permissible distributee if the trust terminated. ORS 130.010(14).

> EXAMPLE: A trust provides for income to *A* for life and then to *B* for life, with the remainder to *C* when both *A* and *B* have died. The trust has three qualified beneficiaries (*A*, *B*, and *C*).

ORS 130.040 grants the rights of qualified beneficiaries to four additional categories of beneficiaries and nonbeneficiaries: a charitable organization expressly designated to receive distributions, if the charitable organization otherwise satisfies the definition of *qualified beneficiary*; a person designated as an enforcer for a pet trust or a trust with a noncharitable purpose; a person designated as an enforcer for a stewardship trust; and the attorney general with respect to a charitable trust having its principal place of administration in Oregon, unless contingencies make the charitable interest negligible.

> EXAMPLE: The attorney general probably would not be entitled to reports 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 probably be entitled to reports while *A* and *B* are both alive.

C. Remote Interest Beneficiary and Secondary Beneficiary

A remote interest beneficiary is "a beneficiary of a trust whose beneficial interest in the trust, at the time the determination of interest is made, is contingent upon the successive terminations of both the interest of a qualified beneficiary and the interest of a secondary beneficiary whose interests precede the interest of the remote interest beneficiary." Thus, a remote interest beneficiary is at least third in line to take any assets and in many cases fourth in line. The definition of secondary beneficiary was necessary to be able to define remote interest beneficiary. ORS 130.010(15). A s*econdary beneficiary* is a beneficiary whose interest is follows the termination of the interests of all qualified beneficiaries whose interest precedes that of the secondary beneficiary. ORS 130.010(17).

D. Financially Incapable

The Oregon UTC uses the term *financially incapable* to mean a person unable to manage the person's financial resources. The term is defined by reference to ORS 125.005, the statute that defines the term in connection with protective proceedings. ORS 130.010(7).

E. Settlor

The Oregon UTC uses the term *settlor* rather than *grantor* or *trustor* to describe a person, including a testator, who creates or contributes property to a trust. ORS 130.010(18).

PRACTICE TIP: Many Oregon drafters used the term *trustor* before adoption of the Oregon UTC. Although the comment to ORS 130.010 notes that the term *settlor* is intended to include *grantor* and *trustor*, the better practice now is to use the term *settlor*. Oregon UTC § 103 (ORS 130.010), comment (printed in 42 Willamette L Rev 187, 212 (2006)).

F. Knowledge

The Oregon UTC rule on when a person is deemed to know a fact comes from the Uniform Commercial Code. A person has *knowledge* if the person has actual knowledge of a fact, has received notice of the fact, or has reason to know the fact from all the facts and circumstances known to the person at the time in question. ORS 130.015(1). An organization has *knowledge* only from the time an employee having responsibility for the trust has knowledge or would have knowledge if the organization had exercised "reasonable diligence." ORS 130.015(2).

IV. JUDICIAL PROCEEDINGS AND NONJUDICIAL SETTLEMENT

A. Principal Place of Administration

The terms of the trust can designate the principal place of administration for the trust, but that designation will be controlling only if a trustee's principal place of business is located there, the trustee is a resident, all or part of the administration occurs there, or other means exist for establishing a "sufficient connection." ORS 130.022(1).

The trustee must administer the trust at a place appropriate to the trust's purposes, the trust's administration, and the interests of the beneficiaries. ORS 130.022(2). Absent a substantial change of circumstances, the trustee may assume that the original place of administration is the appropriate place. ORS 130.022(2). The trustee can change the place of administration if the trustee follows detailed procedures before doing so. The trustee must notify the qualified beneficiaries before transferring the place of administration, and the trustee cannot transfer the administration without court approval if a qualified beneficiary objects. ORS 130.022(3).

B. Common Law

The common law of trusts and principles of equity continue to apply to the extent not specifically changed by the Oregon UTC. ORS 130.025.

C. Governing Law

The settlor can choose the governing law for a trust by stating in the trust document which law will govern. The jurisdiction selected need not have any other connection with the trust, as long as the choice is not "contrary to a strong public policy" of the jurisdiction having the most significant relationship to the matter. ORS 130.030(1). If the terms of the trust do not specify the governing law, the law of the jurisdiction having the most significant relationship to the matter will apply. ORS 130.030(2). This jurisdiction will in many cases be the principal place of administration.

D. Notice

A trustee or other person required to give notice may give notice by any method likely to result in its receipt by the person entitled to receive the notice. ORS 130.035(1). If a person entitled to notice is a minor or a financially incapable person, the notice can be given to a representative for the person entitled to notice. *See* ORS 130.035(4)(b)–(c).

Notice of a judicial proceeding must be given to the trustee, all persons whose interests are affected by the requested action or relief, and any other person the court requires. ORS 130.035(4)(a), (d). If the notice occurs in the context of a judicial proceeding to contest the validity of a revocable trust, the person giving notice must comply with ORCP 7. In any other judicial proceeding, notice must be given in the manner required by statute for the approval of the final account in a decedent's estate. ORS 130.035(5).

E. Nonjudicial Settlement Agreements

ORS 130.045, governing nonjudicial settlement agreements, was intended to track the approach under *former* ORS 128.177, but the initial adoption did not effectively capture the scope of the former section. Subsequent revisions have improved the process for nonjudicial settlement agreements in Oregon.

Under the Oregon UTC, interested persons can enter into a nonjudicial settlement agreement affecting any matter involving a trust, ORS 130.045(3)(a), except that an agreement cannot violate a material purpose of the trust, ORS 130.045(4). The statute defines *interested persons* as any settlor who is living, all qualified beneficiaries, any acting trustee of the trust, the Attorney General if the trust is a charitable trust, and all members of the stewardship committee if the trust is a stewardship trust. ORS 130.045(1). If the settlor retained the power to change charitable beneficiaries, the Attorney General will represent all charitable beneficiaries subject to the retained power. ORS 130.045(2).

Matters that can be resolved by a nonjudicial settlement agreement include construing the terms of the trust, approving a report or accounting, directing a trustee to refrain from performing an act, granting an additional power to the trustee, appointing a trustee and determining a trustee's compensation, accepting the resignation of a trustee, transferring the trust's principal place of administration, determining the liability of a trustee, resolving disputes about trust administration or distribution, determining classes of creditors, beneficiaries, heirs, or others, and modifying the terms of the trust, including extending or shortening the period of the trust. ORS 130.045(5). Any interested person may petition the court to approve a nonjudicial settlement agreement. ORS 130.045(6).

A nonjudicial settlement agreement will be binding on all parties to the agreement without filing the agreement with a court. If the agreement is not filed with the court, however, the agreement will bind only the parties to the agreement and not other interested persons. ORS 130.045(3)(b).

If the parties file the agreement with the court and provide notice of a right to object to beneficiaries, the agreement will be binding on all those who receive or waive notice, if no one objects. Note that the party filing the agreement must send notice within five days to each beneficiary who is not a party to the agreement and whose address is known. No further court action is necessary. If someone objects and a hearing is held, the decision of the court will be binding on all beneficiaries of the trust and all parties to the agreement. If the court does not approve the agreement, the agreement will not be binding on any beneficiary or party. The time period for objections is 60 days. The statute provides a form of notice and directs that notice of filing be substantially in that form. ORS 130.045(6)(c).

ORS 130.305 provides that entering into a nonjudicial settlement agreement is not, by itself, a transfer in violation of a spendthrift clause. Further, the mere existence of a trustee's duty of obedience to carry out the terms of the trust and duty of loyalty to administer the trust solely in the interests of the beneficiaries does not require a trustee to object to a modification. ORS 130.650, 130.655.

F. Role of Court

The Oregon UTC encourages the resolution of disputes without court proceedings and does not create a system of mandatory court supervision. *See* ORS 130.050(2). The Oregon UTC provides that the court is always available for interested persons in the event that judicial involvement becomes necessary. ORS 130.050(1). Historically, a court also has had the authority to act on its own initiative with respect to a trust and provide instructions to a trustee even if no actual dispute exists. The Oregon UTC does not change this authority.

G. Jurisdiction

Oregon courts have jurisdiction over the trustees and beneficiaries of any trust that has its principal place of administration in Oregon. The trustee and any beneficiary who accepts a distribution from the trust are subject to personal jurisdiction over any matter involving the trust. In addition, all beneficiaries are subject to jurisdiction regarding any matter involving their interests in the trust. ORS 130.055(1)–(2). The circuit court has subject-matter jurisdiction over proceedings concerning trust administration, subject to ORS 130.355, which provides a process that can be used after the death of a settlor of a revocable trust. ORS 130.060.

V. REPRESENTATION

A. Basic Rule

The Oregon UTC contains comprehensive provisions on representation of beneficiaries with respect both to the receipt of notice and to the giving of consent. ORS 130.100–130.110. These statutes are similar to the provisions of *former* ORS 128.135 but apply the concepts more broadly, permitting representation in other situations.

The Oregon UTC addresses 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. The Oregon UTC authorizes representation in a number of situations, as long as no conflict of interest exists between the representative and the person being represented. ORS 130.110.

B. Holder of Power of Appointment

The holder of a testamentary power of appointment can represent the permissible appointees and the takers in default, as long as no conflict of interest exists. ORS 130.105.

C. Fiduciaries and Parents

As long as no conflict of interest exists, a conservator can represent the estate subject to the conservatorship, an agent can represent the principal, a trustee can represent the beneficiaries, a personal representative can represent the persons interested in the estate, and a parent can represent minor and unborn children. ORS 130.110.

D. Substantially Identical Interest

As long as no conflict of interest exists, a person having a substantially identical interest with respect to an issue can represent a minor, a financially incapable person, an unborn person, or a person whose identify or location is unknown and not reasonably ascertainable. ORS 130.115.

E. Special Representative

The Oregon UTC (like *former* ORS 128.179) authorizes the court to appoint a special representative to represent persons incapable of representing themselves, whether the issue to be resolved is in or out of court. ORS 130.120(1)–(2). It specifies rules for determining who may act as a special representative and the procedures to be followed. ORS 130.120(3)–(7).

VI. CREATION OF TRUSTS

A. Requirements for Creation

1. Methods of Creating Trust

A trust must have property in order to be created, and ORS 130.150(1) lists methods for transferring property to a trustee. The methods listed are not exclusive.

A trust for death benefits will be valid even if the only trust corpus during the life of the settlor is the right of the trustee to receive death benefits as a beneficiary. ORS 130.150(2)(a). A trustee named in a will can receive death benefits upon the probate of the will or the filing of a small estate affidavit. ORS 130.150(2)(b). The trust will be administered as a testamentary trust.

A trust can be created if the owner of property declares that he or she owns identifiable property as trustee. ORS 130.150(1)(b). Although reregistration of the property may not be necessary, *see Samuel v. King*, 186 Or App 684, 692, 64 P3d 1206 (2003), transferring title into the name of the trustee remains the recommended practice.

> NOTE: A trust may be created by an agent under a power of attorney only if the power of attorney expressly grants authority to create the trust. ORS 130.150(1)(d).

2. Capacity

The settlor of a trust must have the capacity to create the trust. ORS 130.155(1)(a). The Oregon UTC focuses on transactional capacity. To create an irrevocable trust, the settlor must have capacity during life to transfer the property free of trust. To create a testamentary trust or a revocable trust, the settlor must have the capacity to make a will. Oregon UTC § 402 (ORS 130.155), (printed in 42 Willamette L Rev 187, 249 (2006)).

> NOTE: ORS 130.155 and 130.500 lower the level of capacity required to establish a revocable trust.

3. Intent

The settlor must intend to create a trust. ORS 130.155(1)(b). Usually the trust instrument demonstrates the intent. In the case of an oral trust, ORS 130.180 requires that intent be established by clear and convincing evidence.

4. Definite Beneficiary

A trust must have a definite beneficiary unless the trust qualifies as a charitable trust, a pet trust, a trust for a noncharitable purpose, or a stewardship trust. ORS 130.155(1)(c). A beneficiary may be unascertained but will be considered definite if the beneficiary can be ascertained at any time within the rule against perpetuities. ORS 130.155(2). A trustee can be given the power to select a beneficiary from an indefinite class but must exercise the power within a reasonable time, or the power will fail. ORS 130.155(3).

5. Purpose

Because a trustee must have duties to perform, the trust must have a purpose. ORS 130.155(1)(d). The purpose cannot be unlawful, contrary to public policy, or impossible to achieve. ORS 130.165.

> EXAMPLE: Purposes that have been held to be against public policy include purposes that encourage criminal or tortious conduct, limit religious freedom, interfere with the freedom to marry or encourage divorce, or are frivolous or capricious. Although the Comments to Restatement (Third) of Trusts § 29 state that a restriction on marriage should be considered invalid as against public policy, an Illinois court upheld such a restriction in 2009. Feinberg v. Feinberg, 919 N.E.2d 888 (Ill. 2009). Purposes permitted by federal or state laws, including purposes that relate to public benefit planning or planning to minimize tax liability, are not contrary to public policy. Oregon UTC § 404 (ORS 130.165), comment (printed in 42 Willamette L Rev 187, 252 (2006)).

6. Trustee Cannot Be Sole Beneficiary

The same person cannot be the sole beneficiary and the trustee, because in that case the doctrine of merger applies and no trust is created. ORS 130.155(1)(e). The trustee can be the sole life beneficiary if some other person is the remainder beneficiary, so in a typical revocable living trust the interests will not merge if the settlor names one or more remainder beneficiaries.

7. Fraud, Duress, or Undue Influence

A trust created as a result of fraud, duress, or undue influence is void. ORS 130.175.

B. Charitable Trusts

A charitable trust is a trust created for a charitable purpose. ORS 130.170(1). The statutory list of charitable purposes restates the purposes that trust law has considered charitable since the time of Queen Elizabeth I. The statute clarifies that a trust created to distribute funds to charities is a charitable trust. The court can select a charitable purpose or beneficiary if the settlor intended to create a charitable trust but did not specify a particular purpose or beneficiary. ORS 130.170(2).

Under prior Oregon law, only the attorney general had the authority to enforce a charitable trust. ORS 128.170. The Oregon UTC, however, also permits the settlor of a charitable trust to enforce the trust. ORS 130.170(3).

> COMMENT: A *settlor* includes someone who contributes property to a trust, as to that property (ORS 130.010(16)), and a *charitable trust* is a trust or portion of a trust created for a charitable purpose (ORS 130.010(3)). Thus, a charity created as a trust can now be sued by a donor to that charity, with respect to the property contributed by that donor, for the purpose of enforcing the trust.

The attorney general has the responsibility to provide oversight for charitable assets, but in some trusts a charitable interest may be negligible. To avoid an undue burden on the attorney general and the trustees of certain trusts, if the combined interests of all charitable beneficiaries of a trust are negligible or the charitable beneficiaries are all remote interest beneficiaries, the portion of the trust held by charitable beneficiaries will not be considered a charitable trust. For example, if a trust provides for three generations of family members, with multiple people at each generation, and then provides a contingent remainder interest in a charity so that the charity takes only if all family members die before the trust terminates, the contingent remainder interest will not be considered a "charitable trust" for purposes of the Oregon UTC. In this situation the trustee will not need to provide notice to the attorney general when notice to "beneficiaries" is required.

C. Oral Trust

The requirements for creating a trust do not include the requirement of a writing. The Oregon UTC continues to permit oral trusts but raises the level of evidence required to establish the creation of the trust and the terms of the trust to "clear and convincing evidence." ORS 130.180.

D. Pet Trusts

The Oregon UTC's pet trust statute, ORS 130.185, is similar to the pet trust statute previously enacted in Oregon as *former* ORS 128.308. ORS 130.185 provides that a trust can be created for one or more animals, using the term "animal" to clarify that horses and farm animals that might not be considered pets can be named in a pet trust. The trust will be enforced by a person named by the settlor to enforce the trust, or if the settlor fails to name someone, by someone the court appoints. Any person having an interest in the welfare of the animal for which a trust is created may request the court to appoint a person to enforce the trust or to remove a person appointed. The trust terminates on the death of the last animal provided for in the trust, and the remaining assets are then distributed as provided by the terms of the trust, or if the trust is silent, to the settlor or the settlor's successors in interest.

E. Trusts for a Purpose

The Oregon UTC validates two types of trusts created for noncharitable purposes without ascertainable beneficiaries: trusts for a general noncharitable purpose (such as "a benevolent purpose selected by my trustee") and trusts for a specific noncharitable purpose (such as for the care of a cemetery lot). A trust for a purpose can be enforced by a person appointed in the terms of the trust or by a person appointed by the court, but the trust cannot be enforced for more than 90 years. ORS 130.190(1)–(2). If a court determines that the value of the trust property exceeds the amount required for the intended use, the excess must be distributed to the persons designated in the trust or to the settlor or the settlor's successors in interest. ORS 130.190(3).

F, Stewardship Trusts

A stewardship trust is a type of purpose trust. ORS 130.193. Like the noncharitable purpose trust authorized in ORS 130.190, a stewardship trust has no ascertainable beneficiaries. Unlike that type of purpose trust, a stewardship trust can continue in perpetuity and the court has no authority to reduce the amount in the trust.

A stewardship trust must be organized for a business purpose, which can involve seeking both economic and noneconomic benefits. The trust is enforced by a trust enforcer or enforcers named in the terms of the trust or by the court. A mandatory trust stewardship committee of at least three persons directs the actions of the trustee. A stewardship trust may be modified or terminated only with the unanimous agreement of the trust enforcer(s) and all members of the trust stewardship committee.

VII. MODIFICATION AND TERMINATION OF TRUSTS

A. Settlor Standing

The Oregon UTC gives a settlor standing to commence a proceeding to modify or terminate a trust. ORS 130.195(2). Prior Oregon law permitted a settlor to participate in modification or termination of a trust by agreement but did not give the settlor standing to commence a proceeding. *Former* ORS 128.177. The settlor's standing applies to charitable trusts, even though traditionally only the attorney general had standing to request that a court modify a charitable trust. ORS 130.195(2).

B. Modification or Termination of an Irrevocable Trust by Consent

1. Settlor and Beneficiaries Agree

If the settlor and all beneficiaries who are not remote interest beneficiaries agree, they can modify or terminate an irrevocable trust even if doing so is inconsistent with a material purpose of the trust. ORS 130.200(1). An agent acting under a power of attorney can consent on behalf of the settlor, to the extent authorized by the terms of the trust or by the grant of the power of attorney. A conservator or guardian may be able to consent on behalf of the settlor, with court approval.

> COMMENT: This provision initially made some tax lawyers concerned that the IRS would consider the trust revocable for purposes of IRC section 2036, causing the trust property to be taxed in the settlor's estate at death. However, this section of the Oregon UTC should not present a tax problem because it simply codifies the common law that already existed when IRC section 2036 was enacted. Some lawyers address the issue in the trust instrument and prohibit the settlor from modifying the trust with the consent of the beneficiaries.

2. Beneficiaries Agree

If the settlor is no longer living or is unable or unwilling to agree, all the beneficiaries who are not remote interest beneficiaries can agree to modify an irrevocable trust if the court concludes that the modification is not inconsistent with a material purpose of the trust. Similarly, if all beneficiaries other than remote interest beneficiaries agree, they can terminate an irrevocable trust if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. ORS 130.200(2).

3. Attorney General's Consent

The Attorney General must consent to any modification or termination that involves a charitable trust. ORS 130.200(2).

4. Court Approval if Consent Missing

If all the required parties do not consent, a court can approve modification or termination if the modification or termination could have been made by consent and if the interest of any beneficiary who does not consent will be protected. ORS 130.200(5).

5. Approval of Agreement Without a Hearing

If all interested persons, as defined in ORS 130.045, agree to modify or terminate an irrevocable trust, they may do so by entering into a binding nonjudicial settlement agreement.

6. Spendthrift Clause Presumed a Material Purpose

The Oregon UTC applies the material purpose doctrine (stated as "dominant purpose" under prior Oregon law) to trust modification and termination, and raises a rebuttable presumption that a spendthrift clause is a material purpose. ORS 130.200(3). Thus, although beneficiaries can agree to modify or terminate a trust, modification or termination by consent will be difficult because most trusts contain a spendthrift clause, and modification or termination will affect a material purpose.

C. Modification or Termination Because of Unanticipated Circumstances or Inability to Administer Trust Effectively

The Oregon UTC adopts the concept of equitable deviation for all trusts. A court may modify both administrative and dispositive trust terms, or terminate the trust, because of circumstances not anticipated by the settlor (whether or not the circumstances existed on creation), if the modification or termination will further the settlor's broader purposes. Modification must be in accord with the settlor's probable intention, to the extent practicable. ORS 130.205(1).

In addition, a court may modify administrative terms if the existing terms are impracticable or wasteful or impair the trust's administration. ORS 130.205(2).

A trustee who is not a beneficiary of a trust and who does not owe a duty of support to a beneficiary of a trust may terminate the trust if termination is appropriate due to circumstances not anticipated by the settlor, the termination is not inconsistent with a material purpose, and all qualified beneficiaries consent. ORS 130.205(3).

> PRACTICE TIP: In the past, courts have been extremely reluctant to modify the dispositive terms of a trust. Expansion of the court's authority may prove to be useful under some circumstances. For example, if a trust for the settlor's surviving spouse provides for distribution of income only, but the income is insufficient to meet the spouse's needs, a court may be willing to modify the trust to permit invasion of principal for the spouse's benefit.

D. *Cy Pres*

The Oregon UTC liberalizes the doctrine of *cy pres* in ways believed more likely to carry out the average settlor's intent. First, a court may apply *cy pres* to charitable trusts not only if the trust purpose becomes unlawful, impracticable, or impossible to achieve, but also if it becomes wasteful. ORS 130.210(1). Second, ORS 130.210 presumes that the trust has a general charitable purpose, permitting application of *cy pres*, whereas under the common law a court had to find that the settlor in fact had general charitable intent. Finally, the Oregon UTC changes cy pres by providing that a gift over to a noncharity upon failure of the original charitable purpose is effective only (1) for the settlor's lifetime, if the trust property is to revert to the settlor, or (2) if fewer than 50 years have elapsed since creation of the trust. ORS 130.210(2).

> PRACTICE TIP: If a client wants to name a noncharity to receive the trust remainder if a charitable trust fails, the lawyer should caution the client that the provision for a gift over will end after 50 years.

E. Uneconomic Trust

A trustee may terminate a trust if the value of the trust property does not justify the cost of administering the trust. ORS 130.215(1). The trust may become so inefficient to administer that a trustee should be able to terminate the trust without a court proceeding even if a spendthrift provision exists. The Oregon UTC does not impose a dollar limit but instead permits the trustee to make the determination by weighing the value of the trust property and the cost of administration. The trustee must give notice to the qualified beneficiaries before terminating the trust. The trustee cannot terminate the trust if the trustee is a qualified beneficiary or has a duty to support a qualified beneficiary. ORS 130.215(1).

A court may modify or terminate a trust or remove a trustee and appoint a new trustee for economic reasons. ORS 130.215(2).

Section 103.215 does not apply to an easement for conservation or preservation. ORS 103.215(4).

F. Reformation to Correct Mistakes

The Oregon UTC permits a court to reform the terms of a trust if a mistake of fact or law affected the settlor's intent and the terms of the trust. Clear and convincing evidence is required. Reformation is permitted even if the terms of the trust are unambiguous. ORS 130.220.

G. Modification to Achieve Settlor's Tax Objectives

The Oregon UTC allows a court to modify a trust to accomplish the settlor's tax objectives if the modification is not contrary to the settlor's probable intent. ORS 130.225. Federal law controls whether a modification will be recognized for federal tax purposes.

> EXAMPLE: The Internal Revenue Code authorizes the revision of split-interest trusts to qualify for the charitable deduction, modification of a trust to create a qualified domestic trust for a noncitizen spouse, and splitting a trust for purposes of the generation-skipping tax exemption. Other modifications may not be effective to achieve the desired tax results.

H. Combination and Division of Trusts

A trustee may combine two trusts or divide a trust if the modification does not materially impair rights of any beneficiary or adversely affect the achievement of the settlor's intent. ORS 130.230. Combination or division may be helpful for tax reasons or for improved administration, and many trust instruments already give trustees the power to combine or divide trusts. To take action under ORS 130.230, the trustee must give notice to all qualified beneficiaries. Consent is not required. Combination is permitted even if the terms of the trusts being combined are not identical, and division is authorized even if the division creates trusts that are not identical. Oregon UTC § 417 (ORS 130.230), comment (printed in 42 Willamette L Rev 187, 278–279 (2006)).

Caveat: If trusts being combined are not identical or a division creates trusts that are not identical, the trustee should be particularly careful that the change does not impair the rights of any beneficiary.

I. Legal Effect of Division of Trust into Shares

A trust may require or permit the trustee to divide the trust into separate shares for separate beneficiaries. ORS 130.232, added in 2013, provides rules governing the legal effect for income tax purposes.

J. *In Terrorem* Clause

ORS 130.235 incorporates the provisions of *former* ORS 128.255. An *in terrorem clause* (also known as a no-contest clause) is a trust provision that reduces or eliminates the interest of a beneficiary who challenges the validity of the trust. ORS 130.235(4). An *in terrorem* clause is valid and enforceable against a beneficiary who brings a challenge to a trust, even if probable cause for the challenge exists. ORS 130.235(1). The only circumstances under which the clause will not be enforced are (1) if the beneficiary establishes probable cause to believe that the trust is a forgery or has been revoked or (2) if the challenge is brought by a fiduciary acting on behalf of a protected person or by a guardian ad litem appointed for a minor or an incapacitated or financially incapable person. ORS 130.235(2)–(3).

K. Abatement

A section on abatement, ORS 130.237, was added in 2013. The section tracks the abatement rules that apply in the probate context. If on the settlor's death, property in a trust is not sufficient to pay all claims and distribute all gifts under the trust, the statute provides the following order for abatement: (1) property not disposed of by the terms of the trust, (2) residuary gifts, (3) general gifts, and (4) specific gifts. Gifts within each category abate pro rata, if necessary.

L. Marital Deduction Gifts

ORS 130.240 incorporates the tax-savings provisions of *former* ORS 128.398 that are designed to ensure that a marital deduction gift in a trust qualifies for the marital deduction.

VIII. CREDITORS' CLAIMS

A. Beneficiary's Creditors

1. No Spendthrift Protection

If a beneficiary's interest is not protected by a spendthrift clause, a court may authorize a creditor to reach the beneficiary's interest by garnishment or execution. ORS 130.300.

> NOTE: Before adoption of the Oregon UTC, ORS 18.618(1)(a) provided that equitable interests (which would include the interests of trust beneficiaries) were not garnishable. This statute was amended by the 2005 Legislature to provide that equitable interests are not garnishable, "except to the extent allowed under ORS chapter 130." 2005 Or Laws ch 348, § 98a.

2. Valid Spendthrift Clause

A spendthrift clause must restrain both voluntary and involuntary alienation to be valid. ORS 130.305(1). A trust term stating 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. ORS 130.305(2). A settlement agreement entered into under ORS 130.045 is not, by itself, a violation of a spendthrift clause. ORS 130.305(4).

> PRACTICE TIP: Even though using the term *spendthrift trust* is sufficient under Oregon law, the better drafting practice is to state explicitly that the beneficiary cannot alienate the beneficiary's interest and the beneficiary's creditors cannot reach the beneficiary's interest. Doing so should minimize the risk that questions might be raised in a different state.

3. Exceptions to Spendthrift Protection

Special creditors may assert a claim against a beneficiary's interest in a spendthrift trust. 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 or a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust" (e.g., a lawyer). ORS 130.310(2). 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 distributions the trustee has otherwise decided to make, such as through the exercise of discretion." ORS 130.310(2). These special creditors cannot compel a discretionary distribution under this statute, but the court may order execution against an amount a trustee is required to distribute.

> NOTE: The Oregon UTC does not contain a controversial provision found in the Uniform Trust Code that permits the beneficiary's child, spouse, or former spouse to compel a discretionary distribution under certain circumstances. The Study Committee that developed the proposal for the Oregon UTC decided to leave the development and determination of the law to the courts. The Comments to the Oregon UTC explain that adoption of the Oregon UTC "should not be considered as any expression of legislative intent regarding the right or lack of right of children and ex-spouses to seek court review of the discretionary decisions of a trustee." Oregon UTC *omitted* § 504, comment (printed in 42 Willamette L Rev 187, 289 (2006)).

4. Overdue Distribution

Even if a trust contains a spendthrift provision, creditors can reach mandatory distributions that a trustee has failed to make within a reasonable time after the designated distribution date. ORS 130.320.

B. Holder of Power of Withdrawal

Generally, creditors of the holder of a *power of withdrawal* (presently exercisable general power of appointment, ORS 130.010(12)) can reach property subject to the power, but only if the power is greater than the amount of the annual exclusion. ORS 130.315(2). 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, as long as the trustee's power is limited by an ascertainable standard. ORS 130.315(4).

C. Personal Obligations of Trustee

Creditors of the trustee cannot reach trust assets. ORS 130.325.

D. Creditors' Claims Against Settlor

1. Irrevocable Trust

Creditors of the settlor can reach an irrevocable trust to the extent distributions can be made to the settlor. ORS 130.315(1)(b).

2. Revocable Trust

Creditors of the settlor can reach a revocable trust during the settlor's lifetime or after death, ORS 130.315(1)(a), (c), except that tenancy by the entirety property transferred by spouses to a revocable trust or trusts retains its creditor protection if the requirements of ORS 130.518 are met. However, creditors of the settlor cannot reach assets in a trust solely because the trustee holds a discretionary power to pay taxes or to reimburse the settlor for taxes paid, and or because someone other than the settlor is given a non-general power of appointment. Assets in an inter vivos marital deduction trust will be deemed contributed by the donor's spouse.

3. Procedures for Claims After Death of Settlor of Revocable Trust

ORS 130.350 to 130.450, which incorporate *former* ORS 128.256 to 128.300, establish rules for bringing claims against a revocable trust. A trustee may allow or disallow a claim, following the provisions of ORS. 130.400. ORS 130.350 provides that the statute of limitations is the earlier of the statute of limitations applicable to the claim and a shortened statute of limitations that applies if the trustee chooses to use the procedure described in ORS 130.355-130.360. ORS 130.375 provides rules for the form of claims, ORS 130.425 lists the priority for claims, and the Oregon UTC includes various procedural rules.

The Oregon UTC provides a process a trustee can use to shorten the claims period, tracking to some extent the rules that apply to claims under wills law. After the settlor dies, a trustee can ask the probate court to determine the claims of creditors of the settlor. ORS 130.355. If the trustee files such a petition, the trustee must publish notice and deliver or mail notice to known creditors. ORS 130.365. Claims are then barred the later of four months after the date of publication or 30 days after the date the notice is delivered or mailed to the claimant. ORS 130.360. If a trustee files a petition for court determination of claims, the trustee must file a petition to close the case, with a statement that all claims have been paid or otherwise resolved. ORS 130.440.

IX. REVOCABLE TRUSTS

A. Capacity of Settlor of Revocable Trust

The Oregon UTC lowers the standard of capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, to that required to make a will. ORS 130.500.

B. Presumption that a Trust Is Revocable

The Oregon UTC changes the existing presumption that a trust is irrevocable to a presumption that the trust is revocable unless the trust provides otherwise. ORS 130.505(1). This change in Oregon law applies only to trusts created on or after January 1, 2006. 2005 Or Laws ch 348, § 47.

C. Revocation and Amendment

The Oregon UTC follows the traditional rule that a settlor wishing to revoke or amend the trust must comply with the procedures specified in the trust instrument, but it loosens the Oregon rules somewhat by permitting substantial compliance with those procedures. If the terms of the trust are silent on the method for revocation or amendment, the settlor can revoke or amend by any method manifesting clear and convincing evidence of the settlor's intent, other than by execution of a will or codicil. ORS 130.505(3).

> PRACTICE TIP: "A settlor's powers with respect to revocation, amendment or distribution of trust property may be exercised by an agent or attorney-in-fact under a power of attorney only to the extent expressly authorized by the terms of the trust." ORS 130.505(5). Authorization in the power of attorney is not sufficient.

D. Settlor's Powers

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. ORS 130.510(1).

> COMMENT: This provision likely changed Oregon law because fiduciary duties generally are owed to all the beneficiaries of a trust.

E. Power of Withdrawal

If a person holds a power of withdrawal, the rights of beneficiaries with respect to property subject to the power are subject to the power holder's control, and the trustee owes duties only to the power holder. ORS 130.510(2).

F. Limitation on Action Contesting Validity of Revocable Trust; Distribution of Trust Property

For revocable trusts, the statute of limitations to contest the validity of the trust is three years after the settlor's death. The Oregon UTC allows a trustee to shorten the limitations period to four months by giving notice to a potential contestant and protects a trustee unaware of a possible contest who makes a distribution before the expiration of the contest period. ORS 130.515(1)–(2). The four-month period after notice 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 drafters concluded that three years after the date of death is an appropriate limitations period for a revocable trust. *Cf.* ORS 113.075(3).

PRACTICE TIP: Depending on the circumstances, giving notice to a potential contestant may be desirable to shorten the statute of limitations for contesting the validity of a revocable trust. However, the Oregon UTC does not authorize giving notice before the settlor's death.

G. Tenancy by Entirety Property

If spouses married to each other transfer property owned in tenancy by the entirety to a joint revocable trust or to revocable trusts for each of them, the property continues to have the same immunity from creditors it would have if the spouses continued to own it as tenants by the entirety. ORS 130.518(1). For the protection to continue, the spouses must remain married to each other, the property must remain in trust, and the spouses must be beneficiaries of the trust or trusts. This section applies to tenancy by the entirety property conveyed into trust after January 1, 2022.

H. Rules Governing Revocable Trusts

A number of provisions originally found in laws related to wills were made applicable to revocable trusts by *former* ORS 128.370 to 128.397. These statutes have been incorporated into the Oregon UTC as ORS 130.520 to 130.575. The rules in these statutes are all default rules that can be changed by the terms of the trust.

1. Marriage

A settlor's marriage does not revoke a revocable trust. ORS 130.530.

2. Divorce

A settlor's divorce revokes all provisions in favor of the former spouse or naming the former spouse as trustee and revokes all powers of appointment exercisable by the former spouse. ORS 130.535(1).

3. Contract of Sale

A contract of sale does not revoke a specific distribution, and the property passes subject to the contract. ORS 130.540.

4. Encumbrance

An encumbrance does not revoke a specific distribution, and the property passes subject to the encumbrance. ORS 130.545.

5. Substitute Gift (Anti-Lapse)

If a beneficiary is related by blood or adoption to the settlor, the beneficiary dies either before the settlor dies or before the time set in the trust for distribution, and the beneficiary is survived by descendants, the descendants take the property the beneficiary would have taken if the beneficiary had not died. This rule also applies to class gifts. ORS 130.550.

6. Pretermitted Children

A child of the settlor who is born or adopted after the execution of the trust instrument and during the settlor's lifetime or is in gestation at the time of the settlor's death (i.e., a *pretermitted child*) is treated the same as a pretermitted child under a will. ORS 130.555. *Cf.* ORS 112.405. A child will not be considered pretermitted if the settlor acknowledges or mentions the child by name or by class either in the trust instrument or in the settlor's will.

7. Failure of Specific Distribution (Anti-Ademption)

The rules that provide a substitute gift for a specific devise under a will if the property is not in the estate when the testator dies apply to property subject to a specific distribution under a revocable trust. ORS 130.560. *Cf.* ORS 112.385.

8. Advancement

Property given to a beneficiary during the settlor's life is an advancement only if a writing by the settlor or the beneficiary confirms the intent to treat the gift as an advancement. ORS 130.570.

X. OFFICE OF TRUSTEE

A. Acceptance or Rejection of Trusteeship

A trustee can accept a trusteeship by following procedures specified in the trust instrument, knowingly accepting delivery of trust property, or knowingly exercising powers as a trustee. ORS 130.600(1). If a person designated as the trustee fails to act in a reasonable time, the person will be treated as having rejected the trusteeship. ORS 130.600(2). To protect trust property, the Oregon UTC permits a person designated as trustee to act to protect the property without being treated as accepting the trusteeship. ORS 130.600(3). To protect the person designated as trustee, the Oregon UTC allows the person to inspect the property before accepting the trusteeship. ORS 130.600(4).

B. Bond

A court can require a bond even if the trust instrument waives the requirement. ORS 130.605(1)–(2). However, the comment to ORS 130.605 points out that the court should do so only for good reasons. Oregon UTC § 702 (ORS 130.605), comment (printed in 42 Willamette L Rev 187, 324 (2006)).

C. Cotrustees

Consistent with prior Oregon law, the Oregon UTC permits cotrustees to act by majority decision and includes provisions protecting a cotrustee who dissents. ORS 130.610(1), (8). If the action constitutes a serious breach of trust, the dissenting cotrustee must take reasonable steps to rectify the improper conduct to escape liability. ORS 130.610(7)–(8).

The Oregon UTC also provides for delegation among cotrustees, and probably expands the scope of permissible delegation. A trustee should delegate functions the trustee is not competent to perform (such as decisions about investments) and can delegate to cotrustees except as prohibited in the trust instrument. ORS 130.610(5). Any delegation or revocation of a delegation must be in writing. ORS 130.610(5).

PRACTICE TIP: Cotrustees can complicate administration, and the comment to ORS 130.610 recommends "careful reflection" before providing for cotrustees. Oregon UTC § 703 (ORS 130.610), (printed in 42 Willamette L Rev 187, 326 (2006)). Division of responsibility among cotrustees may be confused, and individual accountability may be unclear.

D. Vacancy

The Oregon UTC provides procedures for filling vacancies and appointing successor trustees. If the terms of the trust do not designate a person to fill a vacancy, the qualified beneficiaries, acting unanimously, may appoint a trustee, or if the trust is a charitable trust, the qualified beneficiaries and the Attorney General may appoint a trustee. ORS 130.615.

PRACTICE TIP: The better drafting practice is to provide in the trust for vacancies and successor trustees.

E. Resignation of Trustee

Subject to the right of the settlor to specify the method for resigning, a trustee can 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. ORS 130.620(1)–(2). The Oregon UTC changes Oregon law to make it easier for the trustee to resign without court approval, in accordance with standard drafting practice.

F. Removal of Trustee

A trustee can be removed for a variety of specified grounds. Some of the grounds are traditional, including serious breach of trust, lack of cooperation among cotrustees, and unfitness, unwillingness, or persistent failure to administer the trust effectively. ORS 130.625(2)(a)–(c). New provisions permit a court to remove a trustee if removal best serves the interests of all the beneficiaries and, in addition, (1) there has been a substantial change of circumstances or removal has been requested by all the qualified beneficiaries, (2) removal is not inconsistent with a material purpose of the trust, and (3) a suitable successor trustee is available. ORS 130.625(2)(d). A change in 2013 clarified that the settlor's choice of trustee is not necessarily a material purpose, and that removal will be permitted unless the trustee establishes by clear and convincing evidence that removal is inconsistent with a material purpose of the trust. ORS 130.625(2)(d)(C).

ORS 130.625(1) also changes prior Oregon law by permitting the settlor of an irrevocable trust to petition for removal of the trustee.

> NOTE: With the adoption of the Oregon UTC, Oregon no longer requires a beneficiary to post a bond as a prerequisite to petitioning the court for removal of a trustee or any other action. *Former* ORS 128.155 required a bond.

G. Delivery of Property by Former Trustee

A trustee who has resigned or been removed still has the powers of a trustee necessary to protect the trust property, but must expeditiously deliver the property to the successor trustee or other person entitled to the property. ORS 130.630. A successor trustee or the court may require the departing trustee to prepare a final report, and if the departing trustee is required to prepare a final report, the trust must pay reasonable fees and costs. ORS 130.630(3).

H. Compensation

A trustee is entitled to reasonable compensation unless the terms of the trust provide otherwise. ORS 130.635(1). The comment to ORS 130.635 indicates that relevant factors in determining reasonable compensation, as specified in the Restatement of Trusts, include community standards for compensation of trustees, the trustee's expertise, the time spent by the trustee, the amount and type of trust property, the issues involved in administering the trust, and the quality of the trustee's performance. Oregon UTC § 708 (ORS 130.635), comment (printed in 42 Willamette L Rev 187, 336 (2006)). The court has the authority to increase or reduce fees set by the terms of a trust if the trustee's duties are substantially different from the duties contemplated by the settlor or if the court determines that the amount of compensation would otherwise be unreasonable. ORS 130.635(2). Trustee compensation must reflect the total services provided to the trust by co-trustees or by third parties such as financial advisors, so that the trust is not paying duplicative fees. ORS 130.635(3), (4).

I. Reimbursement of Expenses

A trustee is entitled to be reimbursed out of trust property for expenses properly incurred in the administration of the trust. ORS 130.640(1)(a). A trustee can be reimbursed for attorney fees incurred in defending an action unless the trustee breached the trust. Oregon UTC § 709 (ORS 130.640), comment (printed in 42 Willamette L Rev 187, 340 (2006)).

XI. DUTIES AND POWERS OF TRUSTEES

The Oregon UTC adopts the fiduciary duties that have been an important part of trust law and have been important in the development of fiduciary law in general. The rules have been modernized in some respects, most significantly in the duty of delegation, which now permits prudent delegation.

A. Duty to Administer Trust

A trustee must administer a trust in good faith, considering the terms and purposes of the trust and the interests of the beneficiaries. ORS 130.650(1). This duty does not create a duty to object to a modification or termination of the trust under other provisions of the Oregon UTC. ORS 130.650(2).

B. Duty of Loyalty

A trustee owes a duty of loyalty to the beneficiaries and must administer the trust solely in their interests. ORS 130.655(1). The trustee must administer the trust on behalf of the beneficiaries and not for the trustee's personal benefit. A transaction affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary unless the terms of the trust authorize the transaction, a court approved the transaction, the beneficiary consented, the statute of limitations has run, or the trustee entered into the transaction before becoming trustee. ORS 130.655(2). The Oregon UTC applies the "no further inquiry rule" to transactions for the trustee's personal account, which means that a transaction is voidable even if the trustee acted in good faith and paid fair consideration. A transaction involving the trustee's spouse, descendants, siblings, parents, their spouses, or the trustee's agent or attorney or a business in which the trustee owns a significant interest is presumed to be affected by a conflict of interest, but the trustee can rebut the presumption by showing that the transaction is fair to the beneficiaries. ORS 130.655(3). ORS 130.655 adds a number of clarifications as to when a transaction entered into by a trustee may be considered a conflict of interest, in some cases even if the transaction does not involve property of the trust. ORS 130.655(4)–(8). The duty of loyalty does not require a trustee to object to a proposed modification or termination. ORS 130.655(9).

C. Duty of Impartiality

A trustee must act impartially with respect to beneficiaries, treating the beneficiaries equitably in light of the purposes and terms of the trust. ORS 130.660.

> PRACTICE TIP: The duty of impartiality comes into play in decision-making that affects income beneficiaries and remainder beneficiaries

differently, and the trustee should be particularly sensitive to allocation of receipts and disbursements between income and principal.

D. Prudent Administration

The prudent person rule is a fundamental duty of a trustee. Under this rule, a trustee must administer the trust as a prudent person would, considering the purposes, terms, distributional requirements, and other circumstances of the particular trust. The trustee must exercise reasonable care, skill, and caution. ORS 130.665.

E. Costs of Administration

The trustee can incur only reasonable costs. ORS 130.670.

F. Trustee's Skills

A trustee must use any special skills or expertise the trustee possesses. ORS 130.675.

G. Delegation

The trustee may delegate various aspects of trust administration to agents if the trustee exercises "reasonable care, skill and caution" in selecting the agent, defining the scope of the delegation, and periodically reviewing the agent's performance. ORS 130.680(1).

H. Powers to Direct

A trustee of a revocable trust can follow a direction of the settlor that is contrary to the terms of the trust. ORS 130.685(1). If the terms of a trust give someone other than the settlor of a revocable trust the power to direct, the trustee must follow a direction unless the direction is manifestly contrary to the terms of the trust or would constitute a serious breach of fiduciary duty. ORS 130.685(2). A person, other than a beneficiary, holding a power to direct is rebuttably presumed to be a fiduciary with respect to the beneficiaries. ORS 130.685(4).

NOTE: A settlor may appoint a trust adviser or trust protector in the terms of the trust and give that person the power to direct the trustee's actions. ORS 130.685(3). The comment to ORS 130.685 indicates that trust advisers "have long been used for certain trustee functions, such Oregon UTC § 808 (ORS 130.685), comment (printed in 42 Willamette L Rev 187, 354 (2006)). By contrast, the term *trust protector* is more recent and "usually connotes the grant of greater powers, sometimes including the power to amend or terminate the trust." Oregon UTC § 808, comment, *supra.*

I. Control and Protection of Trust Property

A trustee must take reasonable steps to take control of trust property and protect it. ORS 130.690.

J. Recordkeeping and Duty Not to Commingle

A trustee must keep adequate records of trust property and the administration of the trust. ORS 130.695(1). The trustee must keep trust property separate from property owned by the trustee personally. ORS 130.695(2). A trustee may commingle property held by two or more trusts for purposes of investment if the trustee keeps records clearly indicating the respective interests of the trusts. ORS 130.695(4).

K. Enforcement and Defense of Claims

The trustee must take reasonable steps to enforce and defend claims. ORS 130.700.

L. Collecting Trust Property

A trustee must make reasonable efforts to collect trust property from a former trustee or any other person. A trustee also has a duty to remedy a breach of trust committed by a former trustee if the trustee knows of the breach. ORS 130.705.

M. Discretionary Powers and Tax-Savings Provisions

A trustee must always exercise a discretionary power in good faith, even if the terms of the trust give the trustee uncontrolled discretion. The trustee must exercise discretion in accordance with the terms and purposes of the trust and the interests of the beneficiaries. ORS 130.715(1). The comment to ORS 130.715 indicates that the trustee also must exercise reasonable skill, care, and caution. Oregon UTC § 814 (ORS 130.715), comment (printed in 42 Willamette L Rev 187, 364 (2006)).

If a beneficiary is acting as trustee, the Oregon UTC limits the trustee's discretion under certain circumstances for the purpose of protecting the beneficiary from adverse estate and gift tax consequences. *See* Oregon UTC § 814 (ORS 130.715), comment, *supra*, at 364–366. The provisions altering the extent of the trustee's discretion apply unless the terms of the trust expressly indicate that the provisions do not apply. ORS 130.715(2). The trustee may include capital gains in distributable net income if the gains are allocated within the discretion of the trustee according to specified conditions. ORS 130.715(5).

N. General and Specific Powers

The Oregon UTC grants a trustee the broadest possible powers, to be exercised in accordance with the trustee's fiduciary duties and subject to the terms of the trust. *See* ORS 130.720. ORS 130.725 lists specific trustee powers. Many of the powers are similar to the powers in *former* ORS 128.009, which was part of the Oregon Uniform Trustees' Powers Act. Some powers have been updated, and others are new. An addition in 2013 clarified that distributions can be made in cash or in kind. ORS 130.725(22).

O. When Interest of Beneficiary Vests

Unless the will or trust clearly indicates a contrary intent, the interests of a beneficiary of a testamentary trust vest when the testator dies, and the interests of a beneficiary of a revocable or irrevocable trust vest when the trust becomes irrevocable. ORS 130.730(1).

P. Distribution on Termination

The Oregon UTC provides a procedure for making final distributions that permits a trustee to obtain the beneficiaries' approval of a plan of distribution before the trustee makes the distribution. ORS 130.730(2). The trustee must distribute trust assets expeditiously, but may maintain a reserve for the payment of debts, expenses, and taxes. ORS 130.730(3). The trustee may request that a beneficiary execute a release, but the release will be invalid if the trustee failed to disclose material facts or engaged in improper conduct.

XII. TRUSTEE'S DUTY TO PROVIDE NOTICE, INFORMATION, AND REPORTS

A. Duty Before Enactment of the Trust Code

A trustee's duty to keep the beneficiaries reasonably informed about the administration of the trust has long been a fundamental fiduciary duty. In *former* ORS 128.125, Oregon added statutory provisions to the common-law duty, requiring 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 and permitting the beneficiary to petition a court to obtain this information if the trustee failed to provide it. In addition, *former* ORS 128.135(2)(a) gave the beneficiary a right to petition a court for an accounting.

B. Duty to Inform and Report

1. General Duty to Inform Qualified Beneficiaries

A trustee has a duty to keep qualified beneficiaries "reasonably informed about the administration of the trust and of the material facts necessary for those beneficiaries to protect their interests." ORS 130.710(1). To satisfy the duty to inform, a trustee must respond to reasonable requests for information from a qualified beneficiary. The trustee must communicate information about the trust that will enable a qualified beneficiary to enforce the qualified beneficiary's rights. Providing a copy of the annual report and responding to requests for information usually are sufficient, but special circumstances may require the trustee to provide additional information. For example, if the trustee is dealing with the qualified beneficiary on the trustee's own account, the trustee must communicate material facts concerning the transaction. If transactions involve real estate or closely held business interests, providing information in advance may be appropriate. Oregon UTC § 813 (ORS 130.710), comment (printed in 42 Willamette L Rev 187, 360 (2006)).

2. No Duty to Other Beneficiaries

Unlike the common law and prior Oregon statutes, the Oregon UTC limits the trustee's general duty to inform and report to qualified beneficiaries rather than extending it to all beneficiaries. A trustee may, but is not required to, respond to a reasonable request from a beneficiary who is not a qualified beneficiary for information related to the administration of the trust. ORS 130.710(1).

3. Copy of Trust Instrument

A trustee must provide a copy of the trust instrument to a qualified beneficiary who requests one. ORS 130.710(2)(a). Before the Oregon UTC, no Oregon statute required a trustee to provide a copy of the trust instrument to a beneficiary.

4. Trustee Reports

At least annually and on termination of a trust, the trustee must send a trustee report to the permissible distributees of trust income or principal and to qualified beneficiaries who request a copy. A trustee may choose to send reports to qualified beneficiaries as a matter of course, as a way to fulfill the trustee's duty to keep qualified beneficiaries reasonably informed about the trust. Trustee reports must include a listing of trust property and liabilities; the market values of trust assets, if feasible; the receipts and disbursements of the trust; and the source and amount of the trustee's compensation. ORS 130.710(3).

PRACTICE TIP: The Oregon UTC does not prescribe a format for trustee reports and states only that the report should provide beneficiaries with information necessary to protect their interests. In some circumstances, copies of the trust's income tax returns and monthly brokerage account statements may be sufficient. Oregon UTC § 813 (ORS 130.710), comment (printed in 42 Willamette L Rev 187, 362 (2006)).

5. Waiver

A beneficiary may waive the right to receive reports or other information. ORS 130.710(4).

6. Cost of Providing Information

A trustee may charge the beneficiaries a reasonable fee for providing information. ORS 130.710(5).

7. Request Must Be Specific

If a beneficiary requests information, the request must be about a specific trust and not a general request to inform the beneficiary of any interests he or she has in any trust managed by the trustee. ORS 130.710(6).

C. Duty to Provide Notice

The Oregon UTC imposes affirmative duties to provide notice that did not exist under prior Oregon law.

1. New Trustee

Within a reasonable time after a trustee accepts a trusteeship, the trustee must notify the qualified beneficiaries of the acceptance and of contact information for the trustee. ORS 130.710(2)(b). This requirement applies only to acceptances that occur after December 31, 2005. 2005 Or Laws ch 348, § 72(1).

2. Existence of an Irrevocable Trust

Within a reasonable time after 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 report. ORS 130.710(2)(c). This requirement applies only to trusts that become irrevocable after December 31, 2005. 2005 Or Laws ch 348, § 72(2).

3. Reasonable Time

The comment to ORS 130.710 describes a "reasonable time" for notifying qualified beneficiaries as 60 days after the trustee determines the identity of the beneficiaries. The comment also notes that a longer period might be reasonable under some circumstances, particularly situations in which the trustee had difficulty identifying the beneficiaries. Oregon UTC § 813 (ORS 130.710), comment (printed in 42 Willamette L Rev 187, 361 (2006)).

4. Fees

A trustee must notify qualified beneficiaries in advance of any change in the method or rate of the trustee's compensation. ORS 130.710(2)(d).

5. Revocation or Amendment of Joint Trust

If one settlor of a trust with more than one settlor revokes or amends the trust, the trustee must notify any other settlors of the revocation or amendment. ORS 130.505(2)(c).

D. Trust Code Limitations on the Trustee's Duty

1. Revocable Trusts

While the settlor of a revocable trust is alive, beneficiaries other than the settlor have no right to receive notice, information, or reports about the trust, and the trustee's duties run only to the settlor. ORS 130.510(1), 130.710(9). The comment to ORS 130.510 notes that if the settlor becomes financially incapable, any right of action the settlor has against the trustee for breach of fiduciary duty passes to the settlor's agent or conservator. Oregon UTC § 603 (ORS 130.510), comment (printed in 42 Willamette L Rev 187, 312 (2006)).

2. Trust Created for Spouse

A trustee must give notice, information, and reports required by ORS 130.710 only to the settlor's spouse if (1) the spouse survives the settlor and is financially capable (as defined in ORS 125.005), (2) the spouse is the only permissible distributee of the trust, and (3) all other qualified beneficiaries of the trust are descendants of the spouse. ORS 130.710(8).

> PRACTICE TIP: Spouses often want to control their property until the death of the survivor and withhold information about the property from their children until after both spouses have died. For example, the first spouse to die might create a credit shelter trust for tax reasons, providing a life estate for the surviving spouse with the remainder going to their children. If the children are all children of the surviving spouse, and if the surviving spouse is competent and can keep an eye on the trustee, the default rule under the Oregon UTC is that notice cannot be given to the children. Even if the beneficiaries are people other than the children or other descendants of the surviving spouse, the settlor can put terms in the trust providing that notice, information, and reports will be given only to the surviving spouse.

3. Specific Gift of Property or Money

A revocable trust may direct the trustee to distribute specific gifts of property or money after the trust becomes irrevocable, typically when the settlor dies. A beneficiary whose only interest in the trust is a specific distribution is a qualified beneficiary, but the statute does not require the trustee to provide a trustee's report if the gift is distributed within six months of the settlor's death. If the beneficiary has not received the distribution six months after the trust becomes irrevocable, the trustee must notify the beneficiary of the right to a report and provide the reports until the beneficiary receives the distribution. ORS 130.710(10).

E. Settlor's Limitations on the Trustee's Duty

1. Waiver or Modification

The Oregon UTC permits a settlor to waive or modify most of the trustee's duties related to notice, information, and reports. *See* ORS 130.020.

2. Mandatory Duties

ORS 130.020 contains two mandatory rules regarding the trustee's duty to provide notice, information, and reports. Subject to two exceptions (discussed below), these rules cannot be waived or modified. A settlor cannot modify the trustee's duty to notify qualified beneficiaries of an irrevocable trust of the existence of the trust, the identity of the trustee, and the right to request reports. ORS 130.020(3)(h). Similarly, a settlor cannot modify the trustee's duty 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 the trust. ORS 130.020(3)(i).

> COMMENT: The latter rule means that a settlor can waive the trustee's duty to send annual reports to permissible distributees, but a qualified beneficiary (including a permissible distributee) will still have the right to request reports.

3. Exceptions to Mandatory Duties

Two exceptions allow a settlor to waive or modify the mandatory duties discussed above. The settlor must do so either in the trust instrument itself or in another writing delivered to the trustee. First, all duties can be waived or modified during the period that either the settlor or the settlor's spouse is alive and financially capable. ORS 130.020(4)(a). 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.

Second, all duties can be waived or modified if the settlor designates a person to receive the required notice, information, and reports. The person designated must act in good faith to protect the interests of the qualified beneficiaries. ORS 130.020(4)(b).

> PRACTICE TIP: A settlor may create a trust for an irresponsible child and not want the child to have information about the trust. ORS 130.020(4)(b) permits the settlor to designate some other person, who need not be a beneficiary of the trust, to receive the notice, information, and reports the child otherwise would be entitled to receive. This provision balances the need for someone to have information about the trust for purposes of enforcing it with the possible desire of a settlor to limit the knowledge of certain beneficiaries about the trust.

> QUERY: Although the settlor can designate someone who is not a beneficiary to receive notice, information, and reports, whether the person will have standing to enforce the trust is unclear because that person is not a beneficiary. Another unanswered question is the degree of fiduciary duty imposed on the designated person. A good drafting practice is to provide in the trust instrument that the person designated will have standing.

XIII. UNIFORM PRUDENT INVESTOR ACT

A. Enactment of Oregon's UPIA

ORS 130.750 to 130.775 reenact Oregon's version of the Uniform Prudent Investor Act (UPIA) (*former* ORS 128.192–128.218), which was adopted in Oregon in 1995. UPIA provides rules for the investment and management of trust assets. Some of UPIA's provisions appear in the Oregon UTC in a slightly different form because the provisions apply to trust administration more generally. Several of UPIA's provisions duplicate language already found elsewhere in the Oregon UTC. The other provisions impose on the trustee a duty to comply with the prudent investor rule, ORS 130.750; explain what the rule means, ORS 130.755; require the trustee to diversify investments, ORS 130.760; and require a trustee, within a reasonable time after accepting the trusteeship or receiving trust assets, to review all assets and make decisions about their retention or disposition, ORS 130.765.

B. Values of Settlor and Beneficiaries

In 2019 Oregon joined Delaware, Del. Code Ann. tit. 12 §3302(a); Georgia, Ga. Code Ann. § 53-12-340(d); Illinois, 760 Ill. Comp. Stat. 3/902(c)(7), (8); and New Hampshire, N.H. Rev. Stat. Ann. § 564-B:9-902(c)(10); in addressing sustainable investing in the prudent investor statute. A subsection states that when a trustee considers a beneficiary's needs in connection with investment decisions, the trustee may consider the beneficiary's "personal values and desire that the trustee engage in sustainable or socially responsible investing strategies that align with the beneficiaries' social, environmental, governance or other values or beliefs, as well as the financial needs of the beneficiaries." ORS 130.755(3)(j). The trustee can also consider the "intent, desire and personal values of the settlor" to the extent the trustee knows the settlor's values and beliefs related to investment strategies. ORS 130.755(3)(i).

XIV. NOTICE OF PROPOSED TRUSTEE ACTION AND RIGHT OF BENEFICIARY TO OBJECT

In 2013 a new section, ORS 130.733, was added to the Oregon UTC to provide a procedure for a trustee to inform beneficiaries of a proposed action. If the trustee provides a beneficiary with sufficient information about the proposed action to enable the beneficiary to make an informed decision, and advised the beneficiary of the right to object, the beneficiary's right to object to the action will be barred after 45 days or a later time stated in the notice. This provision does not apply to certain actions involving the trustee's personal interests, such as compensation or buying property from the trust, or approval of the trustee's report.

XV. (§2.129) ADVISERS

A section added in 2009 and modified in 2013, ORS 130.735, provides that a settlor may appoint a trust adviser to direct or approve decisions made by a trustee. If a trust instrument appoints an adviser, the adviser acts as a fiduciary unless the trust instruments provides otherwise. ORS 130.735(1). The trustee is not liable if the trustee follows the adviser's directions and has no duty to monitor the adviser, unless the trust instrument specifies a duty to do so. ORS 130.735(2), (4). A court may remove an adviser if the court determines that the adviser has committed a serious breach of trust or that removal serves the best interests of the beneficiaries. ORS 130.735(6).

XVI. LIABILITY OF TRUSTEES AND RIGHTS OF PERSONS DEALING WITH TRUSTEES

A. Remedies for Breach

ORS 130.800 lists the remedies available to a beneficiary for a breach of trust committed by the trustee.

B. Damages for Breach

A trustee is liable for the greater of (1) the amount of damages caused by the breach (even if the damages did not affect the beneficial interest in the trust), (2) the amount required to restore the value of the trust property, or (3) the amount of profit the trustee made. ORS 130.805(1). If more than one trustee is liable, contribution among the trustees is based on the degree of fault and whether any trustee acted in bad faith or with reckless indifference. ORS 130.805(2).

C. Damages in Absence of Breach

As under prior Oregon law, "a trustee is accountable to an affected beneficiary for any profit made by the trustee arising from the administration of the trust," even in the absence of a breach. ORS 130.810(1). However, in the absence of any breach, the trustee is not liable "for a loss or depreciation in the value of trust property or for not having made a profit." ORS 130.810(2).

D. Attorney Fees and Costs

A court may award attorney fees and costs to any party, and may charge the fees and costs either against the trust or against another party. ORS 130.815.

E. Limitation of Action Against Trustee

The Oregon UTC requires that any civil action against a trustee based on any act or omission of the trustee be commenced within (1) six years after the date the act or omission is discovered or should have been discovered, or (2) one year if a report is sent to the beneficiary that adequately discloses potential claims and informs the beneficiary of the time allowed for commencing a proceeding. ORS 130.820(1)–(2). If neither of those limitations periods applies, a judicial proceeding against a trustee must be commenced within 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. ORS 130.820(3). For certain actions, the limitations period can be shortened to 45 days. *See* ORS 130.733.

NOTE: The first and third limitations periods come from ORS 12.274. The second period, which cuts off claims after one year if the trustee discloses specific information about the potential claim to the beneficiary, was new with the enactment of the Oregon UTC. Depending on the circumstances, giving notice to beneficiaries may be desirable to shorten the statute of limitations for making a claim against the trustee.

F. Reliance on Trust Instrument

A trustee who reasonably relies on the terms of a trust as expressed in the trust instrument is not liable to a beneficiary if a breach results from the reliance. ORS 130.825. The trustee should be able to follow the express terms of the instrument even if a court later determines that the settlor intended the terms to mean something other than their apparent meaning.

G. Event Affecting Administration or Distribution

The Oregon UTC protects a trustee who is without knowledge of an event such as marriage, divorce, performance of educational requirements, or death, if the trustee exercised reasonable care in attempting to determine whether the event has occurred. ORS 130.830. This statute changes the common law, under which a trustee is absolutely liable for misdelivery of trust property even if the trustee does not know of an event that affects distribution under the trust terms.

H. Exculpation of Trustee

The Oregon UTC validates, but at the same time places limits on, the enforceability of a trust term that relieves a trustee of liability for breach of trust. An exculpatory provision is invalid if it relieves the trustee of liability for acting in bad faith or with reckless indifference or if it resulted from the trustee's abuse of a fiduciary or confidential relationship to the settlor. ORS 130.835(1). Nevertheless, an exculpatory provision that is "drafted or caused to be drafted by the trustee" is valid if the settlor is represented by independent counsel who reviewed the provision or if the trustee proves that the provision is fair under the circumstances and its existence and contents were adequately communicated to the settlor. ORS 130.835(2). The effect of this provision is to place the burden of proof on the trustee, rather than on a beneficiary, if the trustee caused the provision to be included in the terms of the trust.

I. Beneficiary's Consent, Release, or Ratification

A trustee is not liable to a beneficiary for a breach of trust if the beneficiary consented to the conduct, released the trustee from liability, or ratified the transaction. However, if the trustee improperly induced the beneficiary or if the beneficiary did not know the beneficiary's rights or material facts relating to the breach, the consent, release, or ratification will not protect the trustee. ORS 130.840.

J. Limitation on Personal Liability of Trustee

The Oregon UTC protects a trustee from personal liability in some circumstances if the trustee is acting in a fiduciary capacity. A trustee is not personally liable in contract if the trustee disclosed the fiduciary capacity. ORS 130.845(1). A trustee is liable in tort only if the trustee is personally at fault. ORS 130.845(2). A trustee is not personally liable solely because an instrument shows title in the name of the trustee but does not state that the trustee holds the property in a representative capacity. ORS 130.845(4). In a change from common law, a trustee can be sued in a fiduciary capacity whether or not the trustee is personally liable. ORS 130.845(3).

The Oregon UTC provides a trustee with similar protection from liability for contracts entered into or torts committed by a general or limited partnership of which the trustee was a general partner. ORS 130.850.

K. Protection of Person Dealing with Trustee

A person who is not a beneficiary and who assists a trustee or deals with a trustee for value is protected from liability if the trustee acts beyond the scope of the trustee's powers, as long as the person acted in good faith and did not know the trustee had exceeded the trustee's powers or was improperly exercising those powers. ORS 130.855(1). A third party dealing with a trustee in good faith does not have a duty to inquire into the extent of a trustee's powers and may assume that the trustee has the powers necessary for the transaction. ORS 130.855(2).

L. Certification of Trust

A certification of trust protects the privacy of a trust instrument while providing sufficient information to assure a third party that a trustee has authority to act on behalf of the trust. ORS 130.860 describes the required contents of a certification, which need not include the trust's dispositive terms. A person acting in reliance on a certification of trust, without actual knowledge that the certification contains incorrect representations, will not be liable and does not have a duty to inquire as to the existence of the facts stated in the certification.

M. Application

Chapter 130 applies to all trusts, whether created before or after enactment of the Oregon UTC, with a few exceptions, as indicated in this outline. The rules of construction and presumptions contained in Chapter 130 apply to all trusts, including trusts executed before enactment, unless the terms of a trust establish contrary intent. ORS 130.910.

Oregon Uniform Trust Code

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Why A Uniform Trust Code?

- Uniform Law Commission
- Common law challenges
- Uniformity across the country
- 36 enactments so far (and WA has some of the sections)

Oregon's UTC

- Work group with lots of representation
- Goals:
  - Retain existing Oregon law unless a good reason to change it
  - Promote uniformity among the states
- Enacted in 2005, with amendments in subsequent sessions
- UTC section numbers included for reference

UTC Comments

- UTC Comments provide useful explanations
- OR Comments submitted during legislative hearings - can be used as legislative history
- Oregon UTC and Comments published by Willamette L. Rev.

Some Basics

- All express trusts are subject to the Oregon UTC, including charitable trusts
- Statutes apply to all trusts, regardless of when created but only to actions taken after Jan. 1, 2006
- Older Oregon trust statutes incorporated into Chapter 130

Trust Law is Default Law, But:

- Trustee must act in good faith and in accord with trust's purposes
- Purposes cannot be contrary to public policy or illegal
- Settlor cannot override:
  - Court's power to supervise
  - Creditor rights under statutes

Duty to Inform and Report

- Common law – trustee has a duty to keep beneficiaries informed
- UTC adds affirmative duties to provide notice and reports
- Oregon - mandatory rules except:
  - When the settlor or spouse is alive and financially capable
  - If the settlor names someone else to receive the notice (not in UTC)

Beneficiaries

- Permissible distributees
- Qualified beneficiaries
- Beneficiaries
- Oregon added:
  - Remote interest beneficiary
  - Secondary beneficiary

Representation

Used for notice and consent, in the absence of a conflict of interest

- **Holder of testamentary power of appointment**
- **Fiduciaries and parents**
- **Beneficiary with a substantially identical interest**
- **Special representative**

Creation of Trusts

- **Property transferred to trustee**
  - **Trust can be funded at death**
- **Declaration of trust by settlor-trustee**
  - **Schedule A may be enough – *Samuel v. King***
- **Trust must have a beneficiary unless**
  - **Charitable trust; pet trust; trust for a purpose; stewardship trust**
- **Charitable trust – settlor can enforce**
- **Oral trust – prove by C & C**

Stewardship Trust

- Perpetual purpose trust
- Organized for a business purpose
- No beneficiary – trust enforcer
- Stewardship committee directs the trustee (stakeholders of the business)
- Can be modified only with unanimous agreement of trust enforcer and all members of stewardship committee

In terrorem clause

- Also called a no contest clause
- Remember to “bait” it
- Enforceable in Oregon even if probable cause to contest the will
- Consider combining the clause with a direction to try mediation or arbitration

Revocable Trusts

- Legal of capacity – same as a will
- Presumption that a trust is revocable – does not apply to trusts created before 1-1-06
- Settlor must comply with terms of trust to revoke; UTC adds substantial compliance
- An agent under a POA may not revoke unless trust expressly authorizes
- While settlor is alive, trustee owes duties only to settlor

Revocable Trusts - Rules from Wills Law

- Tenancy by entirety property retains creditor protection
- Marriage does not revoke a Rev Trust
- Rules from Wills law apply:
  - divorce revokes provisions for spouse
  - anti-lapse
  - pretermitted children
  - anti-ademption
  - advancement

Powers of Trustee

- Codification of common law
- Settlor can appoint a trust advisor and the person will have fiduciary duties unless the document says otherwise

Co-trustees

- Permitted but often not a good idea
- Can act by majority decision
- Can delegate to one trustee, but must be in writing
- Trustees can delegate – e.g. to investment advisors

Removal of Trustees

Traditional grounds:

Serious breach of trust; lack of cooperation among cotrustees; and unfitness, unwillingness, or persistent failure to administer the trust effectively

UTC adds:

If removal best serves interests of all beneficiaries and if (1) change of circumstances or removal requested by all QBs, (2) not inconsistent with material purpose, and (3) suitable successor trustee available

Uniform Prudent Investor Act

- **UPIA sections moved into Oregon UTC**
- **Oregon added a provision permitting a trustee to consider personal values of beneficiaries and settlor when making investment decisions**
- **Trustee can engage in sustainable investing strategies that align with beneficiaries' or settlor's values**

States That Authorize Consideration of Values in Their Prudent Investor Acts

- **Delaware, Georgia, New Hampshire, and Oregon – consider beneficiaries' values**
- **Illinois – consider ESG information**
- **Oregon – consider values of settlor, to the extent known, and values of beneficiaries**