$16.1$ OVERVIEW

The UTC provisions on the creation and validity of trusts, sections 401-409, largely codify traditional doctrine. A trust may be created by transfer of property, self-declaration, or exercise of a power of appointment. Whatever method may have been employed, other requirements, including intention, capacity, and, for certain types of trusts, an ascertainable beneficiary, also must be satisfied before a trust is created. A trust not created by will is validly created if its creation complied with the law of specified jurisdictions where the settlor or trustee had significant contacts. A trust cannot be created to carry out an illegal or impossible purpose. Rather, a noncharitable trust and its terms must be for the benefit of its beneficiaries, and a charitable trust must have an appropriate charitable purpose. A trust is invalid to the extent its creation was induced by fraud, duress, or undue influence. Oral trusts of personal property are recognized if their terms can be proved by clear and convincing evidence. The UTC recognizes what are often referred to as “honorary” trusts, which at common law were no more than unenforceable powers but which under the UTC are valid and enforceable as trusts. Honorary trusts include trusts created to care for an animal, in addition to
trusts created for another noncharitable purpose such as maintaining a cemetery lot.

The requirements for a trust’s creation, such as the necessary level of capacity and the requirement that a trust have a legal purpose, are controlled by statute and common law, not by the settlor. See section 105(b)(1), discussed at section 12.2.

§16.2 METHODS OF CREATING TRUSTS

§16.2.1 Description of UTC Provision

UTC section 401 specifies the most common methods for creating a trust. Section 401 authorizes a trust to be created by a transfer of property to another person as trustee during the settlor’s lifetime; by will or other disposition taking effect on the settlor’s death; by a declaration by the owner of property that the owner holds identifiable property as trustee; or by exercise of a power of appointment in favor of a trustee. The section is based on the Restatement (Third) of Trusts §10 (2003) and the Restatement (Second) of Trusts §17 (1959).

The methods specified in section 401 are not exclusive. Section 102 recognizes that trusts can also be created by special statute or court order. See Restatement (Third) of Trusts §1 comment a (Tentative Draft No. 1, approved 1996); Uniform Probate Code §2-212 (elective share of incapacitated surviving spouse to be held in trust on terms specified in statute); Uniform Probate Code §5-411(a)(4) (conservator may create trust with court approval); Restatement (Second) of Trusts §17 comment I (1959) (trusts created by statutory right to bring wrongful death action).

At common law, a trust can also be created by a promise that creates enforceable rights in a person who immediately or later holds these rights as trustee. See Restatement (Third) of Trusts §10(e) (Tentative Draft No. 1, approved 1996). A trust thus created is valid, notwithstanding that the trustee may resign or die before the promise is fulfilled. Unless the promise is expressly made personal, a successor trustee can enforce the promise. For examples of trusts created by means of promises
enforceable by the trustee, see the Restatement (Third) of Trusts §10 comment g (2003) and the Restatement (Second) of Trusts §§14 comment h, 26 comment n (1959). Because the UTC is supplemented by the common law, these trusts are valid under section 401 even though they are not specifically mentioned.

Under the methods specified for creating a trust, a trust is not created until it receives property. For what constitutes an adequate property interest, see the Restatement (Third) of Trusts §§40-41 (2003) and the Restatement (Second) of Trusts §§74-86 (1959). See also section 103(11), discussed at section 12.4. The property interest necessary to fund and create a trust need not be substantial. A revocable designation of the trustee as beneficiary of a life insurance policy or employee benefit plan has long been understood to be a property interest sufficient to create a trust. Furthermore, the property interest need not be transferred at the same time the trust instrument is signed. A trust instrument signed during the settlor’s lifetime is not rendered invalid simply because the trust was not created until property was transferred to the trustee at a much later date, including by contract after the settlor’s death. A pourover devise to a previously unfunded trust is also valid and may constitute the property interest creating the trust. See Uniform Testamentary Additions to Trusts Act §1 (1991), codified at Uniform Probate Code §2-511 (pourover devise to trust valid regardless of existence, size, or character of trust corpus). See also Restatement (Third) of Trusts §19 (2003). In In re Trust of Rosenberg, 727N.W.2d 430 (Neb. 2007), the court held that a statement in a trust agreement stating that certain policies were to be transferred to the trustee was insufficient to make them trust property where there was no evidence that the beneficiary designation was ever changed.

Although section 401 refers to transfer of property to a trustee, a trust can be created even though for a period of time no trustee is in office. See Restatement (Third) of Trusts §2 comment g (2003); Restatement (Second) of Trusts §2 comment i (1959). A trust can also be created without notice to or accept-
ance by a trustee or beneficiary. See Restatement (Third) of Trusts §14 (2003); Restatement (Second) of Trusts §§35-36 (1959).

A trust created by self-declaration is best created by reregistering each of the assets to be included in the trust into the settlor's name as trustee. However, reregistration is not necessary to create the trust. See, e.g., In re Estate of Heggestad, 20 Cal. Rptr. 2d 433 (Ct. App. 1993); Restatement (Third) of Trusts §10 comment e (2003); Restatement (Second) of Trusts §17 comment a (1959). A declaration of trust can be funded merely by attaching a schedule listing the assets that are to be subject to the trust without executing separate instruments of transfer. Such a practice, however, can make it difficult to later confirm title with third-party transferees and is not recommended for this reason.

Although a trust created by will may come into existence immediately at the testator's death and not necessarily only on the later transfer of title from the personal representative, section 701, discussed at section 19.2, makes clear that the nominated trustee does not have a duty to act until there is an acceptance of the trusteeship, express or implied. To avoid an implied acceptance, a nominated testamentary trustee who is monitoring the actions of the personal representative, but who has not yet made a final decision on acceptance, should inform the beneficiaries that the nominated trustee has assumed only a limited role. The failure to inform the beneficiaries about this limited acceptance could result in liability if misleading conduct by the nominated trustee causes harm to the trust beneficiaries. See Restatement (Third) of Trusts §35 comment b (2003).

UTC section 401(3) confirms the familiar principle that a trust may be created by means of the exercise of a power of appointment. However, the UTC does not legislate comprehensively on the subject of powers of appointment but addresses only selected issues. See section 302, discussed at section 14.4, which addresses representation by a holder of general testamentary power of appointment; section 505(b), discussed at section 17.6, which addresses creditor claims against the holder of a