I. INTRODUCTION

Nebraska lawyers now face the reality of a changed world of Nebraska trust law with the passage of LB 130 during the Ninety-eighth Legislature, First Session. LB 130 enacts the Nebraska Uniform Trust Code ("Nebraska UTC") — an event comparable to the passage of LB 354 in 1974 that brought the Uniform Probate Code to Nebraska. LB 354 stipulated an operative date of January 1, 1977, in order to allow Nebraska lawyers sufficient time to acquaint themselves with the new Nebraska Probate Code. In a similar fashion, LB 130 provides for an operative date of January 1, 2005, with the hope that Nebraska lawyers will have sufficient lead time to educate themselves in regard to the particulars of the new trust code. The operative date of January 1, 2005, also allows additional time to make further legislative changes in 2004 to the Nebraska UTC if changes are deemed necessary.

The education process for Nebraska lawyers can and will take various forms. The Nebraska State Bar Association’s Real Property, Probate and Trust Section and Continuing Legal Education Committee co-sponsored a one day seminar on November 14, 2003, and other seminars are being scheduled. This issue of the Creighton Law Review features two articles on the Nebraska UTC. Both articles cover the same topic and present a practitioner's perspective and an academic's perspective. The articles share a similar goal in focusing upon the Nebraska UTC with a view towards placing the Nebraska UTC in the context of what had been the pre-existing trust law of the State of Nebraska.

† Professor of Law, Creighton University School of Law. While the author benefited greatly from comments and discussions with the members of the interim study group, the views expressed in this article are solely those of the author.

3. Id.
4. See L.B. 130, § 140 (stating "[t]his act becomes operative on the second January 1 following the effective date of this act").
5. The seminar was entitled "The Nebraska Uniform Probate Code"; written materials from that seminar are available from Nebraska Continuing Legal Education.
The Lindsay article\(^6\) presents a fairly comprehensive overview of the Nebraska UTC from the practitioner's perspective. This article presents a slightly different perspective in that its purposes are: (1) to place the Nebraska UTC in the context of national developments; (2) to highlight resources available for those interested in further researching the Uniform Trust Code ("UTC"); (3) to provide a short history of how the Nebraska UTC became law; and (4) to review some of the Nebraska UTC topics that are likely to be the most significant as debate continues over the changes wrought by the Nebraska UTC. The Lindsay article and this article were designed by their authors to be complementary — offering differing perspectives of the Nebraska UTC, but both focusing on the more practical aspects of drafting documents in the context of the new legislation.

As an academic, I have to state the obvious: There is no substitute for reading the statutory language of the Nebraska UTC. The Lindsay article has a "recommended reading order"\(^7\) which should be helpful for those unfamiliar with the Nebraska UTC. This "road map" re-emphasizes the point first made: Paying critical and careful attention to the language of the statutes is the first and most important recommendation that both William Lindsay, Jr. and I agree upon.

What this article will *not* do is duplicate or repeat the discussions and commentaries that have been occurring nationally on provisions of the UTC as promulgated by the National Conference of Commissioners on Uniform State Laws. This article will reference some of these articles, but the focus of this article is not to join the nationwide debate over UTC policy choices. My focus, like that of William Lindsay, Jr. is to concentrate upon the Nebraska UTC and the impact it will have upon Nebraska lawyers, particularly in the context of a Nebraska lawyer who drafts trusts. Having stated that as my main goal, I nonetheless want to place the enactment of the Nebraska UTC within a national perspective, a topic to which I now turn.

II. THE NATIONAL PERSPECTIVE

A. WHAT'S IN A NAME? THE "PURE" UTC

The National Conference of Commissioners on Uniform State Laws ("NCCUSL") approved the Uniform Trust Code ("UTC") at its annual conference in the summer of 2000.\(^8\) Professor David English,

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7. Id. at 96.
8. Detailed information about the Uniform Trust Code ("UTC") can be accessed through the NCCUSL website which is available at http://www.nccusl.org.
the Reporter for the UTC, in a recent article discussing the Kansas Uniform Trust Code, refers to the UTC, promulgated by the NCCUSL, as the "pure UTC." The 2000 version of the UTC has been the subject of modifications in the years 2001 and 2003 (about which more will be said later). Although it may be common to refer to the Uniform Trust Code as the Uniform Trust Code, it is probable that references to the Uniform Trust Code or to the "pure" Uniform Trust Code are to the current version of the Uniform Trust Code as promulgated by the NCCUSL. In this article references to the "UTC" will be to the UTC as amended in 2001.

B. THE EVOLUTION OF THE UTC

The origins of the UTC go back to 1993 when the NCCUSL appointed a study committee to investigate the drafting of a comprehensive trust act. This in turn led, in 1994, to the appointment of a committee to draft a uniform trust act, with Professor David English serving as Reporter. It was a six year process whereby the work of this committee culminated in the UTC. During this period, the drafting committee sought extensive input from various groups and constituencies.

During the late 1990's there were other significant projects in progress that also addressed the law of trusts. The American Law Institute ("ALI") was proceeding apace with the drafting of the Restatement (Third) of Trusts and the Restatement (Third) of Property: Wills and Other Donative Transfers. The UTC drafters worked in close coordination with the drafters of these two ALI projects. The late 1990s were thus a period in which there was an ongoing national discussion on the law of trusts by prominent academics and practitioners. Given the extensive dialogue and discussion preceding its adoption, it is fair to state that the UTC represented the emerging national consensus (if any there can be).

Despite the intensive scrutiny that the UTC received during the drafting stages, the NCCUSL's approval of the UTC in 2000 did not end the process of review. The NCCUSL subsequently approved changes in 2001 and in 2003 to the originally approved 2000 ver-


12. The 2001 amendments are incorporated into the version of the UTC that is labeled as the "Final Draft" on the NCCUSL website. The 2001 amendments are also incorporated into the UTC appearing in the 2003 supplement to Uniform Laws Anno-
sion. And so, when Nebraska adopted its version of the UTC in 2003, the UTC had undergone a ten year odyssey on the national level during which it had been conceived, crafted, and refined. I think it is important for anyone reviewing Nebraska's version of the UTC to have some appreciation for the evolutionary developments that had preceded it at the national level.

C. AVAILABLE RESOURCES

There are many easily accessible resources available to those researching the UTC. The NCCUSL website contains a wealth of information about the UTC. In addition, the NCCUSL has recently created a website devoted exclusively to the UTC. One of the features of the latter website is a specialized publication entitled "UTC Notes," containing the most recent information regarding UTC developments. In the more traditional vein of legal scholarship, there are a number of excellent law review articles addressing the UTC generally and specific topics covered by the UTC.

In the manner of other uniform acts, each of the UTC sections are followed by official comments. The various comments are extremely valuable in that they oftentimes give the history and/or background of the preceding section. Indeed, with some sections, it is tempting to say that the section is the "bones" and the comment is the "meat." However alluring the comments to the sections might be, the comments are not the statutes. That is not to say, however, that a court might not resort to the comments in interpreting a UTC section.

Recall that the UTC was drafted contemporaneously with two ALI projects — the drafting of the Restatement (Third) of Trusts and the Restatement (Third) of Property: Wills and Other Donative Trans-

13. The 2003 amendments can be found at a special website created by the NCCUSL available at www.utcproject.org under the heading "Amendments."
16. Professor David English, Reporter for the UTC, has written extensively on the UTC and its development. Professor English's article cited in footnote 10 supra was, in a sense, the "keynote" article in a symposium issue published by the Missouri Law Review in the spring of 2002. See David M. English, The Uniform Trust Code (2000): Significant Provisions and Policy Issues, 67 Mo. L. Rev. 143 (2002). This article is highly recommended as the starting point for anyone interested in a comprehensive and thorough review of the UTC.
17. The Missouri Law Review symposium referred to in the previous footnote contains six articles on various aspects of the UTC in addition to Professor English's overview. Another prominent article focuses upon the rights of creditors. See Alan Newman, The Rights of Creditors of Beneficiaries Under the Uniform Trust Code: An Examination of the Compromise, 69 TENN. L. REV. 771 (2002).
According to the Reporter for the UTC "the Restatement provides a wealth of background materials for interpreting the language of the UTC." He further points out that "several sections of the UTC are patterned on the Restatement (Third) of Property." Thus, these other authorities provide additional background materials that may be helpful in evaluating the history and context of certain UTC sections.

When it comes to the Nebraska UTC, an excellent research tool is currently available. I concur with William Lindsay, Jr.'s view that, when it comes to researching the Nebraska UTC, the starting point is the report of the interim study committee called Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code. Both William J. Lindsay, Jr. and I contributed to that work, and participated in the study that produced it, so we are hardly unbiased in recommending it. On the other hand, the interim study was specifically designed as a research tool and was not written as an advocacy brief. The interim study will be discussed in further detail infra.

D. STATES ADOPTING

The states bordering Nebraska on the east (Iowa) and on the south (Kansas) deserve special mention for different reasons. In 1999, while the UTC was still in draft form, the Iowa legislature passed a comprehensive trust code that bears some resemblance to the UTC, but the Iowa Trust Code is a state specific trust code, like that of some other states, and does not contain the essential structure and policies of the UTC. Kansas, on the other hand, has the distinction of being the very first "UTC state," having enacted the Kansas Uniform Trust Code ("Kansas UTC") in 2002. The Kansas UTC is the subject of a recent article by the Reporter for the UTC, Professor David English, and he concluded by noting that despite some glitches, enactment of the Kansas UTC "has resulted in a [body of law] that is more complete, accessible, and, as a consequence, more useful than former

18. See supra note 11 and accompanying text.
19. David M. English, Presentation at the American College of Trusts and Estate Counsel (Summer, 2001) (unpublished materials presented at the 2001 summer meeting of the American College of Trusts and Estate Counsel).
20. Id.
21. NEB. UNICAMERAL, Banking, Insurance and Commerce Committee, Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code, LR 367 (Dec. 2002) [hereinafter "Interim Study"].
23. For an extensive analysis of the Iowa Trust Code, see Martin D. Begleiter, In the Code We Trust — Some Trust Law for Iowa at Last, 49 DRAKE L. REV. 165 (2001).
As of 2003, the states that have enacted the UTC, in addition to Kansas and Nebraska, are New Mexico, Wyoming, and Arizona.

III. ENACTMENT OF THE NEBRASKA UTC

A. The Study Committee

The passage of LB 130 in 2003 was the end product of two years of careful study. Senator David Landis, who introduced LB 130, believed that the road to enactment of the UTC in Nebraska could only be accomplished if the process went slowly and deliberately. Senator Landis started the process in 2001 with the introduction of LB 361, a bill designed to enact the UTC provisions into law.

In October 2001, I wrote an article in the Nebraska Lawyer magazine describing the formation of a “study group” that was being constituted to assist the Banking, Commerce, and Insurance Committee of the legislature. The study group was given the task to conduct a section-by-section review of the UTC. The initial charge of the committee was to determine to what extent the UTC, as proposed in LB 361, would change existing Nebraska law and also to determine which existing Nebraska statutes needed to be repealed or amended. The study group concluded its work at the end of 2001.

LB 361 was carried over to the legislative session that began in 2002. At that time, it was determined that more study of the UTC was needed and so the study group was re-constituted and given a new charge: To examine the UTC with the express purpose of recommending changes to the UTC. It was anticipated that this would require a number of meetings by the study group and that this task could not be completed in the first quarter of 2002. LB 361 would not be moved forward legislatively; it would be allowed to expire when the 2002 legislative session concluded. Legislative Resolution 367 passed during the 2002 legislative session, authorized “interim study [of the UTC]” that would include “a section-by-section Nebraska analysis and commentary of the Uniform Trust Code.”

The study group went to work again and this time around discussed and debated each section of the UTC as it then existed (by this

33. Id.
time the study group members were aware of the 2001 amendments to the UTC that had been approved by the NCCUSL). The end product of this second go-around was a section-by-section analysis that not only provided a descriptive analysis of changes in Nebraska law, but also contained recommendations for change in the UTC version that would be placed in a new bill to be introduced in January 2003. By December 2002, the study group had completed its second round of review and delivered its report to the Banking, Commerce, and Insurance Committee of the Legislature. The recommendations contained in the interim study report became the basis for LB 130, introduced in the Legislature in January 2003.

B. LEGISLATIVE BILL 130

Legislative Bill 130 is fairly complicated for it contains not only the changes to the UTC as recommended by the study group, but it also addresses a host of coordination issues. Some of these coordination matters are fairly straightforward, such as repealing statutes that are inconsistent with UTC provisions. Some of the coordination issues are matters of cross-reference, created by the complicating factor of moving the Nebraska Prudent Investor Act out of Chapter 8 and into Chapter 30 as a part of the Nebraska UTC. Also complicating the process was the fact that the NCCUSL was in the process of drafting new amendments to the UTC, changes which would not be officially ratified until the NCCUSL's annual meeting in the summer of 2003. Even more challenging were the coordination issues created by the fact that the study group had recommended that the existing Nebraska statutes on trust registration and trust certification be retained. As to all of these matters, study group member William Marienau, legal counsel to the Banking, Commerce and Insurance Committee, was given the unenviable task of piecing LB 130 together into a coherent package to accomplish all of these objectives.

The study group spent a considerable amount of time considering the inter-relationship between the Nebraska UTC and the Nebraska Probate Code. As a result, the study group recommended repeal of some sections of the Nebraska Probate Code and the amendment of others. The coordination of the provisions of the two codes is an ongoing process and the study group has informally continued to study this matter.

34. Sections 1 to 110 of LB 130 are the sections that enact the Nebraska Uniform Trust Code into law; Sections 111 to 143 of LB 130 address the coordination matters.
C. DEPARTURES FROM THE "PURE" UTC

As noted above, the interim study contains, for each UTC section, a recommendation as to whether an amendment or a deletion to the UTC is in order. In making these recommendations, the study committee was guided by the philosophy of the sponsor of the legislation, Senator David Landis, that changes to the UTC should only be made for compelling, substantial reasons. In other words, the study group approached each section with the presumption that the national drafting committee, having consulted with national experts and having meticulously subjected each provision to rigorous scrutiny, had come to the proper conclusions. Thus, a review of the interim study would reveal that the study committee made relatively few changes to the national model. Even more significantly, in each instance that the study committee recommended a change, these changes were incorporated into LB 130 and became a part of the Nebraska UTC.

The following is a listing of the UTC sections that were changed in the process of enacting the Nebraska UTC: 103\textsuperscript{38}; 105\textsuperscript{39}; 109\textsuperscript{40}; 401\textsuperscript{41}; 403\textsuperscript{42}; 407\textsuperscript{43}; 409\textsuperscript{44}; 414\textsuperscript{45}; 505\textsuperscript{46}; 602\textsuperscript{47}; 604\textsuperscript{48}; 701\textsuperscript{49}; 702\textsuperscript{50}; 707\textsuperscript{51}; 802\textsuperscript{52}; 813\textsuperscript{53}; 816\textsuperscript{54}; 1005\textsuperscript{55}; 1106\textsuperscript{56}

The current statutory compilation of the Nebraska UTC contains references to the UTC sections upon which the Nebraska statutory sections were based.\textsuperscript{57} A review of the current statutory compilation would indicate that Nebraska did not enact sections 112, 203, 204, 807; 1013; 1103; 1104; and 1105 of the UTC. There is, in each in-

\begin{itemize}
\item \textsuperscript{38} NEB. REV. STAT. § 30-3803.
\item \textsuperscript{39} NEB. REV. STAT. § 30-3805.
\item \textsuperscript{40} NEB. REV. STAT. § 30-3809 (Supp. 2003).
\item \textsuperscript{41} NEB. REV. STAT. § 30-3827 (Supp. 2003).
\item \textsuperscript{42} NEB. REV. STAT. § 30-3829 (Supp. 2003).
\item \textsuperscript{43} NEB. REV. STAT. § 30-3833 (Supp. 2003).
\item \textsuperscript{44} NEB. REV. STAT. § 30-3835 (Supp. 2003).
\item \textsuperscript{45} NEB. REV. STAT. § 30-3840 (Supp. 2003).
\item \textsuperscript{46} NEB. REV. STAT. § 30-3850 (Supp. 2003).
\item \textsuperscript{47} NEB. REV. STAT. § 30-3854 (Supp. 2003).
\item \textsuperscript{48} NEB. REV. STAT. § 30-3856 (Supp. 2003).
\item \textsuperscript{49} NEB. REV. STAT. § 30-3856.
\item \textsuperscript{50} NEB. REV. STAT. § 30-3858 (Supp. 2003).
\item \textsuperscript{51} NEB. REV. STAT. § 30-3863 (Supp. 2003).
\item \textsuperscript{52} NEB. REV. STAT. § 30-3867 (Supp. 2003).
\item \textsuperscript{53} NEB. REV. STAT. § 30-3878 (Supp. 2003).
\item \textsuperscript{54} NEB. REV. STAT. § 30-3881 (Supp. 2003).
\item \textsuperscript{55} NEB. REV. STAT. § 30-3894 (Supp. 2003).
\item \textsuperscript{56} NEB. REV. STAT. § 30-38,110 (Supp. 2003).
\item \textsuperscript{57} The cross-references to the UTC sections are in the 2003 Supplement to the Nebraska Revised Statutes (accessible on Westlaw as well). The 2003 Supplement to Revised Statutes of Nebraska Annotated, published by Lexis Publishing, does not contain the UTC cross-references.
\end{itemize}
stance, a reason why these particular UTC sections were not listed by the Revisor of Statutes as having been enacted.

Section 112, designated by the NCCUSL as an "optional" section, was deliberately omitted for the reason that the study group could not arrive at a consensus as to whether to include this section. The study group recommended that a separate study group be formed to address the topic of rules of construction for trusts.\(^5\) Sections 203 and 204 of the UTC cover the topics of subject-matter jurisdiction of courts and venue. The study group decided that these sections needed to be totally re-written to conform to existing Nebraska law and practice.\(^5\) Sections 30-3814 and 30-3815 of the Nebraska UTC are the Nebraska counterparts to sections 203 and 204 of the UTC.

Section 807, dealing with the topic of delegation, was totally changed by simply making a cross-reference to the delegation rule set forth in the Nebraska Prudent Investor Act.\(^6\) UTC section 1013, relating to trust certification, was not adopted for the reason that the study committee opted to replace it with the existing Nebraska statutory rules\(^6\) pertaining to trust certification. UTC section 1103, dealing with severability, has no counterpart in the Nebraska UTC.\(^6\) Section 1104 of the UTC, dealing with the effective date of the UTC, was not adopted. Section 140 of LB 130, specifying an "operative date for this act" as "the second January 1 after the effective date of this act,"\(^6\) is the Nebraska equivalent to UTC section 1104. Section 1105 of the UTC, dealing with repeals of existing statutes, was addressed by sections 142 and 143 of LB 130.\(^6\)

A review of the legislative history of LB 130 indicates that certain amendments were added to LB 130 by the Banking, Commerce, and Insurance Committee\(^6\) as well as a series of amendments that were added after the bill came out of committee.\(^6\) These amendments, ad-

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58. NEB. UNICAMERAL, Banking, Insurance and Commerce Committee, Comments and Recommendations for Enactment of a Nebraska Uniform Trust Code, LR 367, 54 (Dec. 2002) [hereinafter "Interim Study"].
59. Id. at 61-65.
60. See NEB. REV. STAT. § 30-3872 (stating."[a] trustee may delegate functions as provided in section 30-3888"). Section 30-3888 was formerly NEB. REV. STAT. § 8-2210.
61. NEB. REV. STAT. §§ 30-3701 - 30-3706.
62. Oddly enough, § 141 of LB 130 does contain a severability clause yet this section does not appear in the Nebraska Revised Statutes.
64. L.B. 130, §§ 142 and 143.
ded after the study group completed its work, modified the original LB 130 provisions for the following Nebraska UTC sections: 105; 505; 707; 813; 816 and the Nebraska counterpart to section 203. All of the foregoing indicates that while the Nebraska UTC is a fairly faithful replica of the "pure" UTC, the enactment process did produce a fair number of amendments, some of which are in the nature of housekeeping-type changes and others of which, to be discussed below, are fairly significant.

IV. CHANGES IN THE LAW: IMPLICATIONS FOR THE DRAFTER

The Lindsay article, while providing a fairly broad overview of the Nebraska UTC, has a greater emphasis on the Article 1, Article 2, Article 3, and Article 4 sections of the Nebraska UTC. In this portion of the article, the emphasis will be upon selected provisions of Article 4, Article 5, Article 6, Article 7, and Article 8. This section will highlight these selected provisions in the context of a generic overview that emphasizes significant changes in Nebraska trust law and the implications for the drafter.

A. SIGNIFICANT CHANGES IN NEBRASKA TRUST LAW

1. Rules Relating to Revocable Trusts

Article 6 is one of the pre-eminent features of the Nebraska UTC containing, as it does, Nebraska's first, discrete statutory law dealing specifically with revocable trusts. While it has been settled law throughout the country and in Nebraska that the revocable inter vivos trust is a valid nontestamentary means of passing property at death, the most that can be said of the "validity" of the revocable inter vivos trust is that this type of trust is treated as inter vivos so as to escape the testamentary formalities of the statute of wills. Once we go beyond the statute of wills issue, which is now settled, there are a host of issues that arise out of using the revocable inter vivos trust as

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67. In the Nebraska Revised Statutes, the terminology used in the UTC was not followed. What the UTC refers to as "Articles," the Nebraska statutes refer to as "Parts." Thus, UTC Article 1 in the Nebraska Revised Statutes is technically "Part 1 of Article 38 of Chapter 30."
68. In the Nebraska statutory scheme, UTC Articles 4, 5, 6, 7 and 8 are, respectively, Parts 4, 5, 6, 7, and 8, of Article 38 of Chapter 30.
70. See RESTATEMENT (SECOND) OF TRUSTS § 57 (1959) (stating that a settlor's reservation of power in a trust does not make the disposition testamentary or invalid); Whalen v. Swircin, 141 Neb. 650, 655-56, 4 N.W.2d 737, 740-41 (1942) (concluding that a reservation by the settlor of the income from a trust does not invalidate the trust or make it testamentary).
a will substitute. Article 6 is, according to the "General Comment," a "short article" that is "one of the more important articles of the Code." The first and arguably most important rule to remember is: A trust is presumed revocable unless otherwise stated. The second most important rule that is articulated in Article 6 is that while a trust is revocable and the settlor has capacity, the rights of the beneficiaries are subject to the settlor's control.

The first stated change drafters need to be aware of is a modification in the default rule. The second rule has a number of embedded issues that become apparent when the inter-relationship of this rule to other sections of the Nebraska UTC is discovered. So long as the settlor has "capacity," the rule articulated is fairly easy to apply; when the settlor (allegedly) loses "capacity," other challenging issues arise. A final note on the Article 6 provisions: Not all of the rules relating to revocable trusts are in Article 6. As an example, the rules pertaining to creditors' rights are in Article 5.

2. Rules Relating to Creditors' Rights

Article 5 of the Nebraska UTC deals with the general topic of creditors' claims in the context of spendthrift and discretionary trusts. As is true of Article 6, Article 5 addresses a topic that had not previously been addressed in Nebraska statutory law. The extent to which the Article 5 rules change existing Nebraska common law rules will be addressed in greater detail infra.

Once again, there are important drafting considerations: A thoughtful decision must be made as to whether it is advisable to include within the terms of a trust a so-called "spendthrift" provision. In addition, careful consideration must be given to whether the payments from the trust are mandatory, discretionary, or according to a standard (ascertainable or otherwise).

The various Article 5 rules that determine the rights of creditors against trust beneficiaries assume that a trust is of a particular variety. So, while the Article 5 rules are rules of law that may not be

72. NEB. REV. STAT. § 30-3854(a).
73. NEB. REV. STAT. § 30-3855(a).
74. The determination of "capacity," absent a judicial proceeding, is a threshold problem that drafters will need to consider.
drafted around, the drafter must consider the effects of including a spendthrift clause or creating a so-called “discretionary” trust.

3. Rules Relating to Trust Modification and Termination of Noncharitable Trusts

The Nebraska UTC rules contained in sections 411 and 412 are likely to be the subject of continued debate and LB 130 may not be the final result. As it stands under LB 130, the rules of sections 411 and 412, by and large, mirror the national model. If these two sections remain unchanged, the principal adjustment in Nebraska law would relate to the significance of a spendthrift clause as spelled out in section 411(c).

With regard to drafting, section 105(b)(5) would seem to stand in the way of attempting to draft around the rules specified in sections 410 through 416. However, section 411(c), the critical section relating to a “presumption,” is concerned with ascertaining what in fact the settlor’s “material purpose” of the trust is (or was). If the “material purpose” of the settlor is clearly spelled out in the trust, one would think that a statutory “presumption” would be rebutted. In the Nebraska Probate Code, there are “Rules of Construction” applicable to wills. These rules are clearly presumptive in nature as they yield to an expression of contrary intention in the will by the testator. If the presumption of Nebraska UTC section 411(c) is treated the same as the UPC rules of construction, then no insuperable drafting problem arises.

77. See Neb. Rev. Stat. § 30-3805(b)(5) (Supp. 2003) (stating that the terms of a trust do not trump the Code provisions regarding the effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust).
82. If one resorts to the ordinary meaning of a presumption as articulated in the Nebraska Evidence Code (Rule 301), then the effect of a presumption is to assign the burden of proof. See Neb. Rev. Stat. § 27-301 (Reissue 1995). But in particular instances involving probate law, the Supreme Court of Nebraska has stated that certain presumptions are not presumptions within the ambit of Rule 301. See McGowan v. McGowan, 197 Neb. 596, 250 N.W.2d 234 (1977) (stating that a “presumption of undue influence” is not a presumption within the meaning of § 27-301).
TRUST LAW IN TRANSITION

4. Rules Relating to Standing

The Nebraska UTC rules relating to the standing of the settlor of an irrevocable noncharitable trust and an irrevocable charitable trust, as articulated in sections 706(a)\textsuperscript{85} and 405(c)\textsuperscript{86} represent changes in the law. These changes would seem to have little impact on the drafter; standing to sue is not the type of legal issue controlled by the language of the creating instrument.

5. Duty to Inform and Report

The key section relating to the trustee’s duty to inform and report is section 813.\textsuperscript{87} This section is likely to be the subject of much debate and controversy as the discussion of LB 130 continues. As it now stands, the ability to draft around section 813 is limited by section 105\textsuperscript{88} and it is that section that the drafter must keep in mind in determining what the trust instrument can dictate in regard to keeping the trust instrument confidential and in informing and reporting to the beneficiaries. More particularly, the drafter will need to study carefully the distinctions in subsection (b)(8) and (b)(9) of section 105; there is a distinction drawn between the duty to notify “qualified beneficiaries” and the duty to respond to “the request of a beneficiary.”\textsuperscript{89}

V. SELECTED REVIEW OF NEBRASKA CASE LAW IN LIGHT OF THE NEBRASKA UTC

In this section, the focus will shift from the drafting aspects of the Nebraska UTC to the pre-existing Nebraska trust case law and the changes, if any, that the Nebraska UTC makes. This will be a selective review that will attempt to highlight the more significant areas of change (continuing in the same manner at the previous section of this article).

A. CREDITOR’S CLAIMS: SPENDTHRIFT AND DISCRETIONARY TRUSTS (ARTICLE 5)

The various rules in Article 5 of the Nebraska UTC\textsuperscript{90} address an area of law that Nebraska statutory law had not previously addressed.

\textsuperscript{85} NEB. REV. STAT. § 30-3862(a) (Supp. 2003).
\textsuperscript{86} NEB. REV. STAT. § 30-3831(c) (Supp. 2003).
\textsuperscript{87} NEB. REV. STAT. § 30-3878 (Supp. 2003).
\textsuperscript{88} NEB. REV. STAT. § 30-3805.
\textsuperscript{89} It is important to point out as well that the subsections use the terms “beneficiaries” and “qualified beneficiaries,” which are defined differently in the Nebraska UTC. See NEB. REV. STAT. § 30-3803(2) (Supp. 2003); NEB. REV. STAT. § 3803(12). Recall as well that Nebraska UTC section 110 also impacts upon the definition of “qualified beneficiaries.” See NEB. REV. STAT. § 30-3810 (Supp. 2003).
\textsuperscript{90} NEB. REV. STAT. §§ 30-3846 - 30-3852 (Supp. 2003).
However, the Supreme Court of Nebraska has provided common law rules in a series of decisions that are the subject of the present inquiry. With regard to the spendthrift trust, the Nebraska Supreme Court has recognized the validity of a spendthrift provision, but has indicated that where the settlor is the beneficiary, the spendthrift provision will not be recognized because such a provision contradicts public policy. These rules are re-affirmed by Article 5 provisions of the Nebraska UTC.

The decisions of the Nebraska Supreme Court in the 1994 case of *Smith v. Smith* and the 2000 case of *Doksansky v. Norwest Bank Nebraska*, where both cases involved the same trust, are the crucial cases which articulate the rights of creditors against trust beneficiaries. These cases will now be examined from the perspective of determining to what extent the Nebraska UTC Article 5 rules change Nebraska law.

In the *Smith* and *Doksansky* cases, the trusts in question were two trusts created by the parents of Richard Smith with substantially similar provisions. In each of these trusts, the settlors stated that the "primary purpose" of the trust was "to provide for the health, support, care and maintenance of my son Richard during his lifetime." The "secondary purpose" of the trusts, referred to by the court as the "support provision," was "to provide for the health, support, care, comfort and education of the issue of my son Richard in the event the parents of any such issue are unable to provide the same." The trusts also contained provisions granting to the trustee "full, absolute and uncontrollable discretionary power and authority. . . ."

In the *Smith* case, the ex-wife of beneficiary Richard Smith attempted, by way of a garnishment action, to compel payments from the trust for the purpose of satisfying child support arrearages. The trial court denied relief on the grounds that the trusts were discretionary in nature. On appeal, it was argued that the trusts in question were "support trusts." The Nebraska Supreme Court acknowledged

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93. See Neb. Rev. Stat. § 30-3847(c) (Supp. 2003) (stating that spendthrift provisions are generally recognized); Neb. Rev. Stat. § 30-3850(a)(2) (Supp. 2003) (stating that where the settlor is a beneficiary, the spendthrift provision is not given effect).
94. 246 Neb. 193, 517 N.W.2d 394 (1994).
95. 260 Neb. 100, 615 N.W.2d 104 (2000).
97. *Smith*, 246 Neb. at 195, 517 N.W.2d at 397.
98. *Id.; Doksansky*, 260 Neb. at 102-103, 615 N.W.2d at 106-107.
that the categorization of these trusts would be the critical issue before the court if the general rule were followed. According to the court's syllabus, the general rule was that "[g]enerally, support trusts may be reached by creditors for support-related debts, but discretionary trusts may not be reached by creditors for any reason."100 In the text of its opinion, the court cited a law review article for the foregoing proposition.101 This is problematic, for the quoted language is a gross-oversimplification of the law. Be that as it may, the quoted syllabus language, if taken at face value, insofar as it draws a distinction between support and discretionary trusts, is indeed a correct statement of the "general law" if one were to rely upon the then current Restatement (Second) of Trusts as authority.102 Insofar as the quoted language of the syllabus purports to state an over-arching rule pertaining to the rights of creditors of discretionary trusts, the court is giving the appearance that the law in this area is settled and clear. A thorough review of the law on this point is beyond the scope of this article, but the reader should be aware that taking the court’s pronouncement at face value oversimplifies a very problematic area of trust law.103

The Smith court acknowledged the provisions of the trusts in question contained language that was “in conflict” because, as the quotations supra noted, there was language of “support” and “discretion” in the trusts.104 This led the court to conclude that the trusts in question were a “hybrid” — “a discretionary support trust.”105 The court then proceeded to study the nature of this oxymoronic trust in greater detail by examining the character of the rights possessed by the judgment debtor beneficiary in a discretionary support trust. While the beneficiary of such a trust might compel the trustee to carry out the purposes of the trust “in good faith,” the court noted that courts generally refuse to interfere with a trustee’s exercise of discretion unless there is abuse of discretion.106 Furthermore the court stated that:

100. Id. at 193, 517 N.W.2d at 396 (syllabus five).
102. Section 157 of the Restatement (Second) of Trusts supports the view that “support-related debts” can be reached by creditors of a support trust. RESTATEMENT (SECOND) OF TRUSTS § 157 (1959). Section 157 applies only to “support” and “spendthrift” trusts.
103. With regard to the over-arching and global rule the Smith court states, one could point to a legal encyclopedia’s black letter “rule” as authority. See 90 C.J.S. TRUSTS § 271 (2002). For the author, this approach is unsatisfactory. To get a genuine understanding of the nuanced nature of the law in this area, the author recommends a review of section 60 of the Restatement (Third) of Trusts and particularly the Reporter's Notes thereto. See 2 RESTATEMENT (THIRD) OF TRUSTS § 60, cmts. a-g (2003).
104. See supra notes 96-98 and accompanying text.
105. Smith, 246 Neb. at 198, 517 N.W.2d at 398.
106. The court cited Section 187 of Restatement (Second) of Trusts, which states the non-interference standard unless it is necessary to “prevent an abuse by the trustee of
Ordinarily, the trustee of a discretionary support trust should consider factors such as the degree of need experienced by the beneficiaries, the standard of living experienced by the beneficiaries at the time the trust was created, and the financial relationship between the settlor and the beneficiaries prior to the formation of the trust.\textsuperscript{107}

In the context of \textit{Smith}, the court concluded that the "child support arrearage would not further the purposes of the trust since the children are emancipated" and thus the trustee "could not be compelled to distribute trust assets."\textsuperscript{108}

Six years later in the \textit{Doksansky}\textsuperscript{109} case, the Nebraska Supreme Court had before it another appeal arising out of "the same discretionary support trusts examined" by the court in the \textit{Smith} case.\textsuperscript{110} In this appeal, the ex-wife of Richard Smith sought, by way of a creditor's bill, an order of the district court requiring the trustee to make payments to her for child support arrearage and to "make no further distribution to Richard D. Smith until the judgment of the Plaintiff has been satisfied."\textsuperscript{111} On this appeal the dispositive issue, as stated by the court, was "whether Richard's beneficial interest in the discretionary support trusts was an 'interest in property' which may be reached by an equitable assets creditor's bill to satisfy Doksansky's judgment for child support arrearage."\textsuperscript{112}

In responding to this issue, the \textit{Doksansky} court quoted the applicable "general rule" that was part of the official court syllabus:

In order for equity to subject to the claims of creditors the interests of the beneficiary, it is essential that it be such an interest as could be enforced by the beneficiary himself; creditors cannot reach the beneficiary's interest if the trustee has complete discretion not only as to the time of and manner of conferring the intended benefit, but also as to whether it shall be conferred at all, or if disbursements are restricted to such amounts as may be necessary for the comfortable maintenance and support of the cestui que trust.\textsuperscript{113}

At this point the \textit{Doksansky} court referred back to the basis for its holding in the \textit{Smith} case:

\begin{itemize}
\item [107.] \textit{Smith}, 246 Neb. at 199, 517 N.W.2d at 399.
\item [108.] \textit{Id.}
\item [109.] 260 Neb. 100, 615 N.W.2d 104 (2000).
\item [110.] \textit{Doksansky}, 260 Neb. at 102, 615 N.W.2d at 106.
\item [111.] \textit{Id.} at 102, 615 N.W.2d at 106.
\item [112.] \textit{Id.} at 105, 615 N.W.2d at 108.
\item [113.] \textit{Id.} at 100, 615 N.W.2d at 105 (syllabus eight).
\end{itemize}
Under our decision in *Smith v. Smith*, supra, Richard would have no right to compel the cotrustees to distribute trust assets for the purpose of satisfying his child support arrearage even if he wished to do so. As noted above, the creditor’s rights with respect to property can be no greater than that of the debtor. Thus, because of the restricted purposes for which assets can be distributed to Richard under the discretionary support trusts, his beneficial interests therein do not constitute an interest in property which can be reached by an equitable assets creditor’s bill in order to satisfy a judgment for child support arrearage where the children are emancipated.  

The critical finding is contained in the court’s conclusion wherein the court again emphasized that the petition “does not allege that Richard had any interest in the discretionary support trusts which could be applied to any payment of his child support arrearage.”

In the course of the *Doksansky* opinion, Judge Stephan cited the 1964 decision of the Nebraska Supreme Court in *Summers v. Summers*. In that case, an equitable assets creditor’s bill, in the context of a support order by an ex-spouse, was allowed against a spendthrift trust beneficiary, but the basis for so doing was the res judicata doctrine. Interestingly enough, Judge Stephan in *Doksansky* quoted the following *dicta* from the *Summers* case:

> if this were a case in which the controlling question was that of whether or not the income of this trust could be invaded for the purpose of satisfaction of the judgment against the [trust beneficiary/judgment debtor] the required answer would be that it could not.

Given the language from the *Smith* and *Doksansky* cases (and the dicta from the *Summers* case), what can be said about the potential changes in Nebraska law in the context of the Article 5 sections of the Nebraska UTC? The language of the dicta from the *Summers* case suggests that there are *no* exceptions to the validity of the spendthrift provision and strongly *implies* that an ex-spouse’s claim for “maintenance,” as a judgment creditor, is not an exception. As to the suggestion in *Summers* that there is no exception to the spendthrift protection, one need only refer back to the initial discussion of the validity of the spendthrift clause with the notation that Nebraska has

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114. *Id.* at 106-107, 615 N.W.2d at 109.
115. *Id.* at 108, 615 N.W.2d at 110 (emphasis added).
116. 177 Neb. 365, 128 N.W.2d 829 (1964).
117. There was only one syllabus written by the court and that syllabus was devoted solely to the res judicata doctrine. *Summers v. Summers*, 177 Neb. 365, 365, 129 N.W.2d 829, 830 (1964).
118. *Doksansky*, 260 Neb. at 105, 615 N.W.2d at 108.
previously recognized the exception that a person cannot create a valid spendthrift trust for oneself.\textsuperscript{119}

To the extent that Summers and Doksansky imply that the spendthrift clause is effective to bar maintenance claims by ex-spouses, that would mean that Nebraska was consciously following a minority rule and not following the rule articulated in section 157 of the \textit{Restatement (Second) of Trusts}. Section 503 of the Nebraska UTC,\textsuperscript{120} entitled "Exceptions to Spendthrift," clearly allows for enforceability of support claims by a spouse, an ex-spouse or children of the beneficiary against a spendthrift trust.

To the extent that the \textit{Smith} case articulated creditor's rights rules based upon the distinction between support and discretionary trusts, that distinction will not have viability after the operative date of the Nebraska UTC. Section 504\textsuperscript{121} provides a single rule and a single section for all discretionary trusts, including an interest or trust that is subject to a support standard.

The facts of the \textit{Smith} and Doksansky cases are highly relevant in assessing exactly what the Nebraska Supreme Court held in those cases and why the court ruled as it did. According to the court in \textit{Smith}, the child support payments began to accrue in 1965, but the court pointed out that the trust beneficiary Richard "has never made any of the payments."\textsuperscript{122} An arrearage of more than $90,000 had accrued.\textsuperscript{123} When the ex-spouse sought, by way of garnishment in 1991, to subject Richard's trust to the payment of the arrearage, Richard's children by this time presumably had reached the age of majority (or if minors, were now "emancipated"). The \textit{Smith} court reasoned that payment of the money in 1991 to the ex-spouse would not further the trust purposes — support of the minor children — since they were now either adults or "emancipated." Had the suit been brought during the period of time the children were unemancipated minors, an entirely different question would have presented. It is a fair reading of the court's opinion to conclude that simply because this was a "discretionary support" trust, that fact alone rendered the trust assets immune from judgment for child support. In other words, if there is a \textit{current} support obligation, the assets of the "discretionary support" trust are not automatically exempt.

Section 504(c) of the Nebraska UTC triggers the right of the support claimant based upon an \textit{ex ante} finding that the trustee "has not

\textsuperscript{119} See supra note 91 and accompanying text.
\textsuperscript{120} Neb. Rev. Stat. § 30-3848.
\textsuperscript{121} Neb. Rev. Stat. § 30-3849.
\textsuperscript{122} Smith, 246 Neb. at 195, 517 N.W.2d at 396.
\textsuperscript{123} Smith, 246 Neb. at 194-95, 517 N.W.2d at 396.
complied with a standard of distribution" or "has abused a discretion."\textsuperscript{124} In the case of alleged non-compliance with a "standard of distribution," the factors the \textit{Smith} court discussed, previously quoted \textit{supra}, would be considered.\textsuperscript{125} It would seem that in a \textit{Smith}-type situation, a court applying section 504(c) would not necessarily take the same approach as the \textit{Smith} court did in focusing upon the \textit{timing} of the action to recover the arrearage. It would seem that in a \textit{Smith}-type situation the focus should be on what duty the trustee had to determine whether the beneficiaries were in need of support. A trustee of a support trust cannot blissfully ignore the needs of the beneficiaries who are supposed to be supported.\textsuperscript{126}

In the \textit{Doksansky} case, the court did not quote the trust language relating to the "secondary" purposes of the trust — the language that referred to the support of the beneficiary's issue. The \textit{Doksansky} analysis focused upon the status of Richard as beneficiary of the trusts and \textit{his} beneficial interest in the trust. This restricted approach, perhaps dictated by the nature of the action, made it easier for the court to reach its conclusion that "[Richard's] beneficial interest in the trust" was not reachable by a creditor's bill.\textsuperscript{127} Under section 504(c) of the Nebraska UTC,\textsuperscript{128} the likely focal point would be the scope of the "standard of distribution" that was established under the "primary purpose" clause of the trust.

From the perspective of the author, the rules under Article 5 of the Nebraska UTC provide the needed clarity currently lacking in the case law. The changes wrought by Article 5 are likely to be the subject of continued debate, but at least there is a statutory framework for analysis that will take Nebraska law beyond the murky depths of the \textit{Smith}, \textit{Doksansky}, and \textit{Summers} trilogy.

\textbf{B. \textit{Cy Pres} Doctrine (Section 413)}

One of the unique features of the law of charitable trusts is the doctrine of \textit{cy pres}, which is expressed in the \textit{Restatement (Second) of Trusts} as follows:

\begin{quote}
If property is given in trust to be applied to a particular charitable purpose, and it becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will
\end{quote}

\textsuperscript{125} See \textit{supra} note 107 and accompanying text.
\textsuperscript{127} \textit{Doksansky}, 260 Neb. at 107, 615 N.W.2d at 109.
\textsuperscript{128} \textit{Neb. Rev. Stat.} § 30-3849(c).
direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.129

Nebraska case law has recognized and applied cy pres utilizing the Restatement version of the doctrine.130 Section 413(a) of the Nebraska UTC131 codifies the cy pres doctrine, but does so with one significant change from the Restatement formulation. According to the Comment to section 413, section 413(a) "modifies the doctrine of cy pres by presuming that the settlor had a general charitable intent when a particular charitable purpose becomes impossible or impracticable to achieve."132 With section 413(a) in effect, the cy pres doctrine will be easier for courts to apply.

In the recent case of In re R.B. Plummer Memorial Trust Fund ("Plummer"),133 the Nebraska Supreme Court was requested to apply the cy pres doctrine to two testamentary charitable trusts. The trusts in question involved bequests to the University of Nebraska Foundation in wills dated 1947 and 1967. The trust donors had specified that the income from the trusts was to be used for loans to students. In administering these trusts, the Foundation experienced difficulty in making loans; it appeared that less than 10% of the income from the trusts had been loaned out. In 2001, the Foundation filed suit in county court asking the court to apply the cy pres doctrine in order to allow it to utilize the trust income for scholarships. The county court denied relief.134

The Nebraska Supreme Court upheld the lower court ruling that the cy pres doctrine was inapplicable. In so doing, the court cited the Restatement (Second) of Trusts section 399. The court concluded that the purposes of the trust had not become "impossible, impracticable or illegal."135 In the instant case, the court found it unnecessary to inquire into the question of whether the trust settlors had a "more general charitable purpose."136 This inquiry would become relevant, said the court, only if "the will or wish of the donor cannot be given effect."137 The court concluded that "the record does not clearly show

129. Restatement (Second) of Trusts § 399 (1959).
130. See, e.g., In re Last Will and Testament of Teeters, 205 Neb. 576, 288 N.W.2d 735 (1980).
133. 266 Neb. 1, 661 N.W.2d 307 (2003).
135. Plummer, 266 Neb. at 7, 661 N.W.2d at 312.
136. Id.
137. Id.
that the purpose of the trusts cannot be given effect."\textsuperscript{138} Given the court's analysis, the change wrought by section 413(a) of the Nebraska UTC would not have affected the court's analysis of the cy pres doctrine.

The Foundation sought relief not only upon the basis of cy pres, but also upon the application of the "deviation" doctrine. This trust doctrine applies to both charitable and noncharitable trusts. With respect to charitable trusts, the doctrine is articulated in the Restatement (Second) Trusts as follows:

Section 381. Deviation from Terms of Trust
The court will direct or permit the trustee of a charitable trust to deviate from a term of a trust if it appears to the court that compliance is impossible or illegal, or that owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust.\textsuperscript{139}

The Nebraska Supreme Court emphasized that the "deviation doctrine is applicable to make changes in how the charitable trust is administered, while cy pres is used where a change of the settlor's specific charitable purpose is involved."\textsuperscript{140}

The court in Plummer emphasized that "nothing in the wills indicates that the use of the trusts for loans is a matter of administration."\textsuperscript{141} Rather, the court saw the instant case as a request by the Foundation to "change the ultimate purposes of the trusts by allowing them to provide scholarships."\textsuperscript{142} Given the court's characterization of the Foundation's request, it is not surprising that the court concluded that the deviation doctrine was not applicable.

If the Plummer case were to arise under Nebraska UTC section 412, it is probable that the focus would be on subsection (a) of section 412 which states that "[t]he court may modify the administrative or dispositive terms of a trust or terminate a trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust."\textsuperscript{143} Section 412(a) mirrors Restatement (Second) of Trusts section 391, but there is one slight change. As the Comment to section 412 states, "[w]hile it is necessary that there are circumstances not anticipated by the settlor before the court may

\textsuperscript{138} Id.
\textsuperscript{139} RESTATEMENT (SECOND) TRUSTS § 381 (1959).
\textsuperscript{140} Plummer, 266 Neb. at 8, 661 N.W.2d at 312-13. The distinction the court referenced has historically been referred to as the distinction between "administrative" and "distributive" deviations.
\textsuperscript{141} Id. at 8-9, 661 N.W.2d at 313.
\textsuperscript{142} Id. at 9, 661 N.W.2d at 313.
\textsuperscript{143} NEB. REV. STAT. § 30-3838 (Supp. 2003).
grant relief under subsection (a), the circumstances may have been in existence when the trust was created.”

According to the *Plummer* court’s recitation of the facts, the Foundation had alleged “that because of changes in the financial aid arena, students are reluctant to pursue loans from multiple sources because federal loan rates are available at competitive rates.” There was also extensive evidence relating to the loan programs available through the two trusts. The trial court found that “the Foundation failed to establish the existence of changes in the financial aid arena which would have substantially defeated or impeded the attainment of the original charitable intent to use the trusts for loans.” In its discussion of the *cy pres* doctrine, the Nebraska Supreme Court essentially agreed with the trial court’s findings.

It may well be the result in *Plummer* would have been decided in exactly the same way under the Nebraska Uniform Trust Code as it was decided under the common law rules the court applied. The key issue that is likely to determine the outcome is how one views the “purposes of the trust.” If the purposes of the trust are, as stated in *Plummer*, “to provide loans to students,” it is likely that the equitable deviation doctrine would not be applied. If the court were willing to interpret the purposes of the trust more broadly — to assist students in obtaining an education — then the door would likely open to the application of the deviation doctrine.

C. REMOVAL OF TRUSTEE (SECTION 706)

The law governing removal of trustees in Nebraska can be categorized into three time periods. The first time period is that before the Nebraska Uniform Probate Code became operative on January 1, 1977. In the 1982 case of *In re Zoellner Trust*, the Supreme Court of Nebraska stated:

Prior to the adoption of the Nebraska Probate Code, which includes [section] 30-2816, a trustee could be removed for one of the following grounds: The existence of a substantial personal disability in the trustee, a failure of the trustee to perform the duties of its position, misconduct in the office of trustee, or hostile relations between the beneficiaries and the trustee of such a nature so as to interfere with proper administration of the trust.
The Zoellner case was citing from a line of cases going back to the 1931 decision of Burnham v. Dennison, which stated in syllabus three of its opinion that:

A court of equity has power and authority to remove a trustee from his office, when any substantial personal disability exists in the trustee, when he fails to perform the duties of his position, when he has misconducted himself in office, when hostile relations exist between the trustee and his beneficiaries of such a nature as to interfere with the proper execution of the trust, or under any other conditions which render his removal necessary for the best interests of the trust estate, particularly where it appears that the trustee's personal interests conflict with, or are antagonistic to, his duties as trustee under the terms of his trust.

Zoellner was a trustee removal case in which it was alleged that the trustee should be removed to "further efficient administration of the trust" and it was upon this ground that the trial court entered an order granting removal. The majority opinion in Zoellner cited a provision of the Nebraska Probate Code section, which addressed the topic of "appropriate place of administration." In the eyes of the majority, the place of administration had not become "inappropriate," even though the place of administration "may be less efficient, less convenient, or less pleasant than another place." The trial court's ruling ordering removal was reversed.

In the much discussed case of In re Guardianship and Conservatorship of Garcia, the underlying issue had to do with the power of a conservator to "step into the shoes" of an incompetent settlor in order to amend a revocable trust. The Nebraska Supreme Court construed the relevant statutes as authorizing the county court to exercise its power to amend or revoke upon a proper showing. However, the supreme court concluded that the evidence offered was insufficient to justify a proposed amendment to the trust — which in this case was an amendment that would have changed the location of

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149. 121 Neb. 291, 236 N.W. 745 (1931).
151. Zoellner, 212 Neb. at 675, 325 N.W.2d at 139.
153. Zoellner, 212 Neb. at 678, 325 N.W.2d at 140.
154. 262 Neb. 205, 631 N.W.2d 464 (2001). The Garcia case was the subject of extensive analysis in a casenote published in this review. See Cynthia J. Wooden, Note, The Supreme Court of Nebraska Determines a Court's Power to Authorize a Conservator to Exercise an Incompetent Settlor's Reserved Rights to Amend or Revoke her Trust in In re Guardianship and Conservatorship of Garcia, 36 Creighton L. Rev. 47 (2002).
the trust from Omaha to Scottsbluff. This change of location apparently would have involved removing the Omaha corporate trustee and replacing it with a Scottsbluff corporate trustee. Thus, in some respects the Garcia case, in terms of requested relief, had the same underlying issue (appropriate place of administration) as was before the court in Zoellner.

The most recent trustee removal case is In re Loyal W. Sheen Family Trust, decided in 2003. In this case, the court removed the trustees based on the following grounds: (1) the trustees did not properly account to the beneficiaries; (2) the trustees violated the standard of care required in their dealing with the property. The Nebraska Supreme Court upheld the trial court's action in removing the trustee, finding sufficient evidence to support the trial court's rulings.

The pertinent provision of the Nebraska UTC is section 706(b), which states that:

> The court may remove a trustee if: (1) the trustee has committed a serious breach of trust; (2) lack of cooperation among cotrustees substantially impairs the administration of the trust; (3) because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee serves the interests of the beneficiaries; or (4) there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.

It is unlikely that anyone would quibble with the grounds for removal listed under (1) and (2). With regard to the listing of grounds under (3), the Comment to this section amplifies more fully on the topics of "unfitness" and "unwillingness." The Comment notes that "a persistent failure to administer the trust efficiently" might include a long-term pattern of mediocre performance, such as consistently poor investment results when compared to comparable trusts. In that regard, it might be asked whether the "consistently poor investment results" can be divorced from the duty of a trustee to invest prudently (under the Uniform Prudent Investor Act). In other words, can a trus-
tee who has invested "properly" later be removed for its consistently poor investment results?

With regard to subsection (4), the Comment states that this subsection is a "specific but more limited application of [section 411]." The Comment continues: "Subsection (b)(4) . . . similarly allows the qualified beneficiaries to request removal of the trustee if the designation of the trustee was not a material purpose of the trust." Unlike section 411, there is no language in section 706 regarding the significance of a spendthrift limitation. The approach of section 706(b)(4) is likely to open up another debate over the "material purpose" of the settlor; in this instance, a debate over the significance of the settlor naming this individual or institution as trustee. One would think that in drafting the trust instrument the "material purpose" of the settlor can (should?) be spelled out. A recent case illustrating the intersection of the "material purpose" doctrine and a trustee's removal is Estate of Berthot. It would appear that section 706(b)(4), with its "substantial change of circumstances" and "material purpose" tests open the door more widely than prior case law did in regards to the judicial removal of trustees.

D. ATTORNEY'S FEES (SECTIONS 1004 AND 709)

Nebraska UTC section 1004, entitled "Attorney Fees and Costs," has a rather generic rule providing that a court may award costs and expenses, "including reasonable attorney fees," to any party "as justice and equity may require." There is a line of case law in Nebraska that articulates a general rule similar to that of section 1004.

Section 709 of the Nebraska UTC, dealing with "Reimbursement of Expenses," is directed to the topic of the trustee's right to be reimbursed out of trust property. This section likewise states a fairly generic rule establishing a right of reimbursement for "expenses that

162. Id.
163. Id.
164. The "material purpose" doctrine (sometimes referred to as the Claflin doctrine after the landmark case) is generally associated with the topic of trust termination at the request of the trust beneficiaries. See generally RESTATEMENT (SECOND) OF TRUSTS § 337 (1959). The presence of a spendthrift limitation has typically been regarded as a significant factor in a court's assessment of the "material purpose" of the settlor. See RESTATEMENT (SECOND) OF TRUSTS § 377 cmt. h (1959). Section 411(c) of the UTC is controversial because it reverses that long standing approach.
165. 59 P.3d 1080 (Mont. 2002).
166. NEB. REV. STAT. § 30-3893 (Supp. 2003).
167. NEB. REV. STAT. § 30-3893.
were properly incurred in the administration of the trust.”170 According to the Comment to section 709, “[r]eimbursement under this Section may include attorney’s fees and expenses incurred by the trustee in defending an action.”171 The Comment continues: “However, a trustee is not ordinarily entitled to attorney’s fees and expenses if it is determined that the trustee breached the trust.”172

The decision of the Nebraska Supreme Court in Rapp v. Rapp,173 is the most instructive Nebraska case on the issue of the liability of the trust estate for attorney fees. The Rapp court examined the prior Nebraska case law for guidance and determined that a slight change in the existing rule was warranted. In order for a fiduciary such as trustee to be entitled to reimbursement for necessary costs and fees in defending his acts, it is no longer necessary for a fiduciary to be “fully successful.” According to the court in Rapp, “the standard should be substantially successful.”174

In the recent Martin175 case, the Nebraska Supreme Court also addressed the topic of attorney fees sought by a fiduciary in defense of its acts. Martin involved alleged improper investments by a corporate trustee. The issue on appeal centered primarily upon the trustee’s decision to invest the trust assets predominantly in fixed income assets. The Martin court upheld the lower court ruling that this investment was proper.176 If that were the only issue before the trial court, the result presumably would have been that the trustee would have successfully defended itself and would have been entitled to reimbursement from the trust for its attorney fees.

In the county court, however, other issues relating to the trustee’s actions were called into question. With regard to the bank’s decision to liquidate certain assets, the trial court found this was done primarily for the convenience of the trustee and held that this action was an abuse of discretion by the trustee. However, on this issue, no damages were awarded. Because there was no appeal by the bank on the issue of its liquidation and abuse of discretion, the Nebraska Supreme Court concluded that the “bank breached its duty” and this breach of duty “precludes an award of attorney fees.”177 The Martin court ruled as it did after citing the Rapp case and its “substantially successful” rule. According to the court in Martin, the Rapp ruling “left undis-

172. Id.
175. 266 Neb. 353, 664 N.W.2d 923 (2003).
177. Martin, 266 Neb. at 360, 664 N.W.2d at 929.
turbed the principle that if a fiduciary is guilty of a breach of duty or the court orders the fiduciary to account to the estate, the estate is not liable for the fiduciary's attorney fees.\textsuperscript{178}

The \textit{Martin} decision, as it relates to the attorney fee issue, seems to raise more questions than it answers. The \textit{Martin} court's conclusion was straightforward: "the bank's decisions and actions regarding the investment of the trust assets complied with applicable law."\textsuperscript{179} The bank thus prevailed on the principal issue presented on appeal. With the \textit{Rapp} and \textit{Martin} cases, it seems that the court has taken one step forward and two steps back.

\textbf{VI. REFORMATION TO CORRECT MISTAKES}

Section 415 of the Nebraska UTC provides:

The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether by expression or inducement.\textsuperscript{180}

The Comment to this section notes that "[r]eformation of inter vivos instruments to correct a mistake of law or fact is a long-established remedy."\textsuperscript{181} This generic statement, like most statements of this type, is satisfactory as a general proposition, but as the saying goes, general propositions do not decide specific cases. The important point for present purposes is that the Comment emphasizes that the traditional rule applies only to \textit{inter vivos instruments}.

The Comment continues with the following statement: "Restatement (Third) of Property, Donative Transfers section 12.1 (Tentative Draft No. 1, approved 1995), which this section copies, clarifies that this doctrine applies to wills."\textsuperscript{182} The \textit{Restatement} section quoted has now been officially approved by the American Law Institute and provides as follows:

A donative document, though unambiguous, may be reformed to conform the text to the donor's intention if it is established by clear and convincing evidence (1) that a mistake of fact or law, whether in expression or in inducement, affected specific terms of the document; and (2) what the donor's intention was. In determining whether these elements have been established by clear and convincing evidence, direct evidence of

\textsuperscript{178} \textit{Id.} The court cited \textit{In re Guardianship of Bremer}, 209 Neb. 267, 307 N.W.2d 504 (1981) for the principle quoted.

\textsuperscript{179} \textit{Martin}, 266 Neb. at 361, 664 N.W.2d at 929-30.

\textsuperscript{180} \textit{NEB. REV. STAT.} § 30-3841 (Supp. 2003).

\textsuperscript{181} \textit{UNIF. TRUST CODE} § 415 cmt., 7C U.L.A. 171 (Supp. 2003).

\textsuperscript{182} \textit{Id.}
intention contradicting the plain meaning of the text as well as other evidence of intention may be considered.\textsuperscript{183}

It is significant that the "Introductory Note" to Chapter 12, which is titled "Reforming and Modifying Donative Documents," states that "Chapter 12 addresses measures that are available to carry out the donor's intention regarding donative documents that are unambiguous."\textsuperscript{184} It is also significant that Comment d to section 12.1 specifically states that the "plain-meaning rule is disapproved to the extent that rule purports to exclude extrinsic evidence of the donor's intention."\textsuperscript{185}

Given the foregoing, to what extent is Nebraska law changed? Before addressing that question it would be helpful to go further into the background of section 415. As noted above, section 415 "copies" Restatement (Third) of Property: Wills and Other Donative Transfers Section 12.1. The Restatement comment to this section provides the appropriate "historical background" in Comment c:

The reformation doctrine for donative transfers other than wills is well established. Equity has long recognized that deeds of gift, inter vivos trusts, life-insurance contracts, and other donative documents can be reformed if it is established by clear and convincing evidence: (1) that a mistake of fact or law, whether in expression or in inducement, affected specific terms of the document; and (2) what the donor's intention was. Reformation of these documents is granted, on an adequate showing of proof, even after the death of the donor.\textsuperscript{186}

It is fair to say that this statement is in general accord with existing Nebraska case law,\textsuperscript{187} but it does not appear that the Nebraska courts have decided a case involving reformation of an inter vivos trust. Comment c continues as follows:

This section unifies the law of wills and will substitutes by applying to wills the standards that govern other donative documents. Until recently, courts have not allowed reformation of wills.\textsuperscript{188}

Comment c then elaborates upon the modern day trend in wills law in "moving away from insistence upon strict compliance" with

\textsuperscript{183} RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 (2003).
\textsuperscript{184} Id. at 353 (emphasis added).
\textsuperscript{185} Id. cmt. d.
\textsuperscript{186} Id. cmt. c.
\textsuperscript{187} Most of the Nebraska case law on the subject of reformation involves deeds. For a representative example of a case of this genre and an excellent discussion of the traditional reformation doctrine, see Newton v. Brown, 222 Neb. 605, 386 N.W.2d 424 (1986).
\textsuperscript{188} RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 cmt. c (2003).
statutory formalities for execution.189 This trend, it is said, "is based upon a growing acceptance of the broader principle that mistake, whether in execution or in expression, should not be allowed to defeat intention."190

Section 415, by its terms, would clearly apply to a testamentary trust and the question that is still open is whether applying the section 415 reformation rule would represent a change in Nebraska law. A look at the existing case law is in order and, in the view of this author, the principle that underlies section 415 does not find support in Nebraska case law.

One could argue that because the Nebraska Supreme Court has not specifically ruled that a will is not subject to reformation, section 415 cannot be considered a change in Nebraska law insofar as section 415 applies to testamentary trusts. Perhaps the closest the Nebraska Supreme Court has come to making any pronouncement on this topic is the statement of the court in the 1969 Sadler191 case regarding the "mistake of law" that the testator was laboring under. According to the Sadler court, the testator's alleged "pure mistake" does not justify a court's inquiry into what the decedent actually intended: "...it is against sound public policy to permit a pure mistake to defeat the duly solemnized and completely competent testamentary act."192 This language can be read more narrowly as applying only to situation involving admission to probate. On the other hand, it can certainly be argued that the court is also stating that once a will is admitted to probate, any attempt to modify or vary its provisions based upon "pure mistake" will not be allowed.

Once a will containing a trust is admitted to probate there are all kinds of issues that might arise as to the construction of the language used (or as the Nebraska UTC puts it, the "terms of the trust").193 In will construction cases, the polar star rule of construction is to ascertain and give effect to the intention of the testator.194 Whether and to what extent extrinsic evidence is admissible typically becomes the battleground over the alleged intention of the testator. According to one authority, a majority of jurisdictions follow the "plain meaning rule" — a plain meaning in a will cannot be disturbed by the introduction of

189. Id.
190. Id.
194. The proposition is so basic that it hardly needs a citation; however, in Nebraska case law, it is customary to cite section 76-205 of the Nebraska Revised Statutes — the so-called "intent" statute.
extrinsic evidence that another meaning was intended.\textsuperscript{195} This rule has traditionally been applied to bar the introduction of extrinsic evidence in cases involving alleged mistake.\textsuperscript{196} It is only if the court judges the will to be an “ambiguous” that a court will allow the admission of extrinsic evidence. The law here gets even more complicated when it comes to the topic of ambiguity for some courts have clung to the time-honored distinction between “patent” and “latent” ambiguities.\textsuperscript{197}

As noted supra, Restatement section 12.1, upon which Nebraska UTC section 415 was based, has a comment stating that the “so-called plain meaning rule is disapproved.”\textsuperscript{198} Assuming for the moment that section 415 inferentially adopts the Restatement view as expressed in the Restatement comment, would a “disapproval” of the plain meaning rule be a departure from existing Nebraska law?

Many Nebraska cases address the proper judicial approach to will construction. Perhaps the most artfully articulated statement of the approach of the Nebraska Supreme Court to will construction is contained in Judge Thomas Shanahan’s opinion in In re Estate of Walker:\textsuperscript{199}

To arrive at a testator’s or testatrix’ intention expressed in a will, a court must examine the decedent’s will in its entirety, consider and liberally interpret every provision in a will, employ the generally accepted literal and grammatical meaning of words used in the will, and assume that the maker of the will understood the words stated in the will. . . . When language in a will is clear and unambiguous, construction of a will is unnecessary and impermissible. . . . As a corollary of the immediately preceding rule, when ambiguity exists in a testamentary provision, construction of a will is necessary. Ambiguity exists in an instrument, including a will, when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable interpretations or meanings. . . . A patent ambiguity is one which exists on the face of an instrument. . . . Construction includes the process of determining the correct sense, real meaning, or proper interpretation of an ambiguous term, phrase, or provision in a written

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\textsuperscript{195} Jesse Dukeminier & Stanley M. Johanson, Wills, Trusts and Estates 409-10 (6th ed. 2000).
\textsuperscript{196} A representative case is Mahoney v. Grainger, 283 Mass. 189, 186 N.E. 86 (1933).
\textsuperscript{197} Dukeminier, supra note 195, at 424-25.
\textsuperscript{198} Restatement (Third) of Prop.: Wills and Other Donative Transfers § 12.1 cmt. d (2003).
\textsuperscript{199} 224 Neb. 812, 402 N.W.2d 251 (1987).
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instrument. . . . When patent ambiguity exists in a will, a court must resolve such ambiguity as a matter of law.200

Taking the above quotation as an accurate summarization of Nebraska law, there can be little doubt that the Nebraska supreme court has adhered to the "plain meaning" rule as that rule has been traditionally defined. To the extent that Nebraska UTC section 415 is embracing the principles articulated in Restatement section 12.1, section 415 represents a change in Nebraska, certainly in regard to the application of the plain meaning rule as applied to testamentary trusts. Whether section 415 is the first step down a slippery slope leading to a broader acceptance — whether statutory or judicially — of a reformation doctrine applicable to wills remains to be seen. But it appears to this author that with the adoption of section 415, in regards to testamentary trusts, the first step down that road has definitely been taken.

VII. CONCLUSION

There will be ongoing debate over the Nebraska Uniform Trust Code ("Nebraska UTC") and further changes in the Nebraska UTC are currently being discussed. While this activity goes forward, so does the education effort.

Both William J. Lindsay and I had modest goals in writing our articles: We wanted to contribute to the process of educating Nebraska lawyers with regard to significant changes in Nebraska trust law and how these changes would impact the estate planning bar, particularly from a drafting standpoint. Both of us have already spent a considerable amount of time and effort in studying, explaining, and promoting the Nebraska UTC. Given the comprehensive nature of the subject and the number of important policy choices presented in the particulars of the act, it is unlikely that two Nebraska lawyers will agree 100% on all aspects of this legislation.

I would suggest that, to some degree, change is inevitable and that the non-probate world of estate planning is a reality, particularly in regard to revocable trusts. Clarifying rules are needed for drafters to guide their clients through the maze of trust law. I believe the Nebraska UTC is a positive step forward. Senator David Landis is, in my humble opinion, to be commended for moving Nebraska trust law into the 21st century. Nebraska continues to be a pioneer in enacting uniform acts in the trusts and estates area and I, for one, am proud to be a part of that tradition.
