SENATE JUDICIARY
EXHIBIT NO. 2
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MONTANA UNIFORM TRUST CODE COMMENTS (02-12-2013)
Montana Uniform Trust Code

The Montana Uniform Trust Code (MT UTC) is a version of the Uniform Trust Code (UTC) as promulgated by the Uniform Law Conference. The comments drafted by the Uniform Law Conference apply to most of the sections of the MT UTC. The following comments list the MT UTC sections and their corresponding UTC sections. The comments additionally explain differences between the MT UTC sections and their UTC counterparts.

ARTICLE 1
GENERAL PROVISIONS, DEFINITIONS, CONSTRUCTIVE AND RESULTING TRUSTS, AND NOTICE OF PROPOSED ACTION BY TRUSTEES

Part 1
General Provisions and Definitions

Section 1. Because the MT UTC modifies the UTC as promulgated by the Uniform Law Commission, the Code should be cited as the "Montana Uniform Trust Code."

Section 2. Unlike the UTC, the MT UTC includes provisions concerning constructive and resulting trusts.

Section 3. The Uniform Law Commission's comment concerning subsection (3) of UTC §103 indicates "charitable trusts do not have beneficiaries in the usual sense." Former Montana law did not include such a comment and nonprofit corporations often served as trustees if they were also beneficiaries of the trust. *See* MCA (2011) §72-33-622(2). To address the concern raised by the UTC comment, amendments to MCA (2011) §§32-1-102 and 35-2-118(1) were enacted. These amendments clarify that a nonprofit corporation with an interest in a charitable trust similar to that of a beneficiary of a noncharitable trust may, consistent with prior law, serve as trustee of the charitable trust.

The MT UTC adds three new definitions found in subsections (8), (11), and (14) of this section. The remaining subsections are renumbered.

Subsection (8) of this section defines "interested person." Section 32 requires that certain notices be given to "interested persons." The definition of that term is based on prior law, MCA (2011) §§72-35-306(1), 72-33-703, and 72-33-705. The beneficiaries who were entitled to notice pursuant to MCA (2011) §72-33-705 of prior law are similar to "qualified beneficiaries," which is defined in subsection (16) of this section.

Subsection (8)(b) contemplates some qualified beneficiaries are not entitled to notice. For example, while a trust is revocable, the duty to provide notice is owed exclusively to the settlor. *See* section 75.

Subsection (11) of this section defines "permissible distributee." This term is used in subsection (16) of this section, (Qualified Beneficiary), section 10 (Others Treated as Qualified Beneficiaries), and section 100 (Duty to Inform and Report).

The definition includes only charitable organizations expressly designated to receive distributions under the terms of a charitable trust. For example, if the terms of a charitable trust expressly provide Montana State University is a potential recipient of trust distributions, Montana State University would be a "permissible distributee" under this definition. However, if the terms of a charitable trust permit distributions to "any educational organization organized and operating under IRC §501(c)(3), which organization has a campus in Montana," no "permissible distributee" exists under the definition of this subsection. Thus, the trustee is not obliged to locate all such charities and provide them with the report that otherwise would be required by section 100(3).

Subsection (14) of this section defines "principal place of administration." A settlor may designate the "principal place of administration" in a trust instrument. If no such designation is made as provided in section 8, subsection (14) provides guidance useful for the determination of the trust's tax status, for the determination of venue under section 28, and for other purposes.

Subsection (23) of this section defines "trustee." *See* also MCA §32-1-102 (Banks and Trust Companies) and MCA §35-2-118 (Nonprofit Corporations) for the service of a nonprofit corporation as trustee under certain circumstances.

Section 4. This section is adopted from UTC §104.

Section 5. Unlike the UTC, the MT UTC does not include statutory exceptions to the effectiveness of spendthrift provisions. Thus, subsection (2)(e) of this section makes no reference to the rights of certain creditors and assignees.

Section 100 permits the settlor to limit or waive the trustee's duty to inform and report. Because of the strong privacy rights provided for in the Montana Constitution, Article II, Section 10, optional subsections numbered 105(b)(8) and (b)(9) of the UTC were not adopted as part of the MT UTC.

Section 6. This section is adopted from UTC §106.

Section 7. This section is adopted from UTC §107.

Section 8. This section is adopted from UTC §108.

The official comments to UTC §108 indicate the UTC does not attempt to define "principal place of administration." However, section 3(14) does define that concept.

The official comments to UTC §108 indicate UTC §704(c) provides the procedure for the appointment of a successor trustee of a noncharitable trust and UTC §704(d) provides the procedure for the appointment of a successor trustee of a charitable trust. However, the MT UTC deals with successor trustee appointment for both charitable and noncharitable trusts in the same subsection, namely section 82(3).

Section 9. Subsection (1)(c) of this section specifically provides a general rule that a 30-day notice is deemed reasonable. The UTC has no comparable general rule.

Unlike the UTC, sections 24 through 44 provide an abbreviated process for trust proceedings. Thus, subsection (4) of this section refers to the related notice provisions of sections 31 through 35, rather than the rules of civil procedure.

Section 10. Because section 100 permits the settlor to limit or waive the trustee's duty to inform and report, subsection (1) of this section expressly references section 100.

As noted in the comments under section 3(3) (Beneficiary), one of the Uniform Law Commission's comments indicates "charitable trusts do not have beneficiaries in the usual sense." Unlike the UTC, subsection (2) of this section provides a charitable organization expressly designated to receive distributions under the terms of a charitable trust not only has the rights of a qualified beneficiary, but also has the lesser rights of a beneficiary under certain circumstances. Rights specific to a beneficiary include the following:

- standing to petition the court under section 36;
- standing to commence a proceeding to modify or terminate a trust under section 59(2);
- authority to consent to the modification or termination of a trust under subsection 60(1); and
- authority to request that the trustee furnish a copy of portions of a trust instrument under subsection 100(2)(a).

Subsection (4) of this section addresses the rights of the Attorney General with respect to a charitable trust having its principal place of administration in Montana. For all such charitable trusts, the Attorney General is treated as a qualified beneficiary with respect to two rights: the right to request information pursuant to subsection 100(1) and the right to request a copy of the annual report pursuant to subsection 100(3). *See* subsection 10(4)(b).

The Attorney General has all of the rights of a qualified beneficiary when no charitable organization is expressly designed to receive distributions. The following examples illustrate the Attorney General's authority.

> Example One. The governing instrument provides "To A for life, remainder to Rocky Mountain College (RMC) of Billings, Montana." Because RMC is expressly designated and would be a distributee of trust income and principal if the trust terminated on that date, it is a qualified beneficiary. The Attorney General would not be treated as a qualified beneficiary under subsection 10(4)(c).
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> Example Two. The governing instrument provides "To A for life, remainder to one or more colleges selected by the trustee." A would be a qualified beneficiary under section 103(16). Because no expressly designated charitable organization is entitled to any of the remainder (the charitable portion of the trust), the Attorney General would be treated as a qualified beneficiary under subsection 10(4)(c).
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> Example Three. The governing instrument provides "To A for life, remainder to RMC of Billings, Montana. However if RMC is not in existence at the time of A's death, to one or more colleges selected by the trustee." RMC would be treated as a qualified beneficiary under section 103(16). Although it is possible RMC might not be in existence at the time of A's death, RMC is a remainder beneficiary that would be a distributee of trust income or principal if the trust terminated on that date and therefore could enforce the trust and protect the charitable interest. The existence of a means to select a contingent charitable remainder beneficiary

would not alter this result. There is no need for the Attorney General to be treated as a qualified beneficiary. Thus, the Attorney General would not be treated as a qualified beneficiary under subsection 10(4)(c).

Example Four. The governing instrument includes the same provisions as Example Three. Ten years after the creation of the trust and during A's lifetime, RMC is dissolved. Because no expressly designated charitable organization is entitled to any of the remainder (the charitable portion of the trust), the Attorney General would be treated as a qualified beneficiary under subsection 10(4)(c) as of the date RMC is dissolved and thereafter during A's lifetime.

See also section 44 for the Attorney General's authority to bring a petition under sections 24 through 44, section 54 for the Attorney General's authority to commence a proceeding to enforce a charitable trust, section 60 for the necessity of the Attorney General's consent to modify or terminate an irrevocable charitable trust, and section 110 for the necessity that the Attorney General be a party to a proceeding referenced under that section.

Section 11. Subsection 60(1) permits the settlor and all of the beneficiaries to modify or terminate an otherwise irrevocable trust even if the modification or termination is inconsistent with a material noncharitable purpose of the trust. The Attorney General must consent to the modification or termination of a charitable trust. Subsection (3) of this section expressly notes subsection 60(1) is an exception to the general rule that a nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust.

Section 12. This section is adopted from UTC §112.

Section 13. Unlike the UTC, subsection (2)(b) of this section expressly references MCA §33-15-201. That section defines the parties who have an insurable interest in an individual.

Part 2
Constructive and Resulting Trusts

This Part continues five sections of Montana law dealing with constructive and resulting trusts. None of these sections are part of the UTC as promulgated by the Uniform Law Commission.

Section 14. This section continues MCA (2011) §72-33-216. It is drawn from section 411 of the Restatement (Second) of Trusts (1957).

Section 15. This section continues MCA (2011) §72-33-217. It is drawn from section 430 of the Restatement (Second) of Trusts (1957).

Section 16. This section continues MCA (2011) §72-33-218. It is drawn from sections 440, 441, 442, 443, and 444 of the Restatement (Second) of Trusts (1957).

Section 17. This section continues MCA (2011) §72-33-219. It is drawn from section 160 of the Restatement of Restitution (1937).

Section 18. This section continues MCA (2011) §72-33-220. *See* section 56(3) (Statute of Frauds).

Part 3
Notice of Proposed Action and Notice of Proposed Inaction by Trustee

This Part is not part of the UTC as promulgated by the Uniform Law Commission. The provisions of this Part permit a trustee to notify qualified beneficiaries of a proposed action or proposed inaction. If the beneficiaries do not timely object, the trustee is not liable to any current or future beneficiary with respect to the proposed action or inaction.

A trustee could petition the court for instructions under section 36. Such a proceeding would be a part of the public record. However, the trustee and the beneficiaries may prefer the privacy permitted under the Notice of Proposed Action and Notice of Proposed Inaction by Trustee as provided in this Part. Such a preference would be consistent with Montana's strong public policy interest in privacy derived from the Montana Constitution, Article II, Section 10. Also, the trustee may prefer the notice procedure of this Part because it is likely less costly than a court petition and likely to be resolved sooner than a court petition.

The following examples illustrate uses of the notice procedure.

> Example One. The trustee proposes to sell or exchange a trust asset.
>
> Example Two. The trustee proposes to abandon trust assets the trustee believes have no current value.

A number of other situations may arise where the trustee believes one or more beneficiaries may potentially assert claims against the trustee for acting or failing to act.

The provisions of the Part are similar to California Probate Code (2012) §§16500 through 16504.

Section 19. This section is based on California Probate Code (2012) §16500.

Section 20. This section is based on California Probate Code (2012) §16501. Subsection (1) of this section relies on the qualified beneficiary definition of the MT UTC. Because of section 9, some of the subsections of the corresponding California section are not included in the MT UTC.

Section 21. This section is based on California Probate Code (2012) §16502.

Section 22. This section is based on California Probate Code (2012) §16503. Section 22 relies on the qualified beneficiary definition of the MT UTC. A representative may bind an unborn or minor child or an incapacitated adult under section 47.

Section 23. This section is based on California Probate Code (2012) §16504.

ARTICLE 2
JUDICIAL PROCEEDINGS

Part 1
Jurisdiction and Venue

Section 24. This section continues MCA (2011) §72-35-101, drawn from California Probate Code (1986) §17000.

Section 25. This section continues MCA (2011) §72-35-102, drawn from California Probate Code (1986) §17001.

Section 26. Subsections (1) and (2) of this section are based on MCA (2011) §72-35-104, drawn from California Probate Code (1986) §17003.

Subsection (3) of this section is drawn from UTC §202(b).

Section 27. This section continues MCA (2011) §72-35-105 drawn from California Probate Code (1986) §17004. This section recognizes the court, in proceedings relating to internal trust affairs or other purposes described in section 24, may exercise jurisdiction on any basis not inconsistent with the Montana or United States Constitution, as provided in Montana Code Annotated Title 25 Chapter 20 (Rule 4 of Civil Procedure). In addition, this section codifies a basis of personal jurisdiction derived from concepts of presence in the state and consent to jurisdiction. However, personal jurisdiction over a trustee may be exercised where the trustee is found, regardless of the location of the trust property. Similarly, jurisdiction may be exercised to determine matters concerning trust property, particularly land, located in Montana even if the principal place of administration of the trust is not in Montana. *See* Restatement (Second) of Conflicts of Laws §276 and comments (1969); 5 A. Scott, The Law of Trusts §§ 644-47, at 4074-83 (3d ed. 1967).

A determination that a Montana court may exercise jurisdiction is not decisive if the exercise would be an undue interference with the jurisdiction of a court of another state which has primary supervision over the administration of the trust. *See* Restatement (Second) of Conflict of Laws §267 and comments (1969). The concept of primary supervision in the context of trust administration is a special application of the doctrine of *forum non conveniens*.

Where the court has acquired jurisdiction over parties to a trust, jurisdiction continues over the parties and the subject of the proceeding, notwithstanding the removal from the state of a person or of trust property.

Section 28. This section is based in part on prior law, MCA (2011) §72-35-106, drawn from California Probate Code (1986) §17005.

Section 29. This section provides that, unless ordered by a court to the contrary, the Montana Rules of Civil Procedure, including discovery, do not apply to a proceeding under the MT UTC. An analogy may be made to the Uniform Probate Code where most proceedings are undertaken informally.

Section 30. This section continues MCA (2011) §72-35-107, drawn from California Probate Code (1986) §17006.

Part 2
Notice

Section 31. This section is based on prior law, MCA (2011) §72-35-201, drawn from California Probate Code (1986) §17100. Unlike MCA (2011) §72-35-201, this provision applies only to notice in judicial proceedings commenced pursuant to Article 2.

Section 32. This section is based on the Uniform Probate Code provisions found in MCA §72-1-301. However, the last two sentences of subsection (4) are based on MCA (2011) §72-35-206(2), drawn from California Probate Code (1986) §17104.

Subsection (1) of this section requires notice to be given to any "interested person" as defined in subsection 3(8). However, while a trust is revocable, the duty to provide notice is owed exclusively to the settlor. *See* section 75.

Section 33. This section is based on MCA (2011) §72-1-302.

Section 34. Subsections (1) through (4) of this section are based on MCA (2011) §72-1-303. However, the last sentence of subsection (4) of this section, dealing with the compensation and costs due a guardian *ad litem*, is generally based on MCA (2011) §72-35-313(3), drawn from California Probate Code (1986) §17208.

Subsection (5) of this section is based on MCA (2011) §72-35-306(2).

Section 35. This section continues MCA (2011) §72-35-207, drawn from California Probate Code (1986) §17105.

Part 3
Proceedings Concerning Trusts

Section 36. This section continues MCA (2011) §72-35-301, drawn from California Probate Code (1986) §17200.

The exception in subsection (1) of this section makes it clear the settlor of a revocable trust is the sole beneficiary who has a right to petition concerning the internal affairs of the trust. *See* section 75.

Subsection (2)(g) of this section is modified to conform to the terms used in section 100.

Section 37. This section incorporates both existing and new statutes.

Subsection (1) of this section continues MCA (2011) §72-35-302(1), drawn from California Probate Code (1986) §17201.

Subsection (2) of this section provides a list of specifically permitted pleadings under the MT UTC. The format is similar to the list found in MCA (2011) §72-1-310(1), which is applicable to permitted probate proceedings.

Subsection (3) of this section continues MCA (2011) §72-35-302(2), drawn from California Probate Code (1986) §17201.

Subsection (4) of this section adopts a verification requirement for trust proceedings similar to a verification requirement for probate proceedings found in MCA (2011) §72-1-310(2).

Subsection (5) of this section adopts an evidentiary rule for trust proceedings similar to a rule applicable to probate proceedings found in MCA (2011) § 72-1-311.

Subsection (6) of this section adopts an attorney signature rule for trust proceedings similar to a rule applicable to probate proceedings found in MCA (2011) § 72-1-312.

Subsection (7) of this section reflects that, except for interpretation of certain testamentary trusts, the trust code governs trust matters, and the probate code governs probate matters as discussed in *In re Estate of Haugen*, 346 Mont 1 (2008).

Section 38. This section continues MCA (2011) §72-35-303, drawn from California Probate Code (1986) §17202.

Section 39. This section is based on prior law, MCA (2011) §72-35-307, drawn from California Probate Code (1986) §17204. Unlike prior law which includes a reference to "petitions", this section refers to "pleadings."

Section 40. This section continues MCA (2011) §72-35-308, drawn from California Probate Code (1986) §17205.

Section 41. This section continues MCA (2011) §72-35-311, drawn from California Probate Code (1986) §17206.

Section 42. This section continues MCA (2011) §72-35-312, drawn from California Probate Code (1986) § 17207.

Section 43. This section continues MCA (2011) §72-35-314, drawn from California Probate Code (1986) §17209.

Section 44. This section continues MCA (2011) §72-35-315, drawn from California Probate Code (1986) §17210.

ARTICLE 3
REPRESENTATION

Section 45. This section is drawn from UTC §301. As indicated in the official comments to the UTC, UTC §301 validates substitute notices to a person who may represent and bind another person as provided in the succeeding sections of this article.

The official comments to the UTC §301 cite subsection 109(d) and its reference to the rules of civil procedure. However, unlike UTC subsection 109(d), MT UTC subsection 9(4) does not refer to the rules of civil procedure. Rather, subsection 9(4) requires that notices of judicial proceedings must be given as provided in sections 31 through 35.

In addition to the types of notices referenced in the official comments to the UTC, notice includes the providing of information, portions of the trust instrument that describe or affect a beneficiary's interest, and other notices described in section 100.

In addition to the types of consents referenced in the official comments to the UTC, consent includes the consent of the settlor to modify or terminate the trust under subsection 60(1). The settlor's agent, under a power of attorney, may consent to the revocation, amendment or distribution of trust property if expressly authorized by the terms of the trust and the power of attorney pursuant to subsection 74(5).

Subsection (2) of this section differs from its corresponding UTC subsection and permits a person who would otherwise be bound by the representational provisions of this article to object by notifying the trustee or the representative before the consent would have become effective.

Section 46. This section is adopted from UTC §302.

Section 47. This section is drawn from UTC §303.

In addition to the provisions of corresponding UTC §303, this section expands subsection (6) with an order of priority to determine which parent is entitled to represent and bind a child.

Section 48. This section is adopted from UTC §304.

Section 49. This section is adopted from UTC §305.

ARTICLE 4
CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUST

Section 50. This section is drawn from UTC §401. The word "a" is substituted for "another" in subsection (1) to clarify that the same individual may be both settlor and trustee by the settlor's transferring assets to himself or herself as trustee.

Section 51. This section is drawn from UTC §402.

Subsection (4) of this section is not part of UTC §402. A conservation easement instrument does not create a charitable trust unless the settlor expresses a clear intention to create such a trust. Thus, the following uniform law commissioner's comment under UTC §414(d) does not apply to the MT UTC:

> Even though not accompanied by the usual trappings of a trust, the creation and transfer of an easement for conservation or preservation will frequently create a charitable trust. The organization to whom the easement was conveyed will be deemed to be acting as trustee of what will ostensibly appear to be a contractual or property arrangement. Because of the fiduciary obligation imposed, the termination or substantial modification of the easement by the "trustee" could constitute a breach of trust.

Section 52. This section is adopted from UTC §403.

Section 53. This section is adopted from UTC §404.

Section 54. This section is drawn from UTC §405. Subsection (3) of this section differs from its corresponding UTC subsection by naming the Attorney General and a charitable organization expressly named in the trust to receive trust distributions, as well as the settlor, as parties entitled to bring a proceeding to enforce a charitable trust. A person who may represent the settlor, such as the personal representative of the estate of the settlor, would have standing to bring an action to enforce a charitable trust. Additionally, subsection (3) of this section indicates others with standing may bring such a proceeding.

Section 55. This section is adopted from UTC §406.

Section 56. Unlike UTC §407, this section requires a writing to evidence the creation of a trust, except a constructive trust or a resulting trust, both of which arise by operation of law. This section continues prior law, MCA (2011) §72-33-208, drawn from California Probate Code (1986) §15206. Unlike California Probate Code (1986) §15206, this section applies to trusts of personal property, as well as to trusts of real property. This statute of frauds requirement is a threshold question that must be answered affirmatively before a trust may be examined for validity and enforceability.

Section 57. This section is adopted from UTC §408.

Section 58. This section is adopted from UTC §409.

Section 59. This section is adopted from UTC §410.

Section 60. This section is drawn from UTC §411.

Unlike UTC §411, this section applies to charitable, as well as noncharitable, irrevocable trusts.

Subsection (1) of this section permits an irrevocable trust to be modified or terminated without court action so long as the settlor and all of the beneficiaries consent. However, in the case of a charitable trust, modification or termination also requires the consent of the Attorney General.

Unlike UTC §411, subsection (1) of this section permits the settlor's consent to be exercised by an agent under a power of attorney only if two conditions are satisfied. The power of attorney and the terms of the trust must both expressly authorize the agent to provide such consent.

Subsection (2) of this section permits an irrevocable trust to be modified or terminated so long as all of the beneficiaries consent and the court determines modification or termination is not inconsistent with a material purpose of the trust. Unlike UTC §411(b), subsection (2) of this section expressly requires the consent of the Attorney General in the case of a charitable trust.

Unlike UTC §411(c), subsection (3) of this section presumes a spendthrift provision constitutes a material purpose of the trust.

Unlike UTC §411(d), subsection (4) of this section includes express provisions for the distribution of trust property on the termination of a charitable trust.

If the charitable trust is terminated, trust property is to be distributed in accordance with the trust terms. If no applicable trust terms exist, the trust property is to be distributed as agreed by the Attorney General and the beneficiaries. However, if no charitable organization has the rights of a beneficiary and the termination is pursuant to subsection (1), trust property is to be distributed as agreed by the settlor and the Attorney General. If no charitable organization has the rights of a beneficiary and the termination is pursuant to subsection (2), trust property is to be distributed as directed by the court.

Section 61. This section is adopted from UTC §412.

Section 62. This section is adopted from UTC §413.

Section 63. This section is adopted from UTC §414 except that $100,000 is the amount set forth in subsection (1) of this section.

As noted in the MT UTC comment under section 51, a conservation easement instrument does not create a charitable trust unless the settlor expresses a clear intention to create such a trust. Thus, the following uniform law commissioner's comment under UTC §414(d) does not apply:

> Even though not accompanied by the usual trappings of a trust, the creation and transfer of an easement for conservation or preservation will frequently create a charitable trust. The organization to whom the easement was conveyed will be deemed to be acting as trustee of what will ostensibly appear to be a contractual or property arrangement. Because of the fiduciary obligation imposed, the termination or substantial modification of the easement by the "trustee" could constitute a breach of trust.

Section 64. This section is adopted from UTC §415.

Section 65. This section is adopted from UTC §416

Section 66. This section is adopted from UTC §417.

ARTICLE 5
CREDITOR'S CLAIMS; SPENDTHRIFT AND DISCRETIONARY TRUSTS

The MT UTC continues prior law concerning statutory exceptions to the effectiveness of spendthrift trust protection. Like MCA (2011) §72-33-305, section 70 permits the settlor's creditors and assignees to reach trust assets that could otherwise be distributed to or for the settlor's benefit. Like prior Montana law, the MT UTC does not include other express statutory exceptions to the effectiveness of spendthrift trusts. Thus, the MT UTC differs from the UTC. The MT UTC does not include UTC §503, which specifies preferred creditors who could reach trust assets despite a spendthrift trust provision.

Section 67. This section is adopted from UTC §501.

Section 68. This section is adopted from UTC §502.

Section 69. This section is drawn from UTC §504. The section continues prior Montana law.

Unlike UTC §504, this section does specify a class of preferred creditors who could seek a court order compelling a distribution to satisfy a judgment or court order against a beneficiary if the trustee has not complied with a standard of distribution or has abused a discretion. Thus, subsections (a) and (c) of UTC §504 have been deleted and the remaining subsections have been re-lettered.

Section 70. This section is drawn from UTC §505.

The last sentence of subsection (1)(b) of this section is not part of UTC §505. The last sentence provides that a trustee's discretionary authority to pay directly, or to reimburse the settlor, amounts for income taxes payable on trust income will not subject those amounts to the claims of the settlor's creditors. This sentence is drawn from Virginia Code Annotated (2012) §64.2-747. Thus, a discretionary provision for the payment of income taxes in an intentionally defective grantor trust will not subject the trust to the settlor's creditors.

Section 71. This section is adopted from UTC §506.

Section 72. This section is adopted from UTC §507.

ARTICLE 6
REVOCABLE TRUSTS

Section 73. This section is adopted from UTC §601.

Section 74. This section is drawn from UTC §602.

Unlike UTC §602, subsection (3) of this section does not permit a settlor to revoke or amend a revocable trust by a later will or codicil. Subsection (3) of this section does permit revocation or amendment either by substantial compliance with a method provided in the terms of a trust, or if the trust terms do

not include a method, only by delivering a writing to the trustee manifesting clear and convincing evidence of the settlor's intent to revoke or amend.

Unlike UTC §602, subsection (4) of this section includes specific provisions for the distribution of community property if community property is part of a revoked trust.

Unlike UTC §602, subsection (5) of this section permits an agent to exercise the settlor's powers with respect to revocation, amendment, or distribution of trust property under a power of attorney only if two conditions are satisfied. The power of attorney and the terms of the trust must both expressly authorize the agent to exercise those powers.

Section 75. This section is drawn from UTC §603.

Unlike UTC §603, subsection (1) of this section indicates the settlor is entitled to all the rights of beneficiaries of a revocable trust, including the right to consent to any action. The trustee owes all duties, including the duty to provide notice, exclusively to the settlor. The settlor's rights and the trustee's obligations to the settlor are not contingent on the settlor's capacity to revoke the trust. The provisions of this section prevail over other provisions of the MT UTC.

Section 76. This section is adopted from UTC §604.

Section 77. This section is drawn from MCA (2011) §72-12-206. This section applies the rules applicable to challenging wills to challenges of previously revocable trusts after the settlor's death.

Section 78. This section is drawn from MCA (2011) §72-33-211. The primary purpose of this section is to avoid the likelihood of a probate when an item of tangible personal property arguably may not have been titled as an asset of the settlor's revocable trust prior to the settlor's death. Rather than force a probate to dispose of the item as provided in the written statement or list, the trustee may simply dispose of the asset in accordance with the list, just as a personal representative would have done under MCA (2011) §72-2-533. The same beneficiary will receive the item whether the item was part of the testator's probate estate or the settlor's revocable trust estate.

ARTICLE 7
OFFICE OF TRUSTEE

Section 79. This section is adopted from UTC §701.

Section 80. This section is adopted from UTC §702.

Section 81. This section is adopted from UTC §703.

Section 82. This section is drawn from UTC §704.

Unlike UTC §704, subsection (1)(g) of this section lists an additional circumstance when a trustee vacancy occurs, namely, when the trustee has been ordered committed as defined in MCA §53-21-102.

Unlike UTC §704, subsection (3) of this section applies the priority for filling a vacancy in the trusteeship to both charitable and noncharitable trusts.

UTC §704(d), which deals solely with charitable trusts, is not included in the MT UTC and UTC §704(e) has been re-lettered as subsection 82(4).

Section 83. This section is adopted from UTC §705.

Section 84. This section is drawn from UTC §706.

Unlike UTC §706, subsection (2)(c) of this section includes the phrase "and impartially," and thus emphasizes the trustee's duty set forth in section 90.

Section 85. This section is drawn from UTC §707.

Unlike UTC §707, subsections (2)(a) and (2)(b) have been added to this section. The resigned or removed trustee is personally liable for damages incurred as a result of a failure to deliver trust property. The court may order the resigned or removed trustee to pay reasonable attorney fees when enforcing the trustee's duty to deliver trust property.

Section 86. This section is adopted from UTC §708.

Section 87. This section is adopted from UTC §709.

ARTICLE 8
DUTIES AND POWERS OF TRUSTEE

Part 1
General Duties and Powers

Section 88. This section is drawn from UTC §801.

Unlike UTC §801, this section includes the term "expeditiously" and thus emphasizes one of the trustee's duties. The trustee's duty to administer the trust expeditiously must be read in context of the trustee's other duties. The trustee is obliged to administer the trust as a prudent person and must exercise reasonable care, skill, and caution. *See* section 91. Thus, for example, on the death of the settlor of a revocable trust, the trustee's expeditious distribution of the trust assets to the beneficiaries would also dictate reasonable care and caution by the trustee who should consider potential trust contests, the settlor's potential creditors, potential tax liabilities, and other potential liabilities. As a result of such consideration, the trustee would reasonably retain sufficient assets for periods of time necessary to satisfy these contingencies. The retention of sufficient assets to reasonably satisfy the probable contingencies would not be deemed a breach of trust subjecting the trustee to liability under section 119.

Section 89. This section is drawn from UTC §802.

The last sentence of subsection (4) of this section is not part of UTC §802. For example, a settlor may name a charity as trustee of a charitable remainder trust. Both the settlor and the charity are beneficiaries of the trust. A settlor's subsequent gift to the charity, or to a trust for the charity's benefit, is not voidable under subsection(4).

Section 90. This section is adopted from UTC §803.

Section 91. This section is adopted from UTC §804.

Section 92. This section is adopted from UTC §805.

Section 93. This section is adopted from UTC §806.

Section 94. This section is adopted from UTC §807.

Section 95. This section is adopted from UTC §808.

Section 96. This section is adopted from UTC §809.

Section 97. This section is adopted from UTC §810.

Section 98. This section is adopted from UTC §811.

Section 99. This section is adopted from UTC §812.

Section 100. This section is drawn from UTC §813.

Because of the strong privacy rights provided for in the Montana Constitution, Article II, Section 10, optional subsections numbered 105(b)(8) & (9) in the UTC were not adopted as part of the MT UTC. Thus, a settlor is permitted to limit, or waive, all of the notice requirements of section 100. To clarify these rights of a settlor, the first sentence of this section is added to the MT UTC. This sentence makes it clear the settlor in a trust instrument, executed before or after the effective date of the MT UTC, can limit or waive the trustee's duties to inform and report.

However, before limiting or waiving the trustee's duty to respond to a beneficiary's request for information related to the administration of the trust, a settlor should consider the impact of the Restatement (Second) of Trusts, §173. Under §173, the beneficiary is entitled to such information as is reasonably necessary to enable the beneficiary to enforce the beneficiary's rights under the trust or to prevent or redress a breach of trust. *See Wilson v. Wilson*, 690 S.E.2d 710 (N.C. Ct. Appl. 2010).

Unlike UTC §813(a), the trustee's duty to respond to requests under subsection (1) of this section is limited. The duty applies only to "qualified" beneficiaries. The scope of the requested information is limited to that which is "reasonably necessary" for the qualified beneficiary to enforce that qualified beneficiary's rights.

Unlike UTC §813, subsection (2)(a) of this section provides the trustee is obliged to furnish a beneficiary only those portions of the trust instrument which describe or affect the beneficiary's interest. The

trustee is not obliged to provide the entire trust instrument. UTC §813(b)(3) is modified to reflect the modification to subsection (2)(a) of this section.

Subsection (3) of this section differs in many respects from its UTC counterpart.

- The trustee's duties apply only to "qualified" beneficiaries.
- The trustee may report on a fiscal year or a calendar year basis, consistent with the trust's tax reporting.
- Although the trustee is obliged to report, if feasible, the market values of the trust's assets, no appraisal or statement of fair market value is required for real estate, closely-held businesses, or other property if fair market value is not readily ascertainable or if the asset is not traded on an established public market.
- On request, a qualified beneficiary can receive copies of applicable income, estate, or other transfer tax returns relevant to the trust's administration.

Subsection (4) of this section differs from its UTC counterpart as it applies only to "qualified" beneficiaries.

Subsection (5) of this section indicates subsections (2)(b) and (2)(c) do not apply to:

- Trustees who accepted a trusteeship before October 1, 2013.
- Irrevocable trusts created before October 1, 2013, and
- Revocable trusts that become irrevocable before October 1, 2013.

Unless otherwise limited by law or expressly limited by the settlor in the trust's terms, the trustee may provide beneficiaries more information about the trust and its administration than that required by this section.

Section 101. This section is adopted from UTC §814.

Section 102. This section is adopted from UTC §815.

Section 103. This section is drawn from UTC §816.

Subsection (21)(b) of this section permits payments to a custodial trustee pursuant to the laws of any state. Unlike its UTC counterpart, the subsection is not limited to the Uniform Custodial Trust Act.

Section 104. This section is adopted from UTC §817.

Part 2
Duties of Trustees of Private Foundations, Charitable Trusts, and Split-Interest Trusts

Section 105. This section continues MCA (2011) §72-34-201, drawn from the California Probate Code (1986) §16100. It defines terms for the purposes of this part.

Section 106. This section continues MCA (2011) §72-34-202, drawn from the California Probate Code (1986) §16101.

Section 107. This section continues MCA (2011) §72-34-203, drawn from the California Probate Code (1986) §16102.

Section 108. This section continues MCA (2011) §72-34-204, drawn from the California Probate Code (1986) §16103.

Section 109. This section is drawn from MCA (2011) §72-34-205, drawn from the California Probate Code (1986) §16104.

The phrase "trust instrument" found in MCA (2011) §72-34-205 was replaced with "terms of the trust."

The phrase "unless that term is more restrictive" was added at the end of the second sentence of this section.

Section 110. This section continues MCA (2011) §72-34-206, drawn from the California Probate Code (1986) §16105. For the text of section 101(l)(3) of the Tax Reform Act of 1969, relating to judicial proceedings by a private foundation to reform or excuse compliance with its governing instrument to comply with 26 U.C.A. §4942, see the note following 26 U.C.A. §4940.

Section 111. This section continues MCA (2011) §72-34-207 with two additions.

The phrase "organized as a trust" was added to clarify that this section affects only those private foundations created in the form of a trust.

The last sentence of the section applying to split-interest trusts is added. The sentence is drawn from suggested trust language found in Rev. Proc. 2005-52, 2005-34 I.R.B. 326, 2005-2 C.B. 326.

ARTICLE 9
UNIFORM PRUDENT INVESTOR ACT

As recommended by the drafters of the UTC, portions of the Uniform Prudent Investor Act were incorporated in the UTC. However, where the Uniform Prudent Investor Act and the UTC are duplicative, those duplicating provisions of the Uniform Prudent Investor Act were repealed. Thus, MCA (2011) §72-34-604 is repealed because the duty of impartiality is covered in section 90. MCA (2011) §72-34-607 is repealed because costs of administration are covered in section 92. MCA (2011) §72-34-609 is repealed because trustee delegation is covered in section 94.

Section 112. This section continues MCA (2011) §72-34-602 without the first sentence because the duty of loyalty is covered in section 89. This section is drawn from section 1 of the Uniform Prudent Investor Act.

Section 113. This section continues MCA (2011) §72-34-603, drawn from section 2 of the Uniform Prudent Investor Act.

Section 114. This section is drawn from MCA (2011) §72-34-605, drawn from section 3 of the Uniform Prudent Investor Act. However, the phrase "unless otherwise directed by a majority of adult trust beneficiaries" found in MCA (2011) §72-34-605 was deleted.

Section 115. This section continues MCA (2011) §72-34-606, drawn from section 4 of the Uniform Prudent Investor Act.

Section 116. This section continues MCA (2011) §72-34-608, drawn from section 8 of the Uniform Prudent Investor Act.

Section 117. This section continues MCA (2011) §72-34-610, drawn from section 10 of the Uniform Prudent Investor Act.

ARTICLE 10
LIABILITY OF TRUSTEES AND RIGHTS OF PERSONS DEALING WITH TRUSTEE

Section 118. This section is adopted from UTC §1001.

Section 119. This section is adopted from UTC §1002.

See comment to section 88 concerning the trustee's duty to administer the trust expeditiously in the context of the trustee's other duties.

Section 120. This section is adopted from UTC §1003.

Section 121. This section is adopted from UTC §1004.

Section 122. This section is drawn from UTC §1005.

Unlike UTC §1005, subsection (1) of this section provides for a three-year statute of limitations.

Section 123. This section is adopted from UTC §1006.

Section 124. This section is adopted from UTC §1007.

Section 125. This section is adopted from UTC §1008.

Section 126. This section is adopted from UTC §1009.

Section 127. This section is adopted from UTC §1010.

Section 128. This section is drawn from UTC §1011.

Unlike UTC §1011(c), this section has no express exclusions from the protections of this section for trustees who own an interest in a partnership in another capacity or for the trustee if the interest is

owned by the trustee's spouse, descendants, siblings, parents, or their spouses. Thus, subsection (1) of this section makes no reference to such exceptions.

Additionally, subsection (1) of this section includes the phrase "in the trustee's fiduciary capacity." That provision is not included in UTC §1011(a). The last sentence of subsection (1) of this section is not part of the corresponding subsection of the UTC. The terms "trustee", "as trustee", or a similar designation associated with the trustee's signature constitutes a sufficient disclosure of the trustee's fiduciary capacity to protect the trustee from liability.

Subsection (2) of this section relating to immunity from tort liability also includes the phrase "in the trustee's fiduciary capacity." Subsection (2) of this section clarifies the exception "unless the trustee is personally at fault" by deleting that phrase and expressly providing the subsection's limits to tort liability do not affect the trustee's liability for the trustee's own negligence, wrongful act, or misconduct.

Section 129. This section is adopted from UTC §1012.

Section 130. This section is drawn from UTC §1013.

The certification set forth in subsection (1) of this section differs in many respects from its UTC counterpart.

- The certification need only include the "relevant" powers of the trustee. *See* subsection (a)(4) of this section.
- The certification does not need to include the trust's taxpayer identification number.
- The certification does not need to specify the manner of taking title to trust property.

Subsection (2) of this section permits a person to request that the certification be acknowledged so it may be recorded. The UTC does not include a similar provision.

Subsection (9) of this section adds the phrase "when required to be furnished by law," which is not included in its UTC counterpart.

ARTICLE 11
MISCELLANEOUS PROVISIONS

Section 131. This section is adopted from UTC §1101.

Section 132. This section is adopted from UTC §1102.

Section 133. This section is based on California Probate Code (2012) §2580.

Section 134. This section is based on California Probate Code (2012) §2581.

Section 135. This section is based on California Probate Code (2012) §2582.

Section 136. This section is based on California Probate Code (2012) §2583.

Section 137. This section is based on California Probate Code (2012) §2584.

Section 138. This section is based on California Probate Code (2012) §2585.

Section 139. This section is based on California Probate Code (2012) §2586.

Section 140. This section applies the creditor claim and statutory allowance provisions of section 141 to conveyances made by beneficiary deeds.

Section 141. This section is based on Uniform Probate Code (1998) §6-102.

Section 142. This section amends MCA (2011) §31-2-209 by deleting subsection (7), which refers to a section of former law repealed by this bill.

Section 143. This section amends MCA (2011) §32-1-102. It is the intent of this amendment to clarify, and not change, current law, which permits a nonprofit corporation to serve as trustee of a charitable trust in which the nonprofit corporation's interest is similar to that of a beneficiary of a noncharitable trust. Such service as trustee is exempt from the provisions of Title 32. *See* the Uniform Law Commission's comments under UTC §103(3) concerning beneficiaries and charitable trusts.

Section 144. This section amends MCA (2011) §32-3-506 by replacing the term "trustor" with the term "settlor."

Section 145. This section amends MCA (2011) §35-2-118. It is the intent of this amendment to clarify, and not change, current law, which permits a nonprofit corporation to serve as trustee of a charitable trust in which the nonprofit corporation's interest is similar to that of a beneficiary of a noncharitable trust. *See* the Uniform Law Commission's comments under UTC §103(3) concerning beneficiaries and charitable trusts.

Section 146. This section amends MCA (2011) §72-1-103. The amendment applies the definitions of MCA (2011) §72-1-103 to Title 72, Chapter 6, Nonprobate Transfers on Death and to continue the application of the definitions to Chapters 1 - 5.

Section 147. This section amends MCA (2011) §72-1-310. The amendment deletes the reference to trust proceedings.

Section 148. This section amends MCA (2011) §72-1-311. The amendment deletes the reference to trust matters.

Section 149. This section amends (2011) MCA (2011) §72-1-312. The amendment deletes the reference to trust proceedings.

Section 150. This section amends MCA (2011) §72-6-206 by deleting a reference to MCA (2011) §72-6-215, which is repealed by this bill.

Section 151. This section amends MCA (2011) §72-6-214 by referring to section 141 and deleting a reference to MCA (2011) §72-6-215, which is repealed by this bill.

Section 152. This section amends MCA (2011) §71-16-1001 by replacing the term "trustor" with the term "settlor."

Section 153. This section amends MCA (2011) §72-34-424 by deleting references to former law and by replacing the term "trustor" with the term "settlor."

Section 154. This section amends MCA (2011) §72-34-446 by replacing the term "trustor" with the term "settlor."

Section 155. This section amends MCA (2011) §72-36-206 so it refers to sections 1 through 132.

Section 156. This section amends MCA (2011) §77-1-219 by deleting a reference to former law and inserting a reference to section 88.

Section 157. This section amends MCA (2011) §77-1-229 by deleting a reference to former law and inserting a reference to section 88.

Section 158. This section amends MCA (2011) §77-2-364 by deleting a reference to former law and inserting a reference to section 88.

Section 159. This section amends MCA (2011) §82-1-304 by deleting a reference to former law and inserting a reference to section 113.

Section 160. This section provides codification instructions.

Section 161. This section is adopted from UTC §1103.

Section 162. This section repeals specified provisions of existing law. The section follows the format of UTC §1105.

Section 163. This section is adopted from UTC §1104.

Section 164. This section is adopted from UTC §1106.