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# How Does the Arkansas Trust Code Affect Real Estate Transactions?

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The Arkansas Trust Code (ATC)[1] has been in effect since September 1, 2005.[2] In addition to Arkansas, 18 other states, plus the District of Columbia, have enacted versions of the Uniform Trust Code.[3] This is a remarkable result for a uniform law first approved by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 2000. Arkansas real estate lawyers, along with their counterparts in other jurisdictions that have adopted the Uniform Trust Code, are beginning to see the subtle ways in which codification of trust law affects the real estate practice. This overview highlights provisions of the ATC that are most directly relevant to real estate practice. It does not, however, attempt to address all of the many provisions of the ATC that may affect real estate matters.[4]

## Putting the ATC in Perspective

While a few states have long had comprehensive trust codes, until now, trust law in most jurisdictions, including Arkansas, has been a far less satisfactory collection of incomplete judicial interpretations of traditional trust law, supplemented by limited legislative initiatives. In many respects, the ATC reconfirms and clarifies conventional principles of trust law. One of its chief benefits is that it resolves some areas of uncertainty by filling in gaps in the law. The ATC also reforms trust law in a few significant ways. Perhaps its most important contribution, however, is simply that it restates trust law as a coherent, coordinated, consistent, and nearly comprehensive body of rules and principles.

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1. ARK. CODE ANN. §§ 28-73-101 through -1106 (Supp. 2005).

2. *Id.* § 1104.

3. UNIF. TRUST CODE (amended 2005). The National Conference of Commissioners on Uniform State Laws maintains a current list of states that have adopted versions of the Uniform Trust Code. *See* http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-utc2000.asp

4. For a more comprehensive overview of the ATC, including a comparison of the ATC with prior Arkansas law and with the provisions of the Uniform Trust Code, see Professor Lynn Foster's excellent article, *The Arkansas Trust Code: Good Law for Arkansas*, 27 U. ARK. LITTLE ROCK L. REV. 191 (2005). For a more comprehensive analysis of the Uniform Trust Code, see David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 Mo. L. REV. 143 (2002).

As a preliminary matter, real estate lawyers should be aware that the ATC leaves many of the most important aspects of trust law within the capable control of our colleagues in the trusts and estates bar. Most ATC provisions are default rules in the sense that they may be modified by express terms of a trust instrument.[5] Only a few rules are mandatory, including those that govern the creation of trusts,[6] the duty of the trustee to act in good faith and in accordance with the purposes of the trust,[7] certain judicial powers over trusts,[8] creditors' rights,[9] certain other rights of third parties dealing with the trustee,[10] and periods of limitation for commencing a judicial proceeding.[11]

The original version of the Uniform Trust Code also specified as mandatory the obligation of the trustee to provide certain information and reports to beneficiaries, but the ATC omits those requirements from the list of code provisions that the trust instrument may not overrule.[12] The Arkansas Legislature was not alone in taking this approach. As explained in the comments to the Uniform Trust Code as amended in 2004, the provisions requiring the trustee to provide certain information and reports to beneficiaries were so commonly rejected or modified by enacting jurisdictions that the uniform act now brackets them as optional items among the list of mandatory code provisions "out of a recognition that there is a lack of consensus on the extent to which a settlor ought to be able to waive reporting to beneficiaries, and that there is little chance" of uniformity among the states on this issue.[13] The controversy on this aspect of the Uniform Trust Code reflects the strong desire of many settlors to maintain the confidentiality of certain details even to the extent of withholding information from beneficiaries.

The subdivisions that follow address specific topics under the ATC in the order that they are most likely to affect the real estate practice. For comparison purposes, this overview sometimes makes reference to the version of the Uniform Trust Code as last revised in 2005. The NCCUSL Internet home page[14] provides a wealth of helpful information on the uniform act, including the current version as amended in 2005, along with the comments.

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5. Section 28-73-105(b).
6. *Id.* § 105(b)(1) and (3).
7. *Id.* § 105(b)(2).
8. *Id.* § 105(b)(4), (6), (7), (10), and (11).
9. *Id.* § 105(b)(5).
10. *Id.* § 105(b)(8).
11. *Id.* § 105(b)(9).
12. *Compare* Uniform Trust Code § 105(b) *with* ARK. CODE ANN. § 28-73-105(b). Thus, under the ATC, the terms of the trust may modify all of the statutory information and reporting duties of the trustee. This approach recognizes that many settlors wish to maintain the secrecy of trust provisions even from beneficiaries. *See* Donald D. Kozusko, *In Defense of Quiet Trusts*, TR. & EST. at 20 (Mar. 2004).
13. U.T.C. § 105, cmt (2004 Amendment).
14. *See* http://www.nccusl.org

### Liability of a Trustee and Rights of Third Parties Dealing with a Trustee

For many real estate lawyers, the most common intersection of real estate practice and trust law occurs in transactions involving real estate held in trust. The transaction may concern a buyer, seller, lender, borrower, tenant, or landlord who either is a trustee or who is negotiating with a trustee. Article 10 of the ATC is of particular interest to a lawyer representing a client in a transaction involving real estate held in trust. Article 10 includes several provisions that clarify, modify, or fill in gaps in established trust law governing the liability of the trustee to third parties (those other than beneficiaries) and the rights of third parties dealing with trustees. Two especially important provisions address contractual and tort liability arising out of activities on behalf of the trust.

Under section 1010(a), a trustee is not personally liable on a contract properly entered into by the trustee if the contract discloses the trustee's fiduciary capacity and the contract itself does not provide for the trustee's personal liability.[15] To some extent, this principle will change how Arkansas lawyers think about transactions involving trust property. For example, based on traditional trust law, many lawyers representing trustees routinely insist that any contract made by the trustee must expressly limit the trustee's obligations to the assets held in trust. While cautious lawyers may continue to follow that practice when representing trustees, lawyers negotiating transactions with trustees must now recognize that section 1010(a) generally insulates a trustee from personal liability if the contract discloses the trustee's fiduciary capacity.

The ATC's approach to a trustee's tort liability will be especially important for trustee clients who hold title to commercial real estate or any land where personal injuries may occur or questions of premises liability may arise. Section 1010(b) provides that a trustee who is not personally at fault is not personally liable for torts committed in the course of administering a trust "or for obligations arising from ownership or control of trust property, including liability for violation of environmental law."[16] Decisions about a trustee's potential liability under environmental laws, however, will still require careful analysis of the controlling environmental statutes and regulations, such as the fiduciary liability provisions of the Comprehensive Environmental Response, Compensation, and Liability Act.[17]

The ATC also modifies and fills in gaps concerning the rights of third parties when they deal with a trustee. Under section 1012, a third party who deals in good faith with a trustee is generally relieved of any obligation to inquire into the power or authority of the trustee or into the application of assets delivered to the trustee.[18] Of course, this protection is not available to a third party who knows "that the trustee is exceeding or improperly exercising the trustee's powers."[19]

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15. ARK. CODE ANN. § 1010(a).
16. *Id.* § 1010(b).
17. 42 U.S.C.A. § 9607(n) (2005).
18. Section 28-73-1012.
19. *Id.* § 1012(a).

On a related point, the ATC introduces a concept that will be new to many real estate practitioners — the trust certification. Section 1013(a) gives the trustee the right to furnish to a third party a trust certification verifying certain facts concerning the trust, but without providing a copy of the entire trust instrument or the dispositive terms of the trust.[20] The ATC specifies the following information for trust certification:

> (1) a statement that the trust exists and the date the trust instrument was executed;
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> (2) the identity of the settlor;
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> (3) the identity and address of the currently acting trustee;
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> (4) the powers of the trustee;
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> (5) the revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;
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> (6) the authority of cotrustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee; and
>
> (7) the manner of taking title to trust property.[21]

Additionally, the certification "must state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect."[22]It need not, however, disclose the dispositive terms of the trust (the provisions that govern distributions from the trust).[23] A third party acting in good faith may rely on the trust certification without further investigation.[24] A related provision adds teeth to this rule for transactional purposes: "[a] person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct."[25]

Because many settlors and beneficiaries want to keep details of a trust private, lawyers representing those clients and their trustees will often prefer to use a trust certification rather than making more complete disclosures to third parties of the trust's terms. The practical effect of a trust certification should not be especially troublesome in most real estate transactions because the ATC expressly authorizes the recipient of a trust certification to "require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments which designate the trustee and confer upon the trustee the power to act in the pending transaction."[26]

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20. *Id.* § 1013(a).
21. *Id.*
22. *Id.* § 1013(c).
23. *Id.* § 1013(d).
24. *Id.* § 1013(f).
25. *Id.* § 1013(g).
26. *Id.* § 1013(e).

Section 1013(h) introduces a more curious change in trust law by imposing potential liability on a third party who refuses to accept a trust certification: "A person making a demand for the trust instrument in addition to a certification of trust or excerpts is liable for damages if a court determines that the person did not act in good faith in demanding the trust instrument."[27] While it may be difficult to prove either damages or lack of good faith, lawyers representing third parties should now be reluctant to press a demand for the complete trust instrument. This threat of damage liability may even require real estate attorneys to reconsider traditional title examination standards and loan due diligence practices. For example, customary practice may call for a title examiner or title insurance company dealing with a trustee as seller to require the trustee to produce for examination a copy of the trust instrument to demonstrate the authority of the trustee to convey the property.[28] Similarly, some lending procedures may call for a complete copy of the trust instrument when a trustee borrows or grants a mortgage or deed of trust.

The extent to which the ATC contemplates that such practices should change is not clear from the statute itself, but the comments to section 1013 of the Uniform Trust Code explain that the good faith defense will protect at least some transactional due diligence beyond requesting a certification.

> A person acting in good faith would include a person required to examine a complete copy of the trust instrument pursuant to due diligence standards or as required by other law. Examples of such due diligence and legal requirements include (1) in connection with transactions to be executed in the capital markets where documentary standards have been established in connection with underwriting concerns . . . [items (2) and (3) relate to requirements of state or local governments or regulatory agencies] and (4) where the insurance rates or premiums or other expenses of the party would be higher absent the availability of the documentation.[29]

Based on the relatively narrow examples of due diligence standards included in the comments, one might question whether a party's own internal standards (such as an institutional lender's due diligence practices) would qualify for the good faith defense.

A third party's request for a legal opinion from the trustee's counsel would not seem to trigger damage liability under section 1013(h). But a legal opinion arguably is unnecessary because sections 1013(f) and (g) protect a third-party who relies in good faith on a trust certification. An interesting question is whether a lawyer who gives a legal opinion concerning the existence of the trust,

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27. *Id.* § 1013(h).

28. "Proof of the authority of the trustee of an express trust to convey land owned by the trust should be furnished." Arkansas Bar Association, STANDARDS FOR EXAMINATION OF REAL ESTATE TITLES IN ARKANSAS, Standard 4.7.3 (2000). Use of a trust certification for this purpose, however, would not seem to be a radical departure from the affidavit process that the title standards already contemplate as a method of providing the required proof. *Id.* App. "A", 4.g.

29. UNIF. TRUST CODE § 1013 cmt.

the powers of the trustee, or other matters covered by section 1013 may rely exclusively on a certification of trust without conducting other legal due diligence relating to those matters. Perhaps the controlling question on this point is whether the lawyer issuing the opinion qualifies as a "person who acts in reliance upon a certification of trust without knowledge that the representations contained therein are incorrect."[30]

One potentially controversial provision of Article 10 regulates exculpatory provisions in trust instruments. An exculpatory term of a trust "is unenforceable to the extent that it: (1) relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or (2) was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor."[31] It remains to be seen whether courts will generally apply these standards to the greater protection of settlors and beneficiaries or to the advantage of trustees.

A lawyer serving as a trustee or representing a trustee should use extra caution when including an exculpatory clause in a trust instrument. An exculpatory provision "drafted or caused to be drafted by the trustee is invalid as an abuse of fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor."[32] This provision, which applies only to irrevocable trusts created on or after September 1, 2005 and to revocable trusts which become irrevocable on or after September 1, 2005,[33] may prove especially troublesome for trustees using form documents or clauses. In light of the burden of proof, the trustee or the trustee's counsel should maintain documentary support in the file to show compliance with the statutory requirements for validity.

### Private Trusts Do Not Always Require Ascertainable Beneficiaries

For the most part, Article 4 of the ATC continues long-established requirements for creating a valid private trust. These include requirements that the settlor must have both the capacity and the intent to create the trust,[34] that the trustee must have duties to perform,[35] and that the same person may not be both the sole trustee and the sole beneficiary of the trust.[36] Another traditional requirement is that a private trust must have ascertainable beneficiaries.[37] While the ATC preserves that requirement as a general matter, it creates two significant exceptions.[38]

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30. Ark. Code Ann. § 28-73-(1013(f)(1).
31. *Id.* § 1008(a).
32. *Id.* § 1008(b).
33. *Id.* § 1008(c).
34. *Id.* § 402(a) (1) & (2).
35. *Id.* § 402(a)(4).
36. *Id.* § 402(a)(5).
37. Restatement (Third) of Trusts § 44 (Tentative Draft No. 2, 1999).
38. Section 28-73-402(a)(3). There are a total of three exceptions to the definite beneficiary rule, but one concerns charitable trusts rather than private trusts.

Both of these exceptions will be useful to estate planning lawyers because clients often wish to establish trusts that do not have ascertainable beneficiaries in the traditional sense.[39] One of these special rules has particular significance for real estate trusts. The first exception facilitates trusts for the care of animals.[40] Perhaps real estate lawyers will find that provision of interest to the extent that it may encourage more pet owners to leave their homes in trust for the benefit of their pets.[41] But it is the other exception to the ascertainable beneficiary rule that more immediately affects real estate matters. That exception broadly authorizes private (noncharitable) "trusts for purposes" (as contrasted to trusts for the benefit of ascertainable beneficiaries).[42]

One common trust in this category that involves land is a trust fund established to maintain a cemetery plot, a specific trust purpose that was already authorized under existing Arkansas law.[43] Presumably, the new provision of the ATC allows a client to create a trust fund to maintain any property of special importance to the client even though no ascertainable person or charity benefits. For example, a client might leave a bequest in trust to maintain a beloved house, farm, or garden. While trusts of this nature may be validly created under traditional trust law if they qualify as charitable trusts (e.g., a fund to maintain a garden for public enjoyment), they present two fundamental problems under the traditional law of private trusts.[44] First, they do not exist for the benefit of any ascertainable beneficiary who can enforce the trustee's obligations. Second, they may violate the Rule against Perpetuities.[45] Section 409 of the UTC handles both of these problems by fiat. First, the trust may designate a person to enforce the terms of the trust, and if the trust does not do that, a court may appoint an appropriate person for that purpose.[46] Second, a trust for a purpose as authorized by the ATC may only be enforced for a period of 21 years.[47]

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39. *See generally* John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 Nw. U. L. Rev. 1105, 1107-11 (2004); Adam J. Hirsch, *Trusts for Purposes: Policy, Ambiguity, and Anomaly in the Uniform Laws*, 26 Fla. St. U.L. Rev. 913 (1999).

40. *Id.* § 28-73-408.

41. *See generally* Gerry W. Beyer, *Pet Animals: What Happens When Their Humans Die?*, 40 Santa Clara L. Rev. 617 (2000).

42. Section 28-73-409.

43. *See* Ark. Code Ann. § 20-17-904 (Repl. 2005). The recently enacted Uniform Statutory Rule Against Perpetuities made a minor amendment to section 20-17-904. *See* 2007 Ark. Acts 240 § 2. Because section 409 applies "[e]xcept as otherwise provided . . . by another statute," section 20-17-904 will continue to authorize trusts established within that statute's purview.

44. *See generally* Hirsch, *supra* note 39.

45. With the adoption in Arkansas of the Uniform Statutory Rule Against Perpetuities, this second problem has been significantly ameliorated. *See* 2007 Ark. Acts 240.

46. Ark. Code Ann. § 28-73-409(2).

47. *Id.* § 28-73-409(1).

### The UTC Presumes that Trusts Are Revocable

Traditionally, courts presume that a trust is irrevocable unless the trust instrument expressly reserves to the settlor the right to revoke.[48] This presumption is logical because a trust operates to transfer legal title to the trustee. The drafters of the Uniform Trust Code, however, concluded that the traditional presumption did not reflect the contemporary reality that many trusts are will substitutes that should be amendable or revocable until the settlor dies. A presumption of irrevocability could easily foil the estate planning objectives of an unsophisticated settlor of an inter vivos trust.

The ATC adopts the uniform act's reversal of the traditional presumption: "[u]nless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust."[49] Because irrevocability may be extremely important for certain tax purposes and other reasons, lawyers drafting trust instruments now must take care to include a provision expressly making the trust irrevocable when that is the intent. In light of the new statutory presumption, real estate lawyers dealing with trustees should confirm either that the trust is irrevocable by its express terms or that the trust has not been revoked. A trust certification, of course, can provide these assurances.

### Creditors' Rights

Lawyers who deal with assets held in trust must sometimes sort out competing claims made against those assets. Some of the most significant reforms of the Uniform Trust Code reflect a policy favoring special classes of creditors of a beneficiary. In particular, under section 503(b) of the uniform act, a beneficiary's child, spouse, or former spouse seeking to enforce a support order, as well as "a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust," may reach the beneficiary's interest in a spendthrift trust. Additionally, while section 504 of both the Uniform Trust Code and the ATC provides a general rule that a creditor may not compel a discretionary distribution (even if the trust does not include a spendthrift provision), section 504(c) of the Uniform Trust Code creates an exception to this general rule by authorizing a court in limited circumstances to order distributions from a discretionary trust to satisfy the beneficiary's obligations under an order "for support or maintenance of the beneficiary's child, spouse, or former spouse." The ATC does not include either of these protections for special categories of creditors. By deleting this language from the Uniform Act, the Arkansas Legislature seems to be concluding that support creditors should not reach these trusts. This is contrary to prior case law.[50]

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48. *See, e.g.*, Rogoski v. McLaughlin, 228 Ark. 1157, 1160, 312 S.W.2d 912, 915 (1958).

49. ARK. CODE ANN. § 28-73-602(a).

50. One might question whether subchapter 5 of the ATC absolutely closes the door on claims for satisfaction of child support or alimony out of spendthrift trusts. Pre-code law in Arkansas established a judicial child support and alimony exception to the enforceability of a spendthrift provision. Council v. Owens, 28 Ark. App. 49, 770 S.W.2d 193 (1989). The ATC seems to overrule that judicial decision by the broad statement, in reference to a beneficiary's interest in a spendthrift trust, that "except as otherwise provided in this subchapter, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary." ARK. CODE ANN. § 28-73-502(c). There is, however, some anecdotal evidence that members of the bar committee that participated in the process leading to the enactment of the ATC did not necessarily contemplate that subchapter 5 must be construed to overrule Council v. Owens. *See* Foster, *supra* note 4, 231.

A particularly controversial question of contemporary trust law is whether tort creditors should be able to reach assets of a spendthrift trust established for the benefit of the tort defendant.[51] Neither the Uniform Trust Code nor the ATC addresses this issue expressly, but the statutory provision declaring the enforceability of spendthrift provisions in general logically should prevail over policy considerations to the contrary.[52]

Another policy debate in trust law involves asset-protection trusts, which are self-settled trusts that include provisions intended to shield the settlor's assets from the claims of the settlor's creditors.[53] Under Section 505 of both the Uniform Trust Code and the ATC, the settlor's creditors may reach the settlor's interest in a self-settled trust. Section 505(a)(3) of the Uniform Trust Code, however, goes further than the ATC by making it possible in some circumstances for the settlor's creditors even to reach assets in the settlor's revocable inter vivos trust after the settlor has died and no longer has any interest in the trust.

### Other Provisions of Potential Interest to Real Estate Lawyers

Many changes effected by the ATC address nuances of trust law that may interest real estate practitioners. Several of these provisions fill in gaps in traditional trust law, while others modify the law in ways that will facilitate or simplify trust administration.

Section 103 of the ATC defines many terms used throughout the code. For administrative purposes, one of the most useful defined terms is "qualified beneficiary," a new term introduced into trust law.[54] It includes only beneficiaries who are either currently eligible for distributions or who would be next in line to be eligible or who would be eligible for distributions upon termination of the trust. The provisions of the ATC that make use of this special term will often facilitate administration of the trust in a practical manner by affording certain notice, approval, and objection rights only to qualified beneficiaries. For example, if it is necessary to fill a vacancy in the trusteeship and the trust instrument does not designate a successor, the qualified beneficiaries may appoint the successor by unanimous agreement.[55]

Article 3 employs a representation concept that should sometimes be useful to those dealing with real estate held in trust. A common problem of trust administration concerns minor beneficiaries, potential unborn members of a class of beneficiaries, remote beneficiaries, and incapacitated beneficiaries and settlors. Article 3 significantly expands the use of representation to simplify the process for protecting the interests of persons in those categories. The essence of the representation concept is that, absent a conflict of interest, a statutorily authorized representative may receive notices on behalf of the person represented and may take action that is binding on that person.

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51. *Compare* Scheffel v. Krueger, 782 A.2d 410 (N.H. 2001) (preventing a victim of childhood sexual abuse from reaching assets in a spendthrift trust benefitting the incarcerated perpetrator) and Duvall v. McGee, 826 A.2d 416 (Md. 2003) (denying murder victim's estate recourse to assets of spendthrift trust to satisfy tort judgment against the trust beneficiary), *with* Sligh v. First Nat'l Bank, 704 So. 2d 1020 (Miss. 1997) (permitting enforcement of a judgment against the defendant's interest in a spendthrift trust based on an intentional or grossly negligent tort). The Mississippi legislature effectively overruled *Sligh*. *See* Miss. Code Ann. § 91-9-503 (2004).

52. *See* Ark. Code Ann. § 28-73-502(c).

53. *See generally* Robert T. Danforth, *Rethinking the Law of Creditors' Rights in Trusts*, 53 Hastings L. J. 287 (2002); Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 Cornell L. Rev. 1035 (2000).

54. Section 28-73-103(14).

55. *Id.* § 704(c)(2).

The ATC designates certain relationships to which the representation authority applies. One of the broadest and, from the perspective of efficient trust administration, potentially one of the most useful representation provisions states that an otherwise unrepresented "minor, incapacitated, or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person represented."[56] This form of representation, which goes beyond customary representation by a fiduciary, is sometimes called virtual representation.[57]

A simple example will show how virtual representation may facilitate transactions involving real estate held in trust. Assume that a commercial office building is held in a trust under which all income is to be used for the benefit of a decedent's 5 children, 4 of whom are adults and one of whom is a minor. Sound administrative practice or the trustee's internal policies may call for the trustee to consult with the beneficiaries before making certain major decisions, such as selling or mortgaging the property or entering into a long term lease. Assuming no conflict of interest exists among the siblings, rather than seeking court approval or appointment of a guardian ad litem for the minor child, the trustee may feel comfortable relying on representation of the minor beneficiary by one of the adult beneficiaries "having a substantially identical interest."[58] Under those facts, the minor beneficiary would normally be bound by the consent the representative gives on the minor's behalf.[59]

Another aspect of trust law that the ATC modernizes involves modifications and terminations of trusts. Traditional trust law restricts the opportunity for changing or terminating the provisions of irrevocable trusts. The ATC restates some familiar rules and adds considerable flexibility to them. These reforms may often be important to a trustee holding real estate. For example, the ATC authorizes the trustee, after giving notice to the qualified beneficiaries, to terminate a trust that holds property having a value of less than $100,000 if the trustee determines that it is uneconomic to continue the trust.[60]

Two provisions of the ATC establish special limitations periods that may be important to real estate lawyers. One governs actions to contest the validity of, or distributions made under, revocable inter vivos trusts commonly used as will substitutes.[61] To illustrate how this provision might facilitate a real estate transaction, consider the trustee who wishes to sell the trust property in accordance with the terms of the trust shortly after the settlor's death even though the trustee antici-

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56. *Id.* § 304.

57. *See* English, *supra* note 4, 159.

58. Section 28-73-304.

59. This result follows from section 304 in conjunction with section 301(b), concerning consents by representatives, and section 1009, governing the effect of a beneficiary's consent on the trustee's liability.

60. Section 28-73-414(a).

61. *Id.* § 604.

pates an attack on the validity of the trust by someone who claims that the trust was the product of undue influence exercised over the settlor. The trustee could begin a special 90-day limitations period simply by sending the potential contestant "a notice informing the person of the trust's existence, the settlor's name, the trustee's name and address, the time allowed for commencing a proceeding, and a description of the beneficiary's interest, if any."[62]

The other special statute of limitations restricts the time a beneficiary has to commence a proceeding against a trustee for breach of trust.[63] In many ordinary circumstances that time period may be as long as 5 years after the termination of the trust.[64] But the ATC accelerates the period to "one (1) year after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding."[65] While this provision does not invite the trustee to use the limitation period strategically for transactional purposes, trustees who follow prudent reporting practices will routinely raise this section as a defense whenever a disappointed beneficiary threatens to bring a damage claim based on how the trustee dealt with trust property.

Finally, lawyers advising clients on trust matters must carefully consider the transition rules of the ATC. Most ATC provisions apply "to all trusts created before, on, or after September 1, 2005."[66] Moreover, the ATC even "applies to judicial proceedings concerning trusts commenced before September 1, 2005, unless the court finds that application of a particular provision . . . would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties . . . ."[67] In some instances, a client who created a revocable trust prior to the UTC effective date should consider revising some terms of the trust to override any non-mandatory rules of the ATC that fail to advance the settlor's objectives.[68] The ATC recognizes some important limits on the general rule of retroactive application. In recognition of es-

62. *Id.* § 604(a)(2).

63. *Id.* § 1005.

64. *Id.* § 1005(c).

65. *Id.* § 1005(a).

66. *Id.* § 1106(a)(1).

67. *Id.* § 1106(a)(3).

68. For example, some clients may wish to alter the circumstances under which the qualified beneficiaries may remove the trustee named by the settlor. The most significant ATC reform in this regard is that a court may remove a trustee if "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 of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable co-trustee or successor trustee is available." *Id.* § 706(4). In this respect, the ATC modifies traditional trust law principles that tend to prefer the trustee selected by the settlor even in the face of changed circumstances occurring long after the settlor died. *See generally* Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 663-66 (2004).

tablished constitutional and equitable doctrine, the ATC preserves the effect of a prior statute to the extent "a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before September 1, 2005."[69] Additionally, the presumption that a trust is revocable unless expressly stated to be irrevocable "does not apply to a trust created under an instrument executed before September 1, 2005."[70] This deference to prior law may sometimes be important to preserve tax objectives of pre-code trusts that are silent about the settlor's right to revoke or amend. Several other provisions of the ATC only apply to irrevocable trusts created on or after September 1, 2005 and revocable trusts that become irrevocable on or after that date.[71]

## Conclusion

Arkansas real estate lawyers will especially appreciate the ATC for its clarity and its nearly comprehensive restatement of trust law. Lawyers advising clients who wish to use Arkansas trusts for management of real estate assets will welcome new rules and concepts that more readily accommodate their clients' objectives. Lawyers negotiating transactions with trustees must adjust to several modernized rules, some of which offer greater protection to trustees than prior law. Lawyers representing trustees who manage real estate will embrace those additional protections, as well as the more flexible trust administration aspects of the ATC. Overall, Arkansas real estate lawyers should find the ATC helpful in real estate transactions involving property held in trust.

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69. Section 28-73-1106(b).

70. *Id.* § 602(a).

71. *See Id.* § 108(g) (relating to the rights of qualified beneficiaries concerning changes in the trust's principal place of administration), § 705(d) (concerning resignation of a trustee), § 802(j) (concerning certain detailed rules governing the trustee's duty of loyalty), § 813(e) (concerning the trustee's duty to provide information and reports to beneficiaries), and § 1008(c) (concerning exculpatory terms of a trust).