

**MISSOURI UNIFORM TRUST CODE**  
**MISSOURI COMMENTS**  
<**DRAFT: 4-22-02**>

**Introduction.** This document contains comments that are specific to Missouri law and practice. These comments are applicable to the 4-01-02 draft of the MISSOURI UNIFORM TRUST CODE (MUTC). These MUTC comments highlight those portions of the MUTC that significantly change the UTC or that significantly impact current Missouri trust law. Additionally, the comments focus on those portions of the MUTC where the UTC provisions have been significantly altered.

The comments to the Uniform Trust Code (UTC) are extremely helpful and illuminate many of the provisions of the MUTC. The UTC comments have been taken out of the drafts of the MUTC, for sake of clarity, brevity, and economy through the drafting process and are compiled in another document entitled “MISSOURI UNIFORM TRUST CODE, UTC COMMENTS.”

It is intended that all of MUTC comments and the original UTC comments will be inserted in the final adopted drafts of the MUTC.

**SECTION 456.1-103.**  
**DEFINITIONS.**  
**Missouri Comment**

In the MUTC many new definitions have been added to the definitional section of the UTC. This is due to other changes in the MUTC from the UTC. Subsection (2), affidavit of capacity has been added due to the changes in MUTC section 456.6-603 defining the point in time a settlor is deemed incapacitated for purposes of representing all interests in a revocable trust.

Subsections (5) and (7) defining respectively the terms Conservator and Guardian have been changed to conform to the Chapter 475 R.S.Mo. definitions of those two offices.

Subsection (12) is new. This subsection was inserted as the term “Permissible Distributee” is used quite often in the UTC and was undefined. That term was also used in the MUTC to modify the UTC provisions of 456.1-105.2(8) governing mandatory provisions for notice to a certain class of beneficiaries.

The definitions in subsection (8) (“interested person”), subsection (14) (“Principal Place of Administration”), and subsection (15) (Professional fiduciary”) were all inserted due to the decision to retain the current registration of trust statutes (Sections 456.400 to 456.440 R.S.MO.) Section 456.400, 456.410, 456.420 and 456.430 are retained in Article 11, Miscellaneous Provisions, of the MUTC. The definitions in the old registration of trust provisions have been placed in this section and in section 456.2-202. The concepts from these provisions are used to set jurisdiction and venue in Article 2 of the MUTC.

The new definition in subsection (20), “specified charitable organization” defines what type of charitable entity is entitled to Qualified Beneficiary status under Section 456.1-110.2.

**SECTION 456.1-105.**  
**DEFAULT AND MANDATORY RULES.**  
**Missouri Comment**

Subsection 2 of this MUTC section sets forth the 14 provisions of the MUTC that cannot be waived by the settlor by the terms of the trust. Subsection 1 states that all the other rules of the MUTC are default only and are subject to override by the terms of the trust.

The only change made in the MUTC from the UTC provisions is subsection 2(8). Under the UTC qualified beneficiaries are entitled to certain information about a trust under section 813. UTC Section 105(b)(8) provides that a settlor cannot override this notice requirement as to any qualified beneficiary over age 25. Qualified beneficiary includes those remainder beneficiaries who would receive trust assets if the trust terminated at the time notice were sent.

The subcommittee felt that there are legitimate situations where a settlor should be able to prevent these beneficiaries from receiving notice. The MUTC thus would allow a settlor to override the mandatory notice provision, except for a permissible beneficiary over age 21. Permissible beneficiaries are only beneficiaries with a current interest in a trust. The age 21 was chosen over 25, as that is the age that settlors usually consider trust beneficiaries to be mature enough to be involved in trust matters.

Note that subsection 2(9) provides that other rules of MUTC 456.8-813 allowing any beneficiary (this means any person with any interest in a trust) to request and receive certain information cannot be overridden by the terms of the trust.

**SECTION 456.1-110.**  
**OTHERS TREATED AS QUALIFIED BENEFICIARIES**  
**Missouri Comment**

This section provides that other beneficiaries and entities are treated as Qualified Beneficiaries under certain circumstances. Subsection 1 provides that any beneficiary can request notice to which a qualified beneficiary is entitled and the trustee must send that beneficiary that notice. This provision be waived by the terms of the trust, but only to the extent allowed by MUTC 456.1-105.2(8) & (9). A provision has been added to the MUTC specifically requiring that a request for notice specifically identify the type of notice requested and the trust for which notice is requested. This was inserted to allay concerns of trustees that administer many trusts that persons or organizations would send broad blanket requests for notice for “any trust of which I am a beneficiary.” These requests would be difficult to process, especially if the beneficiary was described in one or more trusts by class. Thus, the request must identify the trust with some certainty and specify the type of notice the beneficiary would like to receive.

Subsection 2 and 3 of section 1-110 of the UTC gives any charitable beneficiary and the Missouri Attorney General the rights of a qualified beneficiary in any charitable

trust, not matter how remote or contingent the charitable interests. MUTC now provides a definition of Specific Charitable Organization in Section 456.1-103(20) that essentially limits those charities that are treated as qualified beneficiaries to those who have a current interest in the trust or would be a remainder beneficiary if the trust terminated at the time notice is given.

Subsection 3 of the UTC provision was also limited to conform to Missouri case law. In Missouri a trust is not “Charitable” in the sense that the Missouri Attorney General has any involvement unless “the trust is public and indefinite to the point that no individuals or corporations have the right to bring such an action.” *State ex rel. Champion v. Holden*, 953 S.W.2d 151 (Mo. App. S.D. 1997). Thus, the Missouri Attorney General is not entitled to notice as a qualified beneficiary unless a trust interest is for the benefit of some broad charitable purposes and lacks a specific charitable beneficiary to represent that interest.

**SECTION 456.1-112.**  
**MARRIAGE DISSOLUTION OR ANNULMENT**  
**Missouri Comment**

The drafters of the UTC intended this section could make all rules of construction applicable to wills applicable trust trusts as well. Missouri law in the area contains two sets of rules of construction, those contained in Chapter 461 that are applicable to non-probate transfers and those contained in Chapter 474 that are applicable to wills. These are not consistent and it is perceived that a study needs to be made with a view toward creating one set of rules of construction applicable to trusts, wills, and non-probate transfers. The subcommittee seriously contemplated taking on this task, but concluded that it was a job beyond the scope of this committee.

Moreover, there was no clear consensus (with one exception) as to what current rules of construction should be made applicable to trusts. It was felt that a provision should be inserted disinheriting a former spouse. It was felt that the rule achieving this from the non-probate transfer statute was the best model. Thus, this section is modeled on Section 461.051 of the current statutes.

**SECTION 456.2-202.**  
**JURISDICTION OVER TRUSTEE AND BENEFICIARY**  
**Missouri Comment**

While the UTC based jurisdiction and venue for trust actions on the concept of the principal place of administration of the trust from the old registration of trust statutes of the UPC, the UTC avoided defining principal place of administration because of problems arising from determining where records are kept.

Recognizing these problems, the subcommittee still decided to retain the basic provisions of the Missouri registration of trust provisions, as discussed in the Missouri comment to section 456.1-103(14). It was felt that in practice, these rules seemed to be clear and that practitioners in Missouri were familiar with these concepts.

It was also felt that the provisions from present section 456.420.4 detailing what types of matters could be dealt with once jurisdiction and venue were obtained should be

retained. These have been inserted in subsection 3 of this section. These matters are now referred to as matters involving the “administration of the trust,” not matters involving the “internal affairs of the trust”, as in the present statute.

**SECTION 456.2-204.**

**VENUE.**

**Missouri Comment**

The UTC venue provisions were rejected and the present trust venue statute, section 456.450, was inserted in this section of the MUTC without change.

**SECTION 456.4-407.**

**EVIDENCE OF ORAL TRUST**

**Missouri Comment**

The essence of the present Missouri statute of frauds as it relates to trusts (present subsections 1 and 2 of Section 456.010), is incorporated into a new subsection 2 of MUTC 456.4-406. Note that the provisions of subsection 3 of present Section 456.010 that requires grants and assignment of a beneficiary’s interest in a trust to be in writing is not carried forward into the MUTC.

**SECTION 456.4-411**

**MODIFICATION OR TERMINATION**

**OF**

**NONCHARITABLE IRREVOCABLE TRUST BY CONSENT**

**Missouri Comment**

**Present law.** In 1983, Missouri adopted Mo.Rev.Stat. section 456.590.2 (2000) which incorporated a unique approach to trust modification into Missouri law. Rejecting the rule of *Clafin v. Clafin*, 149 Mass. 19, 20 N.E.454 (1889) then in force in Missouri (*Thomson v. Union National Bank in Kansas City*, 291 S.W.2d 178 (Mo. 1956); *Bennet v. Tower Grove Bank and Trust Co.*, 434 S.W.2d 560 (Mo. 1968)) and in most other jurisdictions in the United States, section 456.590.2 is based upon the English Variation of Trusts Act (1958), 6 & 7 Eliz. 2, ch. 53. For a comprehensive analysis of the legal background of § 456.590.2 see Peter J. Wiedenbeck *Missouri’s Repeal of the Clafin Doctrine – New View of the Policy Against Perpetuities*, 50 Mo. Law Rev. 805 (1985).

Section 456.590.2 has been widely used in a variety of situations since its enactment. Distributions from trusts have been increased because of unforeseen changes in economic conditions and the beneficiary’s personal circumstances, *Hamerstrom, v. Commerce Bank Of Kansas City, N.A.*, 808 S.W.2d 434 (Mo. App. W.D. 1991). Trusts have been terminated because of the cost of administration and the low yield earned on trust assets and because of the desires of all of the adult beneficiaries of the trust to benefit the life beneficiary, *In re Nitsche* 46 S.W. 3.d 682 (Mo.App. S.D. 2001). Trusts have also been terminated because of their small size and because of the apparent failure of the line of a settlor’s descendants, Heywood H. Davis & Dan C. Sturdevant, *Litigation Settlements in Probate Matters*, in 2 Missouri Estate Administration, Trust and Estate

Series, CLE § 25.12 (MoBar 4<sup>th</sup> ed. 1999, 2001). Trust terminations and reformations have also been used to accomplish estate, gift, and generation skipping transfer tax planning and objectives, to effectuate settlements in trust and estate litigation, to change trustees, to change beneficiaries, and to alter almost every conceivable provision in irrevocable private trusts.

The use made of this statute may be far beyond that anticipated by the drafters of the original 1983 statute, who stated in the comments to this statute when it was enacted that “This is useful chiefly to meet changes in tax laws...[a] minor change in the distributive provision of a trust (e.g. eliminating the settlor as a possible contingent beneficiary) may effect tax savings which will benefit all of the beneficiaries, Missouri Bar Probate and Trust Committee, Missouri Probate Update and New Guardian and Trust Codes – 1983 § 456.590 cmt (John A. Borron, Jr. ed., 1983). The statutory requirement that a termination or modification under the statute be shown to “benefit the disabled, minor, unborn and unascertained beneficiaries has not been a substantial limitation on the power to alter or terminate irrevocable trusts. While the courts in *Hamerstrom* and *In re Nitsche* (the only two reported cases dealing with section 456.590.2) both appointed a guardian ad litem (GAL) to represent the disabled, minor, unborn, and unascertained beneficiaries of the trusts in question, the statute does not require the appointment of a GAL. The statute suggests that the court act as the GAL and make a determination of benefit to the un-represented classes in a section 456.590.2 action. In practice it is probably the exception and not the rule that a guardian ad litem is appointed.

**UTC Provisions.** Unlike Section 456.590.2, the UTC adopts a modified approach to the *Claflin* rule. The severe restrictions that the *Claflin* rule places on trust termination and modifications, however, are somewhat mitigated. Modification upon consent of all beneficiaries is allowed by UTC section 411(b) if “not inconsistent” with a material purpose of the trust. Modification and/or termination are also specifically allowed for change of circumstance, section 412, uneconomical trusts, section 414, tax reasons, section 416, and mistakes of fact or law section, 415.

The adoption of the UTC version of section 411(b) and the return of the material purpose analysis to Missouri law could result in the return of the inflexibility associated with the *Claflin* rule, as expressed in *Thomas* and other cases. See *First National Bank of Kansas City v. Christopher*, 624 S.W.2d 474 (Mo. Ct. App. 1981). In 1983 Missouri made a conscious choice to allow the beneficiaries to modify trusts by consent so long as the interest of beneficiaries that could not directly represent themselves was benefited. There has not been a groundswell of opposition to the statute or suggestion that the *Claflin* rule should be restored. Section 456.590.2 has been widely used, but its use has produced only two reported cases in 18 years. Thus the substance of Section 456.590.2 has been incorporated into MUTC section 456.4-411.2 continuing Missouri’s rejection of the *Claflin* rule.

**MUTC.** Experience with the statute, however, has raised several practical concerns that were addressed in MUTC section 456.4-411.2. First, There is a real concern whether there is a true analysis of the benefit of the variation or termination to the minor, unborn, or unascertained beneficiaries in actions brought under section 456.590.2. Assuming all adult beneficiaries have consented, this is the only true statutory

requirement for a successful action. Faced with the consent of all adult beneficiaries, a judge may view the matter as similar to the entry of a consent judgement. Thus, the parties' contention that some benefit will accrue to the minor, unborn, or unascertained beneficiaries by reason of the termination or variation may receive little independent analysis. Arguments by counsel for the parties advocating a variation or termination often rely on the fact that the minor, unborn, and unascertained beneficiaries are deemed represented under the present representation rules by adult beneficiaries who have consented to the proposed modification or termination.

True benefit to the minor, unborn, and unascertained beneficiaries from a section 456.590.2 action, especially if the trust is being terminated, is probably rare by the very nature of the situation. Those classes of beneficiaries who are either unrepresented or deemed represented by others will almost invariably be the remainder beneficiaries whose interests will in fact be extinguished by the termination. Perhaps the problem is that the appointment of a GAL to represent the minor, unborn, and unascertained beneficiaries is the exception rather than the rule. It is probably not a coincidence that in the only two known cases involving a Section 456.590.2 termination to be appealed, an a GAL had been appointed, *Hamerstrom*, 808 S.W.2d at 434; *Nitsche*, 46 S.W. 3d at 682.

To address this concern the MUTC section 456.4-411.2 now requires that a court find that the interests of the minor, unborn, and unascertained beneficiaries be adequately protected by any proposed variation or termination instead of the court finding the variation or termination will "benefit" those beneficiaries. This should give parties to a 456.590.3 action and the court more flexibility in crafting remedies instead of applying a rigid yes or no solution to terminations or modifications. For example, a court could refuse to terminate a trust, but commute the life beneficiary's interest with the trust continuing for the benefit of the minor, unborn, and unascertained beneficiaries. Protection of those classes of beneficiaries could also be created by requirements that beneficiaries benefiting from the termination have to leave testamentary dispositions in favor of classes of beneficiaries that did not benefit from the termination.

The last sentence of proposed 456.411.2 provides another measure of protection for minor, unborn, and unascertained beneficiaries. That sentence requires the court to appoint a representative under 456.3-305 upon the motion of any party, unless the court finds good cause not to do so. Of course, a court should always have authority to appoint a representative on its own motion. The appointment of a representative would be presumed, unless the court specifically finds that the appointment is not appropriate under the circumstances.

**SECTION 456.4-412**  
**MODIFICATION OR TERMINATION BECAUSE OF UNANTICIPATED**  
**CIRCUMSTANCES OR INABILITY TO ADMINISTER TRUST EFFECTIVELY**  
**Missouri Comment**

The provisions of subsection 2 is a direct replacement for the provisions of current section 456.590.1. Any modification that could have been achieved under section 456.590.1 can also be achieved under subsection 2.

**SECTION 456.4-417**  
**COMBINATION AND DIVISION OF TRUSTS**  
**Missouri Comment**

The two sentences at the end of this section were added to clarify certain issues that the subcommittee felt needed to be addressed. The first new sentence makes it clear that in dividing a trust, the resulting trusts do not have to be exact replicas of the original trust. A division is allowable so long as each beneficiary's interest in the resulting trusts, taken as a whole, are substantially the same as each beneficiary's interest in the original trust. Correspondingly, in combining trusts, it is not necessary that the provisions of the trusts being combined are identical so long as the interests of each beneficiary in the single resulting trust are substantially the same as those interests were prior to the combination. In a combination, it is within the discretion of the trustee to determine what provisions of the original trusts control after the combination where there are minor differences in the original trust's administrative provisions. So long as the beneficiaries interests do not change substantially, there should not be any adverse gift tax or generation skipping transfer tax consequences.

**SECTION 456.5-502**  
**SPENDTHRIFT PROVISION**  
**Missouri Comment**

Subsection 1 has been changed to conform to present Missouri law. UTC Section 502 provides that to be valid, a spendthrift provision must restrain both the voluntary *and* involuntary alienation of a beneficiary's interest in the trust. Present section 456.080 provides that a spendthrift trust can be validly created by a provision that restrains either the voluntary *or* involuntary alienation of a beneficiary's interest in the trust. The UTC provision is based on public policy that would prevent a beneficiary's interest from being protected from involuntary attachment, while allowing the beneficiary to voluntarily assign that interest. While not necessarily used in that manner, Missouri law has long allowed such a result, and current law has been carried forward in this section to that a spendthrift clause may prohibit either type of alienation. The subcommittee was concerned that any change in present Missouri law could effect existing spendthrift provisions.

**SECTION 456.5-505**  
**CREDITOR'S CLAIM AGAINST SETTLOR**  
**Missouri Comments**

**UTC Provisions: Settlor's Creditors & Spendthrift Protection.** Under section 5-505(a) of the UTC a settlor cannot protect assets from creditors by the use of spendthrift provision in a trust. All assets of revocable trusts are subject to the claims of the settlor. Under the UTC approach, the creditor's of a settlor of an irrevocable trust can

reach “the maximum amount that can be distributed to or for the settlor’s benefit.” This stance is not in accord with the Missouri’s present limited exception to that rule.

**Present Missouri Law: Settlor’s Creditors & Spendthrift Protection.** Terms of a trust that prevents the interest of a beneficiary from being either voluntarily or involuntarily transferred are valid in Missouri, Mo.Rev.Stat. § 456.080.2 (2001.) Until 1986, Missouri law held that it was against public policy for a spendthrift clause to also protect assets from a creditor of the settlor, *Mcilvaine v. Smith*, 42 Mo. 45 (1867); *Jamison v. Mississippi Valley Trust Company*, 207 S.W. 788 (Mo. 1918); Mo.Rev.Stat. § 428.010 (repealed 1986) and § 456.080.3 (repealed 1986). In 1986, Section 456.080.3 was completely changed. After a clarifying amendment was enacted in 1989, that subsection now provides that a spendthrift provision does protect a settlor’s retained interest in an irrevocable trust to the extent that the settlor is one of a class of beneficiaries entitled to trust income or principal in the trustee’s discretion.

Section 456.080.3 was not enacted to create an onshore/offshore jurisdiction for settlors to protect assets from creditors. Rather, the purpose of the 1986 amendment was to allow the settlor of an irrevocable trust to retain an interest in an irrevocable trust that would not result in the inclusion of the assets of that trust in the grantor’s gross estate for federal estate tax purposes on the grantor’s death, Missouri Bar Probate and Trust Committee, Proposed Amendment to Section 456.080 (Spendthrift Trusts) and Amendments to Principal and Income Act (Sept. 19, 1985) § 456.080.3 cmt (unpublished manuscript on file with Missouri Bar Probate and Trust Committee). It has been held that a discretionary interest retained by a settlor to receive income or principal in the discretion of an independent trustee is not an interest includable in a settlor’s estate under Section 2036 or Section 2038 of the I.R.C. (2001), *Estate of Giza Wells*, 42 T.C.M. 1305 (1981). However, inclusion of such an interest in a settlor’s estate for purposes of the federal estate tax may still occur if the retention of such power would allow the creditors of the settlor to reach the interest to satisfy claims, *Mary M. and Edson S. Outwin*, 76 T.C. 153, 168, n.5.

At the time of the amendment to Section 456.080.3, the main concern was the inclusion of an interest for federal estate tax purposes retained by a settlor that took effect after the death of that settlor’s spouse who was the life beneficiary of an inter-vivos Qualified Terminable Interest Property trust (QTIP Trust), I.R.C. § 2523(b) (2000). It is now clear that any interest retained by a settlor following the death of spouse in an intervivos QTIP trust is not includable in the settlor’s estate for federal estate tax purposes, See Private Letter Ruling 9140069 (July 10, 1991). This does not mean, however, that the amendment to Section 456.080.3 was rendered meaningless by the resolution of the issue of inclusion of a settlor’s retained interest in a QTIP Trust. Estate planning techniques that include the settlor’s retention of an interest in a trust that is not included in the settlor’s gross estate under Section 2036 or Section 2038 arise in a number of contexts. Currently there has been discussion regarding the retention of an interest by a settlor in the event that the federal estate tax is actually repealed. Federal law currently provides that the federal estate tax will not apply for decedent’s dying after 12/31/09 (Economic Growth and Tax Relief Reconciliation Act of 2001, H.R. 1836, 107th Cong. § 501(a), I.R.C. § 2210(a) (2001)) and before 12/31/10 (Economic Growth and Tax Relief Reconciliation Act of 2001, H.R. 1836, 107th Cong. § 901). The issue

here is whether the retention of a beneficial interest that arises only on the occurrence of an event results in estate tax inclusion if the settlor dies while the estate tax still applies and the interest has not arisen. Even if estate tax inclusion does not occur in that context, inclusion would still occur if such an interest subjected the assets of the trust to the claims of the settlor's creditor's.

**MUTC: Settlor's Creditors & Spendthrift Protection.** Missouri's limited exception is designed to allow the retention by a settlor of a discretionary interest as one of a class of beneficiaries. This exception should allow estate-planning techniques that would require a settlor to retain some interest in a trust that should not be included in the settlor's gross estate for federal estate tax purposes. This seems a valid purpose that when weighed against the narrowness of the exception tends to weigh toward maintaining the exception in a Missouri version of the UTC. Thus, the current Missouri exception to spendthrift protection for settlor interest in trusts has been inserted in MUTC section 456.5-505.3.

**Current Law: Settlor's Creditors & Terminating Revocable Trusts.** Missouri currently has two other statutes that apply to creditors ability to reach trust assets that are more detailed than the UTC and cover issues not covered in that Code. Section 456.610 allows a trustee of a trust that confers power to pay the debts of a decedent to publish notice similar to the requirement for notice in a probate proceeding. Creditors who are owed a debt are barred from collecting that debt if they have not received payment or initiated collection proceedings within six months from the date of publication. The provisions of section 456.610 are significantly narrower than the probate claim statute because the trust non-claim statute bars only debts of the settlor, not judgment claims, trust contest actions, or any other type of claim. The statute may violate the right granted by the U.S. Constitution to procedural due process. However, other than the government enacting the statute, there seems to be lacking the element of state action needed for the perfection of a procedural due process claim, *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 484. Whether or not actual notice was due the claimant in *Pope* turned on whether the probate claim bar statute was a self-executing statute of limitations. The provisions of section 456.610 have been inserted in Missouri's version of the UTC as Section 456.5-505.4.

Another Missouri statute establishes a rather elaborate procedure for the satisfaction of claims from non-probate property when the assets in the probate estate are insufficient to cover such claims, Mo.Rev.Stat. § 461.300 (2001). This statute is based on Section 6-107 of the Uniform Probate Code. Missouri Bar Probate and Trust Committee, Missouri Probate and Trust Update – 1989, § 461.071 cmt (Leo E. Eickhoff, Jr. ed., 1989). It was originally enacted as part of the Nonprobate Transfers law in 1989 as Section 461.071. *Id.* In 1995 it was amended and moved out of the Nonprobate Transfers law. Missouri Bar Probate and Trust Committee, Nonprobate Transfer Laws Comments to 1995 Amendments (1995), § 461.300 cmt (unpublished manuscript on file with Missouri Bar Probate and Trust Committee).

If an asset not subject to probate administration is subject to the satisfaction of a decedent's debts immediately prior to death it can be brought back into the probate estate to satisfy claims identified in the statute, Section 461.300.1. This is done by a separate

action filed against the person holding title to the non-probate property. This statute clearly applies to assets in revocable trusts, *Fischer v. Fischer*, 901 S.W.2d 239 (Mo. App. E.D. 1995); § 461.300.8. A probate estate can be opened where the only asset is the right to reach assets under this statute, *Fischer*, 901 S.W.2d at 240. The action has to be filed within eighteen months of the decedent's death. However, the action is completely derivative of a valid claim filed in the probate action. If a probate estate is not timely opened or a claim validly filed, then non-probate assets cannot be reached.

**UTC: Settlor's Creditors & Terminating Revocable Trusts.** The UTC provides that assets of a trust revocable immediately prior to the settlor's death are subject to the claims of the settlor's creditors, UTC section 505(a)(3). Costs of administration of the settlor estate, expenses of settlor's funeral and disposal of remains, and statutory allowances to spouses and minor children are also payable from the assets of a revocable trust. However, these claims and other expenses are only recoverable "to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and [allowances]." This section of the UTC fails to cover many issues that are covered by present Section 461.300 R.S.Mo. The provisions governing the rights of a creditor of the settlor to reach trust assets originally in section UTC Section 5-505.3 were deleted, leaving present Section 461.300 to control this issue.

**MUTC: Settlor's Creditors & Terminating Revocable Trusts.** A new provision has been inserted as Section 456.5-505.4(2) that resolves a present conflict between the provisions of current section 456.610 and 461.300. Both of these statutes purport to cut off claims of creditors of a deceased settlor of a terminating revocable trust, yet each has different procedures and claim periods. If the trust non-claim period under section 456.610 has run after notice is published, it is not clear whether a valid probate claim can be satisfied from trust assets through the procedure set forth in Section 461.300. Assuming that the notice procedure of Section 456.610 passes constitutional muster, it should either control, preventing a valid section 456.300 claim if the notice period has run, or it is meaningless and should be repealed.

Missouri Trustees have relied upon the efficacy of this procedure since 1983 and it has facilitated the distribution of trusts. Eighteen months is a long time for distributions to be potentially delayed as the trustee awaits the expiration of all claims against a deceased settlor. The concept of publication of notice and a claim bar period has been retained in a Missouri version of the UTC and now controls the barring of claims against trustees of certain trusts. Thus, if a claim is barred by published notice under MUTC Section 456.5-505.4, that claim cannot be satisfied through a subsequent proceeding under Section 461.300.

**SECTION 456.6-601.**  
**CAPACITY OF SETTLOR OF REVOCABLE TRUST**  
**Missouri Comment**

This section is unchanged from the UTC and probably restates current Missouri law. The level of mental capacity needed to execute an inter vivos trust in Missouri is that

needed to execute a will. This is because the capacity required is that necessary to make an inter vivos gift of the assets that become the trust estate, which is the same as that required to make a will. *Farnsworth v. Farnsworth*, 728 S.W.2d 223 at 227.

**SECTION 456.6-602.**  
**REVOCATION OR AMENDMENT OF REVOCABLE TRUST.**  
**Missouri Comment**

Subsection 5 is inconsistent with the Missouri Durable Power of Attorney Statute, section 404.710.6(1), which states that the Power to amend a trust must be contained in the Durable Power of Attorney.

**SECTION 456.6-603.**  
**SETTLOR'S POWERS; POWERS OF WITHDRAWAL.**  
**Missouri Comment**

Section 603(a) of the UTC provides that while a settlor has capacity to revoke trust, the settlor is treated as the sole beneficiary of a revocable trust. This is probably a change from current law, although Missouri law is silent on this issue. The effect of this section is to remove any duty the trustee may have to any other beneficiary under the UTC. For example, but for section UTC section 603(a), a trustee has to provide any information to any beneficiary or respond to a beneficiary's request for information under section 813. The MUTC adds a presumption that a settlor of a revocable trust has capacity. This presumption lasts until an adjudication of incapacity or disability or the trustee receives an affidavit of capacity. An affidavit of capacity is defined in section 456.1-103(2) as a letter from one licensed medical doctor that the settlor lacks capacity to revoke the trust.

**SECTION 456.6-604.**  
**LIMITATION ON ACTION CONTESTING VALIDITY OF REVOCABLE TRUST; DISTRIBUTION OF TRUST PROPERTY**  
**Missouri Comment**

The UTC provides that a judicial proceeding contesting the validity of a revocable trust must be brought within the earlier of three years of the settlor's death or 120 days after the trustee sent the contestant a copy of the trust instrument and basic information regarding the trust. The time periods in the UTC were intended to conform to probate practice in each state. While the Missouri self-executing statute of limitations for wills is one year, a majority of subcommittee members felt that a one year period did not provide enough of an incentive for trustees to provide copies of the trust document and other basic information to non-beneficiaries, such as the settlor's heirs-at-law. This section is an attempt to balance the competing policies of allowing settlor's to dispose of assets in a private manner, while giving persons with a property interest in the trust assets as heirs adequate notice that their interests are being foreclosed.

The MUTC adds another time period barring trust contests. That time period expires at the time the will contest period expires with respect to the probate of the settlor's will

if the trust is entitled to a distribution under the settlor's will and a copy of the trust instrument was filed with the probated division within 60 days of the first publication of notice of granting of letters. This last requirement will affect the present practice of indirectly subjecting revocable trusts to the will contest statute of limitations by including an incorporation by reference clause in the pour-over provision of a probated will. This technique will not work under this statute, unless the trust instrument is filed of record in the probate action. Again, it was felt that the heirs-at-law have an important interest in the settlor's assets so that the heirs should at least have the ability to view documents that affect that interest.

A new subsection, section 456.6-604.2 was added to make it clear that a trustee that sends copies of trust documents and provides other required information is not violating any duty of privacy owed the settlor or the beneficiaries. This resolves a long-standing ambiguity in the interrelationship of section 456.610 and 469.300.

**SECTION 456.8-802.**  
**DUTY OF LOYALTY**  
**Missouri Comment**

Present Missouri law on the Duty of Loyalty is set forth in Section 456.570.2 and is based on the Uniform Trustee Powers Act. That section provides that a court may approve a conflict. However, there are a number of potential self-dealing transactions authorized by other statutes that do not need court approval. The exception contained in 456.520.3(24) almost swallows the rule. That exception provides that a trustee can employ or contract with persons in almost any capacity "even if they are associated or affiliated with the trustee" to provide a wide variety of specific services and to employ an agent to "perform any act of administration, whether or not discretionary...."

The UTC provides much narrower exceptions to the Duty of Loyalty than present Missouri law. Investments in proprietary mutual funds are authorized by section 802(f) and section 802(h) authorizes trustee compensation arrangements, transactions between other trusts and estates of which the trustee is a fiduciary, deposits in a financial institution operated by the trustee, and advances if needed for the protection of the trust, so long as the transaction is fair to the beneficiaries of the trust.

The MUTC strikes a middle ground between present Missouri law and the UTC. More exceptions have been added to Section 456.8-802.6 (UTC Section 802(f)). Those exceptions are an investment in an insurance contract purchased from an affiliate of the trust company and the placing of securities transactions through an affiliated broker. Additional compensation can be paid to the trustee or the affiliate so long as notification of the fact of compensation and manner of calculating compensation is sent to certain beneficiaries on an annual basis. These investments also have to meet the prudent investor standards. A section has also been added to 456.8-807 regarding delegating duties to affiliated agents.

**SECTION 456.8-807**  
**DELEGATION BY TRUSTEE**  
**Missouri Comments**

Subsection 5 of this section of the MUTC has been added to the UTC. This is an exception to the duty of loyalty section 456.8-802. Note that the transaction has to be fair and that notice has to be provided if compensation is received by the trustee or the agent. This new subsection is based on, but more restrictive than, present section 456.520.3(24).

**SECTION 456.8-813**  
**DUTY TO INFORM AND REPORT**  
**Missouri Comment**

This section clarifies an area of Missouri Law that lacks definition and authority. The requirement that first line remainder beneficiaries be given notice of various events and be supplied with specified information without having to request that information is probably a change of Missouri law, *Siefert v. Leonhardt*, 975 S.W.2d 489 (Mo. App. E.D. 1998). This section is certainly a very substantial change from present Missouri statutes, which only require an accounting to income beneficiaries, Section 456.233 R.S.Mo.

**SECTION 456.8-815**  
**GENERAL POWERS OF TRUSTEE**  
**Missouri Comment**

The changes in this statute from the UTC reflect section of present Missouri Section 456.520.3 that the subcommittee felt should be carried over into the new law.

**SECTION 456.10-1008**  
**EXCULPATION OF TRUSTEE**  
**Missouri Comment**

The change noted in this section was inserted due to concerns regarding interpretation of the phrase "... caused to be drafted by the trustee...." The change is intended to make it clear that suggestion by a trustee of language to be inserted in a document is not covered by this section if the settlor is represented by independent legal counsel.