

D R A F T  
FOR APPROVAL

## **UNIFORM TRUST CODE**

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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MEETING IN ITS ONE-HUNDRED-AND-NINTH YEAR  
ST. AUGUSTINE, FLORIDA  
JULY 28 – AUGUST 4, 2000

## **UNIFORM TRUST CODE**

*WITH PREFATORY NOTE AND COMMENTS*

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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# UNIFORM TRUST CODE

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## PREFATORY NOTE

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The Uniform Trust Code is the first comprehensive national codification of the law of trusts. The Code had its first reading at the Commissioner's 1998 Annual Meeting, and a second reading at the Commissioners' 1999 Annual Meeting.

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**Reasons for Trust Code** – There are several reasons why the drafting of a Uniform Trust Code is timely. The primary stimulus is the greater use of trusts in recent years, both in family estate planning and in commercial transactions, both in the United States and internationally. This greater use of the trust, and consequent rise in the number of day-to-day questions involving trusts, has led to a recognition that the trust law in many States is thin. It has also led to a recognition that the existing Uniform Acts relating to trusts, while numerous, are incomplete. The primary source of trust law in most States is thus the Restatement (Second) of Trusts and the multivolume treatises by Scott and Bogert, sources that fail to address numerous practical issues and which on others provide insufficient guidance. While there are numerous Uniform Acts related to trusts, none is comprehensive. The Uniform Trust Code hopefully will provide States with precise guidance on trust law questions and in an easily findable place.

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**Existing Uniform Laws on Trust Law Subjects** – There are numerous Uniform Acts on trusts and related subjects, but none provide comprehensive coverage of trust law issues. Certain of these Acts are incorporated into the larger Uniform Trust Code. Others, addressing more specialized topics, will continue to be available for enactment in free-standing form. The following are the more relevant Acts:

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Uniform Trustee Powers Act – approved in 1964, this Act has been enacted in 16 States. The Act, as its name implies, contains a list of specific trustee powers and deals with selected other issues, particularly relations of a trustee with persons other than beneficiaries. The Trustee Powers Act is badly outdated and is entirely superseded by the Trust Code, principally at Sections 816 and 1012. States enacting the Uniform Trust Code should repeal this other Uniform Act.

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Uniform Prudent Investor Act – approved in 1994, this Act has been enacted in approximately two thirds of the States. This Act, and variant forms enacted in a number of other States, has displaced the older “prudent man” standard, bringing trust law into line with modern investment practice. States which have enacted the Uniform Prudent Investor Act are encouraged to recodify it as part of this Code. A place for this is provided in Article 9.

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1 Uniform Principal and Income Act – a major revision of this widely enacted  
2 Uniform Act was approved in 1997. Because this Act addresses issues with  
3 respect to both decedent’s estates and trusts, a jurisdiction enacting the Principal  
4 and Income Act may wish to codify it either as part of this Code or as part of its  
5 probate code.

6 Uniform Management of Institutional Funds Act – approved in 1972, this Act  
7 has been enacted in 47 jurisdictions. This Act governs the administration of  
8 endowment funds held by charitable, religious, and other eleemosynary  
9 institutions. The Act establishes a standard of prudence for use of appreciation  
10 on assets, provides specific authority for the making of investments, authorizes  
11 the delegation of this authority, and specifies a procedure, through either donor  
12 consent or court approval, for removing restrictions on the use of donated funds.

13 Uniform Custodial Trust Act – approved in 1987, this Act has been enacted in  
14 14 jurisdictions. This Act, which allows standard trust provisions to be  
15 automatically incorporated into the terms of the trust simply by referring to the  
16 Act, is not displaced by the Uniform Trust Code but complements it.

17 Uniform Probate Code Article VII – approved in 1969, Article VII has been  
18 enacted in about 15 jurisdictions. Article VII, although titled “Trust  
19 Administration,” is a modest statute, addressing only a limited number of topics,  
20 including jurisdiction and trustee liability to persons other than beneficiaries.  
21 The provisions of Article VII on jurisdiction are incorporated into Article 2 of  
22 the Uniform Trust Code, and its provision on trustee liability to persons other  
23 than beneficiaries at Section 1010.

24 Uniform Common Trust Fund Act – approved in 1938, this Act has been  
25 enacted in 34 jurisdictions. The drafters of the Uniform Trust Code have elected  
26 not to address the subject of common trust funds and will leave this other Act  
27 undisturbed. In recent years, many banks have replaced their common trust  
28 funds with proprietary mutual funds that may also be made available to non-trust  
29 customers. The Uniform Trust Code addresses the use of proprietary funds at  
30 Section 802.

31 Uniform Trusts Act (1937) – this largely overlooked Act of similar name was  
32 enacted in only six States, none within the past several decades. Despite a title  
33 suggesting comprehensive coverage of its topic, this Act, like Article VII of the  
34 UPC, addresses only a limited number of topics. These include the duty of  
35 loyalty, the registration and voting of securities, and trustee liability to persons  
36 other than beneficiaries. States enacting the Uniform Trust Code should repeal  
37 this earlier namesake.

1 Uniform Supervision of Trustees for Charitable Purposes Act – approved in  
2 1954, this Act has been enacted in four States. This Act is limited to  
3 mechanisms for monitoring the actions of charitable trustees and does not  
4 address the substantive law of charitable trusts, including the doctrine of cy pres.  
5 Cy pres is addressed in Section 412 of the Uniform Trust Code.

6 Uniform Testamentary Additions to Trusts Act – this Act is available in two  
7 versions: the 1960 Act, with 28 enactments; and the 1991 Act, with 17  
8 enactments through 1998. This Act validates pourover devises to trusts. While  
9 not incorporated into the Uniform Trust Code, the Testamentary Additions to  
10 Trusts Act, like the Uniform Trust Code, is designed to facilitate use of the  
11 revocable living trust.

12 Uniform Probate Code – approved in 1969, and enacted in close to complete  
13 form in about 20 States but influential in virtually all, the UPC overlaps with  
14 trust topics in several areas. One area of overlap, already mentioned, is UPC  
15 Article VII. Another area of overlap concerns representation of beneficiaries.  
16 UPC Section 1-403 provides principles of representation for achieving binding  
17 judicial settlements of matters involving both estates and trusts. The Uniform  
18 Trust Code adopts these representation principles, and extends them to  
19 nonjudicial settlement agreements and to optional notices and consents. See  
20 Uniform Trust Code, Section 110 and Article 3. A final area of overlap between  
21 the UPC and trust law topics concerns rules of construction. The UPC, in  
22 Article II, Part 7, extends certain of the rules on the construction of wills to  
23 trusts and other nonprobate instruments. The Uniform Trust Code similarly  
24 extends to trusts the rules on the construction of wills. However, unlike the  
25 UPC, the Trust Code does not prescribe the exact rules. Instead, Section 111 of  
26 the Trust Code is an optional provision extending to trusts whatever rules the  
27 enacting jurisdiction already has in place on the construction of wills.

28 **Role of Restatement of Trusts** – The Restatement (Second) of Trusts was  
29 approved by the American Law Institute in 1957. Beginning in the late 1980s, work  
30 on the Restatement Third began. The portion of Restatement Third relating to the  
31 prudent investor rule and other investment topics was completed and approved in  
32 1990. A tentative draft of the portion of Restatement Third relating to the rules on  
33 the creation and validity of trusts was approved in 1996, and the portion relating to  
34 the office of trustee, trust purposes, spendthrift provisions and the rights of creditors  
35 was approved in May, 1999. The Uniform Trust Code is being drafted in close  
36 coordination with the writing of the Restatement Third.

37 **Models for Drafting** – While the Uniform Trust Code is the first  
38 comprehensive *Uniform* Act on the subject of trusts, comprehensive trust statutes  
39 are already in effect in several States. Notable examples include the statutes in

1 California, Georgia, Indiana, Texas, and Washington, all of which have been  
2 referred to in the drafting process. Most influential has been the 1986 California  
3 statute, found at Division 9 of the California Probate Code (Sections 15000 *et seq.*),  
4 which was used by the Drafting Committee as its initial model.

## 5 **Overview of Code**

6 **Article 1 – General Provisions and Definitions** – In addition to definitions,  
7 this article addresses miscellaneous but important topics. The Code is primarily  
8 default law. A settlor, within specified limitations, is free to draft a trust without  
9 regard to the provisions of the Code. The settlor, if minimum contacts are present,  
10 may in addition designate the trust’s principal place of administration, and the  
11 trustee, if certain standards are met, may transfer the principal place of  
12 administration to another State or country. To encourage nonjudicial resolution of  
13 disputes, the Code provides more certainty for when such settlements are binding.  
14 While the Code does not prescribe the exact rules to be applied to the construction  
15 of trusts, it does extend to trusts whatever rules the enacting jurisdiction has on the  
16 construction of wills. The Code, while comprehensive, does not attempt to legislate  
17 on every issue. Its provisions are supplemented by the common law of trusts and  
18 principles of equity.

19 **Article 2 – Judicial Proceedings** – This article addresses selected issues  
20 involving judicial proceedings concerning trusts, particularly trusts with contacts to  
21 more than one State or country. The courts in the trust’s principal place of  
22 administration have jurisdiction over both the trustee and beneficiaries as to any  
23 matter relating to the trust, and optional provisions on subject-matter jurisdiction  
24 and venue are provided. The minimal coverage of this article was deliberate. The  
25 Drafting Committee concluded that most issues related to jurisdiction and procedure  
26 are not appropriate to a Trust Code, but are best left to the courts and to other  
27 bodies of law.

28 **Article 3 – Representation** – This article deals with the important topic of  
29 representation of beneficiaries, both representation by fiduciaries (personal  
30 representatives, guardians and conservators), and what is known as virtual  
31 representation. The representation principles of the article apply to settlement of  
32 disputes, whether by a court or nonjudicially. They apply for the giving of required  
33 notices. They apply for the giving of consents to certain actions. The article also  
34 authorizes a court to appoint a representative if the court concludes that  
35 representation of a person might otherwise be inadequate. The court may appoint a  
36 representative to represent and approve a settlement on behalf of a minor,  
37 incapacitated, or unborn person or person whose identity or location is unknown  
38 and not reasonably ascertainable.

1                   **Article 4 – Creation, Validity, Modification and Termination of Trust –**

2                   This article specifies the requirements for creating, modifying and terminating trusts.  
3                   Most of the requirements relating to creation of trusts (Sections 401 through 408)  
4                   track traditional doctrine, including requirements of intent, capacity, property, and a  
5                   valid trust purpose. The Code articulates a three-part classification system for  
6                   trusts; noncharitable, charitable, and honorary. Noncharitable trusts, which are the  
7                   most common type, require an ascertainable beneficiary and a valid purpose.  
8                   Charitable trusts, on the other hand, by their very nature are created to benefit the  
9                   public at large. The final category of trust, the so called honorary or purposes trust,  
10                  although unenforceable at common law, is valid and enforceable under the Code  
11                  despite the absence of an ascertainable beneficiary. Examples include a trust for the  
12                  care of an animal and a trust for the maintenance of a cemetery lot.

13                  Sections 409 through 416 provide a series of interrelated rules on when a  
14                  trust may be terminated or modified other than by its express terms. The overall  
15                  objective of these sections is to enhance flexibility consistent with the principle that  
16                  preserving the settlor's intent is paramount. Termination or modification may be  
17                  allowed upon beneficiary consent if the court concludes that the trust or a particular  
18                  provision no longer serves a material purpose or if the settlor concurs, by the court  
19                  in response to unanticipated circumstances or to remedy ineffective administrative  
20                  terms, or by the court or trustee if the trust is of insufficient size to justify continued  
21                  administration under its existing terms. Trusts may be reformed to correct a mistake  
22                  of law or fact, or modified to achieve the settlor's tax objectives. Trusts may be  
23                  combined or divided. Charitable trusts may be modified or terminated under cy pres  
24                  to better achieve the settlor's charitable purposes.

25                   **Article 5 – Creditor's Claims; Spendthrift and Discretionary Trusts –**

26                  This article addresses the validity of a spendthrift provision and other issues relating  
27                  to the rights of creditors, both of the settlor and beneficiaries, to reach the trust to  
28                  collect a debt. To the extent a trust is protected by a spendthrift provision, a  
29                  beneficiary's creditor may not reach the beneficiary's interest until distribution is  
30                  made by the trustee. To the extent not protected by a spendthrift provision,  
31                  however, the creditor can reach the beneficiary's interest, subject to the court's  
32                  power to limit the award. Certain categories of claims are exempt from a  
33                  spendthrift bar, including claims by the government and claims to enforce judgments  
34                  of court orders against a beneficiary for support or maintenance. Other issues  
35                  addressed include creditor claims against discretionary trusts and the effect of a  
36                  standard of distribution; creditor claims against a settlor, whether the trust is  
37                  revocable or irrevocable; and the rights of creditors when a trustee fails to make a  
38                  required distribution within a reasonable time.

39                   **Article 6 – Revocable Trusts** – This short article deals with issues of  
40                  significance not totally settled under current law. The basic policy of this article and

1 the Code in general is to treat the revocable trust as the functional equivalent of a  
2 will. The article specifies a standard of capacity, provides that a trust is presumed  
3 revocable unless its terms provide otherwise, prescribes the procedure for  
4 revocation or modification of a revocable trust, addresses the rights of beneficiaries  
5 during the settlor's lifetime, and provides a statute of limitations on contests.

6 **Article 7 – Office of Trustee** – This article contains a series of default rules  
7 dealing with the office of trustee, all of which may be modified by the terms of the  
8 trust. Rules are provided for getting a trustee into office, including the procedure  
9 for the trustee to accept the office and whether bond will be required. The office of  
10 cotrustee is addressed, including the extent to one cotrustee may delegate to  
11 another, and describing when a cotrustee may be held responsible for the actions of  
12 the other trustee or trustees. Also covered are changes in the trusteeship, specifying  
13 the circumstances when a vacancy must be filled, the procedure for resignation, the  
14 grounds for removal, and the process for appointing a successor. Finally, standards  
15 are provided for determining trustee compensation and reimbursement for expenses.

16 **Article 8 – Duties and Powers of Trustee** – This article states the  
17 fundamental duties of a trustee and lists the trustee's powers. The duties listed are  
18 not new, but the particulars have changed in detail over the years. This article was  
19 drafted where possible to conform with the 1994 Uniform Prudent Investor Act.  
20 The Uniform Prudent Investor Act prescribes a trustee's responsibilities with respect  
21 to the management and investment of trust property. This article also addresses a  
22 trustee's duties regarding distributions to beneficiaries.

23 **Article 9 – Uniform Prudent Investor Act** – This article provides a place  
24 for the enacting State to codify its version of the Uniform Prudent Investor Act.  
25 States adopting this Code which have previously enacted the Prudent Investor Act  
26 are encouraged to recodify their version of the Prudent Investor Act by reenacting it  
27 in this article.

28 **Article 10 – Liability of Trustees and Rights of Persons Dealing With**  
29 **Trustees** – Sections 1001 through 1009 list the remedies for breach of trust,  
30 describe how money damages are to be determined, provide a statute of limitations  
31 on claims against a trustee, and specify other defenses, including consent of a  
32 beneficiary and recognition of and limitations on the effect of an exculpatory clause.  
33 Sections 1010 through 1013 address trustee relations with persons other than  
34 beneficiaries. The emphasis is on encouraging trustees and others to engage in  
35 commercial transactions with respect to the trust property to the same extent as if  
36 the property were not held in trust.

37 **Article 11 – Miscellaneous Provisions** – The Code is intended to have the  
38 widest possible application, consistent with constitutional limitations. The Code

1 applies not only to trusts created on or after the effective date, but also to trusts in  
2 existence on the date of enactment.

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**STATEMENT OF POLICY ISSUES**

The advice of the Conference is invited on the following policy issues. These policy issues are also reproduced immediately following each of the relevant sections.

**Section 706. Removal of Trustee.** Subsection (b) of this section lists the grounds for removal of a trustee by the court. The subsection broadens the grounds for removal applicable in many States by listing such things as changed circumstances, substandard investment performance, and unanimous agreement of the beneficiaries as factors for the court to consider in deciding whether to remove the trustee. The Drafting Committee invites the Conference’s comments on the appropriate standard for removal of a trustee.

**Section 813. Duty to Inform and Report.** Subsection (f) of this section sets out the extent to which required reporting by a trustee may be waived in the terms of the trust. It provides that the terms of an irrevocable trust created on or after the effective date of the Code may dispense with a trustee’s reporting only with respect to a settlor-beneficiary (thereby authorizing creation of the so called “blind” trust), a beneficiary under 25 years of age, or a beneficiary who is not currently entitled or eligible to receive distributions. In other words, for irrevocable trusts created on or after the effective date of the Code, the settlor is not allowed to waive reporting to current beneficiaries who are age 25 or older. The Drafting Committee invites the Conference’s comments on the extent to which a settlor should be allowed to waive trustee reporting to beneficiaries.

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# UNIFORM TRUST CODE

## ARTICLE 1

### GENERAL PROVISIONS AND DEFINITIONS

#### General Comment

In addition to specifying the scope of the Code (Section 102) and providing definitions (Section 103), this article collects several provisions of importance which are not amenable to codification elsewhere in the Code. The Code is primarily a default statute. Most of the Code's provisions may be completely overridden in the terms of the trust. The exceptions are collected in Section 104. The exceptions include the fundamental duty of a trustee to act in good faith and with regard to the purposes of the trust, public policy exceptions to enforcement of spendthrift provisions, the requirements for creating a trust, and the authority of the court to modify or terminate a trust on specified grounds.

Section 105 addresses notice to beneficiaries, allowing beneficiaries with remote interests to request notice of certain actions, such as notice of a trustee resignation, which are normally given only to the "qualified beneficiaries" (defined at Section 103(14)). Section 106 specifies the methods for giving notice and excludes from the Code's notice requirements persons whose identity or location is unknown and not reasonably ascertainable.

Section 107 clarifies that despite the Code's comprehensive scope, not all aspects of the law of trusts have been codified. The Code is supplemented by the common law of trusts and principles of equity.

Section 108 addresses selection of the jurisdiction or jurisdictions whose laws will govern the trust. Subsection (b) allows a settlor, absent overriding public policy concerns, to select the law that will determine the meaning and effect of a trust's terms. Subsection (a) addresses trust validity; a trust not created by will is validly created if its creation complied with the law of specified jurisdictions in which the settlor or trustee has a significant contact. Trusts created by will are excluded from subsection (a) because the validity of their creation is controlled by the law applicable to wills.

Changing a trust's principal place of administration is sometimes desirable, particularly to lower a trust's state income tax. Such transfers are authorized by Section 109. The trustee, following notice to the qualified beneficiaries, may transfer the principal place of administration to another place if the transfer is



consistent with the trustee's duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries. The settlor, if minimum contacts are present, may also designate the trust's principal place of administration.

Section 110 ratifies the use of nonjudicial settlement agreements. While the judicial settlement procedures may be used in all court proceedings relating to the trust, the nonjudicial settlement procedures will not always be available. First, the terms of the trust may direct that the procedures not be used, or settlors may negate or modify them by specifying their own methods for obtaining consents. Second, a nonjudicial settlement may not be used to approve actions that would otherwise be illegal, such as to improperly terminate a trust. Only such matters as a court could properly approve may be made the subject of a nonjudicial settlement.

The Code does not prescribe the rules of construction to be applied to trusts created under the Code. The Code instead recognizes that enacting jurisdictions are likely to take a diversity of approaches, just as they have with respect to the rules of construction applicable to wills. Section 111 accommodates this variation by providing that the State’s specific rules on construction of wills, whatever they may be, also apply to the construction of trusts.

**SECTION 101. SHORT TITLE.** This [Code] may be cited as the Uniform Trust Code.

**SECTION 102. SCOPE.** This [Code] applies to express trusts, charitable or noncharitable, with additions thereto, and to a trust created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust.

### Comment

This Code, while comprehensive, applies only to express trusts. Excluded from the Code's coverage are resulting and constructive trusts, which are not express trusts but remedial devices imposed by law. The Code is directed primarily at express trusts which arise in an estate planning or other donative context, but express trusts can arise in other contexts. For example, a trust created pursuant to a divorce action would be included, even though such a trust is not donative but is

1 created pursuant to a bargained for exchange. The extent to which even more  
2 commercially-oriented trusts are subject to the Code will vary depending on the type  
3 of trust and the laws, other than this Code, under which the trust is created.  
4 Commercial trusts come in numerous forms, including trusts created pursuant to a  
5 state business trust act and trusts created to administer specified funds, such as to  
6 pay a pension or to manage pooled investments. See John H. Langbein, *The Secret*  
7 *Life of the Trust: The Trust as an Instrument of Commerce*, 107 Yale L.J. 165  
8 (1997).

9           **SECTION 103. DEFINITIONS.** In this [Code]:

10                   (1) “Action, “ with respect to the acts of a trustee, includes a decision or  
11 failure to act.

12                   (2) “Beneficiary” means a person who:

13                           (A) has a present or future beneficial interest in a trust, vested or  
14 contingent; or

15                           (B) in a capacity other than that of trustee, holds a power of appointment  
16 over trust property.

17                   (3) “Charitable trust” means a trust created for a charitable purpose  
18 described in Section 404. The term does not include the beneficial interest of a  
19 noncharitable beneficiary.

20                   (4) “[Conservator]” means a person appointed by the court to administer  
21 the estate of a minor or adult individual.

22                   (5) “Environmental law” means any federal, state, or local law, rule,  
23 regulation, or ordinance relating to protection of the environment.

24                   (6) “Fiduciary,” used as a noun, includes a personal representative,  
25 [conservator], [guardian], and trustee.

1           (7) “[Guardian]” means a person appointed by the court [, a parent, or a  
2 spouse] to make decisions regarding the support, care, education, health, and  
3 welfare of a minor or adult individual. The term does not include a guardian ad  
4 litem.

5           (8) “Interests of the beneficiaries” means the beneficial interests provided in  
6 the terms of the trust.

7           (9) “Know,” with respect to a fact, means to have knowledge of the fact or  
8 have reason to know the fact exists based upon all of the facts and circumstances  
9 known to the person at the time. A person who conducts activities through  
10 employees has knowledge of a fact only if the information was received at the  
11 person’s home office or at a place where there was an employee having  
12 responsibility to act and a reasonable time in which to act on the information using  
13 the procedures and facilities available in the regular course of the employer’s  
14 operations.

15           (10) “Person” means an individual, corporation, business trust, estate, trust,  
16 partnership, limited liability company, association, joint venture, government;  
17 governmental subdivision, agency, or instrumentality; public corporation, or any  
18 other legal or commercial entity.

19           (11) “Petition” includes a complaint.

20           (12) “Power of withdrawal” means a presently exercisable general power of  
21 appointment other than a power exercisable only upon consent of the trustee or a  
22 person holding an adverse interest.

1           (13) “Property” means anything that may be the subject of ownership,  
2           whether real or personal, legal or equitable, or any interest therein. The term  
3           includes a chose in action, a claim, and an interest created by a beneficiary  
4           designation under a policy of insurance, financial instrument, employees’ trust, or  
5           deferred compensation or other retirement arrangement, whether revocable or  
6           irrevocable.

7           (14) “Qualified beneficiary” means a beneficiary who, on the date the  
8           beneficiary’s qualification is determined:

9                     (A) is a distributee or permissible distributee of trust income or principal;

10                    (B) would be a distributee or permissible distributee of trust income or  
11           principal if the interests of the distributees in subparagraph (A) terminated on that  
12           date; or

13                    (C) would be a distributee or permissible distributee of trust income or  
14           principal if the trust were to terminate on that date.

15           (15) “Revocable,” as applied to a trust, means revocable by the settlor  
16           without the consent of the trustee or a person holding an adverse interest.

17           (16) “Settlor” means a person, including a testator, who creates, or  
18           contributes property to, a trust. If more than one person creates or contributes  
19           property to a trust, each person is a settlor of the portion of the trust property  
20           attributable to that person’s contribution except to the extent another person has the  
21           power to revoke or withdraw that portion.

(17) “Spendthrift provision” means a term of a trust which restrains both voluntary and involuntary transfer of a beneficiary’s interest.

(18) “State” means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band, or Alaskan native village, recognized by federal law or formally acknowledged by a State.

(19) “Terms of a trust” means the manifestation of the settlor’s intent regarding a trust’s provisions as expressed in the trust instrument or as may be established by other proof that would be admissible in a judicial proceeding.

(20) “Trust instrument” means an instrument executed by the settlor that contains terms of the trust, including any amendments thereto.

(21) “Trustee” includes an original, additional, and successor trustee, and a cotrustee.

### Comment

A definition of “action” (paragraph (1)) is included for drafting convenience, to avoid having to add the phrase “decision or failure to act” in the numerous places in the Code where reference is made to an “action” by the trustee.

“Beneficiary” (paragraph (2)) refers only to a beneficiary of a trust as defined in the Code. The term includes not only beneficiaries who received their interests under the terms of the trust but also beneficiaries who received their interests by other means, including an assignment, exercise of a power of appointment, a resulting trust upon the failure of an interest or gap in a disposition, or operation of an antilapse statute upon the predecease of a named beneficiary. The fact that a person incidentally benefits from the trust does not mean that the person is a beneficiary. For example, neither a trustee nor persons hired by the trustee become beneficiaries merely because they receive compensation from the trust. See

1 Restatement (Third) of Trusts § 48 (Tentative Draft No. 2, 1999). See also  
2 Restatement (Second) of Trusts § 126 cmt. f (1959).

3 While the holder of a power of appointment was not a trust beneficiary  
4 under the common law of trusts, holders of powers are classified as beneficiaries  
5 under the Code. Holders of powers are included on the assumption that their  
6 interests are significant enough that they should be afforded the rights of  
7 beneficiaries under the Code.

8 The definition of “beneficiary” includes only those who hold beneficial  
9 interests in the trust. Because a charitable trust is not created to benefit  
10 ascertainable beneficiaries but to benefit the community at large (see Sections  
11 402(a)(3), 404(a)), persons receiving distributions from a charitable trust are not  
12 beneficiaries as that term is defined in this Code. However, charitable organizations  
13 expressly entitled to receive benefits under the terms of a charitable trust, even  
14 though not beneficiaries as defined, are granted the rights of qualified beneficiaries  
15 under the Code.

16 The Code leaves certain issues concerning beneficiaries to the common law.  
17 Any person with capacity to take and hold legal title to intended trust property has  
18 capacity to be a beneficiary. See Restatement (Third) of Trusts § 43 (Tentative  
19 Draft No. 2, 1999); Restatement (Second) of Trusts §§ 116-119 (1959). Absent a  
20 violation of public policy, the extent of a beneficiary’s interest is determined solely  
21 by the settlor’s intent. See Restatement (Third) of Trusts § 49 (Tentative Draft No.  
22 2, 1999); Restatement (Second) of Trusts §§ 127-129 (1959). While most  
23 beneficial interests terminate upon a beneficiary’s death, the interest of a beneficiary  
24 may devolve by will or intestate succession the same as a corresponding legal  
25 interest. See Restatement (Third) of Trusts § 55 (Tentative Draft No. 2, 1999);  
26 Restatement (Second) of Trusts §§ 140, 142 (1959).

27 Under the Code, only the charitable portion of a trust with both charitable  
28 and noncharitable beneficiaries qualifies as a “charitable trust” (paragraph (3)).  
29 Consequently, a split-interest trust will in certain instances be governed by two sets  
30 of provisions, one applicable to the charitable interests, the other the noncharitable.

31 To encourage trustees to accept and administer trusts containing real  
32 property, the Code contains several provisions designed to limit exposure to  
33 possible liability for violation of “environmental law” (paragraph (5)). A nominated  
34 trustee may investigate trust property to determine potential liability for violation of  
35 environmental law without accepting the trusteeship. See Section 701(c)(2). A  
36 trustee is granted comprehensive and detailed powers to deal with property  
37 involving environmental risks. See Section 816(13). A trustee is not personally

1       liable for violation of environmental law arising from the mere ownership and  
2       control of trust property. See Section 1010(b).

3               The definition of “fiduciary” (paragraph (6)) refers to the person holding a  
4       fiduciary office as opposed to the duties or obligations of the office. A trustee may  
5       engage in transactions with another trust, decedent’s estate or conservatorship  
6       estate of which the trustee is the fiduciary. See Section 802(h)(3). A trustee has a  
7       duty to redress a breach of trust known to the trustee to have been committed by a  
8       former trustee or other fiduciary from whom the trustee received trust property.  
9       See Section 812.

10              Under the Code, a “guardian” (paragraph (7)) makes decisions with respect  
11       to personal care; a “conservator” (paragraph (4)) manages property. The  
12       terminology used is that employed in Article V of the Uniform Probate Code, and in  
13       its free-standing Uniform Guardianship and Protective Proceedings Act. Enacting  
14       jurisdictions not using these terms in the defined sense should substitute their own  
15       terminology. For this reason, both terms have been placed in brackets. The  
16       definition of “guardian” accommodates those jurisdictions which allow appointment  
17       of a guardian by a parent or spouse in addition to appointment by a court. Enacting  
18       jurisdictions which allow appointment of a guardian solely by a court should delete  
19       the bracketed language “[, a parent, or a spouse].”

20              The phrase “interests of the beneficiaries” (paragraph (8)) is used with some  
21       frequency in the Code. The definition clarifies that the interests are as determined  
22       by the settlor and not by the beneficiaries. Absent an overriding provision in the  
23       terms of the trust, a trustee may not change a trust’s principal place of  
24       administration if the transfer would violate the trustee’s duty to administer the trust  
25       at a place appropriate to the interests of the beneficiaries. See Section 109(b).  
26       Section 706(c) authorizes the court to order such relief as necessary to protect the  
27       interests of the beneficiaries pending a final determination on a petition for removal.  
28       Section 801 requires the trustee to administer the trust in the interests of the  
29       beneficiaries. Section 808(b) requires the holder of a power to direct who is subject  
30       to a fiduciary obligation to act in the interests of the beneficiaries. Section 813(c)  
31       negates a requirement to disclose certain transactions in advance if such disclosure  
32       would be seriously detrimental to the interests of the beneficiaries. Section 1002(b)  
33       may impose greater liability on a cotrustee who acted without regard to the interests  
34       of the beneficiaries. Section 1008 invalidates an exculpatory term to the extent it  
35       relieves a trustee of liability for breach of trust committed with reckless indifference  
36       to the purposes of the trust or the interests of the beneficiaries.

37              The fact that a person does not have actual knowledge of a particular fact  
38       does not mean that the person did not “know” the fact (paragraph (9)). But neither  
39       is a person charged with knowledge of facts the person would have discovered upon

1 investigation. This definition takes an intermediate approach. A fact is known to a  
2 person if the person had actual knowledge of the fact or had reason to know of the  
3 fact's existence based on all of the circumstances and other facts actually known to  
4 the person. The definition also accommodates organizations, such as financial-  
5 service institution trustees, that conduct business through branch offices. Notice to  
6 an organization is not achieved merely by giving notice to any branch office. Under  
7 the definition, the organization acquires knowledge of a fact only if notified at its  
8 home office or at a place where there is an employee having responsibility to act on  
9 the information. For the comparable provision of the Uniform Commercial Code,  
10 see U.C.C. § 1-202(f) (Nov. 22, 1999 Draft).

11 "Know" is used in its defined sense in Sections 106 (methods of giving  
12 notice), 305 (appointment of representative), 306 (notice of proceeding for judicial  
13 settlement), 604 (limitation on contest of revocable trust), 812 (duty to redress  
14 breach of trust committed by predecessor), 1009 (nonliability of trustee upon  
15 beneficiary's consent, release, or ratification), and 1012 (protection of person  
16 dealing with trustee). But as to certain actions, a person is charged with knowledge  
17 of facts the person would have discovered upon reasonable inquiry. See Section  
18 1005 (limitation of action against trustee following report).

19 The definition of "property" (paragraph (13)) removes any lingering  
20 uncertainty that a revocable designation under an employee plan or life insurance  
21 contract is not a sufficient property interest to activate a trust. See also Section 401  
22 and Comment (methods of creating trust).

23 Because of the difficulty of identifying beneficiaries with remote contingent  
24 interests and their probable lack of interest in the day-to-day affairs of the trust, the  
25 Code uses the concept of "qualified beneficiary" (paragraph (14)) to limit the class  
26 of beneficiaries to whom certain notices must be given or consents received. The  
27 definition of qualified beneficiaries is used to define the class to whom notice must  
28 be given of a trustee resignation. See Section 705(a)(1). A qualified beneficiary  
29 must receive the trustee's annual report and other notices required by Section 813.  
30 Notice to the qualified beneficiaries is also required before a trust may be combined  
31 or divided. See Section 416. Actions which may be accomplished by the consent of  
32 the qualified beneficiaries include the appointment of a successor trustee. See  
33 Section 704 (filling vacancy in trusteeship). Prior to transferring a trust's principal  
34 place of administration, the trustee must give at least 60 days notice to the qualified  
35 beneficiaries. See Section 109(b).

36 The qualified beneficiaries are limited to the beneficiaries currently eligible to  
37 receive a distribution from the trust as well as to what might be termed the first line  
38 remaindermen. These are the beneficiaries who would become eligible to receive  
39 distributions were the event triggering the termination of a beneficiary's interest or



1 of the trust itself to occur on the date in question. Such a terminating event will  
2 typically be the death or deaths of the beneficiaries currently eligible to receive the  
3 income. Should a qualified beneficiary be a minor, incapacitated, or unknown, or a  
4 beneficiary whose identity or location is not reasonably ascertainable, the  
5 representation and virtual representation principles of Article 3 may be employed,  
6 including the possible appointment by the court of a representative to represent the  
7 beneficiary's interest.

8 Charitable trusts and trusts for a valid noncharitable purpose do not have  
9 beneficiaries in the usual sense. However, certain persons, while not technically  
10 beneficiaries, do have an interest in seeing that the trust is enforced. In the case of a  
11 charitable trust, this includes the Attorney General and charitable organizations  
12 designated to receive benefits under the terms of the trust. To permit them to  
13 protect their interests, Section 105(b) provides that the Attorney General of the  
14 State and charitable organizations expressly designated to receive benefits under the  
15 terms of a charitable trust have the rights of qualified beneficiaries. Similarly  
16 granted the rights of qualified beneficiaries are persons appointed by the terms of the  
17 trust or by the court to enforce a trust created for an animal or other noncharitable  
18 purpose. See Sections 407, 408.

19 The definition of "revocable" (paragraph (15)) clarifies that revocable trusts  
20 include only trusts whose revocation is substantially within the settlor's control.  
21 The consequences of classifying a trust as revocable are many. The Code contains  
22 provisions relating to liability of a revocable trust for payment of the settlor's debts  
23 (Section 505), the standard of capacity for creating a revocable trust (Section 601),  
24 the procedure for revocation (Section 602), the subjecting of the beneficiaries' rights  
25 to the settlor's control (Section 603), the period for contesting a revocable trust  
26 (Section 604), the power of the settlor of a revocable trust to direct the actions of a  
27 trustee (Section 808(a)), notice to the beneficiaries upon the settlor's death (Section  
28 813(b)), and the liability of a trustee of a revocable trust for the obligations of a  
29 partnership of which the trustee is a general partner (Section 1011).

30 Because under the Code the holder of a power of withdrawal has the rights  
31 of a settlor of a revocable trust (see Section 603(c)), the definition of "power of  
32 withdrawal" (paragraph (12)), and "revocable" (paragraph (15)) are similar. Both  
33 exclude individuals who can exercise their power only with the consent of the  
34 trustee or person having an adverse interest.

35 The definition of "settlor" (paragraph (16)) refers to the person who creates  
36 a trust, whether by will, self-declaration, transfer of property to another person as  
37 trustee, or exercise of a power of appointment. See Section 401. Determining the  
38 identity of the "settlor" is usually not an issue. The same person will both sign the  
39 trust instrument and fund the trust. Ascertaining the identity of the settlor becomes

1 more difficult when more than one person signs the trust instrument or funds the  
2 trust. The fact that a person is designated as the “settlor” by the terms of the trust is  
3 not necessarily determinative. For example, the person who executes the trust  
4 instrument may be acting as the agent for the person who will be funding the trust.  
5 In that case, the person funding the trust, and not the person signing the trust  
6 instrument, will be the settlor. Similarly, should more than one person contribute to  
7 a trust, all of the contributors will ordinarily be treated as settlors in proportion to  
8 their respective contributions, regardless of which one signed the trust instrument.  
9 However, in the case of a revocable trust, transfers made to the trust by a person  
10 who did not participate in the trust’s creation will frequently be intended as a  
11 donative transfer to the person who originally created the trust. In that event, only  
12 the person who created the trust, and not the later donor, will be the settlor.

13           Ascertaining the identity of the settlor is important for a variety of reasons.  
14 It is important for determining rights in revocable trusts. See Sections 505(a)(1),  
15 (3) (creditor claims against settlor of revocable trust), 602 (revocation or  
16 modification of revocable trust), and 604 (limitation on contest of revocable trust).  
17 It is also important for determining rights of creditors in irrevocable trusts. See  
18 Section 505(a)(2) (creditors of settlor can reach maximum amount trustee could  
19 distribute to settlor). While the settlor of an irrevocable trust traditionally has no  
20 continuing rights over the trust except for a right to terminate the trust with the  
21 beneficiaries’ consent (see Section 410), under the Code the settlor of an irrevocable  
22 trust may also petition for removal of the trustee and to enforce or modify a  
23 charitable trust. See Sections 409 (standing to enforce charitable trust), 412  
24 (doctrine of cy pres), and 706 (removal of trustee).

25           “Spendthrift provision” (paragraph (17)) means a term of a trust which  
26 restrains the transfer of a beneficiary’s interest, whether by a voluntary act of the  
27 beneficiary or by an action by a beneficiary’s creditor or assignee, which at least as  
28 far as the beneficiary is concerned, would be involuntary. The effect of a valid  
29 spendthrift provision is addressed in Article 5. The presence of a spendthrift  
30 provision may also constitute a material purpose sufficient to prevent the  
31 termination of a trust by agreement of the beneficiaries, although the Code does not  
32 presume this result. See Section 410(c).

33           “Terms of a trust” (paragraph (19)) is a defined term used frequently in the  
34 Code. While the wording of a written trust instrument is almost always the most  
35 important determinant of a trust’s terms, the definition is not so limited. Oral  
36 statements, the settlor’s family circumstances, and, to the extent the settlor was  
37 otherwise silent, rules of construction, all may have a bearing on determining a  
38 trust’s meaning. If a trust established by order of court is to be administered as an  
39 express trust, the terms of the trust are determined from the court order as  
40 interpreted in light of the general rules governing interpretation of judgments. See

1 Restatement (Third) of Trusts § 4 and cmt. f (Tentative Draft No. 1, 1996). See  
2 also Restatement (Second) of Trusts § 4 (1959).

3 Not all evidence may necessarily be considered in determining the terms of a  
4 trust. A manifestation of a settlor's intention does not constitute evidence of a  
5 trust's terms if it would be inadmissible in a judicial proceeding in which the trust's  
6 terms are in question. See Restatement (Second) of Trusts § 4 cmt. a, b (1959);  
7 Restatement (Third) of Trusts § 4 cmt. b (Tentative Draft No. 1, 1996). See also  
8 Restatement (Third) Property: Wills and Other Donative Transfers §§ 10.2,  
9 11.1-11.3 (Tentative Draft No. 1, 1995). For example, in many States a trust of real  
10 property is unenforceable unless evidenced by a writing, although this Code does  
11 not so require, leaving this issue to be covered, if the enacting jurisdiction so elects,  
12 by separate statute. See Section 406 (evidence of oral trust). Evidence otherwise  
13 relevant to determining the terms of a trust may also be excluded under other  
14 principles of law, such as the parol evidence rule.

15 "Trust instrument" (paragraph (20)) is a subset of the definition of "terms of  
16 a trust" (paragraph (19)), referring to only such terms as are found in an instrument  
17 executed by the settlor. A trust is validly created if created in compliance with the  
18 law of the place where the trust instrument was executed. See Section 108(a). The  
19 contest period for a revocable trust can be shortened by providing the potential  
20 contestant with a copy of the trust instrument plus other information. See Section  
21 604(a). Upon request, the trustee must furnish a beneficiary with a copy of the trust  
22 instrument. See Section 813(b)(1). To allow a trustee to administer a trust with  
23 some dispatch without concern about liability if the terms of a trust instrument are  
24 contradicted by evidence outside of the instrument, Section 1006 protects a trustee  
25 from liability to the extent a breach of trust resulted from reasonable reliance on  
26 those terms. A trustee in lieu of providing a third person with a copy of the trust  
27 instrument may substitute a certification of trust. See Section 1013. Unless there is  
28 a clear indication of a contrary intent, rules of construction and presumptions  
29 provided in the Code apply to trust instruments executed before the effective date of  
30 the Code. See Section 1105(a)(4).

31 The definition of "trustee" (paragraph (21)) includes not only the original  
32 trustee but also an additional and successor trustee as well as a cotrustee. Because  
33 the definition of trustee includes trustees of all types, a trustee of any type, whether  
34 original or succeeding, single or cotrustee, has the powers of a trustee and is subject  
35 to the duties imposed on trustees under the Code. Any natural person, including a  
36 settlor or beneficiary, has capacity to act as trustee if the person has capacity to hold  
37 title to property free of trust. See Restatement (Third) of Trusts § 32 (Tentative  
38 Draft No. 2, 1999); Restatement (Second) of Trusts § 89 (1959). State banking  
39 statutes normally impose additional requirements before a corporation may act as  
40 trustee.

1                   **SECTION 104. DEFAULT AND MANDATORY RULES.**

2                   (a) Except as otherwise provided in the terms of the trust, this [Code]  
3                   governs the duties and powers of a trustee, relations among trustees, and the rights  
4                   and interests of a beneficiary.

5                   (b) The terms of a trust may alter any provision of this [Code] except:

6                               (1) the requirements for creating a trust;

7                               (2) the requirement that a trustee act in good faith and in accordance  
8                   with the purposes of the trust;

9                               (3) the requirement that a trust, its terms, and its administration must be  
10                  for the benefit of its beneficiaries;

11                              (4) the power of the court to modify or terminate a trust pursuant to  
12                  Sections 409 through 415;

13                              (5) the validity and effect of a spendthrift provision and the rights of  
14                  creditors as provided in [Article] 5;

15                              (6) the power of the court under Section 708(b) to adjust a trustee's  
16                  compensation specified in the terms of the trust that is unreasonably low or high;

17                              (7) the duties under Section 813 to report to the qualified beneficiaries  
18                  and to keep them informed;

19                              (8) the effect of an exculpatory term under Section 1008;

20                              (9) the rights under Sections 1010 through 1013 of a person other than a  
21                  trustee or beneficiary;

1 (10) periods of limitation for bringing a judicial proceeding; [and]  
2 (11) the power of the court to take such action and exercise such  
3 jurisdiction as may be necessary in the interests of justice [; and  
4 (12) the subject-matter jurisdiction of the court and venue for  
5 commencing a proceeding as provided in Sections 203 and 204].

6 **Comment**

7 With only limited exceptions, the duties and powers of a trustee, relations  
8 among trustees, and the rights and interests of a beneficiary are as specified in the  
9 terms of the trust. Subsection (a) states this general principle; subsection (b) lists  
10 the exceptions.

11 Similar to other legal arrangements, such as the execution of a will, the  
12 requirements for a trust's creation, such as the necessary level of capacity, are  
13 controlled by the statute and by the common law, not by the settlor. See subsection  
14 (b)(1). Nor may the terms of the trust alter the period for contesting the validity of  
15 a trust. See subsection (b)(10).

16 Similarly, a settlor may not so negate the responsibilities of a trustee that the  
17 trustee would no longer be acting in a fiduciary capacity. The terms may not  
18 eliminate a trustee's duty to act in good faith and in accordance with the purposes of  
19 the trust, nor eliminate the obligation to administer the trust for the benefit of the  
20 beneficiaries. See subsection (b)(2)-(3). These duties are fundamental to the Code.  
21 See Sections 403 (trust, its terms, and its administration must be for benefit of  
22 beneficiaries), 801 (duty to administer trust), 814 (duties with regard to  
23 discretionary power), 1008 (exculpation of trustee).

24 Nor may the terms of a trust deny a court authority to take such action as  
25 necessary in the interests of justice. See subsection (b)(11). Additionally, should  
26 the jurisdiction adopting this Code elect to enact the optional provisions on subject-  
27 matter jurisdiction and venue, such provisions likewise cannot be altered in the  
28 terms of the trust. See subsection (b)(12).

29 The power of the court to modify or terminate a trust under Sections 409  
30 through 415 are not subject to variation in the terms of the trust. See subsection  
31 (b)(4). However, all of these Code sections involve situations which the settlor  
32 could have addressed had the settlor had sufficient foresight. These include  
33 situations where the purpose of the trust has been achieved, a mistake was made in

1 the trust's creation, or circumstances have arisen which were not anticipated by the  
2 settlor.

3 While the settlor is generally free to determine the rights and interests of the  
4 beneficiaries, a settlor may negate the obligation to keep the qualified beneficiaries  
5 reasonably informed only to the extent provided in Section 813. See subsection  
6 (b)(7). Furthermore, a settlor is not free to limit the rights of other persons, such as  
7 purchasers of trust property (see subsection (b)(9)) nor, except to the extent a  
8 spendthrift bar is allowed, the rights of a beneficiary's creditors. See subsection  
9 (b)(5).

## 10 **SECTION 105. SPECIAL NOTICE.**

11 (a) When notice to qualified beneficiaries of a trust is required under this  
12 [Code] , the trustee must also give notice to a beneficiary not otherwise entitled to  
13 notice who has delivered to the trustee a request for special notice.

14 (b) A charitable organization expressly entitled to receive benefits under the  
15 terms of a charitable trust or a person appointed to enforce a trust created for the  
16 care of an animal or another noncharitable purpose as provided in Section 407 or  
17 408 has the rights of a qualified beneficiary under this [Code].

18 (c) The attorney general of this State has the rights of a qualified beneficiary  
19 with respect to a charitable trust having its principal place of administration in this  
20 State.

### 21 **Comment**

22 Under the Code, certain notices need be given only to the "qualified"  
23 beneficiaries. For the definition of "qualified beneficiary," see Section 103(14).  
24 Among these notices are notice of a transfer of the trust's principal place of  
25 administration (Section 109(b)), notice of a trust division or combination (Section  
26 416), notice of a trustee resignation (Section 705(a)(1)), and notice of a trustee's  
27 annual report (Section 813(d)). Subsection (a) of this section authorizes other  
28 beneficiaries to receive one or more of these notices by filing a request for special  
29 notice with the trustee.

1 Under the Code, certain actions, such as the appointment of a successor  
2 trustee, can be accomplished by the consent of the qualified beneficiaries. See  
3 Section 704 (filling vacancy in trusteeship). This section only addresses notice, not  
4 required consent. A person who makes a request for special notice does not thereby  
5 acquire a right to participate in actions that can be taken only by the qualified  
6 beneficiaries. Nor does the fact a qualified beneficiary is missing mean that the  
7 consent of that qualified beneficiary is no longer required. However, the fact a  
8 beneficiary cannot be located may be a sufficient basis for the consent to be given by  
9 another person on the beneficiary's behalf under the representation principles of  
10 Article 3.

11 Charitable trusts do not have beneficiaries in the usual sense. However,  
12 certain persons, while not technically beneficiaries, do have an interest in seeing that  
13 the trust is enforced. In the case of a charitable trust, this includes the Attorney  
14 General and charitable organizations designated to receive benefits under the terms  
15 of the trust, who under this section are granted the rights of qualified beneficiaries.  
16 Similarly granted the rights of qualified beneficiaries are persons appointed by the  
17 terms of the trust or by the court to enforce a trust created for an animal or other  
18 trust with a valid purpose but no ascertainable beneficiary. See Sections 407, 408.

#### 19 **SECTION 106. METHODS OF NOTICE.**

20 (a) Notice required under this [Code] must be given by first-class mail, by  
21 personal delivery, by delivery to the beneficiary's last known place of residence or  
22 place of business, by a properly directed electronic message, or by other method  
23 likely to result in receipt of the notice.

24 (b) Notice otherwise required under this [Code] need not be given to a  
25 beneficiary whose identity or location is unknown to and not reasonably  
26 ascertainable by the trustee.

27 (c) Notice of a judicial proceeding must be given as provided in the  
28 applicable rules of civil procedure.

#### 29 **Comment**

Subsection (a) clarifies that notices under the Code can be given by any method likely to result in its receipt by the person to be notified. The specific methods listed in the subsection are illustrative, not exhaustive.

Subsection (b) relieves a trustee of responsibility for what would otherwise be an impossible task, the giving of notice to a person whose identity or location is unknown and not reasonably ascertainable by the trustee.

Notices under the Code are nonjudicial. Per subsection (c), notice of a judicial proceeding must be given as provided in the applicable rules of civil procedure.

**SECTION 107. COMMON LAW OF TRUSTS.** The common law of trusts and principles of equity supplement this [Code], except to the extent modified by this [Code] or another statute of this State.

### Comment

The Code codifies those portions of the law of express trusts that are most amenable to codification. The Code is supplemented by the common law of trusts, including principles of equity, particularly as articulated in the Restatement of Trusts, Restatement of Property 3d: Wills and Other Donative Transfers, and the Restatement of Restitution. The common law of trusts is not static but includes the contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and changing conditions.

**SECTION 108. GOVERNING LAW.**

(a) A trust not created by will is validly created if its creation complies with the law of this State, the law of the place where the trust instrument was executed, the law of the place where, at the time of creation, the settlor was domiciled, had a place of abode, or was a national, the law of the place where a trustee was domiciled or had a place of business, or the law of the place where any trust property was located.



1 (b) The meaning and effect of the terms of a trust are determined by:

2 (1) the law of the State designated in the terms unless the designation of  
3 that State's law is contrary to a strong public policy of the State having the most  
4 significant relationship to the matter at issue; or

5 (2) in the absence of a controlling designation in the terms of the trust,  
6 the law of the State having the most significant relationship to the matter at issue.

7 **Comment**

8 Subsection (a) is comparable to Section 2-506 of the Uniform Probate Code,  
9 which validates wills executed in compliance with the law of a variety of places  
10 where the testator had a significant contact. Unlike the UPC, however, this  
11 provision is not limited to execution of the instrument but applies to the entire  
12 process of a trust's creation, which includes the requirement of trust property. See  
13 Section 402 (requirements for trust creation). In addition, unlike the UPC, this  
14 section validates a trust if valid under the law of the domicile or place of business of  
15 the designated trustee, or if valid under the law of the place where any of the trust  
16 property is located.

17 Subsection (b) allows a settlor to select the law to govern the meaning and  
18 effect of the terms of a trust. The jurisdiction selected need not have any other  
19 connection to the trust. The settlor is free to select the governing law regardless of  
20 where the trust property may be physically located, whether it consists of real or  
21 personal property, and whether the trust was created by will or during the settlor's  
22 lifetime. Subsection (b) does not attempt to specify the strong public policies  
23 sufficient to invalidate a settlor's choice of governing law. These public policies will  
24 vary depending upon the locale and may change over time. But certain examples do  
25 recur. Trusts which seek to defeat the marital property rights of a surviving spouse  
26 or to encourage a beneficiary to divorce are examples of trusts which courts have  
27 found violative of strong public policies.

28 **SECTION 109. PRINCIPAL PLACE OF ADMINISTRATION.**

29 (a) Without precluding other means for establishing a sufficient connection  
30 with the designated jurisdiction, terms of a trust designating the principal place of  
31 administration are valid and controlling if:

(1) a trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction; or

(2) all or part of the administration occurs in the designated jurisdiction.

(b) A trustee is under a continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries. Without precluding the right of the court to order, approve, or disapprove a transfer, the trustee, in performing this duty, may transfer the trust's principal place of administration to another State or country. The trustee must notify the qualified beneficiaries of the proposed transfer not less than 60 days before initiating the transfer.

(c) In connection with a transfer of the trust’s principal place of administration, the trustee may transfer some or all of the trust property to a successor trustee designated in the terms of the trust or appointed pursuant to Section 704.

### Comment

This section prescribes rules for determining a trust's principal place of administration. Locating a trust's principal place of administration will ordinarily determine where the trustee and beneficiaries are subject to suit concerning the trust. It may also be important for other matters, such as payment of state income tax.

Under the Code, the fixing of a trust’s principal place of administration will determine where the trustee and beneficiaries have consented to suit (Section 202), and the rules for locating venue within a particular State (Section 204). It may also be considered by a court in another jurisdiction in determining whether it has jurisdiction, and if so, whether it is a convenient forum.

Settlors who expect to name a trustee or cotrustees with significant contacts in more than one State may wish to specify the principal place of administration in the terms of the trust. Pursuant to subsection (a), a designation in the terms of the

1 trust is controlling if (1) a trustee is a resident of or has its principal place of  
2 business in the designated jurisdiction, or (2) all or part of the administration occurs  
3 in the designated jurisdiction. Designating the principal place of administration  
4 should be distinguished from designating the law to determine the meaning and  
5 effect of the trust's terms, as authorized by Section 108. A settlor is free to  
6 designate one jurisdiction as the principal place of administration and another to  
7 control the meaning of the dispositive provisions.

8 Subsection (b) addresses changing the principal place of administration. A  
9 change may be desirable to secure a lower state income tax rate, for example. Other  
10 reasons may include the relocation of the trustee or beneficiaries, the appointment of  
11 a new trustee, or a change in the location of the trust investments. This section is  
12 not limited to transfers of the principal place of administration to or from other  
13 States of the United States. It may include a transfer of the principal place of  
14 administration to or from a different country. The procedure specified in subsection  
15 (b) for transferring a trust's principal place of administration applies only in the  
16 absence of a contrary provision in the terms of the trust. See Section 104. Absent  
17 such expression of contrary intent, the trustee, before initiating the transfer, must  
18 give at least 60 days notice to the qualified beneficiaries. This allows the qualified  
19 beneficiaries time to express any disapproval and, if necessary, take appropriate  
20 action to block the transfer.

21 In connection with a transfer of the principal place of administration, the  
22 trustee may transfer some or all of the trust property to a new trustee located  
23 outside of the State. Subsection (c) clarifies that the appointment of the new trustee  
24 must comply with the provisions on appointment of successor trustees as provided  
25 in the terms of the trust or under the Code. Absent an order of succession in the  
26 terms of the trust, Section 704(c) provides for an appointment if approved by all of  
27 the qualified beneficiaries or by the court.

28 While transfer of the principal place of administration will normally change  
29 the governing law with respect to administrative matters, a transfer does not  
30 normally alter the controlling law with respect to the validity of the trust and the  
31 construction of its dispositive provisions.

## 32 **SECTION 110. NONJUDICIAL SETTLEMENT AGREEMENTS.**

33 (a) For purposes of this section, "interested persons" means persons whose  
34 consent would be required in order to achieve a binding settlement were the  
35 settlement to be approved by the court.

(b) Except as otherwise provided in subsection (c), interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust.

(c) A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this [Code] or other applicable law.

(d) Matters that may be resolved by a nonjudicial settlement agreement include:

(1) the interpretation or construction of the terms of the trust;

(2) the approval of a trustee's report or accounting;

(3) direction to a trustee to refrain from performing a particular act or

the grant to a trustee of any necessary or desirable power;

(4) the resignation or appointment of a trustee and the determination of a trustee's compensation;

(5) transfer of a trust's principal place of administration; and

(6) liability of a trustee for an action relating to the trust.

(e) Any interested person may petition the court to approve a nonjudicial settlement agreement, to determine whether the representation as provided in [Article] 3 was adequate, and to determine whether the agreement contains terms and conditions the court could have properly approved.

### Comment

While the Code recognizes that a court may intervene in the administration of a trust to the extent its jurisdiction is invoked by interested persons or otherwise

1 exercised as provided by law (see Section 201(a)), resolution of disputes by  
2 nonjudicial means is encouraged. The purpose of this section is to facilitate the  
3 making of such agreements by giving them the same effect as if approved by the  
4 court.

5 To achieve such certainty, however, the nonjudicial settlement must concern  
6 a matter that the court could properly approve. Under this section, a nonjudicial  
7 settlement cannot be used to produce a result not authorized by law, such as to  
8 terminate a trust in an impermissible manner.

9 Trusts ordinarily have beneficiaries who are minors, incapacitated, unborn or  
10 unascertained. Because such beneficiaries cannot signify their consent to an  
11 agreement, binding settlements can ordinarily be achieved only through the  
12 application of doctrines such as virtual representation or appointment of a guardian  
13 ad litem, doctrines traditionally available only in the case of judicial settlements. The  
14 effect of this section and the Code more generally is to allow for such binding  
15 representation even if the agreement is not approved by the court. For the rules on  
16 representation, including appointments of representatives by the court to approve  
17 particular settlements, see Article 3.

18 Subsection (d) is a nonexclusive list of matters to which a nonjudicial  
19 settlement may pertain. Other matters which may be made the subject of a  
20 nonjudicial settlement are listed in the Article 3 General Comment.

21 **[SECTION 111. RULES OF CONSTRUCTION.** The rules of construction  
22 that apply in this State to the interpretation of and disposition of property by will  
23 also apply as appropriate to the interpretation of the terms of a trust and the  
24 disposition of the trust property.]

25 **Comment**

26 This section is patterned after Restatement (Third) of Trusts § 25(2) and  
27 comment e (Tentative Draft No. 1, 1996), although this section, unlike the  
28 Restatement, also applies to irrevocable trusts. The revocable trust is used primarily  
29 as a will substitute, with its key provision being the determination of the persons to  
30 receive the trust property upon the settlor's death. Given this functional equivalence  
31 between the revocable trust and a will, the rules for interpreting the disposition of  
32 property at death should be the same whether the individual has chosen a will or  
33 revocable trust as the individual's primary estate planning instrument. Over the  
34 years, the legislatures of the States and the courts have developed a series of rules of

1 construction reflecting the legislative or judicial guess as to how the average testator  
2 would wish to dispose of property in cases where the will is silent or insufficiently  
3 clear. Few legislatures have yet to extend these rules of construction to revocable  
4 trusts, and even fewer to irrevocable trusts, although a number of courts have done  
5 so as a matter of judicial construction. See Restatement (Third) of Trusts § 25,  
6 Reporter’s Note to cmt. e (Tentative Draft No. 1, 1996).

7 Because of the wide variation among the States on the rules of construction  
8 applicable to wills, this Code does not attempt to prescribe the exact rules to be  
9 applied to trusts but instead adopts the philosophy of the Restatement that the rules  
10 applicable to trusts ought to be the same, whatever those rules might be. Instead of  
11 enacting this section, a jurisdiction enacting this Code may wish to enact detailed  
12 rules on the construction of trusts, either in addition to its rules on the construction  
13 of wills or as part of one comprehensive statute applicable to both wills and trusts.  
14 For this reason, the section has been made optional. For possible models, see  
15 Uniform Probate Code, Article 2, Parts 7 and 8; and California Probate Code  
16 §§ 21101-21630. The topics addressed by the California Probate Code, the more  
17 comprehensive of the two models, includes rules relating to:

- 18 (1) Equitable conversion of real into personal property (CPC § 21107);
- 19 (2) Abolition of doctrine of worthier title (CPC § 21108);
- 20 (3) Antilapse upon predecease of beneficiary (CPC § 21109-21111);
- 21 (4) Meaning of death “with” or “without” issue (CPC § 21112);
- 22 (5) Persons included within class gifts (CPC § 21113);
- 23 (6) Meaning of transfers to “heirs” (CPC § 21114);
- 24 (7) Inclusion of halfbloods, adoptees, persons born out of wedlock, and  
25 others within terms of family relationship (CPC § 21115);
- 26 (8) Nonexoneration of gifts of encumbered property (CPC §21131);
- 27 (9) Gifts of securities (CPC § 21132);
- 28 (10) Ademption by extinction (CPC § 21133-21139);
- 29 (11) Perpetuities (CPC § 21200-21231);
- 30 (12) No contest clauses (CPC §21300-21333);

1                   (13) Limitations on transfers to drafters (CPC § 21350-21356);

2                   (14) Abatement (CPC § 21400-21406);

3                   (15) Omitted spouses and children (CPC § 21600-21623).

4                   Other rules of construction applicable to both wills and trusts are codified  
5 elsewhere in the California Probate Code.

6                   Rules of construction applicable to both wills and trusts which are found in  
7 the cited sections of the Uniform Probate Code (UPC) and which are not mentioned  
8 on the above list, include:

9                   (1) Requirement of survival for 120 hours (UPC § 2-702);

10                  (2) Choice of law as to meaning and effect of governing instrument (UPC  
11 § 2-703);

12                  (3) Meaning of specific reference requirement in power of appointment  
13 (UPC § 2-704);

14                  (4) Representation among descendants (UPC § 2-709);

15                  (5) Effect of homicide on property interests (UPC § 2-803);

16                  (6) Revocation of probate and nonprobate transfers by divorce (UPC  
17 § 2-804).

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**ARTICLE 2**  
**JUDICIAL PROCEEDINGS**

**General Comment**

This article addresses selected issues involving judicial proceedings concerning trusts, particularly trusts with contacts in more than one State or country. This article is not intended to provide comprehensive coverage of court jurisdiction or procedure with respect to trusts. These issues are better addressed elsewhere, for example in the State’s rules of civil procedure or as provided by court rule.

The jurisdiction of the court is available as invoked by interested persons or as otherwise provided by law. See Section 201. Proceedings involving the administration of a trust will normally be brought in the court at the trust’s principal place of administration. The trustee and beneficiaries are deemed to have consented to the jurisdiction of the court at the principal place of administration as to any matter relating to the trust. See Section 202. Sections 203 and 204 are optional, bracketed provisions relating to subject-matter jurisdiction and venue.

**SECTION 201. ROLE OF COURT IN ADMINISTRATION OF TRUST.**

- (a) The court may intervene in the administration of a trust to the extent its jurisdiction is invoked by interested persons or otherwise exercised as provided by law.
- (b) A trust is not subject to continuing judicial supervision unless ordered by the court.
- (c) A judicial proceeding involving a trust may relate to any matter involving the trust’s administration and distribution, including a petition for instructions and an action to declare rights.

**Comment**

While the Code encourages the resolution of disputes without resort to the courts through such options as the nonjudicial settlement authorized by Section 110,



1 the court is always available to the extent its jurisdiction is invoked by interested  
2 persons. The jurisdiction of the court with respect to trust matters is inherent and  
3 historical and includes the ability to act on its own initiative, to appoint a special  
4 master to investigate the facts of a case, and to provide a trustee with instructions  
5 even in the absence of a dispute.

6 Contrary to the trust statutes in some States, the Code does not create a  
7 system of court supervision. While a court may direct that a particular trust be  
8 subject to continuing court supervision, subsection (b) makes clear that invoking the  
9 court's jurisdiction to decide a particular matter does not necessitate this result.

10 Subsection (c) makes clear that the court's jurisdiction may be invoked even  
11 absent an actual dispute. Traditionally, courts in equity have heard petitions for  
12 instructions and have issued declaratory judgments. This section makes clear that  
13 this Code does not limit this historic jurisdiction. Beyond mentioning petitions for  
14 instructions and actions to declare rights, subsection (c) does not attempt to list the  
15 types of judicial proceedings involving trust administration that might be brought by  
16 a trustee or beneficiary. But such an effort is made in California Probate Code  
17 § 17200. Excluding matters not germane to the Uniform Trust Code, the California  
18 statute lists the following as items relating to the "internal affairs" of a trust:

19 (1) Determining questions of construction;

20 (2) Determining the existence or nonexistence of any immunity, power,  
21 privilege, duty, or right;

22 (3) Determining the validity of a trust provision;

23 (4) Ascertaining beneficiaries and determining to whom property will pass  
24 upon final or partial termination of the trust;

25 (5) Settling accounts and passing upon the acts of a trustee, including the  
26 exercise of discretionary powers;

27 (6) Instructing the trustee;

28 (7) Compelling the trustee to report information about the trust or account  
29 to the beneficiary;

30 (8) Granting powers to the trustee;

31 (9) Fixing or allowing payment of the trustee's compensation or reviewing  
32 the reasonableness of the compensation;

- 1 (10) Appointing or removing a trustee;
- 2 (11) Accepting the resignation of a trustee;
- 3 (12) Compelling redress of a breach of trust by any available remedy;
- 4 (13) Approving or directing the modification or termination of a trust;
- 5 (14) Approving or directing the combination or division of trusts; and
- 6 (15) Authorizing or directing transfer of a trust or trust property to or from
- 7 another jurisdiction.

8 **SECTION 202. JURISDICTION OVER TRUSTEE AND**

9 **BENEFICIARY.**

10 (a) By accepting the trusteeship of a trust having its principal place of

11 administration in this State or by moving the principal place of administration to this

12 State, the trustee submits personally to the jurisdiction of the courts of this State

13 regarding any matter relating to the trust.

14 (b) A beneficiary of a trust having its principal place of administration in this

15 State is subject to the jurisdiction of the courts of this State regarding any matter

16 relating to the trust.

17 **Comment**

18 This section, which is based in part on Arizona Revised Statutes § 14-7202,

19 clarifies that the courts of the principal place of administration have jurisdiction to

20 enter orders relating to the trust that will be binding on both the trustee and

21 beneficiaries. Consent to jurisdiction does not dispense with any required notice,

22 however. With respect to jurisdiction over a beneficiary, the Comment to Uniform

23 Probate Code § 7-103, upon which the Arizona statute is based, is instructive:

24 It also seems reasonable to require beneficiaries to go to the seat of the trust

25 when litigation has been instituted there concerning a trust in which they claim

26 beneficial interests, much as the rights of shareholders of a corporation can be

1 determined at a corporate seat. The settlor has indicated a principal place of  
2 administration by its selection of a trustee or otherwise, and it is reasonable to  
3 subject rights under the trust to the jurisdiction of the Court where the trust is  
4 properly administered.

5 Obtaining jurisdiction over the trustee and beneficiaries pursuant to this  
6 section does not preclude jurisdiction elsewhere on some other basis. Furthermore,  
7 the fact that the courts in the new State acquire jurisdiction following a change in a  
8 trust's principal place of administration does not mean that the courts of the former  
9 principal place of administration necessarily lose jurisdiction, particularly as to  
10 matters involving events which occurred prior to the removal.

### 11 **[SECTION 203. SUBJECT-MATTER JURISDICTION.**

12 (a) The [designate] court has exclusive jurisdiction of proceedings in this  
13 State brought by a trustee or beneficiary concerning the administration of a trust.

14 (b) The [designate] court has concurrent jurisdiction with other courts of  
15 this State of other proceedings involving a trust.]

#### 16 **Comment**

17 This section provides a means for distinguishing the jurisdiction of the court  
18 with primary jurisdiction for trust matters, whether denominated the probate court,  
19 chancery court, or by some other name, from other courts that may on occasion  
20 resolve disputes concerning trusts. The section has been placed in brackets because  
21 subject-matter jurisdiction may already be addressed by other statute or court rule  
22 and may be unnecessary to address in States having unified court systems. For an  
23 explanation of types of proceedings which may be brought concerning the  
24 administration of a trust, see the Comment to Section 201.

### 25 **[SECTION 204. VENUE.**

26 (a) Except as otherwise provided in subsection (b), venue for a judicial  
27 proceeding concerning a trust is in the [county] of this State in which the trust's  
28 principal place of administration is or will be located and, if the trust is created by

1 will and the estate is not yet closed, in the [county] in which the decedent's estate is  
2 being administered.

3 (b) If a trust has no trustee, venue for a judicial proceeding for the  
4 appointment of a trustee is in a [county] of this State in which a beneficiary resides,  
5 in a [county] in which the trust property, or some portion of the trust property, is  
6 located, and if the trust is created by will, in the [county] in which the decedent's  
7 estate was or is being administered.]

8 **Comment**

9 This optional, bracketed section is made available for States which conclude  
10 that venue for a judicial proceeding involving a trust is not adequately addressed in  
11 the State's rules of civil procedure. The State's general venue rules control cases  
12 not covered by subsections (a) and (b). This would include proceedings where  
13 jurisdiction over a trust, trust property, or parties to a trust is based on a factor  
14 other than the principal place of administration. When the principal place of  
15 administration of a trust is in another State, but jurisdiction is proper in this State,  
16 the general rules governing venue also apply.

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**ARTICLE 3**  
**REPRESENTATION**

**General Comment**

This article deals with representation of beneficiaries, both representation by fiduciaries (personal representatives, guardians and conservators), and what is known as virtual representation. Virtual representation is a doctrine that allows binding representation by others of beneficiaries who are unborn or whose identities are not reasonably ascertainable, and under more modern versions, beneficiaries who may be alive and known but who are minors or otherwise legally incapacitated.

Section 301 is the general and introductory section, laying out the scope of the article. The representation principles of this article have numerous applications under this Code. The representation principles of the article apply for purposes of settlement of disputes, whether by a court or nonjudicially. They apply for the giving of required notices. They apply for the giving of consents to certain actions. The representation principles of this article may be used to facilitate:

- (1) Modification or termination of a trust upon the consent of the beneficiaries, with or without the consent of the settlor (Section 410);
- (2) Notice to qualified beneficiaries of a proposed trust combination or division (Section 416);
- (3) Notice to qualified beneficiary of temporary assumption of duties without accepting trusteeship (Section 701(c)(1));
- (4) Appointment of successor trustee upon agreement of qualified beneficiaries (Section 704(c)(1));
- (5) Notice to qualified beneficiaries of resignation of trustee (Section 705(a)(1));
- (6) Notice of trustee’s report (Section 813(d)); and
- (7) Nonliability of trustee upon consent, release, or affirmance of beneficiary (Section 1009).

Section 301(b) deals with the effect of a consent, whether by actual or virtual representation. A consent bars a later objection by the person represented, but a consent is not binding if the person represented raises an objection prior to the

1 date the consent would otherwise become effective. The possibility that a  
2 beneficiary might object to a consent given on the beneficiary's behalf will not be  
3 germane in many cases because the person represented will be unborn or  
4 unascertained. However, the representation principles of this article will sometimes  
5 apply to adult and competent beneficiaries. For example, while the trustee of a  
6 revocable trust entitled to a pourover devise has authority under Section 303 to  
7 approve the personal representative's account on behalf of the trust beneficiaries,  
8 such consent would not be binding on a trust beneficiary who registers an objection.

9           Section 301(c) clarifies that an agent with authority, a conservator, and a  
10 guardian, if no conservator has been appointed, may receive notices and give  
11 consents on behalf of the person represented. However, Sections 410 and 602, both  
12 of which are referred to in Section 301, limit the agent's, conservator's and  
13 guardian's authority to revoke or terminate a trust created by the person  
14 represented.

15           Section 302 deals with the effect of a consent by the holder of a general  
16 testamentary power of appointment. (Revocable trusts and presently exercisable  
17 general powers of appointment are covered by Section 603, which grant the settlor  
18 or holder of the power all rights of the beneficiaries or persons whose interests are  
19 subject to the power). Absent a conflict of interest, the holder of a general  
20 testamentary power of appointment may bind those whose interests are subject to  
21 the power.

22           Section 303 provides that a fiduciary, absent conflict of interest, may  
23 represent and bind the beneficiary or beneficiaries of the respective fiduciary  
24 relationship, whether of an estate, trust, conservatorship, or guardianship. Drawing  
25 from Section 1-403 of the Uniform Probate Code, the section also allows a parent  
26 without a conflict of interest to represent and bind a minor or unborn child. A  
27 typical example of conflict of interest is a trustee who seeks the approval of an  
28 accounting for an estate of which the trustee is acting as personal representative.

29           Section 304 is the virtual representation provision. It provides for  
30 representation of and the giving of a binding consent by another person having a  
31 substantially identical interest with respect to the particular issue. Under this  
32 section, a minor, incapacitated, or unborn person, or a person whose identity or  
33 location is unknown and not reasonably ascertainable, can be bound by a virtual  
34 representative only if (1) the beneficiary is not otherwise represented under another  
35 section of the article; and (2) there is no conflict of interest between the  
36 representative and the person represented.

37           Section 305 authorizes the court to appoint a representative to represent the  
38 interests of unrepresented persons or persons for whom the court concludes the

1 other available representation might be inadequate. To encourage the court to make  
2 such appointments only when really needed, the court must first find that  
3 representation of the beneficiary might otherwise be inadequate. Also, to encourage  
4 some flexibility in how the representative approaches the job, the representative, in  
5 approving a settlement, may consider general family benefit.

6 Section 306 specifies the persons who must be notified of a judicial  
7 proceeding in order to bind a person being represented by others as provided in this  
8 article. If the holder of a general testamentary power of appointment is representing  
9 those whose interests are subject to the power, notice to the permissible appointees,  
10 takers in default, or others whose interests are subject to the power is achieved by  
11 giving notice to the holder. If the person to be bound is represented by a  
12 conservator, guardian, agent, trustee, personal representative, or parent, notice to  
13 the person represented is achieved by giving notice to the fiduciary or parent. If  
14 virtual representation is being relied on, notice to the person represented is required  
15 if the person's identity and location is known or reasonably ascertainable.  
16 Otherwise, notice to the person represented is accomplished by giving notice to all  
17 persons whose interests in the judicial proceedings are substantially identical and  
18 whose identities and locations are known.

19 The provisions of this article are subject to modification in the terms of the  
20 trust. See Section 104. Settlers are free to specify their own methods for providing  
21 substituted notice and obtaining substituted consent.

## 22 **SECTION 301. REPRESENTATION: BASIC EFFECT.**

23 (a) Notice to a person who may represent and bind another person under  
24 this [article] has the same effect as if notice were given directly to the other person.

25 (b) The consent of a person who may represent and bind another person  
26 under this [article] is binding on the person represented unless the person  
27 represented objects to the representation before the consent would otherwise have  
28 become effective.

1           (c) Except as otherwise provided in Sections 410 and 602, a person who  
2           under this [article] may represent a settlor who lacks capacity may receive notice  
3           and give a binding consent on the settlor's behalf.

4           **SECTION 302. REPRESENTATION BY HOLDER OF GENERAL**  
5           **TESTAMENTARY POWER OF APPOINTMENT.** To the extent there is no  
6           conflict of interest between the holder of a general testamentary power of  
7           appointment and the persons represented with respect to the particular question or  
8           dispute, the holder may represent and bind persons whose interests, as permissible  
9           appointees, takers in default, or otherwise, are subject to the power.

10          **SECTION 303. REPRESENTATION BY FIDUCIARIES AND**  
11          **PARENTS.** To the extent there is no conflict of interest between the representative  
12          and the person represented or among those being represented with respect to a  
13          particular question or dispute:

14               (1) a [conservator] may represent and bind the estate that the [conservator]  
15               controls;

16               (2) a [guardian] may represent and bind the ward if a [conservator] of the  
17               ward's estate has not been appointed;

18               (3) an agent having authority to do so may represent and bind the principal;

19               (4) a trustee may represent and bind the beneficiaries of the trust;



1           (5) a personal representative of a decedent's estate may represent and bind  
2 persons interested in the estate; and

3           (6) if a [conservator] or [guardian] has not been appointed, a parent may  
4 represent and bind the parent's minor or unborn child.

5           **SECTION 304. REPRESENTATION BY PERSON HAVING**  
6 **SUBSTANTIALLY IDENTICAL INTEREST.** Unless otherwise represented, a  
7 minor, incapacitated, or unborn individual, or a person whose identity or location is  
8 unknown and not reasonably ascertainable, may be represented by and bound by  
9 another having a substantially identical interest with respect to the particular  
10 question or dispute, but only to the extent there is no conflict of interest between the  
11 representative and the person represented.

12           **SECTION 305. APPOINTMENT OF REPRESENTATIVE.**

13           (a) If the court determines that an interest is not represented under this  
14 [article], or that the otherwise available representation might be inadequate, the  
15 court may appoint a [representative] to receive notice, give consent, and otherwise  
16 represent, bind, and act on behalf of a minor, incapacitated, or unborn individual, or  
17 a person whose identity or location is unknown. A [representative] may be  
18 appointed to represent several persons or interests.

1 (b) A [representative] may act on behalf of the individual represented with  
2 respect to any matter arising under this [Code], whether or not a judicial proceeding  
3 concerning the trust is pending.

4 (c) In making decisions, a [representative] may consider general benefit  
5 accruing to the living members of the individual's family.

6 **SECTION 306. NOTICE OF PROCEEDING FOR JUDICIALLY**

7 **APPROVED SETTLEMENT.** Notice to a person who may be represented and  
8 bound under this [article] of a proceeding for judicial approval of an agreement must  
9 be given:

10 (1) directly to the person or to one who may bind the person if the person  
11 may be represented and bound under Section 302, 303, or 305;

12 (2) in the case of a person who may be represented and bound under Section  
13 304 and who is unborn or whose identity or location is unknown and not reasonably  
14 ascertainable, to all persons whose interests in the judicial proceedings are  
15 substantially identical and whose identities and locations are known; or

16 (3) in the case of any other person who may be represented and bound under  
17 Section 304, directly to the person.

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

**General Comment**

Sections 401 through 408, which specify the requirements for the creation of a trust, largely codify traditional doctrine. Section 401 specifies the methods by which trusts are created, that is, 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. These requirements are listed in Section 402. Section 403 enumerates purposes, such as illegality, for which a trust cannot be created, and further requires that a trust, its terms, and its administration must be for the benefit of its beneficiaries. Section 404 recites the permitted purposes of a charitable trust. Section 405 lists some of the grounds for contesting a trust. Section 406 validates oral trusts. The remaining sections address what are traditionally referred to as “honorary” trusts, although such trusts are valid and enforceable under this Act. Section 407 covers a trust for the care of an animal; Section 408 allows creation of a trust for another noncharitable purpose such as maintenance of a cemetery lot.

Sections 409 through 416 provide a series of interrelated rules on when a trust may be terminated or modified other than by its express terms. The overall objective of these sections is to enhance flexibility consistent with the principle that preserving the settlor’s intent is paramount. Termination or modification may be allowed upon beneficiary consent if the court concludes that the trust or a particular provision no longer achieves a material purpose or if the settlor concurs (Section 410), by the court in response to unanticipated circumstances or due to ineffective administrative terms (Section 411), or by the court or trustee if continued administration under the trust’s existing terms would be uneconomical (Section 413). Trusts may be reformed to correct a mistake of law or fact (Section 414), or modified to achieve the settlor’s tax objectives (Section 415). Trusts may be combined or divided (Section 416). A trustee or beneficiary has standing to petition the court with respect to a proposed termination or modification (Section 409).

Section 412 lists special requirements for the modification and termination of charitable trusts. Most significant are the provisions relating to cy pres. Upon failure of a particular charitable purpose, the trust does not revert to the settlor or settlor’s successors in interest, but instead must be distributed in accordance with the settlor’s charitable purposes.

Because a trust must first exist before a settlor may specify its terms, the requirements for the creation of a trust may not be altered in the terms of the trust. See Section 104(b)(1). Nor may the settlor negate the court's ability to modify or terminate a trust as provided in Sections 409 through 415. See Section 104(b)(4). However, a settlor is free to vary the trustee's ability to terminate an uneconomic trust as provided in Sections 413, and the trustee's ability to combine and divide trusts as provided in Section 416.

**SECTION 401. METHODS OF CREATING TRUST.** A trust may be created by:

(1) transfer of property to another person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death;

(2) declaration by the owner of property that the owner holds identifiable property as trustee; or

(3) exercise of a power of appointment in favor of a trustee.

### Comment

This section follows Restatement (Second) of Trusts § 17 (1959) and Restatement (Third) of Trusts § 10 (Tentative Draft No. 1, 1996). Under all three methods specified for creating a trust, the trust is not created until it receives property. For what constitutes an adequate property interest, see Restatement (Third) of Trusts §§ 40-41 (Tentative Draft No. 2, 1999). See also Restatement (Second) of Trusts §§ 74-86 (1959). 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. See Section 103(13) (“property” defined). Furthermore, the property interest need not be transferred contemporaneously with the signing of the trust instrument. A trust created by means of an instrument signed during the settlor’s lifetime is not invalid simply because the trustee does not receive property until a later date, including by will or by contract after the settlor’s death. A pourover devise to such a trust is also valid. 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).

1           While a trust created by will may come into existence immediately at the  
2           testator's death and not necessarily only upon the later transfer of title from the  
3           personal representative, the nominated trustee does not have a duty to act until there  
4           is an acceptance of the trusteeship, express or implied. See Section 701 (acceptance  
5           or declination of trusteeship). To avoid an implied acceptance, a nominated  
6           testamentary trustee who is monitoring the actions of the personal representative but  
7           who has not yet made a final decision on acceptance should inform the beneficiaries  
8           that it has assumed only a limited role. The failure so to inform the beneficiaries  
9           could result in liability if misleading conduct by the nominated trustee causes harm  
10          to the trust beneficiaries. See Restatement (Third) of Trusts § 35 cmt. b (Tentative  
11          Draft No. 2, 1999). See also Restatement (Second) of Trusts § 102 cmt. c (1959).

12          Consideration is not ordinarily required to create a trust, but a promise to  
13          create a trust in the future is enforceable only if the requirements for a contract are  
14          satisfied. See Restatement (Third) of Trusts § 15 (Tentative Draft No. 1, 1996); see  
15          also Restatement (Second) of Trusts §§ 28-30 (1959). If the right to enforce the  
16          contract is held by the trustee, however, the chose in action thus created in the  
17          trustee is itself a property interest sufficient to create a present trust. Otherwise, the  
18          enforceable right, if held by another, does not create a present trust but may give  
19          rise to an action for breach of contract. A trust created by means of a promise  
20          enforceable by the trustee is valid notwithstanding that the trustee may resign or die  
21          before the promise is fulfilled. Unless expressly made personal, the promise can be  
22          enforced by a successor trustee. For examples of trusts created by means of  
23          promises enforceable by the trustee, see Restatement (Third) of Trusts § 10 cmt. g  
24          (Tentative Draft No. 1, 1996); Restatement (Second) of Trusts §§ 14 cmt. h, 26  
25          cmt. n (1959).

26          While this section confirms the familiar principle that a trust may be created  
27          by means of the exercise of a power of appointment (paragraph (3)), this Code does  
28          not attempt to legislate comprehensively on the subject of powers of appointment  
29          but addresses only selected issues. See Sections 302 (representation by holder of  
30          general testamentary power of appointment), 505(b) (creditor claims against holder  
31          of power of withdrawal), and 603(c) (rights of holder of power of withdrawal). For  
32          the law on powers of appointment generally, see Restatement (Second) of Property:  
33          Donative Transfers §§ 11.1-24.4 (1986); Restatement (Third) of Property: Wills and  
34          Other Donative Transfers (in progress).

35          While trusts are usually created by a transfer of property by the settlor or by  
36          a self-declaration, trusts may also be created by the courts or by special statute.  
37          See, e.g., Unif. Probate Code § 2-212 (elective share of incapacitated surviving  
38          spouse to be held in trust on terms specified in statute); Unif. Probate Code § 5-407  
39          (conservator may create trust with court approval); Restatement (Second) of Trusts

1       § 17 cmt. i (1959) (trusts created by statutory right to bring wrongful death action);  
2       Restatement (Third) of Trusts § 10 cmt. b (Tentative Draft No. 1, 1996).

3                   **SECTION 402. REQUIREMENTS FOR CREATION.**

4               (a) A trust is created only if:

5                   (1) the settlor has capacity to create a trust;

6                   (2) the settlor indicates an intention to create the trust;

7                   (3) the trust has a definite beneficiary or is:

8                           (A) a charitable trust;

9                           (B) a trust for the care of an animal, as provided in Section 407; or

10                          (C) a trust for a noncharitable purpose, as provided in Section 408;

11                   (4) the trustee has duties to perform; and

12                   (5) the same person is not the sole trustee and sole beneficiary.

13               (b) A beneficiary is definite if the beneficiary can be ascertained now or in  
14       the future, subject to any applicable rule against perpetuities.

15               (c) A power in a trustee to select a beneficiary from an indefinite class is  
16       valid. If the power is not exercised within a reasonable time, the power fails and the  
17       property subject to the power passes to the persons who would have taken the  
18       property had the power not been conferred.

19                                   **Comment**

20               Subsection (a) codifies the basic requirements for the creation of a trust. To  
21       create a valid trust, the settlor must indicate an intention to create a trust.  
22       Restatement (Second) of Trusts § 23 (1959); Restatement (Third) of Trusts § 13  
23       (Tentative Draft No. 1, 1996). But only such manifestations of intent as are  
24       admissible as proof in a judicial proceeding may be considered. See Section 103(19)  
25       (“terms of a trust” defined).

1 To create a trust, a settlor must have the requisite mental capacity. To  
2 create a revocable or testamentary trust, the settlor must have the capacity to make  
3 a will. To create an irrevocable trust, the settlor must have capacity during lifetime  
4 to transfer the property free of trust. See Section 601 (capacity of settlor to create  
5 revocable trust), and see generally Restatement (Third) of Trusts § 11 (Tentative  
6 Draft No. 1, 1996).

7 Subsection (a)(3) requires that a trust, other than a charitable trust, a trust  
8 for the care of an animal, or a trust for another valid noncharitable purpose, have a  
9 definite beneficiary. While some beneficiaries will often be definitely ascertained as  
10 of the trust's creation, subsection (b) recognizes that others may be ascertained in  
11 the future. A trust is not created if the beneficiary can only be ascertained beyond  
12 the applicable perpetuities period. The definite beneficiary requirement does not  
13 prevent a settlor from making a disposition in favor of a class of persons. Class  
14 designations are valid as long as the membership of the class will be finally  
15 determined within the applicable perpetuities period. For background on the definite  
16 beneficiary requirement, see Restatement (Second) of Trusts §§ 112-115, 120-121  
17 (1959); Restatement (Third) of Trusts §§ 44-45 (Tentative Draft No. 2, 1999).

18 Subsection (a)(5) addresses the doctrine of merger, which, as traditionally  
19 stated, provides that a trust is not created if the settlor is the sole trustee and sole  
20 beneficiary of *all* beneficial interests. The doctrine of merger has been  
21 inappropriately applied by the courts in some jurisdictions to invalidate self-  
22 declarations of trust in which the settlor is the sole life beneficiary but other persons  
23 are designated as beneficiaries of the remainder. The doctrine of merger is properly  
24 applicable only if all beneficial interests, both life interests and remainders, are  
25 vested in the same person, whether in the settlor or someone else. On the doctrine  
26 of merger generally, see Restatement (Second) of Trusts § 341 (1959).

27 Subsection (c) allows a settlor to empower the trustee to select the  
28 beneficiaries even if the class from whom the selection may be made is indefinite.  
29 Such a provision would fail under traditional doctrine; it is an imperative power with  
30 no designated beneficiary capable of enforcement. But such a provision is valid  
31 under both this Code and the Restatement. If the power is not exercised within a  
32 reasonable time, the power will fail and the property will pass by resulting trust. See  
33 Restatement (Third) of Trusts § 46 (Tentative Draft No. 2, 1999). See also  
34 Restatement (Second) of Trusts § 122 (1959); Restatement (Second) of Property:  
35 Donative Transfers § 12.1 cmt. e (1986).

**SECTION 403. TRUST PURPOSES.** A trust may be created only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve. A trust, its terms, and its administration must be for the benefit of its beneficiaries.

### Comment

For an explication of the requirement that a trust must not have a purpose that is unlawful or against public policy, see Restatement (Second) of Trusts §§ 60-65; Restatement (Third) of Trusts §§ 27-30 (Tentative Draft No. 2, 1999). A trust with a purpose that is unlawful or against public policy is invalid. Depending on when the violation occurred, the trust may be invalid at its inception or the invalidity may occur at a later date. The invalidity may also be limited to particular provisions. Generally, a trust has a purpose which is illegal or against public policy if: (1) its performance involves the commission of a criminal or tortious act by the trustee; (2) its enforcement would otherwise be against public policy even though not criminal or tortious; (3) the settlor's purpose in creating the trust was to defraud creditors or others; or (4) the consideration for the creation of the trust was illegal. See Restatement (Second) of Trusts § 60 cmt. a (1959); Restatement (Third) of Trusts § 28 cmt. a (Tentative Draft No. 2, 1999).

The requirement that a trust, its terms, and its administration must be for the benefit of its beneficiaries is copied from Restatement (Third) of Trusts § 27 (Tentative Draft No. 2, 1999).

For a provision that might allow reformation of a trust that fails to comply with this section, see Section 414.

## SECTION 404. CHARITABLE PURPOSES.

(a) A charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes, or other purposes the achievement of which is beneficial to the community.

(b) If the purposes of a trust are charitable but the terms of the trust do not indicate a particular purpose or beneficiary, the court may select one or more



1 charitable purposes or beneficiaries or delegate to the trustee the responsibility for  
2 preparing and implementing an appropriate plan.

3 **Comment**

4 The required purposes of a charitable trust specified in subsection (a) restate  
5 the well-established categories of charitable purposes listed in Restatement (Second)  
6 of Trusts § 368 (1959), and ultimately derived from the Statute of Charitable Uses,  
7 43 Eliz. I, c.4 (1601). Subsection (b) restates an established estate planning  
8 technique under which the trustee is permitted to select the charitable beneficiary or  
9 purposes for which distributions are to be made. See Restatement (Second) of  
10 Trusts § 396 (1959).

11 **SECTION 405. CREATION OF TRUST INDUCED BY UNDUE**

12 **INFLUENCE, DURESS, OR FRAUD.** A trust is void to the extent its creation  
13 was induced by undue influence, duress, or fraud.

14 **Comment**

15 This section is based on Restatement (Third) of Trusts § 12 (Tentative Draft  
16 No. 1, 1996), although the Restatement provides more generally that a trust can be  
17 set aside or reformed on the same grounds as those which apply to a transfer of  
18 property not in trust, among which include undue influence, duress, and fraud, and  
19 mistake. This section addresses undue influence, duress, and fraud. For reformation  
20 of a trust on grounds of mistake, see Section 414. See also Restatement (Second)  
21 of Trusts § 333 (1959), which is similar to Restatement (Third) of Trust § 12  
22 (Tentative Draft No. 1, 1996), and Restatement (Second) Property: Donative  
23 Transfers § 34.7, which closely tracks the language above. Similar to a will, the  
24 invalidity of a trust on grounds of undue influence, duress, or fraud may be in whole  
25 or in part.

26 **SECTION 406. EVIDENCE OF ORAL TRUST.** Except as required by a  
27 statute other than this [Code], a trust need not be evidenced by a trust instrument,  
28 but the creation of an oral trust and its terms may only be established by clear and  
29 convincing evidence.

1 **Comment**

2 While it is always advisable for a settlor to reduce a trust to writing, the  
3 Code follows established law in recognizing oral trusts. Such trusts are viewed with  
4 caution, however. The requirement of this section that an oral trust can be  
5 established only by clear and convincing evidence is not part of the common law.

6 Absent some specific statutory provision, such as a provision requiring that  
7 transfers of real property be in writing, a trust need not be evidenced by a writing.  
8 States with statutes of frauds or other provisions requiring that the creation of  
9 certain trusts must be evidenced by a writing may wish specifically to cite such  
10 provisions.

11 For the Statute of Frauds generally, see Restatement (Second) of Trusts  
12 §§ 40-52. For a description of what the writing must contain, assuming that a  
13 writing is required, see Restatement (Third) of Trusts § 22 (Tentative Draft No. 1,  
14 1996). For a discussion of when the writing must be signed, see Restatement  
15 (Third) of Trusts § 23 (Tentative Draft No. 1, 1996). For the law of oral trusts, see  
16 Sarajane Love, Imperfect Gifts as Declarations of Trust: An Unapologetic Anomaly,  
17 67 Ky. L. J. 309 (1979).

18 **SECTION 407. TRUST FOR CARE OF ANIMAL.**

19 (a) A trust may be created for the care of an animal born during the settlor's  
20 lifetime. The trust terminates upon the death of all animals covered by the terms of  
21 the trust.

22 (b) A trust authorized by this section may be enforced by a person  
23 appointed in the terms of the trust or, if no person is so appointed, by a person  
24 appointed by the court. A person having an interest in the welfare of the animal may  
25 petition for an order appointing a person to enforce the trust or to remove a person  
26 appointed.

27 (c) Property of a trust authorized by this section may be applied only to its  
28 intended use, except to the extent the court determines that the value of the trust

1 property exceeds the amount required for the intended use. Except as otherwise  
2 provided in the terms of the trust, property not required for the intended use must be  
3 distributed to the settlor, if then living, otherwise to the settlor's successors in  
4 interest.

#### 5 **Comment**

6 This section and the next section of the Code validate so called honorary  
7 trusts. Unlike honorary trusts created pursuant to the common law of trusts, which  
8 are arguably no more than unenforceable powers of appointment, the trusts created  
9 by this and the next section are valid and enforceable and not dependent on whether  
10 the trustee decides to honor the settlor's wishes. For a discussion of the common  
11 law doctrine, see Restatement (Second) of Trusts § 124 (1959); Restatement  
12 (Third) of Trusts § 47 (Tentative Draft No. 2, 1999).

13 This section addresses a particular type of honorary trust, the trust for the  
14 care of an animal. Section 408 specifies the requirements for trusts without  
15 ascertainable beneficiaries that are created for other noncharitable purposes. A trust  
16 for the care of an animal may last for the life of the animal. While the animal will  
17 ordinarily be alive on the date the trust is created, an animal may be added as a  
18 beneficiary after that date as long as the addition is made prior to the settlor's death.  
19 Animals in gestation but not yet born at the time of the trust's creation may also be  
20 covered by its terms. A trust authorized by this section may be created to benefit  
21 one designated animal or multiple animals.

22 Subsection (b) addresses enforcement. Noncharitable trusts ordinarily may  
23 be enforced by their beneficiaries. Charitable trusts may be enforced by the State  
24 Attorney General or by a person deemed to have a special interest. See Restatement  
25 (Second) of Trusts § 391 (1959). But at common law, trusts for the care of an  
26 animal or a trust without an ascertainable beneficiary created for another  
27 noncharitable purpose were unenforceable because there was no person authorized  
28 to enforce the trustee's obligations.

29 This section and the next section close this gap. The intended use of a trust  
30 authorized by either section may be enforced by a person designated in the terms of  
31 the trust or, if none, by a person appointed by the court. In either case, Section  
32 105(b) grants the person appointed the rights of a qualified beneficiary for the  
33 purpose of receiving notices and consenting to certain actions. If the trust is created  
34 for the care of an animal, persons with an interest in the welfare of the animal have  
35 standing to petition for such an appointment, either of themselves or of others. The  
36 person appointed by the court to enforce the trust should also be a person who has

1 exhibited an interest in the animal's welfare. The concept of granting standing to a  
2 person with a demonstrated interest in the animal's welfare is derived from the 1997  
3 Uniform Guardianship and Protective Proceedings Act, which allows a person  
4 interested in the welfare of a ward or protected person to file petitions on the ward's  
5 or protected person's behalf. See, e.g., UGPPA (1997) §§ 210, 414.

6 Subsection (c) addresses the problem of excess funds. If the court determine  
7 that the trust property exceeds the amount needed for the intended purpose and the  
8 terms of the trust do not direct the disposition, a resulting trust is ordinarily created  
9 in the settlor or settlor's successors in interest. See Restatement (Third) of Trusts  
10 § 47 (Tentative Draft No. 2, 1999). The settlor should also anticipate the problem  
11 of excess funds by directing their disposition in the terms of the trust. Like most  
12 other provisions in the Act, the disposition of excess funds is within the settlor's  
13 control. See Section 104.

14 This section and the next section are suggested by Section 2-907 of the  
15 Uniform Probate Code, but much of this and the following section is new.

16 **SECTION 408. NONCHARITABLE TRUST WITHOUT**  
17 **ASCERTAINABLE BENEFICIARY.** Except as otherwise provided in Section  
18 407 or by another statute, the following rules apply:

19 (1) A trust may be created for a noncharitable purpose without a definite or  
20 definitely ascertainable beneficiary or for a noncharitable but otherwise valid  
21 purpose to be selected by the trustee. The trust may not be enforced for more than  
22 [21] years.

23 (2) A trust authorized by this section may be enforced by a person  
24 appointed in the terms of the trust or, if no person is so appointed, by a person  
25 appointed by the court.

26 (3) Property of a trust authorized by this section may be applied only to its  
27 intended use, except to the extent the court determines that the value of the trust

1 property exceeds the amount required for the intended use. Except as otherwise  
2 provided in the terms of the trust, property not required for the intended use must be  
3 distributed to the settlor, if then living, otherwise to the settlor's successors in  
4 interest.

#### 5 **Comment**

6 This section authorizes two types of trusts without ascertainable  
7 beneficiaries; trusts for general but noncharitable purposes, and trusts for a specific  
8 noncharitable purpose other than the care of an animal, which is covered by Section  
9 407. Examples of trusts for general noncharitable purposes include a bequest of  
10 money to be distributed to such objects of benevolence as the trustee might select.  
11 Unless such attempted disposition trust was interpreted as charitable, at common  
12 law the disposition was honorary only. Under this section, however, the disposition  
13 is enforceable as a trust for a period of up to 21 years, although the number is  
14 placed in brackets to indicate that States are free to select a different time limit.

15 The most common example of a trust for a specific noncharitable purpose is  
16 a trust for the care of a cemetery plot. However, the lead-in language to the section  
17 recognizes that such special purpose trusts, particularly those for care of cemetery  
18 plots, will frequently be subject to other statute. Such legislation will typically  
19 endeavor to provide for truly guarantee perpetual care as opposed to care limited to  
20 21 years as under this section.

21 For the requirement that a trust, particularly the type of trust authorized by  
22 this section, must have a purpose that is not capricious, see Section 403 Comment.  
23 For examples of the types of trusts authorized by this section, see Restatement  
24 (Second) of Trusts § 124 (1959); Restatement (Third) of Trusts § 47 (Tentative  
25 Draft No. 2, 1999).

26 This section is similar to Section 407, although less detailed. Much of the  
27 Comment to Section 407 also applies to this section.

### 28 **SECTION 409. MODIFICATION OR TERMINATION OF TRUST;** 29 **PROCEEDINGS FOR APPROVAL OR DISAPPROVAL.**

30 (a) In addition to the methods of termination prescribed in Sections 410  
31 through 413, a trust terminates to the extent the trust is revoked or expires pursuant

1 to its terms, or the purposes of the trust are achieved or become unlawful,  
2 impossible to achieve, or contrary to public policy.

3 (b) A proceeding to approve or disapprove a proposed modification or  
4 termination under Sections 410 through 415, or trust combination or division under  
5 Section 416, may be commenced by a trustee or beneficiary, and a proceeding to  
6 approve or disapprove a proposed modification or termination under Section 410  
7 may be commenced by the settlor. The settlor of a charitable trust may maintain a  
8 proceeding to enforce the trust and may maintain a proceeding to modify the trust  
9 under Section 412.

#### 10 **Comment**

11 Subsection (a) lists the various methods and grounds by which trusts  
12 typically terminate. In addition to other powers granted under this Code or by the  
13 terms of the trust, upon termination of a trust a trustee has the powers appropriate  
14 to wind up the trust's administration. See Section 816(26).

15 Subsection (b) specifies the persons with standing to request court approval  
16 or disapproval of proposed trust modifications, terminations, combinations, or  
17 divisions. This subsection makes clear that court approval or disapproval may be  
18 sought for an action that may be accomplished without court permission. This  
19 would include a petition questioning the trustee's distribution upon termination of a  
20 trust under \$50,000 (Section 413), or a petition to approve or disapprove a  
21 proposed trust division or consolidation (Section 416), neither of which otherwise  
22 require approval of court.

23 Subsection (b) also makes clear that the settlor is an interested person with  
24 respect to a judicial proceeding by the beneficiaries under Section 410 to terminate  
25 or modify a trust, whether or not the settlor's consent is otherwise required.  
26 Contrary to Restatement (Second) of Trusts § 391 (1959), under this section a  
27 settlor is granted standing to maintain an action to enforce or modify a charitable  
28 trust.

1           **SECTION 410. MODIFICATION OR TERMINATION OF**  
2           **IRREVOCABLE TRUST BY CONSENT.**

3           (a) An irrevocable trust may be modified or terminated upon consent of the  
4           settlor and all beneficiaries even if the modification or termination is inconsistent  
5           with a material purpose of the trust. A settlor's power to consent to a trust's  
6           termination may be exercised by an agent under a power of attorney only to the  
7           extent the power of attorney or the terms of the trust expressly authorize the agent  
8           to do so, by the settlor's [conservator] with the approval of the court supervising  
9           the [conservatorship] if an agent is not so authorized, or by the settlor's [guardian]  
10          with the approval of the court supervising the [guardianship] if an agent is not so  
11          authorized and a conservator has not been appointed.

12          (b) An irrevocable trust may be terminated upon consent of all of the  
13          beneficiaries if the court concludes that continuance of the trust is not necessary to  
14          achieve any material purpose of the trust. An irrevocable trust may be modified  
15          upon consent of all of the beneficiaries if the court concludes that modification is not  
16          inconsistent with a material purpose of the trust.

17          (c) A spendthrift provision in the terms of the trust is not presumed to  
18          constitute a material purpose of the trust.

19          (d) Upon termination of a trust pursuant to subsection (a) or (b), the trustee  
20          shall distribute the trust property as agreed by the qualified beneficiaries.

(e) If not all of the beneficiaries consent to a proposed modification or termination of the trust under subsection (a) or (b), the modification or termination may be approved by the court if the court is satisfied that:

(1) if all of the beneficiaries had consented, the trust could have been modified or terminated under this section; and

(2) the interests of a beneficiary who does not consent will be adequately protected.

### **Comment**

This section describes the circumstances when termination or modification of an irrevocable trust may be compelled by the beneficiaries, with or without the concurrence of the settlor. For provisions governing modification or termination of trusts without the need to seek beneficiary consent, see Sections 411 (modification or termination due to unanticipated circumstances or inability to effectively administer trust) and 413 (termination or modification of uneconomic noncharitable trust). If the trust is revocable by the settlor, the method of revocation specified in Section 602 applies.

Subsection (a) states the test for termination or modification by the beneficiaries with the concurrence of the settlor. Subsection (b) states the test for termination or modification by unanimous consent of the beneficiaries without the concurrence of the settlor. Subsection (d) directs how the trust property is to be distributed following a termination under either subsection (a) or (b). Subsection (e) creates a procedure for judicial approval of a proposed termination or modification when the consent of less than all of the beneficiaries is available. A trust may be modified or terminated pursuant to this section over a trustee's objection. However, the court is available to indicate its approval or disapproval of a proposed termination or modification upon petition of the settlor, beneficiary, or trustee. See Section 409.

Subsection (c) of this section, unlike Section 337 of the Restatement (Second) of Trusts (1959), deals expressly with the effect of a spendthrift provision. While the inquiry on whether continuation of a trust is necessary to achieve a material purpose should focus on the material purpose or purposes of the particular settlor, certain courts have tended to preclude termination based on whether the trust contains particular language without examining its context. For the case law, see Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 337 (4th ed. 1988).



1 The insertion of a spendthrift provision, which is often added to instruments with  
2 little thought, has been a particular problem. Subsection (c) does not negate the  
3 possibility that continuation of a trust to assure spendthrift protection might have  
4 been a material purpose of the particular settlor. It instead negates the assumption  
5 that inserting such a clause is always a bar to termination or modification. Whether  
6 a spendthrift provision bars termination or modification of a particular trust is a  
7 question of fact to be determined based on the totality of the circumstances.

8 Subsection (a), which is based on Restatement (Second) of Trusts § 338  
9 (1959), permits termination upon the joint action of the settlor and beneficiaries.  
10 While the beneficiaries alone cannot terminate a trust unless continuation of the trust  
11 is no longer necessary to achieve the settlor's material purposes in creating the trust,  
12 such a finding is not required if the settlor also consents. No finding is required  
13 because all parties with a possible interest in the trust's continuation, both the settlor  
14 and beneficiaries, are agreed there is no further need for the trust.

15 Subsection (a) also addresses the authority of an agent, conservator, or  
16 guardian to act on a settlor's behalf. Consistent with Section 602 on revocation or  
17 modification of a revocable trust, the section assumes that a settlor, in granting an  
18 agent general authority, did not intend for the agent to have authority to consent to  
19 the termination or modification of a trust and possibly undo the settlor's estate plan.  
20 In order for an agent to validly consent to a termination or modification, such  
21 authority must be expressly conveyed either in the power or in the terms of the trust.

22 Subsection (a) does not, however, impose restrictions on consent by a  
23 conservator or guardian, other than prohibiting such action if the settlor is  
24 represented by an agent. The section instead leaves the authority of a conservator  
25 or guardian to local law. Many conservatorship statutes, in fact, recognize that  
26 termination or modification of the settlor's trust is a sufficiently important  
27 transaction that a conservator should not be allowed to consent without first  
28 consulting with and obtaining the approval of the court supervising the  
29 conservatorship. See, e.g., Unif. Probate Code § 5-407. Because under the Code  
30 the court appoints a conservator and not a guardian to manage a ward's property  
31 (see Section 103), a guardian may exercise a settlor's power under this section only  
32 if a conservator has not been appointed.

33 The provisions of Article 3 on representation, virtual representation and the  
34 appointment and approval of guardians ad litem and special representatives apply for  
35 determining whether all beneficiaries have signified consent under this section. The  
36 authority to consent on behalf of another person, however, does not include  
37 authority to consent over the other person's objection. See Section 301(b). For a  
38 listing of who may consent on behalf of a beneficiary, see Sections 302, 303, and  
39 304. A consent obtained by virtual representation is valid only if there is no conflict

1 of interest between the representative and the person represented. Given this  
2 limitation, virtual representation will rarely be available in a trust termination case,  
3 although its use will be frequent in cases involving trust modification, such as a  
4 grant to the trustee of additional powers. If virtual representation is unavailable,  
5 Section 305 of the Code permits the court to appoint a representative who may give  
6 the necessary consent to the proposed modification or termination on behalf of the  
7 minor, incapacitated, unborn, or unascertained beneficiary.

8 Subsection (d) recognizes that the beneficiaries' power to compel  
9 termination of the trust includes the right to direct how the trust property is to be  
10 distributed. While subsection (a) requires the settlor's consent to terminate an  
11 irrevocable trust, the settlor does not control the subsequent distribution of the trust  
12 property. Once a termination has been approved, how the trust property is to be  
13 distributed is solely for the beneficiaries to decide.

14 Subsection (e), which is based on Restatement (Second) of Trusts § 338(2)  
15 (1959), addresses situations in which a termination or modification is requested by  
16 less than all of the beneficiaries, either because a beneficiary objects, the consent of a  
17 beneficiary cannot be obtained, or virtual representation is either unavailable or its  
18 application uncertain. Subsection (e) allows the court to fashion an appropriate  
19 order protecting the interests of the nonconsenting beneficiaries while at the same  
20 time permitting the remainder of the trust property to be distributed without  
21 restriction. The order of protection for the nonconsenting beneficiaries might  
22 include partial continuation of the trust, the purchase of an annuity, or the valuation  
23 and cashout of the interest.

24 **SECTION 411. MODIFICATION OR TERMINATION BECAUSE OF**  
25 **UNANTICIPATED CIRCUMSTANCES OR INABILITY TO ADMINISTER**  
26 **TRUST EFFECTIVELY.**

27 (a) The court may modify the administrative or dispositive terms of a trust  
28 or terminate the trust if, because of circumstances not anticipated by the settlor,  
29 modification or termination will further the purposes of the trust. To the extent  
30 practicable, the modification must be made in accordance with the settlor's probable  
31 intention.

1 (b) The court may modify the administrative terms of a trust if continuation  
2 of the trust on its existing terms would be impracticable or wasteful or impair the  
3 trust's administration.

4 (c) Upon termination of a trust under this section, the trustee shall distribute  
5 the trust property in accordance with the purposes of the trust.

6 **Comment**

7 This section broadens the court's ability to apply equitable deviation to  
8 terminate or modify a trust. Subsection (a) is based on Restatement (Second) of  
9 Trusts §§ 167 and 336. Unlike the Restatement, however, subsection (a) allows a  
10 court to modify the dispositive provisions of the trust as well as its administrative  
11 terms. For example, modification of the dispositive provisions to increase support  
12 of a beneficiary might be appropriate if the beneficiary has become unable to provide  
13 for support due to poor health or serious injury.

14 While it is necessary there be circumstances not anticipated by the settlor  
15 before the court may grant relief under subsection (a), it is not essential that  
16 circumstances have changed. The circumstances not anticipated by the settlor may  
17 have been in existence when the trust was created. This section thus complements  
18 Section 414, which allows for reformation of a trust based on mistake of fact or law  
19 at the creation of the trust.

20 Subsection (b) broadens the court's ability to modify the administrative  
21 terms of a trust. Subsection (b) applies, with respect to the administrative terms, the  
22 same standard as the standard under Section 412(a) for modifying a charitable trust.  
23 Just as a charitable trust may be modified if its particular charitable purpose becomes  
24 impracticable or wasteful, so can the administrative terms of any trust, charitable or  
25 noncharitable.

26 Subsection (b) is also an application of the requirement that a trust, its terms,  
27 and its administration must be for the benefit of its beneficiaries. See Section 403.  
28 See also Restatement (Third) of Trusts § 27(2) & cmt. b (Tentative Draft No. 2,  
29 1999). Although the settlor is granted considerable latitude in defining the purposes  
30 of the trust, the principle that a trust have a purpose which is for the benefit of its  
31 beneficiaries precludes unreasonable restrictions on the use of trust property.  
32 Owners may deal without restraint with their own property but not when impressed  
33 with a trust for the benefit of others. See Restatement (Second) of Trusts § 124  
34 cmt. g (1959). Thus, attempts to impose unreasonable restrictions on the use of  
35 trust property, such as a provision severely impairing the use of real property, will

fail. See, e.g., *Colonial Trust v. Brown*, 135 A. 555 (Conn. 1926). See also Restatement (Third) of Trusts § 27 Reporter's Note to cmt. b (Tentative Draft No. 2, 1999).

Upon termination of a trust under this section, subsection (c) requires that the trust be distributed in accordance with the purposes of the trust. Similar to the doctrine of cy pres, effectuating a distribution in furtherance of the purposes of the trust will require an examination of what the settlor probably would have done had the settlor been aware of the unanticipated circumstances. Typically, such terminating distributions will be made to the qualified beneficiaries, perhaps in proportion to the actuarial value of their interests, although the section does not so prescribe. For the definition of qualified beneficiary, see Section 103(14).

**SECTION 412. CY PRES.**

(a) Except as otherwise provided in subsection (b), if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful:

(1) the trust does not fail, in whole or in part;

(2) the trust property does not revert to the settlor or the settlor's successors in interest; and

(3) the court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes.

(b) The power of the court under subsection (a) to apply cy pres to modify or terminate a charitable trust is subject to a contrary provision in the terms of the trust that would result in distribution of the trust property to a noncharitable beneficiary only if fewer than 21 years have elapsed since the date of the trust's creation.

### Comment

1           This section broadens the authority of courts and trustees to make charitable  
2 gifts more effective. Many of the concepts implemented in this section have long  
3 been advocated by commentators. See, e.g., Roger G. Sisson, *Relaxing the Dead*  
4 *Hand's Grip: Charitable Efficiency and the Doctrine of Cy Pres*, 74 Va. L. Rev. 635  
5 (1988); Report, *Cy Pres and Deviation: Current Trends and Application*, 8 Real  
6 Prop. Prob. & Trust J. 391 (1971); Joseph A. DiClerico, Jr., *Cy Pres: A Proposal*  
7 *for Change*, 47 B.U.L. Rev. 153 (1967); Kenneth L. Karst, *The Efficiency of the*  
8 *Charitable Dollar: An Unfulfilled State Responsibility*, 73 Harv. L. Rev. 433 (1960).  
9 This broadening of the ability of a court to apply cy pres is also reflected in a  
10 number of the state statutes. See, e.g., Wis. Stat. § 701.10.

11           Subsection (a) codifies the court's inherent authority to apply cy pres. The  
12 power may be applied to modify an administrative or dispositive term. The court  
13 may order the trust terminated and distributed to other charitable entities. Partial  
14 termination may also be ordered if the trust property is more than sufficient to  
15 satisfy the trust's current purposes.

16           Subsection (a) modifies the doctrine of cy pres by presuming that the settlor  
17 had a general charitable intent. Traditional doctrine does not supply that  
18 presumption, leaving it to the courts, when a specific charitable purpose becomes  
19 impossible to achieve, to determine whether the settlor had a general charitable  
20 intent. If so, the trust property is diverted to other charitable purposes. If not, the  
21 charitable trust fails. In the great majority of cases the settlor would prefer that the  
22 gift not fail but be used for other charitable purposes. As a consequence, upon  
23 failure of a particular charitable purpose, courts rarely divert the trust property to a  
24 noncharitable use. Courts are almost always able to find a general charitable  
25 purpose to which to apply the property, no matter how vaguely such purpose may  
26 have been expressed by the settlor. Under this section, unless the terms of the trust  
27 provide to the contrary, a charitable trust does not fail in whole or in part if the  
28 particular purpose for which the trust was created becomes impracticable, unlawful,  
29 impossible to achieve, or wasteful. The court must instead either modify the terms  
30 of the trust or direct that the property of the trust be distributed in whole or in part  
31 in a manner consistent with the settlor's charitable purposes.

32           The settlor, with one exception, is free to designate who is to receive the  
33 trust property upon failure of a particular charitable purpose. Subsection (b)  
34 prohibits a gift over to a noncharitable beneficiary if the failure of the charitable  
35 purpose occurs more than 30 years after the trust's creation. Because most  
36 charitable trusts are created to secure a charitable tax deduction, the application of  
37 this subsection will be rare. Also, this subsection would not apply to a charitable  
38 lead trust, under which a charity receives payments for a term certain with a  
39 remainder to a noncharity. In this case the settlor's particular charitable purpose  
40 does not fail. Upon completion of the specified trust term and distribution of the

1 remainder to the noncharity, the settlor's particular charitable purpose has instead  
2 been fulfilled.

3 The doctrine of cy pres is applied not only to trusts, but also to other types  
4 of charitable dispositions, including charitable corporations. This section, because it  
5 is part of a Uniform Trust Code, does not control charitable dispositions made in  
6 nontrust form. However, in formulating rules for such dispositions, the courts often  
7 refer to the principles governing charitable trusts, which would include this Code.

### 8 **SECTION 413. TERMINATION OF UNECONOMIC TRUST.**

9 (a) On notice to the qualified beneficiaries, a trustee may terminate a trust  
10 whose property has a value of less than [\$50,000].

11 (b) The court may modify or terminate a trust or remove the trustee and  
12 appoint a different trustee if it determines that the value of the trust property is  
13 insufficient to justify the cost of administration.

14 (c) Upon termination of a trust under this section, the trustee shall distribute  
15 the trust property in accordance with the purposes of the trust.

#### 16 **Comment**

17 Subsection (a) presumes that a trust with a value of \$50,000 or less is  
18 inherently uneconomical and may be terminated without the expense of a judicial  
19 termination proceeding. This provision is a default rule. While the creation of small  
20 trusts is not encouraged, this subsection does not interfere with the right of a settlor  
21 to do so. The settlor is free to set a higher or lower figure or to specify different  
22 procedures or to prohibit termination without a court order. See Section 104 and  
23 General Comment to Article 4.

24 Subsection (b) allows the court to modify or terminate a trust if the costs of  
25 administration would otherwise be excessive in relation to the size of the trust. The  
26 court may terminate a trust under this section even if the settlor has forbidden this  
27 action. See Section 104(b)(4). A court termination procedure may be utilized for a  
28 trust of any size.

29 When considering whether to terminate a noncharitable trust under this  
30 section, the trustee or court should consider the purposes of the trust. Termination

1 under this section is not always wise. Even if administrative costs may seem  
2 excessive in relation to the size of the trust, protection of the assets from beneficiary  
3 mismanagement may indicate that the trust be continued. The court may be able to  
4 reduce the costs of administering the trust by appointing a new trustee.

5 While this section is not principally directed at honorary trusts, it may be  
6 applied to such trusts. See Sections 407, 408.

7 Upon termination of a trust under this section, subsection (c) requires that  
8 the trust property be distributed in accordance with the purposes of the trust.

9 **SECTION 414. REFORMATION TO CORRECT MISTAKES.** The court  
10 may reform the terms of a trust, even if unambiguous, to conform the terms to the  
11 settlor's intention if there is clear and convincing evidence both of the settlor's intent  
12 and that the terms of the trust were affected by a mistake of fact or law, whether in  
13 expression or inducement.

14 **Comment**

15 Reformation of inter vivos instruments to correct for a mistake of law or fact  
16 is a long-established remedy. Restatement (Third) of Property: Wills and Other  
17 Donative Transfers § 12.1 (Tentative Draft No. 1, 1995), upon which this section is  
18 based, clarifies that this doctrine also applies to wills.

19 This section applies whether the mistake is one of expression or one of  
20 inducement. A mistake of expression occurs when the terms of the trust misstate  
21 the settlor's intention, fail to include a term that was intended to be included, or  
22 include a term that was not intended to be excluded. A mistake in the inducement  
23 occurs when the terms of the trust accurately reflect what the settlor intended to be  
24 included or excluded but this intention was based on a mistake of fact or law.  
25 Restatement (Third) of Property: Wills and Other Donative Transfers § 12.1 cmt. i  
26 (Tentative Draft No. 1, 1995).

27 Reformation is different from clarification of an ambiguity. Clarification of  
28 an ambiguity involves the interpretation of language already in the instrument.  
29 Reformation, on the other hand, involves the addition of language not originally in  
30 the instrument, or the deletion of language originally included by mistake. Because  
31 reformation involves the addition of language to the instrument, or deletion of  
32 language in an instrument that may appear clear on its face, reliance on extrinsic

evidence is essential. To guard against the possibility of unreliable or contrived evidence in such circumstance, the higher standard of clear and convincing proof is required. See Restatement (Third) of Property: Wills and Other Donative Transfers § 12.1 cmt. e (Tentative Draft No. 1, 1995).

In determining the settlor's original intent, the court should not be bound by the so-called "plain meaning" rule, which often produces a meaning plain only in the eye of the beholder. For this reason, under leading American case law and scholarly analysis, evidence contradicting the so-called plain meaning of the text is admissible. The objective of the plain meaning rule, to protect against fraudulent testimony, is satisfied by the requirement in this section that clear and convincing evidence be presented before a requested reformation may be granted. See Restatement (Third) of Property: Wills and Other Donative Transfers § 12.1 cmt. d (Tentative Draft No. 1, 1995).

#### **SECTION 415. MODIFICATION TO ACHIEVE SETTLOR'S TAX**

**OBJECTIVES.** To achieve the settlor's tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention.

The court may provide that the modification has retroactive effect.

#### **Comment**

This section is based on Restatement (Third) of Property § 12.2 (Tentative Draft No. 1, 1995). "Modification" under this section is to be distinguished from the "reformation" authorized by Section 414. Reformation under Section 414 is available when the terms of a trust fail to reflect the donor's original, particularized intention. The mistaken terms are then reformed to match this specific intent. The modification authorized here is more general, allowing documents to be changed to meet the settlor's tax-saving objective as long as the resulting terms, particularly the dispositive provisions, are not inconsistent with the settlor's probable intent. The modification allowed by this subsection is similar in concept to the cy pres doctrine for charitable trusts (see Section 412), and the deviation doctrine for unanticipated circumstances (see Section 411).

Whether a modification made by the court under this section will be recognized under federal tax law is a matter of federal law. Among the modifications recognized under federal law have been the revision of split-interest trusts to qualify for the charitable deduction, modification of a trust for a noncitizen spouse to become eligible as a qualified domestic trust, and the splitting of a trust to better utilize the exemption from generation-skipping tax.



For further discussion of the issues raised by a desire to modify a trust to achieve the settlor's tax objectives, see the Comments and Reporter's Notes to Restatement (Third) of Property § 12.2 (Tentative Draft No. 1, 1995).

**SECTION 416. COMBINATION AND DIVISION OF TRUSTS.** On notice to the qualified beneficiaries, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts, if the result does not impair rights of any beneficiary or adversely affect achievement of the purposes of the trust.

### Comment

This section, which authorizes the combination or division of trusts, applies only in the absence of an express provision in the terms of the trust. See Section 104 and Article 4 General Comment. Many trust instruments and standardized estate planning forms include comprehensive provisions governing combination and division of trusts.

This section allows a trustee to combine two or more trusts even though their terms are not identical, although typically the trusts to be combined will have been created by different members of the same family and vary on only insignificant details, such as the presence of different perpetuities savings periods. The more the dispositive provisions of the trusts to be combined differ from each other the more likely it is that a combination will result in the reduction of some beneficiary's interest and the less likely it is that the settlor's purposes will be accomplished and the combination can be approved. Combining trusts may prompt more efficient trust administration and is sometimes an alternative to terminating the trusts as permitted by Section 413. Administrative economies promoted by combining trusts include a potential reduction in trustee's fees, particularly if the trustee charges a minimum fee per trust, the ability to file one trust income tax return instead of multiple returns, and the ability to invest more efficiently because of a larger pool of available capital.

Division of trusts is often beneficial and, in certain circumstances, almost routine. Division of trusts is frequently undertaken due to a desire to obtain maximum advantage of exemptions available under the federal generation-skipping tax. While the terms of the trusts which result from such a division are identical, the division will permit differing investment objectives to be pursued and allow for discretionary distributions to be made from one trust and not the other.

1           This section authorizes a trustee to divide a trust even if the trusts that result  
2 are dissimilar. Conflicts among beneficiaries, including differing investment  
3 objectives, often invite such a division, although as in the case with a proposed  
4 combination of trusts, the further away the terms of the divided trusts are from the  
5 original plan the less likely it is that the settlor's purposes will be achieved and the  
6 division can be approved.

7           This section does not require that a combination or division be approved by  
8 either the court or beneficiaries. Prudence may dictate, however, that court  
9 approval under Section 409 be sought and beneficiary consent obtained whenever  
10 the terms of the trusts to be combined or the trusts that will result from a division  
11 differ substantially one from the other. For the provisions relating to beneficiary  
12 consent or ratification of a transaction, or release of trustee from liability, see  
13 Section 1009.

14           While the consent of the beneficiaries is not necessary before a trustee may  
15 combine or divide trusts under this section, advance notice to the qualified  
16 beneficiaries of the proposed combination or division is required. This is consistent  
17 with Section 813, which requires that the trustee keep the beneficiaries reasonably  
18 informed of trust administration, including the giving of advance notice to the  
19 qualified beneficiaries of several specified actions that may have a major impact on  
20 their interests.

21           For a list of statutes authorizing division of trusts, either by the trustee or  
22 court order, see Restatement (Third) Property: Wills and Other Donative Transfers  
23 § 12.2 statutory note (Tentative Draft No. 1, 1995). For a provision authorizing a  
24 trustee, in distributing the assets of the divided trust, to make non-pro-rata  
25 distributions, see Section 816(22).

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**ARTICLE 5**  
**CREDITOR’S CLAIMS; SPENDTHRIFT**  
**AND DISCRETIONARY TRUSTS**

**General Comment**

This article addresses the validity of a spendthrift provision and the rights of creditors, both of the settlor and beneficiaries, to reach a trust to collect a debt. Sections 501 and 502 state the general rules. To the extent a trust is protected by a spendthrift provision, a beneficiary’s creditor may not reach the beneficiary’s interest until distribution is made by the trustee. To the extent not protected by a spendthrift provision, however, the creditor can reach the beneficiary’s interest subject to the court’s power to limit the relief. Section 503 lists the categories of creditors whose claims are not subject to a spendthrift bar. Sections 504 through 507 address special categories where the rights of a beneficiary’s creditors are the same whether or not the trust contains a spendthrift provision. Section 504 deals with discretionary trusts and trusts for which distributions are subject to a standard. Section 505 covers creditor claims against a settlor, whether the trust is revocable or irrevocable, and if revocable, whether the claim is made during the settlor’s lifetime or incident to the settlor’s death. Section 506 provides a creditor with a remedy if a trustee fails to make a mandated distribution within a reasonable time. Section 507 clarifies that the fact a trustee holds legal title to trust property does not imply that the trust property is subject to the trustee’s personal debts.

The provisions of this article relating to the validity and effect of a spendthrift provision and the rights of creditors may not be modified by the terms of the trust.

**SECTION 501. RIGHTS OF BENEFICIARY’S CREDITOR OR ASSIGNEE.** To the extent a beneficiary’s interest is not protected by a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary’s interest, including by attachment of present or future distributions to or for the benefit of the beneficiary. The court may limit the award to such relief as is appropriate under the circumstances.

1 **Comment**

2 Absent a valid spendthrift provision, the interest of a beneficiary may be  
3 reached the same as any other of the beneficiary's assets. This does not necessarily  
4 mean that the creditor can collect all distributions made to the beneficiary. Other  
5 creditor law of the State may limit the creditor to a specified percentage of a  
6 distribution. See, e.g., Cal. Prob. Code § 15306.5.

7 This section does not prescribe the procedures for reaching a beneficiary's  
8 interest, leaving that issue to the enacting State's laws on creditor rights. The  
9 section does clarify, however, that an order obtained against the trustee, whatever  
10 state procedure may have been used, may extend to future distributions whether  
11 made directly to the beneficiary or to others for the beneficiary's benefit. By  
12 allowing an order to extend to future payments, the need for the creditor  
13 periodically to return to court will be reduced.

14 While this section does not prescribe creditor procedure, the creditor  
15 typically will serve an order on the trustee attaching the beneficiary's interest,  
16 although the particular State's law may use other terms, such as garnishment or  
17 creditor bill. Assuming the validity of the order cannot be contested, the trustee will  
18 then pay to the creditor instead of to the beneficiary any payments the trustee would  
19 otherwise be required to make to the beneficiary, such as a required payment of  
20 income, as well as payments the trustee might otherwise decide to make, such as a  
21 discretionary distribution of principal. The creditor may also, in theory, force a  
22 judicial sale of a beneficiary's interest.

23 Because proceedings to satisfy a claim are equitable in nature, the section  
24 concludes by ratifying the court's discretion to limit the award as appropriate under  
25 the circumstances. See Restatement (Third) of Trusts § 56 cmt. E (Tentative Draft  
26 No. 2, 1999).

27 **SECTION 502. SPENDTHRIFT PROVISION.**

28 (a) A spendthrift provision is valid only if it restrains both voluntary and  
29 involuntary transfer of a beneficiary's interest.

30 (b) A term of a trust providing that the interest of a beneficiary is held  
31 subject to a "spendthrift trust," or words of similar import, is sufficient to restrain  
32 both voluntary and involuntary transfer of the beneficiary's interest.

1 (c) A beneficiary may not transfer an interest in a trust in violation of a valid  
2 spendthrift provision and, except as otherwise provided in this [article], a creditor or  
3 assignee of the beneficiary may not reach the interest or a distribution by the trustee  
4 before its receipt by the beneficiary.

#### 5 **Comment**

6 Under this section, a settlor has the power to restrain the transfer of a  
7 beneficiary's interest, regardless of whether the beneficiary has an interest in income,  
8 in principal, or both. Unless one of the exceptions under this article applies, a  
9 creditor of the beneficiary is prohibited from attaching a protected interest and may  
10 only attempt to collect directly from the beneficiary after payment is made. This  
11 section is similar to Restatement (Second) of Trusts §§ 152-153 (1959), and  
12 Restatement (Third) of Trusts § 58 (Tentative Draft No. 2, 1999). For the  
13 definition of spendthrift provision, see Section 103(17).

14 For a spendthrift provision to be effective under this Code, it must prohibit  
15 both the voluntary and involuntary transfer of the beneficiary's interest, that is, a  
16 settlor may not allow a beneficiary to assign while prohibiting a beneficiary's  
17 creditor from collecting, and vice versa. See Restatement (Third) § 58 cmt. b  
18 (Tentative Draft No. 2, 1999).

19 Subsection (b), which is derived from Texas Property Code § 112.035(b),  
20 allows a settlor to provide maximum spendthrift protection simply by stating in the  
21 instrument that all interests are held subject to a "spendthrift trust" or words of  
22 similar effect. For another use of a shorthand phrase to express concepts that might  
23 otherwise require detailed drafting, see Uniform Probate Code Section 2-213  
24 (waiver of "all rights" or equivalent language in pre- or post-marital agreement  
25 sufficient to waive rights to elective share, exempt property, and homestead and  
26 family allowances).

27 A disclaimer, because it is a refusal to accept ownership of an interest and  
28 not a transfer of an interest already owned, is not affected by the presence or  
29 absence of a spendthrift provision. Also, most disclaimer statutes expressly provide  
30 that the validity of a disclaimer is not affected by a spendthrift protection. See, e.g.,  
31 Unif. Probate Code § 2-801.

32 While a valid spendthrift provision makes it impossible for a beneficiary to  
33 make a legally binding transfer, a trustee is not penalized for voluntarily honoring  
34 the assignment.

1                   **SECTION 503. EXCEPTIONS TO SPENDTHRIFT PROVISION.**

2                   (a) Even if a trust contains a spendthrift provision, a beneficiary's child,  
3 spouse, or former spouse who has a judgment or court order against the beneficiary  
4 for support or maintenance, or a judgment creditor who has provided services for  
5 the protection of a beneficiary's interest in the trust, may obtain from a court an  
6 order attaching present or future distributions to or for the benefit of the beneficiary.

7                   (b) A spendthrift provision is unenforceable against a claim of this State or  
8 the United States to the extent a statute of this State or federal law so provides.

9   **Comment**

10                   For trusts with spendthrift provisions, the effect of this section is to enable  
11 certain creditors to bypass a spendthrift restriction but only with respect to their  
12 particular claims.

13                   The exception in subsection (a) for judgments or orders to support a  
14 beneficiary's child or current or former spouse is in accord with Restatement  
15 (Second) of Trusts § 157 (1959), Restatement (Third) of Trusts § 59 (Tentative  
16 Draft No. 2, 1999), and numerous state statutes. It is also consistent with federal  
17 bankruptcy law, which exempts such support orders from discharge. The effect of  
18 this exception is to permit the claimant for unpaid support to attach present or  
19 future distributions that would otherwise be made to the beneficiary. Distributions  
20 subject to attachment include distributions required by the express terms of the trust,  
21 such as mandatory payments of income, and distributions the trustee has otherwise  
22 decided to make, such as through the exercise of discretion. Subsection (a), unlike  
23 Section 504, does not authorize the spousal or child claimant to compel a  
24 distribution from the trust. Section 504 authorizes a spouse or child claimant to  
25 compel a distribution to the extent the trustee has abused a discretion or failed to  
26 comply with a standard for distribution.

27                   The exception in subsection (a) for a judgment creditor who has provided  
28 services for the protection of a beneficiary's interest in the trust is also in accord  
29 with Restatement (Second) of Trusts § 157 (1959), and Restatement (Third) of  
30 Trusts § 59 (Tentative Draft No. 2, 1999). The purpose of this exception is to  
31 prevent the unjust enrichment of the beneficiary that would occur were the claimant  
32 prevented from reaching the beneficial interest. Also, this exception allows a  
33 beneficiary of modest means to overcome an obstacle preventing the beneficiary's

1 obtaining services essential to the protection of enforcement of the beneficiary's  
2 rights under the trust. See Restatement (Third) of Trusts § 59 cmt. d (Tentative  
3 Draft No. 2, 1999).

4 Subsection (b), which is similar to Restatement (Third) of Trusts § 59 cmt. a  
5 (Tentative Draft No. 2, 1999), exempts certain governmental claims from a  
6 spendthrift bar. Federal preemption guarantees that certain federal claims, such as  
7 claims by the Internal Revenue Service, may bypass a spendthrift provision no  
8 matter what this Code might say. The case law and relevant Internal Revenue Code  
9 provisions on the exception for federal tax claims are collected in 2A Austin W.  
10 Scott & William F. Fratcher, The Law of Trusts § 157.4 (4th ed. 1987). Regarding  
11 claims by state governments, this subsection recognizes that States take a variety of  
12 approaches with respect to collection, depending on whether the claim is for unpaid  
13 taxes, for care provided at an institution, or for other charges. Acknowledging this  
14 diversity, subsection (b) does not prescribe a definite rule, but instead refers to other  
15 statutes of the State on whether a particular claim is barred or exempted from a  
16 spendthrift provision.

17 Unlike Restatement (Second) of Trusts § 157 (1959), and Restatement  
18 (Third) of Trusts § 59 (Tentative Draft No. 2, 1999), this Code does not create an  
19 exception to the spendthrift bar for creditors who have furnished necessary services  
20 or supplies to the beneficiary. For a discussion of this and other exceptions to the  
21 spendthrift bar, recognized in some States, see 2A Austin W. Scott & William F.  
22 Fratcher, The Law of Trusts §§ 157-157.5 (4th ed. 1987).

#### 23 **SECTION 504. DISCRETIONARY TRUSTS; EFFECT OF STANDARD.**

24 (a) Except as otherwise provided in subsection (b), whether or not a trust  
25 contains a spendthrift provision, a creditor of a beneficiary may not compel a  
26 distribution that is subject to the trustee's discretion, even if the discretion is  
27 expressed in the form of a standard of distribution or the trustee has abused the  
28 discretion.

29 (b) To the extent a trustee has not complied with a standard of distribution  
30 or has abused a discretion:

(1) a distribution may be ordered by the court to satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary's child, spouse, or former spouse; and

(2) the court shall direct the trustee to pay to the child, spouse, or former spouse such amount as is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion.

(c) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.

### Comment

Pursuant to Section 502, the effect of a valid spendthrift provision, where applicable, is to prohibit a creditor from collecting on a distribution prior to its receipt by the beneficiary. If the trust is not protected by a spendthrift provision, or should the creditor fit within one of the exceptions created by Section 503, the creditor may attach a distribution the trustee is required to or has otherwise decided to make to the beneficiary. If the trust does not contain a spendthrift provision, the creditor may also conceivably force a sale of the beneficiary's interest. See Section 501. But the mere power to attach an interest does not mean that a creditor can force a trustee to exercise discretion or make a distribution based on a standard.

Subsection (a), which establishes the general rule, forbids a creditor from compelling a distribution from the trust, even if the trustee has failed to comply with the standard of distribution or has abused a discretion. Per subsection (c), the power to force a distribution due to an abuse of discretion or failure to comply with a standard belongs solely to the beneficiary. Under Section 814, a trustee must always exercise a discretionary power in good faith and with regard to the purposes of the trust and the interests of the beneficiaries.

Subsection (b) creates an exception for support claims of a child, spouse, or former spouse who has a judgment or order against a beneficiary for support or maintenance. While a creditor of a beneficiary generally may not assert that a trustee has abused a discretion or failed to comply with a standard of distribution,



1 such a claim may be asserted by the beneficiary's child, spouse, or former spouse  
2 who has a judgment or court order against the beneficiary for unpaid support or  
3 maintenance. The court must direct the trustee to pay the child, spouse or former  
4 spouse such amount as is equitable under the circumstances but not in excess of the  
5 amount the trustee was otherwise required to distribute to or for the benefit of the  
6 beneficiary. Before fixing this amount, the court with jurisdiction over the trust  
7 should consider that in setting the respective support award, the family court has  
8 already considered the respective needs and assets of the family. The Code does not  
9 attempt to prescribe the particular procedural method for enforcing a judgment or  
10 order against the trust, leaving that matter to local collection law. For an example,  
11 see Cal. Prob. Code § 15305.

## 12           **SECTION 505. CREDITOR'S CLAIM AGAINST SETTLOR.**

13           (a) Whether or not the terms of a trust contain a spendthrift provision, the  
14 following rules apply:

15           (1) During the lifetime of the settlor, the property of a revocable trust is  
16 subject to claims of the settlor's creditors.

17           (2) With respect to an irrevocable trust, a creditor or assignee of the  
18 settlor may reach the maximum amount that can be distributed to or for the settlor's  
19 benefit. If a trust has more than one settlor, the amount the creditor or assignee of a  
20 particular settlor may reach may not exceed the settlor's interest in the portion of  
21 the trust attributable to that settlor's contribution.

22           (3) After the death of a settlor, and subject to the settlor's right to direct  
23 the source from which liabilities will be paid, the property of a trust that was  
24 revocable at the settlor's death is subject to claims of the settlor's creditors, costs of  
25 administration of the settlor's estate, the expenses of the settlor's funeral and  
26 disposal of remains, and [statutory allowances] to a surviving spouse and children to

1 the extent the settlor's probate estate is inadequate to satisfy those claims, costs,  
2 expenses, and [allowances].

3 (b) For purposes of this section:

4 (1) during the period the power may be exercised, the holder of a power  
5 of withdrawal is treated in the same manner as the settlor of a revocable trust to the  
6 extent of the property subject to the power; and

7 (2) upon the lapse, release, or waiver of the power, the holder is treated  
8 as the settlor of the trust only to the extent the value of the property affected by the  
9 lapse, release, or waiver, exceeds the greater of the amount specified in Section  
10 2041(b)(2) or 2514(e) of the Internal Revenue Code of 1986, or Section 2503(b) of  
11 the Internal Revenue Code of 1986, in either case as in effect on [the effective date  
12 of this [Code]] [, or as later amended].

### 13 **Comment**

14 Subsection (a)(1) states what is now a well accepted conclusion, that a  
15 revocable trust is subject to the settlor's creditors while the settlor is living. Such  
16 claims were not allowed at common law, however. See Restatement (Second) of  
17 Trusts § 330, cmt. o (1959). Because a settlor usually also retains a beneficial  
18 interest which a creditor may reach under subsection (a)(2), the common law rule, in  
19 States still adhering to this approach, is normally of little significance. See  
20 Restatement (Second) of Trusts § 156(2) (1959).

21 Subsection (a)(2), which is based on Section 156 of the Restatement  
22 (Second) of Trusts (1959), and Restatement (Third) of Trusts § 58(2) & cmt. e  
23 (Tentative Draft No. 2, 1999), follows traditional doctrine in providing that a settlor  
24 who is also a beneficiary may not use the trust as a shield against the settlor's  
25 creditors. Whether the trust contains a spendthrift provision or not, a creditor of the  
26 settlor may reach the maximum amount that the trustee could have paid to the  
27 settlor-beneficiary. Should the trustee have discretion to distribute the entire income  
28 and principal to the settlor, the effect of this subsection is to place the settlor's  
29 creditors in the same position as if the trust had not been created. For the definition  
30 of "settlor," see Section 103(16).

1           This section does not address possible rights against a settlor should the  
2 settlor have been insolvent at the time of the trust's creation or was rendered  
3 insolvent by the transfer of property to the trust. This subject is instead left to the  
4 State's law on fraudulent transfers. A transfer to the trust by an insolvent settlor  
5 might also constitute a voidable preference under federal bankruptcy law.

6           Subsection (a)(3) recognizes that a revocable trust is usually employed as a  
7 will substitute. As such, the trust assets, following the death of the settlor, should  
8 be subject to the settlor's debts and other charges. However, in accordance with  
9 traditional doctrine, the assets of the settlor's probate estate must normally first be  
10 exhausted before the assets of the revocable trust can be reached.

11           This section does not attempt to address the procedural issues raised by the  
12 need to first exhaust the decedent's probate estate to reach the assets of the  
13 revocable trust. Nor does this section address the priority of the creditor claims or  
14 the possible liability of the decedent's other nonprobate assets for the decedent's  
15 debts and other charges. Subsection (a)(3), however, does ratify the typical  
16 pourover will, revocable trust plan. Such a plan will usually shift a portion if not all  
17 of the death-related liabilities from the probate estate to the revocable trust. As long  
18 as the rights of the creditor or family member claiming a statutory allowance are not  
19 impaired, the settlor is free to shift liability from the probate estate to the revocable  
20 trust.

21           This section does not cover all creditor issues that may arise in connection  
22 with revocable trusts, in particular the possible liability of other nonprobate assets  
23 for unpaid claims. These issues, which extend well beyond the law of trusts, are  
24 addressed in Section 6-102 of the Uniform Probate Code, approved by the  
25 Commissioners in 1998.

26           Subsection (b)(1) treats a power of withdrawal as the equivalent of a power  
27 of revocation because the two powers are functionally the same. This is also the  
28 approach taken in Restatement (Third) of Trusts § 56 cmt. b (Tentative Draft No. 2,  
29 1999). If the power is unlimited, the property subject to the power will be fully  
30 subject to the claims of the power holder's creditors, the same as the power holder's  
31 other assets. If the power holder retains the power until death, the property subject  
32 to the power may be liable for claims and statutory allowances to the extent the  
33 power holder's probate estate is insufficient to satisfy those claims and allowances.  
34 For powers limited either in time or amount, such as a right to withdraw a \$10,000  
35 annual exclusion contribution within 30 days, this subsection would limit the  
36 creditor to the \$10,000 contribution and require the creditor to take action prior to  
37 the expiration of the 30-day period.

Upon the lapse, release or waiver of a power of withdrawal, the property formerly subject to the power will normally be subject to the claims of the power holder's creditors and assignees the same as if the power holder were the settlor of a now irrevocable trust. Pursuant to subsection (a)(2), a creditor or assignee of the power holder generally may reach the power holder's entire beneficial interest in the trust, whether or not distribution is subject to the trustee's discretion. However, following the lead of Arizona and Texas, subsection (b)(2) creates an exception for trust property which was subject to a Crummey or a 5 or 5 power. Upon the lapse, release, or waiver of a power of withdrawal, the holder is treated as the settlor of the trust only to the extent the value of the property subject to the power at the time of the lapse, release, or waiver exceeds the greater of the amounts specified in IRC §§ 2041(b)(2) or 2514(e) [greater of 5% or \$5,000], or IRC § 2503(b) [\$10,000 in 1999]. See Ariz. Rev. Stat. § 14-7705; Tex. Prop. Code Ann. § 112.035.

This Code does not address creditor issues with respect to property subject to a special power of appointment or testamentary general power of appointment. For creditor rights against such interests, see Restatement (Property) Second: Donative Transfers §§ 13.1-13.7 (1986).

**SECTION 506. OVERDUE DISTRIBUTION.** Whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a distribution mandated to be made to the beneficiary by the terms of the trust, including a required distribution of income or distribution upon termination of the trust, if the trustee has not made the distribution within a reasonable time after the mandated distribution date.

### Comment

The effect of a spendthrift provision is generally to totally insulate a beneficiary's interest until a distribution is made and has been received by the beneficiary. See Section 502. But this section, along with several other sections in this article, recognize exceptions to this general rule. Whether a trust contains a spendthrift provision or not, a trustee should not be able to avoid creditor claims against a beneficiary by refusing to make a distribution required to be made by the express terms of the trust. On the other hand, a spendthrift provision would become largely a nullity were a beneficiary's creditors able to attach all required payments as soon as they became due. This section reflects a compromise between these two competing principles. A creditor can reach a distribution required to be made to the

beneficiary by the express terms of the trust only if the trustee has failed to make the payment within a reasonable time after the mandated distribution date. Following this reasonable period, payments mandated to be made by the express terms of the trust are in effect being held by the trustee as agent for the beneficiary and should be treated the same as any other of the beneficiary's personal assets.

**SECTION 507. PERSONAL OBLIGATIONS OF TRUSTEE.** The trust property is not subject to the personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt.

### Comment

Because the beneficiaries of the trust hold the beneficial interest in the trust property and the trustee holds only legal title without the benefits of ownership, the creditors of the trustee have only a personal claim against the trustee. See Restatement (Second) of Trusts § 12 cmt. a (1959). See also Restatement (Third) of Trusts § 5 cmt. k (Tentative Draft No.1, 1996). Similarly, a personal creditor of the trustee who attaches trust property to satisfy the debt does not acquire title as a bona fide purchaser even if the creditor is unaware of the trust. See Restatement (Second) of Trusts § 308 (1959). The protection afforded by this section is consistent with that provided by the Bankruptcy Code. Property in which the trustee holds legal title as trustee is not part of the trustee's bankruptcy estate. 11 U.S.C. § 541(d).

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**ARTICLE 6**  
**REVOCABLE TRUSTS**

**General Comment**

Each section of this article deals with issues of significance not totally settled under current law. Because of the widespread use in recent years of the revocable trust as an alternative to a will, this short article is one of the more important articles of the Code. This article and the other articles of this Code treat the revocable trust as the functional equivalent of a will. Section 601 provides that the capacity standard for wills is to apply in determining whether the settlor had capacity to create a revocable trust. Section 602, after providing that a trust is presumed revocable unless stated otherwise, prescribes the procedure for revocation or modification, whether the trust contains one or multiple settlors. Section 603 provides that while a trust is revocable and the settlor has capacity, the settlor has all rights that would otherwise be granted to the beneficiaries. Section 604 prescribes a statute of limitations on contest of revocable trusts.

Sections 601 and 604, because they address requirements relating to creation and contest of trusts, are not subject to alteration in the terms of the trust. See Section 104. Sections 602 and 603 are not so limited and are fully subject to the settlor’s control.

**SECTION 601. CAPACITY OF SETTLOR OF REVOCABLE TRUST.**

The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will.

**Comment**

This section is patterned after Restatement (Third) of Trusts § 11 (Tentative Draft No. 1, 1996). The revocable trust is used primarily as a will substitute, with its key provision being the determination of the persons to receive the trust property upon the settlor’s death. To solidify the use of the revocable trust as a device for transferring property at death, the settlor usually also executes a pourover will. The use of a pourover will assures that property not transferred to the trust during life will be combined with any trust property which the settlor did manage to convey.

1           Given this primary use of the revocable trust as a device for disposing of  
2 property at death, the capacity standard for wills, and not for lifetime gifts, should  
3 apply. If the standard of capacity affects lifetime management of the trust, this may  
4 be dealt with by reformation or other appropriate remedies that will not jeopardize  
5 the overall plan of disposition by making the standard for the trust different or  
6 higher than that for making a will. See Restatement (Third) of Trusts § 11 cmt. b  
7 (Tentative Draft No. 1, 1996).

8           The application of the capacity standard for wills does not mean that the  
9 revocable trust must be executed with the formalities of a will. There are no  
10 execution requirements under this Code for a trust not created by will, and a trust, at  
11 least one containing personal property, may in theory be created by an oral  
12 statement. See Section 406 and Comment.

13           The Code does not explicitly spell out the standard of capacity necessary to  
14 create other types of trusts, although Section 402 does require that the settlor have  
15 capacity. This section expressly states a capacity standard for the creation of  
16 revocable trusts because of the lack of clarity in the case law and the importance of  
17 the issue in modern estate planning. No such uncertainty exists with respect to the  
18 capacity standard for other types of trusts. To create a testamentary trust, the  
19 settlor must have the capacity to make a will. To create an irrevocable trust, the  
20 settlor must have the capacity during lifetime to transfer the property free of trust.  
21 See generally Restatement (Third) of Trusts § 11 (Tentative Draft No. 1, 1996).

## 22           **SECTION 602. REVOCATION OR AMENDMENT OF REVOCABLE** 23 **TRUST.**

24           (a) Unless the terms of a trust expressly provide that the trust is irrevocable,  
25 the settlor may revoke or amend the trust. This subsection does not apply to a trust  
26 created under an instrument executed before [the effective date of this [Code]].

27           (b) If a revocable trust is created or funded by more than one settlor:

28           (1) to the extent the trust consists of community property, the trust may  
29 be revoked by either spouse acting alone but may be amended only by joint action of  
30 both spouses; and

1                   (2) to the extent the trust consists of property other than community  
2           property, each settlor may revoke or amend the trust with regard the portion of the  
3           trust property attributable to that settlor's contribution.

4                   (c) The settlor may revoke or amend a revocable trust:

5                   (1) by substantially complying with a method provided in the terms of the  
6           trust; or

7                   (2) if the terms of the trust do not provide a method or the method  
8           provided in the terms is not expressly made exclusive, by:

9                   (A) executing a later will or codicil that refers to the trust or  
10          specifically devises property that would otherwise have passed according to the  
11          terms of the trust; or

12                  (B) any other method manifesting clear and convincing evidence of  
13          the settlor's intent.

14                  (d) Upon revocation of a revocable trust, the trustee shall deliver the trust  
15          property as the settlor directs.

16                  (e) A settlor's powers with respect to revocation, amendment, or  
17          distribution of trust property may be exercised by an agent under a power of  
18          attorney only to the extent expressly authorized by the terms of the trust or the  
19          power.

20                  (f) A [conservator] of the settlor or, if no [conservator] has been appointed,  
21          a [guardian] of the settlor may exercise a settlor's powers with respect to



1 revocation, amendment, or distribution of trust property only with the approval of  
2 the court supervising the [conservatorship] or [guardianship].

3 (g) A trustee who does not know that a trust has been revoked or amended  
4 is not liable to the settlor or settlor's successors in interest for distributions made  
5 and other actions taken on the assumption that the trust, as unamended, was still in  
6 effect.

### 7 **Comment**

8 Subsection (a), which provides that a settlor may revoke or modify a trust  
9 unless the terms of the trust expressly state that the trust is irrevocable, is contrary  
10 to the common law of trusts. The common law presumes that a trust is irrevocable  
11 absent evidence of contrary intent. See Restatement (Second) of Trusts § 330  
12 (1959). This subsection does not govern trusts created prior to the effective date of  
13 this Code. Nor does this subsection govern trusts created in another State whose  
14 validity, under choice of law rules, is governed by the law of a State following the  
15 common law rule. In addition, this subsection does not prevent a trust from being  
16 reformed to make it irrevocable if the settlor was proceeding under a mistake of law  
17 at the time of its creation. See Section 414 (reformation of trust). But far easier  
18 than relying on this statute, choice of law rules, or reformation is for the drafter to  
19 simply express in the terms of the trust whether the trust is revocable or irrevocable.

20 A power of revocation includes the power to modify. See Restatement  
21 (Second) of Trusts § 331 cmt. g (1959). An unrestricted power to modify may also  
22 include the power to revoke a trust. See Restatement (Second) of Trusts § 331  
23 cmt. h.

24 Subsection (b) provides default rules for revocation or modification of a  
25 trust with multiple settlors. The settlor's authority to revoke or modify the trust  
26 depends on whether the trust contains community property. To the extent the trust  
27 contains community property, the trust may be revoked by either spouse acting  
28 alone but may be modified only by joint action of both spouses. The purpose of this  
29 provision, and the reason for the use of joint trusts in community property States, is  
30 to preserve the community character of property transferred to the trust. While  
31 community property does not prevail in a majority of States, contributions of  
32 community property to trusts created in noncommunity property States does occur.  
33 This is due to the mobility of settlors, and the fact that community property retains  
34 its community character when a couple move from a community to a noncommunity  
35 property State. For this reason, subsection (b), and its provision on contributions of

1 community property, should be enacted in all States, whether community or  
2 noncommunity.

3           With respect to separate property contributed to the trust, or all property of  
4 the trust if none of the trust property consists of community property, each settlor  
5 may revoke or modify the trust as to the portion of the trust contributed by that  
6 settlor. The inclusion of a rule for contributions of separate property does not mean  
7 that the drafters of this Code concluded that the use of joint trusts should be  
8 encouraged. The rule is included because of the widespread use of joint trusts in  
9 noncommunity property States in recent years. Due to the desire to preserve the  
10 community character of trust property, joint trusts are a necessity in community  
11 property States. Unless community property will be contributed to the trust, no  
12 such motivating reason exists for their creation in a noncommunity property State.

13           This section does not explicitly require that the other settlor or settlors be  
14 notified if a joint trust is revoked by less than all of the settlors, but such notice  
15 would be required under Section 603. While the trust is revocable and the settlor  
16 has capacity, Section 603(a)(1) provides that the trustee's duty to keep the  
17 beneficiaries reasonably informed of developments is owed exclusively to the settlor.  
18 To avoid an issue on how this duty applies to a trust with multiple settlors, Section  
19 603(b) provides that in the case of a trust with multiple settlors, the duty to keep the  
20 *settlor* informed extends to *all* of the settlors. Notifying the other settlor or settlors  
21 of the revocation or modification will place them in a better position to protect their  
22 interests. If the revocation or modification by less than all of the settlors breaches  
23 an implied agreement not to revoke or modify the trust, those harmed by the action  
24 could sue for breach of contract. If the trustee fails to notify the other settlor or  
25 settlors of the revocation, the parties aggrieved by the trustee's failure could sue the  
26 trustee for breach of trust.

27           Under subsection (c), the settlor may revoke a revocable trust by  
28 substantially complying with the method specified in the terms of the trust or by a  
29 later executed will or codicil or any other method manifesting clear and convincing  
30 evidence of the settlor's intent to revoke. Only if the method specified in the terms  
31 of the trust is exclusive is use of the other methods prohibited. Even then, a failure  
32 to comply with a technical requirement, such as required notarization, may be  
33 excused as long as compliance with the method specified in the terms of the trust is  
34 otherwise substantial.

35           While revocation of a trust is ordinarily accomplished by signing and  
36 delivering a written document to the trustee, other methods, such as a physical act  
37 or an oral statement coupled with a withdrawal of the property, might also  
38 demonstrate the necessary intent. These less formal methods, because they provide  
39 less reliable indicia of intent, are not to be encouraged.

1 Subsection (c) does not require that a trustee concur in a revocation or  
2 modification of a trust. Such a concurrence would be necessary only if required by  
3 the terms of the trust. If the trustee concludes that a modification unacceptably  
4 changes the trustee's duties, the trustee is free to resign. See Section 705.

5 Subsection (d), providing that upon revocation the trust property is to be  
6 distributed as the settlor directs, codifies a provision commonly included in  
7 revocable trust instruments.

8 Subsection (e) authorizes an agent under a power of attorney to revoke or  
9 modify a revocable trust only to the extent the terms of the trust or power of  
10 attorney expressly so permit. An express provision is required because most settlors  
11 usually intend the revocable trust, and not the power of attorney, to function as the  
12 settlor's principal property management device. The power of attorney is usually  
13 intended as a backup for assets not transferred to the revocable trust or to address  
14 specific topics, such as the power to sign tax returns or apply for government  
15 benefits, which are questionably beyond the authority of a trustee or are not  
16 customarily granted to a trustee.

17 Many state conservatorship statutes authorize a conservator to exercise the  
18 settlor's power of revocation with the prior approval of the court supervising the  
19 conservatorship. Subsection (f) ratifies this practice. However, because settlors  
20 often create a revocable trust for the very purpose of avoiding conservatorship,  
21 settlors are free under this Code to deny a conservator a power of revocation. But  
22 the settlor is not free to deny the power of the court to take such action as may be  
23 necessary in the interests of justice, up to and including the court's termination of  
24 the trust. See Section 104(b)(11). Furthermore, the fact that the settlor may have  
25 denied a conservator power to revoke the trust does not mean that the conservator  
26 is prohibited from taking appropriate action to protect the settlor's interest if the  
27 settlor, now under conservatorship, is also a beneficiary of the trust. For example,  
28 the conservator could petition for removal of the trustee. See Section 706. The  
29 conservator, acting on the settlor-beneficiary's behalf, could also bring an action to  
30 enforce the trust according to its terms. Pursuant to Section 303, a conservator may  
31 act on behalf of the beneficiary whose estate the conservator controls whenever a  
32 consent or other action by the beneficiary is required or may be given under the  
33 Code

34 Because under this Code, a court appoints a conservator, and not a guardian,  
35 to manage a ward's property (see Section 103), subsection (f) authorizes a guardian  
36 to exercise the settlor's power of revocation only if a conservator for the settlor has  
37 not been appointed.

1 Subsection (g) is similar to California Probate Code §§ 4152-4153, which  
2 protects from liability an attorney in fact who acts without knowledge that the  
3 power of attorney has been terminated. The inclusion of this provision lessens the  
4 need for trustees to insist on provisions conditioning revocation on their approval or  
5 at least notice. Because most trust instruments provide that revocation is effective  
6 only upon notice to the trustee, this subsection, while helpful, will rarely be applied.  
7 For the provision protecting a third person who deals with the former trustee of a  
8 now revoked trust, see Section 1012(d).

9 The settlor's power to revoke the trust under this section does not preclude  
10 termination of the trust under another section.

### 11 **SECTION 603. SETTLOR'S POWERS; POWERS OF WITHDRAWAL.**

12 (a) Except as otherwise provided in the terms of the trust:

13 (1) while a trust is revocable and the settlor has capacity to revoke the  
14 trust, rights of the beneficiaries are subject to the control of, and the duties of the  
15 trustee are owed exclusively to, the settlor; and

16 (2) while a trust is revocable and the settlor does not have capacity to  
17 revoke the trust, rights of the beneficiaries are held by the beneficiaries.

18 (b) If a revocable trust has more than one settlor, the duties of the trustee  
19 are owed to all of the settlors having capacity to revoke the trust.

20 (c) During the period the power may be exercised, the holder of a power of  
21 withdrawal has the rights of a settlor of a revocable trust under this section to the  
22 extent of the property subject to the power.

#### 23 **Comment**

24 This section has the effect of postponing the enjoyment of rights of  
25 beneficiaries of revocable trusts until the death or incapacity of the settlor or other  
26 person holding the power to revoke the trust. This section thus recognizes that the  
27 settlor of a revocable trust is in control of the trust and should have the right to  
28 enforce the trust.

1 Under this section, the duty under Section 813 to inform and report to  
2 beneficiaries is owed to the settlor of a revocable trust as long as the settlor has  
3 capacity. In the case of a trust with multiple settlors, subsection (b) clarifies that the  
4 beneficiaries' right to information extends to all of the settlors. Should fewer than  
5 all of the settlors revoke or modify the trust, the trustee must notify the other settlor  
6 or settlors of this fact. See Section 602 Comment.

7 If the settlor loses capacity, pursuant to subsection (a)(2), the rights of the  
8 beneficiaries are no longer subject to the settlor's control. However, until such time  
9 as the trust becomes irrevocable, the settlor is free to deny the beneficiaries these  
10 rights, even to the point of directing the trustee not to inform them of the existence  
11 of the trust. See Section 813(f).

12 Subsection (c) makes clear that a holder of a power of withdrawal has the  
13 same powers over the trust as the settlor of a revocable trust. Equal treatment is  
14 warranted due to the holder's equivalent power to control the trust. For the  
15 definition of power of withdrawal, see Section 103(12).

16 **SECTION 604. LIMITATION ON ACTION CONTESTING VALIDITY**  
17 **OF REVOCABLE TRUST.**

18 (a) A person may commence a judicial proceeding to contest the validity of  
19 a trust that was revocable at the settlor's death within the earlier of:

20 (1) [three] years after the settlor's death; or

21 (2) [120] days after the trustee sent the person a copy of the trust  
22 instrument and a notice informing the person of the trust's existence, of the trustee's  
23 name and address, and of the time allowed for commencing a contest.

24 (b) Upon the death of the settlor of a trust that was revocable at the  
25 settlor's death, the trustee may proceed to distribute the trust property in  
26 accordance with the terms of the trust. The distribution may be made without  
27 liability unless:

1                   (1) the trustee knows of a pending judicial proceeding contesting the  
2                   validity of the trust; or

3                   (2) a potential contestant has notified the trustee of a possible judicial  
4                   proceeding to contest the trust and commenced the judicial proceeding within 60  
5                   days after the notice was sent.

6                   (c) Until a contest is barred under this section, a beneficiary of a trust that  
7                   later is determined to have been invalid is liable to return any distribution received.

8                   **Comment**

9                   This section provides finality to the question of when a contest of a  
10                  revocable trust may be brought. The section is designed to allow an adequate time  
11                  in which to bring a contest while at the same time permitting the expeditious  
12                  distribution of the trust property following the settlor's death.

13                  A trust can be contested on a variety of grounds. The contestant may allege  
14                  that no trust was created due to lack of intent to create a trust or lack of capacity  
15                  (see Section 402), that undue influence, duress, or fraud was involved in the trust's  
16                  creation (see Section 405), or that the trust had been revoked or modified (see  
17                  Section 602). This section applies not only to contests to invalidate trusts in their  
18                  entirety but also to contests to invalidate trusts in part.

19                  Subsection (a) specifies the time period in which a contest can be brought.  
20                  A contest is barred upon the first to occur of two possible events. The maximum  
21                  possible time for bringing a contest is three years from the settlor's death. Even  
22                  without having received notice of the trust, this should provide potential contestants  
23                  with ample time in which to determine whether they have an interest that will be  
24                  affected by the trust. Many trustees may wish to shorten the contest period,  
25                  however. They may do so by giving notice. Drawing from California Probate Code  
26                  § 16061.7, subsection (a)(2) provides that a contest by a particular person is barred  
27                  120 days after the date the trustee sent the person a copy of the trust instrument and  
28                  informed the person of the trust's existence, of the trustee's name and address, and  
29                  of the time allowed for commencing a contest. The reference to "120" days is  
30                  placed in brackets to suggest to the enacting jurisdiction that it substitute its  
31                  statutory time period for contesting a will. Because three years from the settlor's  
32                  death is the outside time limit for filing a contest, a contest is automatically barred  
33                  three years after the settlor's death even if notice is sent by the trustee less than 120  
34                  days prior to the end of the period.

1           Because only a small minority of trusts are actually contested, trustees  
2           should not be restrained from making distributions because of concern about  
3           possible liability should a contest later be filed. Subsection (b) facilitates the  
4           expeditious distribution of the trust. Upon the death of the settlor of a trust that  
5           was revocable at the settlor's death, the trustee may proceed to distribute the trust  
6           property in accordance with the terms of the trust absent knowledge of a pending  
7           judicial proceeding contesting the validity of the trust, or notification by a potential  
8           contestant of a possible contest, followed by its filing within 60 days. While a  
9           distribution in compliance with subsection (b) discharges the trustee from potential  
10          liability, per subsection (c) the beneficiaries of what may later turn out to have been  
11          an invalid trust are liable to return any distribution received. Issues as to whether  
12          the distribution must be returned with interest, or with income earned or profit made  
13          are not addressed in this section but are left to the common law and the courts.

14           This section does not address possible liability for the debts of the deceased  
15          settlor nor a trustee's possible liability to creditors for distributing trust assets. For  
16          possible liability of the trust, see Section 505(a)(3) and Comment. Whether a  
17          trustee can be held personally liable for creditor claims following distribution of trust  
18          assets is addressed in Uniform Probate Code § 6-102, which was approved by the  
19          Uniform Law Commissioners in 1998.

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**ARTICLE 7**  
**OFFICE OF TRUSTEE**

**General Comment**

This article contains a series of default rules dealing with the office of trustee, all of which may be superseded by the terms of the trust. Sections 701 and 702 address the process for getting a trustee into office, including the procedures for indicating an acceptance and whether bond will be required. Section 703 addresses cotrustees, permitting the cotrustees to act by majority action and specifying the extent to which one trustee may delegate to another. Sections 704 through 707 address changes in the office of trustee, specifying the circumstances when a vacancy must be filled, the procedure for resignation, the grounds for removal, and the process for appointing a successor. Sections 708 and 709 prescribe the standards for determining trustee compensation and reimbursement for expenses advanced.

Except for the court's authority to require bond, all of the provisions of this article are subject to modification in the terms of the trust. See Section 104.

**SECTION 701. ACCEPTING OR DECLINING TRUSTEESHIP.**

(a) Except as otherwise provided in subsection (c), a person designated as trustee accepts the trusteeship by:

(1) substantially complying with a method of acceptance provided in the terms of the trust; or

(2) unless the terms of the trust expressly make the method provided in the terms exclusive, accepting delivery of the trust property, exercising powers or performing duties as trustee, or otherwise indicating acceptance of the trusteeship.

(b) A person designated as trustee who has not yet accepted the trusteeship may reject the trusteeship. A designated trustee who does not accept the trusteeship within a reasonable time after knowing of the designation rejects the trusteeship.



1 (c) A person designated as trustee, without accepting the trusteeship, may:

2 (1) act to preserve the trust property if, within a reasonable time after  
3 acting, the person sends a rejection of the trusteeship to the settlor or, if the settlor  
4 is dead or lacks capacity, to a qualified beneficiary; and

5 (2) inspect or investigate trust property to determine potential liability  
6 for violation of environmental law.

7 **Comment**

8 This section, specifying the requirements for a valid acceptance of the  
9 trusteeship, implicates many of the same issues as arise in determining whether a  
10 trust has been revoked. Consequently, the two provisions track each other closely.  
11 Compare Section 701(a) with Section 602(c) (procedure for revoking or modifying  
12 trust). Procedures specified in the terms of the trust are recognized, but only  
13 substantial, not literal compliance is required. A failure to meet technical  
14 requirements, such as notarization of the trustee's signature, does not result in a  
15 failure to accept. Ordinarily, the trustee will indicate an acceptance by signing the  
16 trust instrument or signing a separate written instrument. However, this section  
17 recognizes any other method indicating the necessary intent, such as by knowingly  
18 exercising trustee powers, unless the terms of the trust make a specified method  
19 exclusive. This section also does not preclude an acceptance by estoppel or  
20 damages for an unreasonable delay in signifying a decision as to an acceptance or  
21 declination. For general background on issues relating to trustee acceptance and  
22 declination, see Restatement (Second) of Trusts § 102 (1959); Restatement (Third)  
23 of Trusts § 35 (Tentative Draft No. 2, 1999). Consistent with Section 201(b),  
24 which emphasizes that continuing judicial supervision of a trust is the rare exception,  
25 not the rule, the Code does not require that a trustee qualify in court.

26 To avoid the inaction that can result if the person designated as trustee fails  
27 to communicate a decision to either accept or reject the trusteeship, subsection (b)  
28 provides that a failure to accept within a reasonable time constitutes a rejection of  
29 the trusteeship. A trustee's rejection normally precludes a later acceptance but does  
30 not cause the trust to fail. See Restatement (Third) of Trusts § 35 cmt. c (Tentative  
31 Draft No. 2, 1999). As to filling vacancies in the event of a rejection, see Section  
32 704.

33 While a person designated as trustee who decides not to accept the  
34 trusteeship need not provide a formal rejection, a clear and early communication is  
35 recommended. The appropriate recipient of the rejection depends upon the

1 particular circumstances. Ordinarily, it would be appropriate to give the rejection to  
2 the person who informs the person of the proposed trusteeship. If judicial  
3 proceedings involving the trust are pending, the rejection could be filed with the  
4 court. In the case of a person named as trustee of a revocable trust, it would be  
5 appropriate to give the rejection to the settlor. In any event it would be best to  
6 inform a beneficiary with a significant interest in the trust because that beneficiary  
7 might be more motivated than others to seek appointment of a new trustee.

8 Subsection (c)(1) makes clear that a nominated trustee may act expeditiously  
9 to protect the trust property without being considered to have accepted the  
10 trusteeship. However, upon conclusion of the intervention, the nominated trustee  
11 must send a rejection of office to the settlor, if living and competent, otherwise to a  
12 qualified beneficiary.

13 Because of the costly liability often at issue, subsection (c)(2) allows a  
14 person designated as trustee to inspect the trust property for possible violation of  
15 environmental law without accepting the trusteeship. See also Sections 816(13)  
16 (trustee powers with respect to possible liability for violation of environmental law),  
17 and 1010(b) (trustee nonliability for violation of environmental law arising from  
18 ownership and control of trust property). The Code does not provide for  
19 reimbursement of expenses incurred prior to a trustee's acceptance of office.  
20 Reimbursement of the costs of an environmental inspection is normally a subject for  
21 negotiation by the parties.

## 22 **SECTION 702. TRUSTEE'S BOND.**

23 (a) A trustee must give bond to secure performance of the trustee's duties  
24 only if the court finds that a bond is needed to protect the interest of beneficiaries or  
25 is required by the terms of the trust and the court has not dispensed with the  
26 requirement.

27 (b) The court may specify the amount of a bond, its liabilities, and whether  
28 sureties are necessary. The court may modify or terminate a bond at any time.

29 [(c) A regulated financial-service institution qualified to do trust business in  
30 this State need not give bond, even if required by the terms of the trust.]

1 **Comment**

2 This provision is consistent with the Restatement and with the bonding  
3 provisions of the Uniform Probate Code. See Restatement (Third) of Trusts § 34  
4 cmt. a (Tentative Draft No. 2, 1999); Unif. Probate Code §§ 3-604 (personal  
5 representatives), 5-410 (conservators), and 7-304 (trustees). Because a bond is  
6 required only if the terms of the trust require bond or a bond is found by the court to  
7 be necessary to protect the interests of beneficiaries, bond should rarely be required  
8 under the Code.

9 This section does not attempt to detail all of the technical bonding  
10 requirements that the court may impose although such requirements are listed in the  
11 Uniform Probate Code sections cited above. The amount of a bond otherwise  
12 required may be reduced by the value of trust property deposited in a manner that  
13 prevents its unauthorized disposition, and by the value of real property which the  
14 trustee, by express limitation of power, lacks power to convey without court  
15 authorization. Also, the court may excuse or otherwise modify a requirement of a  
16 bond, reduce or increase the amount of a bond, release a surety, or permit the  
17 substitution of another bond with the same or different sureties.

18 Subsection (c) clarifies that a regulated financial-service institution need not  
19 provide bond for individual trusts. Such institutions must meet detailed financial  
20 responsibility requirements in order to do trust business in the State, thereby  
21 obviating the need to post bonds in individual trusts. Subsection (c) is placed in  
22 brackets because the enacting jurisdiction may have already dealt with the subject of  
23 bond in separate legislation, such as in its statutes on regulation of financial  
24 institutions, making it unnecessary to enact this provision.

25 **SECTION 703. COTRUSTEES.**

26 (a) Cotrustees who are unable to reach a unanimous decision may act by  
27 majority decision.

28 (b) If a vacancy occurs in a cotrusteeship, the remaining cotrustees may act  
29 for the trust.

30 (c) A cotrustee must participate in the performance of a trustee's function  
31 unless the cotrustee is unavailable to perform the function because of absence,

1 illness, or other temporary incapacity or the cotrustee has properly delegated the  
2 performance of the function to another trustee.

3 (d) If a cotrustee is unavailable to perform duties because of absence,  
4 illness, or other temporary incapacity, and prompt action is necessary to achieve the  
5 purposes of the trust or to avoid injury to the trust property, the remaining cotrustee  
6 or a majority of the remaining cotrustees may act for the trust.

7 (e) A trustee may not delegate to a cotrustee the performance of a function  
8 the settlor reasonably expected the trustees to perform jointly. Unless the  
9 delegation was irrevocable, a trustee may revoke a delegation previously made.

10 (f) Each trustee shall exercise reasonable care to:

11 (1) prevent a cotrustee from committing a material breach of trust; and

12 (2) compel a cotrustee to redress a material breach of trust.

13 (g) A trustee who does not join in an action of another trustee is not liable  
14 for the action. A dissenting trustee who joins in an action at the direction of the  
15 majority of the trustees and who notified any cotrustee of the dissent at or before the  
16 time of the action is not liable for the action unless the action constituted a material  
17 breach of trust.

18 **Comment**

19 Subsection (a) is in accord with Restatement (Third) of Trusts § 39  
20 (Tentative Draft No. 2, 1999), which rejects earlier Restatement formulations  
21 requiring unanimity among the trustees of a private trust. See Restatement  
22 (Second) of Trusts § 194 (1959). This section is consistent with the prior  
23 Restatement rule applicable to charitable trusts, which allowed for action by a  
24 majority. See Restatement (Second) of Trusts § 383 (1959). As provided in  
25 Section 104, the rules of this section are subject to a contrary provision in the terms  
26 of the trust.

1 Under subsection (b), a majority of the remaining trustees may act for the  
2 trust when a vacancy occurs in a cotrusteeship. Per Section 704, a vacancy in a  
3 cotrusteeship need be filled only if there is no trustee remaining in office.

4 By permitting the trustees to act by a majority, this section contemplates that  
5 there may be a trustee or trustees who might dissent. Subsection (g) protects the  
6 dissenting cotrustee by providing that the dissenter is not liable for the action. As  
7 long as the trustee expressed the dissent to a cotrustee at or before the time of the  
8 action in question, the dissenting trustee is protected even if the dissenter joined the  
9 action at the direction of the majority, such as to satisfy the demand of the other side  
10 to the transaction. However, if an action by the other trustee or trustees constitute a  
11 material breach of trust, protection against liability no longer applies. Further, if the  
12 breach is material, liability may be imposed against the dissenting trustee under  
13 subsection (f) for failing to take reasonable steps to rectify the improper action. The  
14 responsibility to take action against a cotrustee codifies the substance of Sections  
15 184 and 224 of the Restatement (Second) of Trusts (1959).

16 Pursuant to subsection (c), a cotrustee must participate in the performance  
17 of a trustee function unless the cotrustee is unable to participate due to temporary  
18 incapacity or the trustee has properly delegated performance to another cotrustee.  
19 Subsection (e) addresses the extent to which a trustee may delegate the performance  
20 of functions to a cotrustee. The standard differs from the standard for delegation to  
21 an agent as provided in Section 807 because the two situations are different.  
22 Subsection (e) is premised on the assumption that most settlors wish all of their  
23 cotrustees to participate in the trust's management. Utilizing language from  
24 Restatement (Second) of Trusts § 171 (1959), the former provision of the  
25 Restatement governing delegation to both agents and cotrustees, a trustee is  
26 prohibited from delegating to another trustee functions the settlor reasonably  
27 expected the trustees to perform jointly. The exact extent to which a trustee may  
28 delegate functions to another trustee in a particular case will vary depending on the  
29 reasons the settlor decided to appoint cotrustees. The better practice is to address  
30 the division of functions in the terms of the trust, as allowed by Section 104.

31 A cotrustee's assumption of duties because of a trustee's inability to perform  
32 the trusteeship is not a delegation. Under subsection (d), a cotrustee may assume  
33 some or all of the functions of another trustee who is unavailable to perform duties  
34 because of absence, illness, or other temporary incapacity.

35 **SECTION 704. VACANCY IN TRUSTEESHIP; APPOINTMENT OF**  
36 **SUCCESSOR.**

1 (a) A vacancy in a trusteeship occurs if:  
2 (1) a person designated as trustee rejects the trusteeship;  
3 (2) a person designated as trustee cannot be identified or does not exist;  
4 (3) a trustee resigns;  
5 (4) a trustee is disqualified or removed;  
6 (5) a trustee dies; or  
7 (6) a [guardian] or [conservator] is appointed for an individual serving or  
8 eligible to serve as trustee.

9 (b) If one or more cotrustees remain in office, a vacancy in a trusteeship  
10 need not be filled. A vacancy in a trusteeship must be filled if the trust has no  
11 remaining trustee.

12 (c) A vacancy in a trusteeship required to be filled must be filled in the  
13 following order of priority:

14 (1) by a person designated by unanimous agreement of the qualified  
15 beneficiaries; or

16 (2) by a person appointed by the court.

17 (d) Whether or not a vacancy in a trusteeship is required to be filled, the  
18 court may appoint an additional trustee or special fiduciary whenever the court  
19 considers the appointment necessary for the administration of the trust.

20 **Comment**

21 This section lists the ways in which a trusteeship becomes vacant and the  
22 rules on filling the vacancy. See also Sections 701 (acceptance or declination of  
23 trusteeship), 705 (resignation of trustee), and 706 (removal of trustee). Good  
24 drafting practice suggests that the terms of the trust deal expressly with the problem

1 of vacancies, naming successors and addressing the procedure for filling a vacancy  
2 in the absence of a named successor. Per Section 104, this section applies only if  
3 the terms of the trust fail to specify a procedure.

4 Subsection (b) provides that a vacancy in the cotrusteeship must be filled  
5 only if the trust has no remaining trustee. If a vacancy in the cotrusteeship is not  
6 filled, Section 703 authorizes the remaining cotrustees to continue to administer the  
7 trust. However, as provided in subsection (d), the court, exercising its inherent  
8 equity authority, may always appoint additional trustees if the appointment would  
9 promote better administration of the trust. See Restatement (Second) of Trusts  
10 § 108 cmt. e (1959); Restatement (Third) of Trusts § 34 cmt. e (Tentative Draft No.  
11 2, 1999).

12 Absent an effective provision in the terms of the trust, subsection (c)(1)  
13 permits a vacancy in the trusteeship to be filled, without the need for court approval,  
14 by a person selected by unanimous agreement of the qualified beneficiaries, who, per  
15 Section 705(a)(1), may also receive the trustee's resignation. If a trustee resigns  
16 following notice to the beneficiaries as provided in Section 705(a), the trust may be  
17 transferred to a successor appointed pursuant to subsection (c)(1) of this section, all  
18 without court involvement. Per Section 706, a nonqualified beneficiary who is  
19 displeased with the choice of the qualified beneficiaries may petition the court for  
20 removal of the trustee.

21 Subsection (c)(2) authorizes the court to fill a vacancy if the qualified  
22 beneficiaries have failed to make an appointment. Factors for the court to consider  
23 in making its selection are found in Restatement (Second) of Trusts § 108 cmt. d  
24 (1959); and Restatement (Third) of Trusts § 34 cmt. f (Tentative Draft No. 2,  
25 1999).

26 In the case of a revocable trust, the appointment of a successor will normally  
27 be made directly by the settlor. As to the duties of a successor trustee, see Section  
28 812.

## 29 **SECTION 705. RESIGNATION OF TRUSTEE.**

30 (a) A trustee may resign:

31 (1) upon at least 30 days' notice to the qualified beneficiaries and all  
32 cotrustees; or

33 (2) with the approval of the court.

1 (b) A qualified beneficiary may waive a notice otherwise required by this  
2 section.

3 (c) In approving a resignation, the court may impose orders and conditions  
4 reasonably necessary for the protection of the trust property.

5 (d) Any liability of a resigning trustee or of any sureties on the trustee's  
6 bond for acts or omissions of the trustee is not discharged or affected by the  
7 trustee's resignation.

8 **Comment**

9 This section provides alternative methods by which a trustee may resign. As  
10 authorized by Section 104, a trustee may always resign as provided in the terms of  
11 the trust. If the terms of the trust do not provide a method for resignation or if the  
12 method for whatever reason is not followed, subsection (a) provides that a trustee  
13 may resign by giving notice to the qualified beneficiaries. A resigning trustee may  
14 also seek approval of the court.

15 Section 813 requires a trustee's report whenever there is a change of  
16 trustees. See also Restatement (Second) of Trusts § 106 cmt. b, and Restatement  
17 (Third) of Trusts § 36 cmt. d (Tentative Draft No. 2, 1999), which, like subsection  
18 (d), provide that resignation does not release the resigning trustee from potential  
19 liabilities.

20 **SECTION 706. REMOVAL OF TRUSTEE.**

21 (a) The settlor, a cotrustee, or a beneficiary may request the court to  
22 remove a trustee, or a trustee may be removed by the court on its own initiative.

23 (b) The court may remove a trustee if:

24 (1) the trustee has committed a material breach of trust;

25 (2) lack of cooperation among cotrustees substantially impairs the  
26 administration of the trust;



(3) investment decisions of the trustee, although not constituting a breach of trust, have resulted in investment performance persistently and substantially below that of comparable trusts;

(4) because of unfitness, unwillingness, inability of the trustee to administer the trust effectively, or substantial change of circumstances, the court determines that removal of the trustee is in the best interest of the beneficiaries; or

(5) the beneficiaries unanimously request the court to remove the trustee and the court finds that removal is in the best interests of all of the beneficiaries and not inconsistent with the material purposes of the trust.

(c) Pending a final decision on a petition to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order such appropriate relief under Section 1001(b) as may be necessary to protect the trust property or the interests of the beneficiaries.

## Policy Issue

Subsection (b) of this section lists the grounds for removal of a trustee by the court. The subsection broadens the grounds for removal applicable in many States by listing such things as changed circumstances, substandard investment performance, and unanimous agreement of the beneficiaries as factors for the court to consider in deciding whether to remove the trustee. The Drafting Committee invites the Conference's comments on the appropriate standard for removal of a trustee.

### Comment

Subsection (a), unlike the Restatement, grants the settlor of an irrevocable trust the right to petition for removal of a trustee. See Restatement (Second) of Trusts § 107 (1959); Restatement (Third) of Trusts § 37 (Tentative Draft No. 2, 1999). The right to petition for removal does not give the settlor of an irrevocable trust any other rights, such as the right to an annual report or to receive other information concerning administration of the trust. The right of a beneficiary to

1 petition for removal does not apply to a revocable trust while the settlor has  
2 capacity. While the trust is revocable and the settlor has capacity, the rights of the  
3 beneficiaries are subject to the settlor's exclusive control. See Section 603.

4 While removal is ordinarily ordered by a court, the topic may also be  
5 addressed in the terms of the trust. See Section 104. In fashioning a removal  
6 provision for an irrevocable trust, the drafter should remain cognizant of the  
7 potential inclusion of the trust in the settlor's federal gross estate if the settlor  
8 retains the power to be appointed as trustee.

9 Subsection (b) allows removal for untoward action on the part of a trustee,  
10 such as for a material breach of trust, but the section is not so limited. The grounds  
11 listed in subsection (b) allow for removal under a variety of circumstances where the  
12 court concludes that the trustee is not acting in the best interests of the beneficiaries  
13 or in conformity with the expectations of the settlor.

14 Because of its importance to the long-term value of the beneficiaries'  
15 interests, subsection (b)(3) allows a trustee to be removed if the investment  
16 decisions of the trustee, although not constituting a breach of trust, have resulted in  
17 investment performance persistently and substantially below that of comparable  
18 trusts.

19 To honor the settlor's reasonable expectations, subsection (b)(4) allows a  
20 trustee to be removed because of changed circumstances. Changed circumstances  
21 justifying removal of a trustee might include a substantial change in the character of  
22 the trustee which has occurred between the date of the trust's creation and the date  
23 the removal petition is filed.

24 Subsection (b)(5) is a specific application of Section 410. Section 410  
25 allows the beneficiaries by unanimous agreement to compel termination of a trust if  
26 the court determines that the trust no longer serves *any* material purpose. The  
27 beneficiaries by unanimous agreement may compel modification of a trust if the  
28 court concludes that the particular modification is not inconsistent with *a* material  
29 purpose of the trust. Subsection (b)(5) authorizes the court, upon unanimous  
30 agreement of the beneficiaries, to remove the trustee if removal is in beneficiaries's  
31 best interests and not inconsistent with the material purposes of the trust.

32 Removal may occur for other reasons. Friction between cotrustees, inability  
33 of the trustee and beneficiaries to get along through fault of the trustee, indifference  
34 on the part of the trustee, and mediocre service may all justify removal if in the best  
35 interests of the beneficiaries. A particularly appropriate circumstance justifying  
36 removal of the trustee is a serious breach of the trustee's duty to keep the  
37 beneficiaries reasonably informed of the administration of the trust or to comply

1 with a beneficiary's request for information as required by Section 813. Failure to  
2 comply with this duty may make it impossible for the beneficiaries to protect their  
3 interests. It may also mask more serious violations by the trustee.

4 While the failure of a trustee to act in the beneficiaries' best interest is an  
5 important factor in determining whether removal is appropriate, the settlor's  
6 purposes in creating the trust should not be compromised. Complying with the  
7 beneficiaries' wishes to the detriment of the settlor's purposes may justify  
8 replacement of a trustee with a trustee who will comply with the fundamental  
9 responsibility to administer a trust in accordance with its terms.

#### 10 **SECTION 707. DELIVERY OF PROPERTY BY FORMER TRUSTEE.**

11 Unless a cotrustee remains in office or the court otherwise orders, and until the trust  
12 property is delivered to a successor trustee or to a person appointed by the court to  
13 receive the property:

14 (1) a trustee who has resigned or been removed has the duties of a trustee  
15 and the powers necessary to protect the trust property; and

16 (2) the former trustee's personal representative, if a former trustee's  
17 appointment terminated because of death, or the former trustee's [conservator] or  
18 [guardian], if the appointment terminated because of incapacity, is responsible for  
19 and has the powers necessary to protect the trust property.

#### 20 **Comment**

21 This section addresses the continuing authority of a former trustee. Subject  
22 to the power of the court to make other arrangements, a former trustee has  
23 continuing authority until the property is delivered to a successor. However, if a  
24 cotrustee remains in office, there is no reason to grant such continuing authority,  
25 and none is granted under this section. If the trustee has resigned or been removed,  
26 the continuing authority is granted to the former trustee; if the former trustee has  
27 died, the continuing authority is granted to the former trustee's personal  
28 representative; if the former trustee has been adjudicated incapacitated, the  
29 continuing authority is granted to the former trustee's guardian or conservator.

1 Whether or not a former trustee remains in office, the former trustee remains liable  
2 for actions or omissions during the trustee's term of office until liability is barred.

3 Unless a cotrustee remains in office, Section 813 requires a trustee's report  
4 whenever there is a change of trustees. Section 1012(d) protects third persons who  
5 deal in good faith with a former trustee without knowledge that the person is no  
6 longer a trustee. There is also ample authority in the Code for the appointment of a  
7 special fiduciary prior to the assumption of duties by a successor trustee so that it  
8 will not be necessary for a resigning or removed trustee to continue with the powers  
9 and duties of office. See Sections 704(d) (court may appoint additional trustee or  
10 special fiduciary whenever court considers appointment necessary for administration  
11 of trust), 705(c) (in approving resignation, court may impose conditions necessary  
12 for protection of trust property), 706(c) (pending decision on petition for removal,  
13 court may order appropriate relief), 1001(b)(5) (to remedy breach of trust, court  
14 may appoint special fiduciary as necessary to protect trust property or interests of  
15 beneficiary).

## 16 **SECTION 708. COMPENSATION OF TRUSTEE.**

17 (a) If the terms of a trust do not specify the trustee's compensation, a  
18 trustee is entitled to compensation that is reasonable under the circumstances.

19 (b) If the terms of a trust specify the trustee's compensation, the trustee is  
20 entitled to be compensated as specified, but the court may allow more or less  
21 compensation if:

22 (1) the duties of the trustee are substantially different from those  
23 contemplated when the trust was created; or

24 (2) the compensation specified by the terms of the trust would be  
25 unreasonably low or high.

### 26 **Comment**

27 Subsection (a) establishes a standard of reasonable compensation. For a list  
28 of factors relevant in determining reasonable compensation, see Restatement  
29 (Second) of Trusts § 242 cmt. b (1959); Restatement (Third) of Trusts § 38 cmt. c  
30 (Tentative Draft No. 2, 1999). Because "trustee" as defined in Section 103(21)

1 includes not only an individual trustee but also cotrustees, each trustee, including a  
2 cotrustee, is entitled to reasonable compensation under the circumstances. In setting  
3 compensation, the services actually performed and responsibilities assumed by the  
4 trustee should be closely examined. For example, an adjustment in compensation  
5 may be appropriate if the trustee has delegated significant duties, such as the  
6 delegation of investment authority, to outside managers. See Section 807  
7 (delegation by trustee). On the other hand, a trustee with special skills, such as  
8 those of a real estate agent, may be entitled to extra compensation for performing  
9 services that would ordinarily be delegated. See Restatement (Second) of Trusts  
10 § 242 cmt. d (1959); Restatement (Third) of Trusts § 38 cmt. d (Tentative Draft  
11 No. 2, 1999).

12 Subsection (b) permits the reasonable compensation standard to be  
13 overridden or clarified by the terms of the trust, subject to the court's inherent  
14 equity power to make adjustments downward or upward in appropriate  
15 circumstances. Compensation provisions should be drafted with care. Common  
16 questions include whether a provision in the terms of the trust setting the amount of  
17 the trustee's compensation is binding on a successor trustee, whether a dispositive  
18 provision for the trustee in the terms of the trust is in addition to or in lieu of the  
19 trustee's regular compensation, and whether a dispositive provision for the trustee is  
20 conditional on the person performing services as trustee. See Restatement (Second)  
21 of Trusts § 242 cmt. f (1959); Restatement (Third) of Trusts § 38 cmt. e (Tentative  
22 Draft No.2, 1999).

23 Compensation may be set by agreement. A trustee may enter into an  
24 agreement with the beneficiaries for lesser or increased compensation, although an  
25 agreement increasing compensation is not binding on a nonconsenting beneficiary.  
26 A trustee may agree to waive compensation and should do so prior to rendering  
27 significant services if concerned about possible gift and income tax liability on the  
28 compensation accrued prior to the waiver. See Rev. Rul. 66-167, 1966-1 C.B. 20.  
29 See also Restatement (Second) of Trusts § 242 cmt. i, j (1959); Restatement (Third)  
30 of Trusts § 38 cmt. f, g (Tentative Draft No. 2, 1999).

31 The fact that a trust has more than one trustee does not mean that the  
32 trustees together are entitled to more compensation than had either acted alone.  
33 Nor does the appointment of multiple trustees mean that the trustees are eligible to  
34 receive the compensation in equal shares. The total amount of the compensation to  
35 be paid and how it will be divided depend on the totality of the circumstances.  
36 Factors to be considered include the settlor's reasons for naming multiple trustees  
37 and the level of responsibility assumed and exact services performed by each trustee.  
38 Often the fees of cotrustees will be in the aggregate higher than the fees for a single  
39 trustee because of the duty of each trustee to participate in administration and not

1 delegate to a cotrustee duties the settlor expected the trustee to perform. See  
2 Restatement (Third) of Trusts § 38 cmt. i (Tentative Draft No. 2, 1999).

3           Section 816(15) grants the trustee authority to fix and pay its compensation  
4 without the necessity of prior court review, but without precluding the right of a  
5 beneficiary to object to the compensation in a later judicial proceeding. Allowing  
6 the trustee to pay its compensation without prior court approval promotes efficient  
7 trust administration but does place a significant burden on a beneficiary who believes  
8 the compensation is unreasonable. To provide a beneficiary with time to take  
9 action, if the beneficiary believes that action is appropriate, and because of the  
10 importance of trustee's fees to the beneficiaries' interests, Section 813(b)(4)  
11 requires a trustee to provide the qualified beneficiaries with advance notice of any  
12 change in the method or rate of the trustee's compensation. Failure to provide such  
13 advance notice constitutes a breach of trust, possibly justifying removal under  
14 Section 706.

## 15           **SECTION 709. REIMBURSEMENT OF EXPENSES.**

16           (a) A trustee is entitled to be reimbursed out of the trust property, with  
17 interest as appropriate, for:

18                   (1) expenses that were properly incurred in the administration of the  
19 trust; and

20                   (2) to the extent necessary to prevent unjust enrichment of the trust,  
21 expenses that were not properly incurred in the administration of the trust.

22           (b) An advance by the trustee of money for the protection of the trust gives  
23 rise to a lien against trust property to secure reimbursement with reasonable interest.

### 24                                   **Comment**

25           A trustee has the authority to expend trust funds as necessary in the  
26 administration of the trust, including expenses incurred in the hiring of agents. See  
27 Sections 807 (delegation by trustee) and 816(15) (trustee to pay expenses of  
28 administration from trust).

29           Subsection (a)(1) clarifies that a trustee is entitled to reimbursement from the  
30 trust for incurring expenses within the trustee's authority. The trustee may also

1 withhold appropriate reimbursement for expenses before making distributions to the  
2 beneficiaries. Restatement (Second) of Trusts § 244 cmt. b (1959); Restatement  
3 (Third) of Trusts § 38 cmt. b (Tentative Draft No. 2, 1999). But a trustee is  
4 ordinarily not entitled to reimbursement for incurring unauthorized expenses. Such  
5 expenses are normally the personal responsibility of the trustee.

6 As provided in subsection (a)(2), a trustee is entitled to reimbursement for  
7 unauthorized expenses only if the unauthorized expenditures benefitted the trust.  
8 The purpose of this provision, which is derived from Restatement (Second) of  
9 Trusts § 245, is not to ratify the unauthorized conduct of the trustee, but to prevent  
10 the unjust enrichment of the trust. Given this purpose, a court, on appropriate  
11 grounds, may delay or even deny reimbursement for expenses which benefitted the  
12 trust. For a list of factors which the court may wish to consider in making this  
13 determination, see Restatement (Second) of Trusts § 245 cmt. g (1959).

14 Subsection (b) makes effective Section 802(h)(5), which creates an  
15 exception to the duty of loyalty for advances by the trustee for the protection of the  
16 trust if the transaction is fair to the beneficiaries.

17 Reimbursement under this section may include attorney's fees and expenses  
18 incurred by the trustee in defending an action. However, a trustee is not ordinarily  
19 entitled to attorney's fees and expenses if it is determined that the trustee breached  
20 the trust. See, e.g., *In re Estate of Gilmaker*, 38 Cal. Rptr. 270 (Ct. App. 1964); *In*  
21 *re Estate of Vokal*, 263 P.2d 64 (Cal. Ct. App. 1953).

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**ARTICLE 8**  
**DUTIES AND POWERS OF TRUSTEE**

**General Comment**

This article states the fundamental duties of a trustee and lists the trustee’s powers. The duties listed are not new, but how the particular duties are formulated and applied has changed over the years. This article was drafted where possible to conform with the 1994 Uniform Prudent Investor Act, which has been enacted in approximately two thirds of the States. The Uniform Prudent Investor Act prescribes a trustee’s responsibilities with respect to the management and investment of trust property. The Uniform Trust Code also addresses a trustee’s duties with respect to distribution to beneficiaries.

Because of the widespread adoption of the Uniform Prudent Investor Act, no effort has been made to disassemble and fully integrate the Prudent Investor Act into the Trust Code. Instead, States enacting the Uniform Trust Code are encouraged to recodify their version of the Prudent Investor Act by reenacting it as Article 9 of this Code rather than leaving it elsewhere in their statutes. Where the Trust Code and Uniform Prudent Investor Act overlap, States should enact the provisions of this article and not enact the duplicative provisions of the Prudent Investor Act. Sections of this article which overlap with the Prudent Investor Act are Sections 802 (duty of loyalty), 803 (impartiality), 805 (costs of administration), trustee’s skills (806), and delegation (807). For a list of the sections of the Prudent Investor Act that should not be enacted as part of this Code, see the General Comment to Article 9.

All of the provisions of this article are subject to modification by the terms of the trust except that the terms of the trust may not negate a trustee’s fundamental obligation to act in good faith, in accordance with the purposes of the trust, and for the benefit of the beneficiaries. See Section 104(b)(2)-(3).

**SECTION 801. DUTY TO ADMINISTER TRUST.** Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this [Code].



1 **Comment**

2 This section confirms that the primary duty of a trustee, above all others, is  
3 to follow the terms and purposes of the trust. Only if the terms of a trust are silent  
4 or for some reason invalid on a particular issue are the trustee's duties derived  
5 exclusively from this Code. This section also confirms that a trustee does not have a  
6 duty to act until the trustee has accepted the trusteeship. See Section 701 and  
7 Comment (acceptance or declination of trusteeship).

8 While a trustee generally must administer a trust in accordance with its terms  
9 and purposes, the purposes and particular terms of the trust will on occasion  
10 conflict. Should such a conflict occur because of circumstances not anticipated by  
11 the settlor, it may be appropriate for the trustee to petition under Section 411 to  
12 modify or terminate the trust. The trustee is not required to perform a duty  
13 prescribed by the terms of the trust if performance would be impossible, invalid,  
14 illegal or contrary to public policy. See Section 403 (purposes for which trust can  
15 be created).

16 For background on the trustee's duty to administer the trust, see  
17 Restatement (Second) of Trusts §§ 164-169 (1959).

18 **SECTION 802. DUTY OF LOYALTY.**

19 (a) A trustee shall administer the trust solely in the interest of the  
20 beneficiaries.

21 (b) Subject to the rights of persons dealing with or assisting the trustee as  
22 provided in Section 1012, a sale, encumbrance, or other transaction involving the  
23 investment or management of trust property entered into by the trustee for the  
24 trustee's own personal account or which is otherwise affected by a conflict between  
25 the trustee's fiduciary and personal interests is voidable by a beneficiary affected by  
26 the transaction unless:

27 (1) the transaction was authorized by the terms of the trust;

28 (2) the transaction was approved by the court;

1                   (3) the beneficiary did not commence a judicial proceeding within the  
2 time allowed by Section 1005;

3                   (4) the beneficiary consented to the trustee's conduct, ratified the  
4 transaction, or released the trustee in compliance with Section 1009; or

5                   (5) the transaction involves a contract entered into or claim acquired by  
6 the trustee before the person became or contemplated becoming trustee.

7                   (c) A sale, encumbrance, or other transaction involving the investment or  
8 management of trust property is presumed to be affected by a conflict between  
9 personal and fiduciary interests if it is entered into by the trustee with:

10                   (1) the trustee's spouse;

11                   (2) the trustee's descendants, siblings, parents, or their spouses;

12                   (3) an agent or attorney of the trustee; or

13                   (4) a corporation or other person or enterprise in which the trustee, or a  
14 person who owns a significant interest in the trustee, has an interest that might affect  
15 the trustee's best judgment.

16                   (d) A transaction between a trustee and a beneficiary that does not concern  
17 trust property but that occurs during the existence of the trust or while the trustee  
18 retains significant influence over the beneficiary and from which the trustee obtains  
19 an advantage is voidable by the beneficiary unless the trustee establishes that the  
20 transaction was fair to the beneficiary.

1           (e) A transaction not concerning trust property in which the trustee engages  
2           in the trustee's individual capacity involves a conflict between personal and fiduciary  
3           interests if the transaction concerns an opportunity properly belonging to the trust.

4           (f) An investment by a trustee in securities of an investment company or  
5           investment trust to which the trustee, or its affiliate, provides services in a capacity  
6           other than as trustee and which complies with the prudent investor rule of [Article]  
7           9 is not presumed to be affected by a conflict between personal and fiduciary  
8           interests. The trustee may be compensated by the investment company or  
9           investment trust for providing those services out of fees charged to the trust if the  
10          trustee discloses at least annually to the persons entitled under Section 813 to  
11          receive a copy of the trustee's annual report the rate and method by which the  
12          compensation was determined.

13          (g) A trustee shall act in the best interests of the beneficiaries in voting  
14          shares of stock or in exercising powers of control over similar interests in other  
15          forms of enterprise. If the trust is the sole owner of a corporation or other form of  
16          enterprise, the trustee shall elect or appoint directors or other managers who will  
17          manage the corporation or enterprise in the best interests of the trust's beneficiaries.

18          (h) This section does not preclude the following transactions, if fair to the  
19          beneficiaries:

20                 (1) an agreement between a trustee and a beneficiary relating to the  
21                 appointment or compensation of the trustee;

22                 (2) payment of reasonable compensation to the trustee;

(3) a transaction between a trust and another trust, decedent's estate, or [conservatorship] of which the trustee is a fiduciary or in which a beneficiary has an interest;

(4) a deposit of trust funds in a regulated financial-service institution operated by the trustee; or

(5) an advance by the trustee of money for the protection of the trust.

(i) Upon petition by a trustee or beneficiary, the court may appoint a special fiduciary to make a decision with respect to any proposed transaction that might violate this section if entered into by the trustee.

### Comment

This section addresses the duty of loyalty, perhaps the most fundamental duty of the trustee. Subsection (a) states the general principle, which is copied from Restatement (Second) of Trusts § 170(1) (1959). A trustee owes a duty of loyalty to the beneficiaries, a principle which is sometimes expressed as the obligation by the trustee not to place the trustee's own interests over those of the beneficiaries. Most but not all violations of the duty of loyalty concern transactions involving the trust property, but breaches of the duty can take a myriad of other forms. For a discussion of the different types of violations, see 2A Austin W. Scott & William F. Fratcher, *The Law of Trusts* §§ 170-170.24 (4th ed. 1987).

Subsection (b) states the general rule with respect to transactions involving trust property which are affected by a conflict of interest. A transaction involving the trust property which is affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction. Transactions involving trust property entered into by a trustee for the trustee's own personal account are voidable without further proof under the "no further inquiry" rule. Such transactions are irrebuttably presumed to be affected by a conflict between personal and fiduciary interests. It is immaterial whether the trustee acts in good faith or pays a fair consideration. See Restatement (Second) of Trusts § 170 cmt. b (1959).

The appropriate result is less clear with respect to transactions involving trust property entered into with persons who have close business or personal ties to the trustee. Subsection (c) resolves the issue by requiring the trustee to prove the

1 propriety of such transactions. Transactions between a trustee and certain relatives  
2 and business associates are presumptively voidable. Also presumptively voidable are  
3 transactions with corporations or other enterprises in which the trustee, or a person  
4 who owns a significant interest in the trustee, has an interest that might affect the  
5 trustee's best judgment. Even where the presumption does not apply, a transaction  
6 may still be voided if the beneficiary proves that a conflict between personal and  
7 fiduciary interests exists and that the transaction was affected by the conflict.

8         The right of a beneficiary to void a transaction affected by a conflict of  
9 interest is elective. If the transaction proves profitable to the trust and unprofitable  
10 to the trustee, the beneficiary will likely allow the transaction to stand. Also, as  
11 provided in subsection (b), no breach of the duty of loyalty occurs if the transaction  
12 was expressly authorized by the terms of the trust or approved by the court, or the  
13 beneficiary failed to commence an judicial proceeding within the time allowed or  
14 chose to ratify the transaction, either prior to or subsequent to its occurrence. See  
15 Sections 1005, 1009. In determining whether a beneficiary has consented to a  
16 transaction, the principles of representation from Article 3 may be applied.

17         Subsection (b)(5), derived from Section 3-713(1) of the Uniform Probate  
18 Code, allows a trustee to implement a contract or pursue a claim that the trustee  
19 entered into or acquired before the person became or contemplated becoming  
20 trustee. While this subsection allows the transaction to proceed without  
21 automatically being voidable by a beneficiary, the transaction is not necessarily free  
22 from scrutiny. In implementing the contract or pursuing the claim, the trustee must  
23 still complete the transaction in a way that will avoid a conflict between the trustee's  
24 fiduciary and personal interests. Because avoiding such a conflict will frequently be  
25 difficult, the trustee should consider petitioning the court to appoint a special  
26 fiduciary, as authorized by subsection (i), to work out the details and complete the  
27 transaction.

28         Subsection (d) creates a presumption that certain transactions between a  
29 trustee and beneficiary outside of trust are an abuse by the trustee of a confidential  
30 relationship with the beneficiary. This subsection has a limited scope. If the trust  
31 has terminated, there must be proof that the trustee's influence with the beneficiary  
32 remains. Furthermore, whether or not the trust has terminated, there must be proof  
33 that the trustee obtained an advantage from the relationship. The fact the trustee  
34 profited is insufficient to show an abuse if a third party would have similarly profited  
35 in an arm's length transaction.

36         Subsection (e), which allows a beneficiary to void a transaction entered into  
37 by the trustee that involved an opportunity belonging to the trust, is based on  
38 Restatement (Second) of Trusts § 170 cmt. k (1959).

1 Subsection (f) creates an exception to the no further inquiry rule for trustee  
2 investments in so called “proprietary funds.” Proprietary funds are mutual fund  
3 investments typically sponsored by an affiliate of a financial-service institution  
4 trustee. Under a typical proprietary fund arrangement, the mutual fund company  
5 will pay to the financial-service institution trustee an annual fee based on a  
6 percentage of the fund’s value for providing investment advice, custody, transfer  
7 agent, distribution, or shareholder services that would otherwise be provided by  
8 agents of the fund. Subsection (f) provides that such dual investment-fee  
9 arrangements are not automatically presumed to involve a conflict between the  
10 trustee’s personal and fiduciary interests. Subsection (f) does not otherwise waive  
11 or lessen a trustee’s fiduciary obligations. The trustee, in deciding whether to invest  
12 in a proprietary fund, must not place its own interests ahead of those of the  
13 beneficiaries. The investment decision must also comply with the enacting  
14 jurisdiction’s prudent investor rule. To obtain the protection afforded by this  
15 subsection, the trustee must disclose at least annually to the beneficiaries entitled to  
16 receive a copy of the trustee’s annual report the rate and method by which the  
17 additional compensation was determined. Furthermore, the selection of a mutual  
18 fund, and the resulting delegation of certain of the trustee’s functions, may be taken  
19 into account in setting the trustee’s regular compensation. See Section 708  
20 (trustee’s compensation).

21 Subsection (g) addresses an overlap between trust and corporate law. It is  
22 based on Restatement of Trusts (Second) § 193, Comment a (1959), which provides  
23 that “[i]t is the duty of the trustee in voting shares of stock to use proper care to  
24 promote the interest of the beneficiary,” and that the fiduciary responsibility of a  
25 trustee in voting a control block “is heavier than where he holds only a small fraction  
26 of the shares.” Similarly, the Department of Labor construes ERISA’s duty of  
27 loyalty to make share voting a fiduciary function. See 29 C.F.R. §2509.94-2. When  
28 the trust owns the entirety of the shares of a corporation, the corporate assets are in  
29 effect trust assets that the trustee determines to hold in corporate form. The trustee  
30 may not use the corporate form to escape the fiduciary duties of trust law. Thus, for  
31 example, a trustee whose duty of impartiality would require the trustee to make  
32 current distributions for the support of current beneficiaries may not evade that duty  
33 by holding assets in corporate form and pleading the discretion of corporate  
34 directors to determine dividend policy. Rather, the trustee must vote for corporate  
35 directors who will follow a dividend policy consistent with the trustee’s trust-law  
36 duty of impartiality.

37 Subsection (h) contains several exceptions to the general duty of loyalty,  
38 which apply if the transaction was fair to the beneficiaries. A trustee is allowed to  
39 negotiate in freedom about the terms of appointment and rate of compensation.  
40 Consistent with Restatement (Second) of Trusts § 170 cmt. r (1959), a trustee may  
41 also engage in a transaction involving another trust of which the trustee is also

1 trustee, a transaction with a decedent's or conservatorship estate of which the  
2 trustee is personal representative or conservator, or a transaction with another trust  
3 or other fiduciary relationship in which a beneficiary of the trust has an interest.  
4 With respect to a transaction involving another fiduciary role, the trustee need not  
5 give advance notice of the transaction to the beneficiaries unless required by some  
6 other provision. See, e.g., Section 813(c).

7 The authority of a trustee to deposit funds in a financial institution operated  
8 by the trustee, as provided in subsection (h)(4), is also recognized in the  
9 Restatement. See Restatement (Second) of Trusts § 170 cmt. m (1959). The  
10 power to deposit funds in its own institution does not negate the trustee's  
11 responsibility to invest prudently, including the obligation to earn a reasonable rate  
12 of interest on deposits.

13 Subsection (h)(5), while it authorizes a trustee to advance money for the  
14 protection of the trust, does not mean that advances should be made as a matter of  
15 routine. Such advances usually are of small amounts and made in emergencies or as  
16 a matter of convenience. The trustee has a lien against the trust property for any  
17 advances made. See Section 709(3).

18 **SECTION 803. IMPARTIALITY.** If a trust has two or more beneficiaries,  
19 the trustee shall act impartially in investing, managing, and distributing the trust  
20 property, giving due regard to the beneficiaries' respective interests.

#### 21 **Comment**

22 The duty of impartiality is an important aspect of the duty of loyalty. This  
23 section is identical to Section 6 of the Uniform Prudent Investor Act, except that  
24 this section also applies to decisions by a trustee with respect to distributions. The  
25 Prudent Investor Act is limited to duties with respect to the investment and  
26 management of trust property. The differing beneficial interests for which the  
27 trustee must act impartially include those of the current beneficiaries versus those  
28 holding interests in the remainder, and among those currently eligible to receive  
29 distributions, the interests of those entitled or eligible to receive distributions of  
30 income versus those eligible to receive distributions of principal. In effectuating the  
31 duty to act impartially, the trustee should be particularly sensitive to allocation of  
32 receipts and disbursements between income and principal and should consider, in an  
33 appropriate case, a reallocation of income to the principal account and vice versa, if  
34 allowable under local law. For an example of such a provision, see Section 104 of  
35 the Uniform Principal and Income Act (1997).

**SECTION 804. PRUDENT ADMINISTRATION.** A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

5	Comment
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6 The duty to administer a trust with prudence is a fundamental duty of the  
7 trustee. This duty is not affected by whether the trustee receives compensation but  
8 may be altered by the terms of the trust. See Section 104. For a more detailed  
9 statement of the duty of prudence with respect to trustee investment, including a list  
10 of factors to be taken into account in determining whether the standard has been  
11 met, see Section 2 of the Uniform Prudent Investor Act.

12           **SECTION 805. COSTS OF ADMINISTRATION.** In administering a trust,  
13           the trustee may incur only costs that are reasonable in relation to the trust property,  
14           the purposes of the trust, and the skills of the trustee.

15 **Comment**

This section is consistent with the rules concerning costs in Section 227(c)(3) of the Restatement (Third) of Trusts: Prudent Investor Rule (1992). For related rules concerning compensation and reimbursement of trustees, see Sections 708 and 709. The duty not to incur unreasonable costs applies to delegation to agents as well as to other aspects of trust administration. In deciding whether and how to delegate, the trustee must be alert to balancing projected benefits against the likely costs. To protect the beneficiary against “double dipping,” the trustee should also be alert to adjusting compensation for functions which the trustee has delegated to others. The obligation to incur only necessary or appropriate costs of administration has long been part of the common law and of the Restatement. See Restatement (Second) of Trusts § 188 (1959).

27 This section is similar to Section 7 of the Uniform Prudent Investor Act.



**SECTION 806. TRUSTEE’S SKILLS.** A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee’s representation that the trustee has special skills or expertise, shall use those special skills or expertise.

### Comment

This section requires a trustee to apply the full extent of the trustee's skills, whether the trustee actually possesses those skills or incorrectly represents such competence. In other words, a skilled trustee who makes representation of minimal competence is subject to the standard of a skilled trustee as is a trustee of modest abilities who makes representations of great competence. This section is similar to Section 7-302 of the Uniform Probate Code, Restatement (Second) of Trusts § 174 (1959), and Section 2(f) of the Uniform Prudent Investor Act.

## SECTION 807. DELEGATION BY TRUSTEE.

(a) A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:

- (1) selecting an agent;
- (2) establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and
- (3) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

(b) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

(c) A trustee who complies with subsection (a) is not liable to the beneficiaries or to the trust for an action of the agent to whom the function was delegated.

(d) By accepting a delegation of powers or duties from the trustee of a trust that is subject to the law of this State, an agent submits to the jurisdiction of the courts of this State.

### Comment

This section permits trustees to delegate various aspects of trust administration to agents, subject to the standards of the section. The language is derived from Section 9 of the Uniform Prudent Investor Act. See also John H. Langbein, *Reversing the Nondelegation Rule of Trust-Investment Law*, 59 Mo. L. Rev. 105 (1994) (discussing prior law).

This section encourages and protects the trustee in making delegations appropriate to the facts and circumstances of the particular trust. Whether particular functions of the trustee are delegable is based on whether it is a function that a prudent trustee might delegate under similar circumstances. For example, delegation of trust administration and reporting duties might be prudent for a family trustee but unnecessary for a corporate trustee.

This section applies only to delegation to agents and not to delegation to a cotrustee. For the provision authorizing delegation to a cotrustee, see Section 703(e).

Under subsection (a)(3), the duty to review the agent’s performance includes the periodic evaluation of the continued need for and appropriateness of the delegation of authority. In particular circumstances, the trustee may need to terminate the delegation to comply with the duty under subsection (a)(1) (duty to use reasonable care, skill, and caution in selecting agent).

## SECTION 808. POWERS TO DIRECT.

(a) While a trust is revocable, the trustee may follow a direction of the settlor even if contrary to the terms of the trust.

(b) If the terms of a trust confer upon a person other than the trustee or the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise

1 is manifestly contrary to the terms of the trust or the trustee knows the attempted  
2 exercise would constitute a material breach of a fiduciary duty that the person  
3 holding the power owes to the beneficiaries of the trust.

4 (c) The holder of a power to direct is presumptively a fiduciary who, as  
5 such, is required to act in good faith, with regard to the purposes of the trust and the  
6 interests of the beneficiaries. The holder of a power to direct is liable for any loss  
7 that results from breach of a fiduciary duty.

#### 8 **Comment**

9 Subsection (a) is an application of the principle expressed in Section 603 that  
10 a revocable trust is within the settlor's exclusive control for as long as the settlor has  
11 capacity. Because of this degree of control, the trustee may rely on a written  
12 direction of the settlor, even if contrary to the terms of the trust. Alternatively, the  
13 written direction of the settlor might be regarded as a modification of the trust.  
14 Subsection (a) has limited application upon a settlor's incapacity. An agent,  
15 conservator, or guardian has authority to give the trustee instructions contrary to the  
16 terms of the trust only if the agent, conservator, or guardian succeeds to the settlor's  
17 powers with respect to revocation, amendment, or distribution as provided in  
18 Section 602.

19 Subsections (b) and (c) are derived from Restatement (Second) of Trusts  
20 § 185 (1959). Powers to direct in the terms of a trust usually relate either to choice  
21 of investment or management of closely-held business interests. A power to direct  
22 must be distinguished from a veto power. A power to direct involves action  
23 initiated and within the control of a third party. The trustee usually has no  
24 responsibility other than to carry out the direction when made. But if a third party  
25 holds a veto power, the trustee is responsible for initiating the decision, subject to  
26 the third party's approval. A trustee who administers a trust subject to a veto power  
27 occupies a position akin to that of a cotrustee and is responsible for taking  
28 appropriate action if the third party's refusal to consent would result in a material  
29 breach of trust. See Restatement (Second) of Trusts § 185 cmt. g (1959); Section  
30 703(f)(duties of cotrustees).

31 Powers to direct take a variety of forms. Frequently, the person holding the  
32 power is directing the investment of the holder's own beneficial interest. Such self-  
33 directed accounts are particularly prevalent among trusts holding interests in  
34 employee benefit plans or individual retirement accounts. See ERISA § 404(c). But

1 for the type of donative trust which is the primary focus of this Code, the holder of  
2 the power to direct is frequently acting on behalf of others. In that event, the  
3 holder, as provided in subsection (c), is presumptively acting in a fiduciary capacity  
4 and can be held liable should the power holder's conduct constitute a breach of  
5 trust.

6 Powers to direct are most effective when the trustee is not deterred from  
7 honoring the exercise of the power due to concerns about possible liability. On the  
8 other hand, the trustee does have overall responsibility for seeing that the terms of  
9 the trust are honored. For this reason, subsection (b) imposes only minimal  
10 oversight responsibility on the trustee. A trustee must generally act in accordance  
11 with the direction. A trustee may refuse the direction only if the attempted exercise  
12 would be manifestly contrary to the terms of the trust or the trustee knows the  
13 attempted exercise would constitute a material breach of a fiduciary duty owed by  
14 the holder of the power to the beneficiaries of the trust.

## 15 **SECTION 809. CONTROL AND PROTECTION OF TRUST**

16 **PROPERTY.** A trustee shall take reasonable steps to take control of and protect  
17 the trust property.

### 18 **Comment**

19 This section codifies the substance of Sections 175 and 176 of the  
20 Restatement (Second) of Trusts (1959). The duty to take control of and safeguard  
21 trust property is an aspect of the trustee's duty to act with prudence. See Section  
22 804. See also Sections 816(1) (power to collect trust property), 816(11) (power to  
23 insure trust property), and 816(12) (power to abandon trust property). This section,  
24 like the other sections in this part, is subject to limitation in the terms of the trust.  
25 For example, the settlor may provide that the spouse or other beneficiary may  
26 occupy the settlor's former residence rent free, in which event the trustee will be  
27 specifically precluded by the terms of the trust from taking complete control.

## 28 **SECTION 810. RECORDKEEPING AND IDENTIFICATION OF**

29 **TRUST PROPERTY.**

30 (a) A trustee shall keep adequate records of the administration of the trust.

1 (b) A trustee shall keep trust property separate from the trustee's own  
2 property.

3 (c) Except as otherwise provided in subsection (d), a trustee shall cause the  
4 trust property to be designated so that the interest of the trust, to the extent feasible,  
5 appears in records maintained by a party other than a trustee or beneficiary.

6 (d) If the trustee maintains records clearly indicating the respective interests,  
7 a trustee may invest as a whole the property of two or more separate trusts.

8 **Comment**

9 The duty to keep adequate records stated in subsection (a) is an aspect of the  
10 duty to act with prudence (see Section 804) and the duty to report to beneficiaries  
11 (see Section 813), neither of which can be properly exercised without appropriate  
12 records. For a case law application, see *Green v. Lombard*, 343 A. 2d 905 (Md. Ct.  
13 App. 1975). See also Restatement (Second) of Trusts §§ 172, 174 (1959).

14 The duty to earmark trust assets and the duty of a trustee not to mingle the  
15 assets of the trust with the trustee's own are closely related. Subsection (b), which  
16 addresses the duty not to mingle, is derived from Section 179 of the Restatement  
17 (Second) of Trusts (1959). However, subsection (c), which addresses earmarking,  
18 broadens the standard of Restatement Second by attempting to make more precise  
19 what is meant by the phrase "the interest of the trust clearly appears." The interest  
20 of the trust must appear in the records of a third party, such as a bank, brokerage  
21 firm, or transfer agent. Because of the serious risk of mistake or misappropriation  
22 even if disclosure is made to the beneficiaries, a trustee is not allowed to show the  
23 interest of the trust solely in the trustee's own internal records. Section 816(7)(B),  
24 which allows a trustee to hold securities in nominee form, is not inconsistent with  
25 this requirement. While securities held in nominee form are not specifically  
26 registered in the name of the trustee, they are properly earmarked because the  
27 trustee's holdings are indicated in the records maintained by an independent party,  
28 such as in an account at a brokerage firm.

29 Earmarking is not practical for all types of assets. With respect to assets not  
30 subject to registration, such as tangible personal property and bearer bonds,  
31 arranging for the trust's ownership interest to be reflected on the records of a third-  
32 party custodian would be impracticable. For this reason, subsection (c) waives  
33 separate recordkeeping for these types of assets. Under subsection (b), however,

1 the duty of the trustee not to mingle these or any other trust assets with the trustee's  
2 own remains absolute.

3 Subsection (d), following the lead of a number of state statutes, allows a  
4 trustee to make joint investments of the property of two or more trusts even though  
5 such joint investments, under traditional principles, would violate the duty to  
6 earmark. Such joint investments are often more economical than attempting to  
7 invest the funds of each trust separately. Also, because the trustee owes fiduciary  
8 duties to each trust, the risk of misappropriation or mistake is less than if the trust  
9 funds are invested jointly with those of the trustee or some other person.

## 10 **SECTION 811. ENFORCEMENT AND DEFENSE OF CLAIMS. A**

11 trustee shall take reasonable steps to enforce claims of the trust and to defend claims  
12 against the trust.

### 13 **Comment**

14 This section codifies the substance of Sections 177 and 178 of the  
15 Restatement (Second) of Trusts (1959). Under this section, it may not be  
16 reasonable to enforce a claim depending upon the likelihood of recovery and the  
17 cost of suit and enforcement. It might also be reasonable to settle an action or  
18 suffer a default rather than to defend an action. See also Section 816(14) (power to  
19 pay, contest, settle or release claims).

20 **SECTION 812. FORMER FIDUCIARIES.** A trustee shall take reasonable  
21 steps to compel a former trustee or other fiduciary to deliver trust property to the  
22 trustee, and to redress a breach of trust known to the trustee to have been  
23 committed by a former trustee or other fiduciary.

### 24 **Comment**

25 This section is based on Restatement (Second) of Trusts § 223 (1959), but  
26 extends the duty to include not only former trustees but also personal  
27 representatives and conservators from whom the trustee receives trust property.

28 This section is a specific application of Section 811 on the duty to enforce  
29 claims, which could include a claim against a predecessor trustee for breach of trust.

1 In certain circumstances it may not be reasonable to enforce a claim against a  
2 predecessor trustee or other fiduciary, depending upon the likelihood of recovery  
3 and the cost of suit and enforcement.

4 As authorized by Section 1009, the beneficiaries may relieve the trustee from  
5 potential liability for acts of a predecessor trustee or other fiduciary.

6 The trustee's duty to redress a breach of trust committed by a predecessor  
7 applies only if the trustee had knowledge of the breach. For the definition of  
8 "know," see Section 103(9).

### 9 **SECTION 813. DUTY TO INFORM AND REPORT.**

10 (a) A trustee shall keep the qualified beneficiaries of the trust reasonably  
11 informed about the administration of the trust and, unless unreasonable under the  
12 circumstances, promptly respond to a beneficiary's request for information.

13 (b) A trustee shall:

14 (1) upon request of a beneficiary, promptly furnish to the beneficiary a  
15 copy of the trust instrument;

16 (2) within 60 days after accepting a trusteeship, notify the qualified  
17 beneficiaries of the acceptance and of the trustee's name, address, and telephone  
18 number;

19 (3) within 60 days after the date a trustee acquires knowledge of the  
20 creation of an irrevocable trust, or the date the trustee acquires knowledge that a  
21 formerly revocable trust has become irrevocable, whether by the death of the settlor  
22 or otherwise, notify the qualified beneficiaries of the trust's existence, of the identity  
23 of the settlor or settlors, and of the right to request a copy of the trust instrument;  
24 and

1                   (4) notify the qualified beneficiaries in advance of any change in the  
2 method or rate of the trustee's compensation.

3                   (c) Except as otherwise provided in the terms of the trust and unless  
4 disclosure is forbidden by law or would be seriously detrimental to the interests of  
5 the beneficiaries, the trustee shall notify the qualified beneficiaries of the intention to  
6 enter into a binding agreement with respect to the sale of;

7                   (1) a controlling interest in a closely-held business; or

8                   (2) a sale of real estate, tangible personal property, closely-held business  
9 interest, or other asset not normally sold on a public market, whose value at the time  
10 of the sale, in the trustee's reasonable judgment, comprises at least 25 percent of the  
11 total value of the trust property.

12                  (d) A trustee shall send to the qualified beneficiaries at least annually and at  
13 the termination of the trust a report of the trust property, liabilities, receipts, and  
14 disbursements, including the source and amount of the trustee's compensation, a  
15 listing of the trust assets and, if feasible, their respective market values. Upon a  
16 vacancy in a trusteeship, unless a cotrustee remains in office, a report must be  
17 furnished to the qualified beneficiaries by the former trustee or, if the trusteeship  
18 terminated by reason of death or incapacity, by the former trustee's personal  
19 representative, [conservator], or [guardian].

20                  (e) A beneficiary may waive the right to a trustee's report or other  
21 information otherwise required to be furnished under this section. A beneficiary,



1 with respect to future reports and other information, may revoke a consent  
2 previously given.

3 (f) Except for a beneficiary who is also a settlor, the terms of an irrevocable  
4 trust created on or after [the effective date of this [Code]] may not dispense with the  
5 requirements of this section with respect to a beneficiary who has attained 25 years  
6 of age and who is a current or permissible distributee of trust income or principal.

### 7 **Policy Issue**

8 Subsection (f) of this section sets out the extent to which required reporting  
9 by a trustee may be waived in the terms of the trust. It provides that the terms of an  
10 irrevocable trust created on or after the effective date of the Code may dispense  
11 with a trustee's reporting only with respect to a settlor-beneficiary (thereby  
12 authorizing creation of the so called "blind" trust), a beneficiary under 25 years of  
13 age, or a beneficiary who is not currently entitled or eligible to receive distributions.  
14 In other words, for irrevocable trusts created on or after the effective date of the  
15 Code, the settlor is not allowed to waive reporting to current beneficiaries who are  
16 age 25 or older. The Drafting Committee invites the Conference's comments on the  
17 extent to which a settlor should be allowed to waive trustee reporting to  
18 beneficiaries.

### 19 **Comment**

20 The duty to keep the beneficiaries reasonably informed of the administration  
21 of the trust is one of the fundamental duties of a trustee. This section is more  
22 specific than the common law. For the common law duty to keep the beneficiaries  
23 informed, see Restatement (Second) of Trusts § 173 (1959). This section makes the  
24 duty to keep the beneficiaries informed more precise by limiting it to the qualified  
25 beneficiaries. For the definition of qualified beneficiary, see Section 103(14). The  
26 result of this limitation is that the information need not be furnished to beneficiaries  
27 with remote remainder interests unless they have filed a specific request with the  
28 trustee. See Section 105 (request for special notice).

29 The trustee is under a duty to communicate to a qualified beneficiary  
30 information about the administration of the trust that is reasonably necessary to  
31 enable the beneficiary to enforce the beneficiary's rights and to prevent or redress a  
32 breach of trust. See Restatement (Second) of Trusts § 173 cmt. c (1959).  
33 Ordinarily, the trustee is not under a duty to furnish information to a beneficiary in  
34 the absence of a specific request for the information. See *id.* cmt. d. Thus, the

1 general duty provided in subsection (a) is ordinarily satisfied by complying with the  
2 annual report mandated by subsection (d) unless there are special circumstances  
3 requiring particular information to be reported to the qualified beneficiaries.  
4 However, if the trustee is dealing with the beneficiary on the trustee's own account,  
5 the trustee has a duty to communicate material facts relating to the transaction that  
6 the trustee knows or should know. See *id.*

7 The standard is different if a beneficiary, whether qualified or not, makes a  
8 specific request for information. In that event, subsection (a) requires the trustee to  
9 promptly comply with the beneficiary's request unless unreasonable under the  
10 circumstances. Further supporting the principle that a beneficiary should be allowed  
11 to make an independent assessment of what information is relevant to protecting the  
12 beneficiary's interest, subsection (b)(1) requires the trustee to on request furnish a  
13 beneficiary with a complete copy of the trust instrument and not merely those  
14 portions the trustee concludes are relevant to the beneficiary's interest.

15 To enable beneficiaries to effectively protect their interests, it is essential that  
16 they know the identity of the trustee. Subsection (b)(2) requires that a trustee  
17 inform the qualified beneficiaries of the trustee's acceptance of office and of the  
18 trustee's name and address within 60 days of acceptance. Similar to the obligation  
19 imposed on a personal representative following admission of the will to probate,  
20 subsection (b)(3) requires the trustee of a revocable trust to inform the qualified  
21 beneficiaries, within 60 days after the settlor's death, of the trust's existence. These  
22 two duties can overlap. If the death of the settlor happens also to be the occasion  
23 for the appointment of a successor trustee, the new trustee of the now formerly  
24 revocable trust would need to inform the qualified beneficiaries both of the trustee's  
25 acceptance and of the trust's existence.

26 Subsection (b)(4) deals with the sensitive issue of changes, usually increases,  
27 in trustee compensation. Consistent with the requirement in subsection (c) that the  
28 qualified beneficiaries receive advance notice of certain major transactions affecting  
29 their interests, subsection (b)(4) requires that the beneficiaries be told in advance of  
30 changes in the method or rate of the trustee's compensation. This might include a  
31 change in a periodic base fee, rate of percentage compensation, hourly rate,  
32 termination fee or transaction charge. For the standard for setting trustee  
33 compensation, see Section 708 and Comment.

34 Subsection (c) requires that the beneficiaries be given advance notice of  
35 certain proposed transactions. This subsection is designed to codify but at the same  
36 time make more precise the fiduciary duty delineated in such cases as *Allard v.*  
37 *Pacific National Bank*, 663 P.2d 104 (Wash. 1983). In *Allard*, the court surcharged  
38 a trustee for failing to give the beneficiaries advance notice of the proposed sale of a  
39 parcel of real estate that was the sole asset of the trust. Cases subsequent to *Allard*

1 have extended this duty to the sale of an interest in a closely-held business, and this  
2 subsection extends the duty to sales of tangible personal property. Under subsection  
3 (c), *Allard* disclosure is not required if forbidden by law, as can on occasion occur  
4 under federal securities laws, or if disclosure would be seriously detrimental to the  
5 interests of the beneficiaries, for example, if disclosure would cause the loss of the  
6 only serious buyer. The settlor can also waive disclosure in the terms of the trust.

7 Subsection (d) requires the trustee to furnish the beneficiaries with a copy of  
8 a trustee's report at least annually and upon termination of the trust. Unless a  
9 cotrustee remains in office, a report must also be furnished upon a resignation or  
10 removal of a trustee or other vacancy in a trusteeship. The term "report" instead of  
11 "accounting" is used to negate the inference that the report must be prepared in any  
12 particular format. The key factor is not the format chosen but whether the report  
13 provides the beneficiaries with the information necessary to protect their interests.

14 Subsection (d) also addresses the responsibility for the preparation of the  
15 report upon a trustee's death or incapacity. If a cotrustee remains in office, the  
16 report need not be prepared by the cotrustee until the end of the regular reporting  
17 period. However, if no cotrustee remains in office, consistent with Section 707, the  
18 report must be prepared by the trustee's personal representative, in the event of the  
19 trustee's death, or the trustee's conservator or guardian, in the event of the trustee's  
20 incapacity.

21 Subsection (e) allows trustee reports and other required information to be  
22 waived by a beneficiary. A beneficiary may also revoke a consent. However, a  
23 waiver of a trustee's report or other information is not a waiver of the trustee's  
24 accountability and potential liability for items that the report or other information  
25 would have disclosed.

26 Subsection (f) responds to the desires of settlors who wish to limit disclosure  
27 about the trusts which they have created. In response to the desire of certain  
28 settlors that younger beneficiaries not know of another person's generosity until  
29 they have reached an age of maturity and self-sufficiency, subsection (f) allows the  
30 terms of the trust to waive the requirements of this section with respect to  
31 beneficiaries under 25 years of age. The settlor may also waive the requirements of  
32 this section with respect to the remainder beneficiaries and while the trust is  
33 revocable. Finally, subsection (f) allows settlors to waive disclosure to themselves,  
34 thereby ratifying the creation of so called blind trusts.

#### 35 **SECTION 814. DISCRETIONARY POWERS.**

1 (a) Notwithstanding the breadth of discretion granted to a trustee in the  
2 terms of the trust, including the use of such terms as “absolute”, “sole”, or  
3 “uncontrolled”, the trustee shall exercise a discretionary power in good faith and  
4 with regard to the purposes of the trust and the interests of the beneficiaries.

5 (b) Unless the terms of a trust indicate that a broader standard is intended  
6 by an express reference to this subsection, a person other than a settlor who is a  
7 beneficiary and trustee of a trust that confers on the trustee a power to make  
8 discretionary distributions to or for the trustee’s benefit may exercise the power only  
9 in accordance with an ascertainable standard relating to the trustee’s health,  
10 education, support, or maintenance within the meaning of Section 2041(b)(1)(A) or  
11 2514(c)(1) of the Internal Revenue Code of 1986, as in effect on [the effective date  
12 of this [Code]] [, or as later amended].

13 (c) Except as expressly provided in the terms of the trust, a trustee may not  
14 exercise a power to make discretionary distributions to satisfy a legal obligation of  
15 support which the trustee, in an individual capacity, owes another person.

16 (d) A power whose exercise is limited or prohibited by subsection (b) or (c)  
17 may be exercised by a majority of the remaining trustees whose exercise of the  
18 power is not so limited or prohibited. If the power of all trustees is so limited or  
19 prohibited, the court may appoint a special fiduciary with authority to exercise the  
20 power.

21 (e) Subsections (b) through (d) do not apply to:

(1) a power held by the settlor's spouse who is the trustee of a trust for which a marital deduction, as defined in Section 2056 or 2523 of the Internal Revenue Code of 1986, as in effect on [the effective date of this [Code]] [, or as later amended], was previously allowed;.

(2) any trust during any period that the trust may be revoked or amended by its settlor; or

(3) a trust if contributions to the trust qualify for the annual exclusion under Section 2503(c) of the Internal Revenue Code of 1986, as in effect on [the effective date of this [Code]] [, or as later amended].

### Comment

Despite the breadth of discretion purportedly granted by the wording of a trust, a grant of discretion to a trustee, whether with respect to management of distribution, is never absolute. A grant of discretion establishes a range within which the trustee may act. The greater the grant of discretion, the broader the range. A trustee's action must always be in good faith, with regard to the purposes of the trust, and in accordance with the trustee's other duties, including the obligation to exercise reasonable skill, care and caution. See Sections 801 (duty to administer trust), and 804 (duty to act with prudence). See also Edward C. Halbach, Jr., *Problems of Discretion in Discretionary Trusts*, 61 Colum. L. Rev. 1425 (1961); Restatement (Second) of Trusts § 187 (1959).

The standard stated in subsection (a) applies only to powers which are to be exercised in a fiduciary capacity. A power held in a nonfiduciary capacity is not subject to this section even though the power holder may coincidentally be acting as trustee.

While this Code does not in general include tax curative provisions that automatically rewrite the terms of trusts that would otherwise fail to qualify for intended tax benefits, the problem of the beneficiary-trustee is an exception. The unintended inclusion of the trust in the beneficiary-trustee's gross estate is a frequent enough occurrence that it is a topic on which far more States have enacted corrective statutes than on other topics. A tax curative provision differs from a statute such as Section 415 of this Code, which allows a court to modify a trust to achieve an intended tax benefit. Absent federal authority authorizing the specific

1 modification, a lower court decree modifying a trust is controlling for federal estate  
2 tax purposes only if the decree was issued before the taxing event, that is, prior to  
3 the decedent's death. See Rev. Rul. 73-142, 1973-1 C.B. 404. There is specific  
4 federal authority authorizing modification of trusts for a number of reasons (see  
5 Comment to Section 415) but not on the specific issues addressed in this section.  
6 Subsections (b) through (e), by interpreting the original language of the trust  
7 instrument in a way that qualifies for intended tax benefits, obviates the need to seek  
8 a later modification of the trust.

9 Subsection (b) states the general rule. Unless the terms of the trust expressly  
10 refer to this subsection, the power in the trustee to make discretionary distributions  
11 to the trustee as beneficiary are automatically limited by the requisite ascertainable  
12 standard necessary to avoid inclusion of the trust in the trustee's gross estate or  
13 taxable gift upon the trustee's release or exercise of the power. Trusts of which the  
14 trustee-beneficiary is also a settlor are not subject to this subsection. Limiting the  
15 discretion of a settlor-trustee to an ascertainable standard is not sufficient to avoid  
16 inclusion of the trust in the settlor's gross estate. More restrictive rules apply. See  
17 generally John J. Regan, Rebecca C. Morgan & David M. English, Tax, Estate and  
18 Financial Planning for the Elderly § 17.07[2][h]. Furthermore, the inadvertent  
19 inclusion of a trust in a settlor-trustee's gross estate is a far less frequent and better  
20 understood occurrence than is the inadvertent inclusion of the trust in the estate of a  
21 trustee-beneficiary who was not the settlor.

22 Subsection (c) addresses a common trap, the trustee who is not a beneficiary  
23 but who has power to make discretionary distributions to those to whom the trustee  
24 owes a legal obligation of support. Discretion to make distributions to those to  
25 whom the trustee owes a legal obligation of support, such as to the trustee's minor  
26 children, results in inclusion of the trust in the trustee's gross estate even if the  
27 power is limited by an ascertainable standard. The relevant regulations provide that  
28 the ascertainable standard exception applies only to distributions for the benefit of  
29 the decedent, and not to distributions to those to whom the decedent owes a legal  
30 obligation of support. See Treas. Reg. § 20.2041-1(b)(2).

31 Subsection (d) deals with cotrustees, incorporating the common drafting  
32 technique of granting the broader discretion only to the independent trustee.  
33 Cotrustees who are beneficiaries of the trust or have a legal obligation to support a  
34 beneficiary may exercise the power only as limited by subsection (b) or (c). If all  
35 trustees are so limited, the court is authorized to appoint a special fiduciary to make  
36 a decision as to the broader exercise is appropriate.

37 Subsection (e) recognizes some necessary exceptions. Trusts qualifying for  
38 the marital deduction are includable in the surviving spouse's gross estate without  
39 regard to the trustee's ability to make discretionary distributions to the spouse.

1 Consequently, there is no need to limit a term of the trust authorizing a spouse-  
2 trustee to make discretionary distributions for the spouse's benefit. Similar  
3 reasoning applies to the revocable trust, which, because of the settlor's power to  
4 revoke, is automatically includable in the settlor's gross estate even if the settlor is  
5 not named as a beneficiary.

6 The exception for the Section 2503(c) minors trust is necessary to avoid loss  
7 of gift tax benefits. While preventing a trustee from distributing trust funds in  
8 discharge of a legal obligation of support would keep the trust out of the trustee's  
9 gross estate, such a restriction may result in loss of the gift tax annual exclusion for  
10 contributions to the trust, even if the trustee is otherwise granted unlimited  
11 discretion. See Rev. Rul. 69-345, 1969-1 C.B. 226.

## 12 **SECTION 815. GENERAL POWERS OF TRUSTEE.**

13 (a) A trustee, without authorization by the court, may exercise:

14 (1) powers conferred by the terms of the trust; or

15 (2) except as limited by the terms of the trust:

16 (A) all powers over the trust property which an unmarried competent  
17 owner has over individually owned property;

18 (B) any other powers appropriate to achieve the proper management,  
19 investment, and distribution of the trust property; and

20 (C) any other powers conferred by this [Code].

21 (b) The exercise of a power is subject to the fiduciary duties prescribed by  
22 this [article].

### 23 **Comment**

24 This section is intended to grant trustees the broadest possible powers, but  
25 to be exercised always in accordance with the duties of the trustee and any  
26 limitations stated in the terms of the trust. The powers conferred elsewhere in this  
27 Code which are subsumed under this section include all of the specific powers listed  
28 in Section 816 as well as others listed in the Comment to that section. The powers  
29 conferred by this Code may be exercised without court approval. Should court

1 approval of the exercise of a power be desired, a petition for court approval may be  
2 filed.

3 A power differs from a duty. A duty imposes either a mandatory obligation  
4 or mandatory prohibition. A power, on the other hand, is a discretion, the exercise  
5 of which is not obligatory. The existence of a power, however created or granted,  
6 does not speak to the question of whether it is prudent under the circumstances to  
7 exercise the power.

8 **SECTION 816. SPECIFIC POWERS OF TRUSTEE.** Without limiting the  
9 authority conferred by Section 815, a trustee may:

10 (1) collect trust property and accept or reject additions to the trust property  
11 from a settlor or any other person;

12 (2) acquire or sell property, for cash or on credit, at public or private sale;

13 (3) exchange, partition, or otherwise change the character of trust property;

14 (4) deposit trust funds in an account in a regulated financial-service  
15 institution;

16 (5) borrow money, with or without security, and mortgage or pledge trust  
17 property for a period within or extending beyond the duration of the trust;

18 (6) with respect to an interest in a proprietorship, partnership, limited  
19 liability company, business trust, corporation, or other form of business or  
20 enterprise, continue the business or other enterprise and take any action that may be  
21 taken by shareholders, members, or property owners, including merging, dissolving,  
22 or otherwise changing the form of business organization or contributing additional  
23 capital;



1           (7) with respect to stocks or other securities, exercise the rights of an  
2 absolute owner, including the right to:

3           (A) vote, or give proxies to vote, with or without power of substitution,  
4 or enter into or continue a voting trust agreement;

5           (B) hold a security in the name of a nominee or in other form without  
6 disclosure of the trust so that title may pass by delivery;

7           (C) pay calls, assessments, and other sums chargeable or accruing against  
8 the securities, and sell or exercise stock subscription or conversion rights; and

9           (D) deposit the securities with a depositary or other regulated financial-  
10 service institution;

11          (8) with respect to an interest in real property, construct or make ordinary or  
12 extraordinary repairs, alterations, or improvements in, buildings or other structures,  
13 demolish improvements, raze existing or erect new party walls or buildings,  
14 subdivide or develop land, dedicate land to public use or grant public or private  
15 easements, and make or vacate plats and adjust boundaries;

16          (9) enter into a lease for any purpose as lessor or lessee, including a lease or  
17 other arrangement for exploration and removal of natural resources, with or without  
18 the option to purchase or renew, for a period within or extending beyond the  
19 duration of the trust;

20          (10) grant an option involving a sale, lease, or other disposition of trust  
21 property or acquire an option for the acquisition of property, including an option  
22 exercisable beyond the duration of the trust, and exercise an option so acquired;

1           (11) insure the property of the trust against damage or loss and insure the  
2 trustee, the trustee's agents, and beneficiaries against liability arising from the  
3 administration of the trust;

4           (12) abandon or decline to administer property of no value or of insufficient  
5 value to justify its collection or continued administration;

6           (13) with respect to possible liability for violation of environmental law:

7               (A) inspect or investigate property the trustee holds or has been asked to  
8 hold, or property owned or operated by an organization in which the trustee holds  
9 or has been asked to hold an interest, for the purpose of determining the application  
10 of environmental law with respect to the property;

11               (B) take action to prevent, abate, or otherwise remedy any actual or  
12 potential violation of any environmental law affecting property held directly or  
13 indirectly by the trustee, whether taken before or after the assertion of a claim or the  
14 initiation of governmental enforcement;

15               (C) decline to accept property into trust or disclaim any power with  
16 respect to property that is or may be burdened with liability for violation of  
17 environmental law;

18               (D) compromise claims against the trust which may be asserted for an  
19 alleged violation of environmental law; and

20               (E) pay the expense of any inspection, review, abatement, or remedial  
21 action to comply with environmental law;

1           (14) pay or contest any claim, settle a claim by or against the trust, and  
2           release, in whole or in part, a claim belonging to the trust;

3           (15) pay taxes, assessments, compensation of the trustee and of employees  
4           and agents of the trust, and other expenses incurred in the administration of the  
5           trust;

6           (16) exercise elections with respect to federal, state, and local taxes;

7           (17) select a mode of payment under any employee benefit or retirement  
8           plan, annuity, or life insurance payable to the trustee, exercise rights thereunder,  
9           including exercise of the right to indemnification for expenses and against liabilities,  
10          and take appropriate action to collect the proceeds;

11          (18) make loans out of trust property, including loans to a beneficiary on  
12          terms and conditions the trustee considers to be fair and reasonable under the  
13          circumstances, and the trustee has a lien on future distributions for repayment of  
14          those loans;

15          (19) pledge trust property to guarantee loans made by others to the  
16          beneficiary;

17          (20) appoint a trustee to act in another State or country with respect to trust  
18          property located in the other jurisdiction, confer upon the appointed trustee all of  
19          the powers and duties of the appointing trustee, require that the appointed trustee  
20          furnish security, and remove any trustee so appointed;

1           (21) pay an amount distributable to a beneficiary who is under a legal  
2       disability or who the trustee reasonably believes is incapacitated, by paying it  
3       directly to the beneficiary or applying it for the beneficiary's benefit, or by:  
4           (A) paying it to the beneficiary's [conservator] or, if the beneficiary does  
5       not have a [conservator], the beneficiary's [guardian];  
6           (B) paying it to the beneficiary's custodian under [the Uniform Transfers  
7       to Minors Act] or custodial trustee under [the Uniform Custodial Trust Act], and,  
8       for that purpose, creating a custodianship or custodial trust;  
9           (C) if the trustee does not know of a [conservator], [guardian],  
10      custodian, or custodial trustee, paying it to an adult relative or other person having  
11      legal or physical care or custody of the beneficiary, to be expended on the  
12      beneficiary's behalf; or  
13           (D) managing it as a separate fund on the beneficiary's behalf, subject to  
14      the beneficiary's continuing right to withdraw the distribution;  
15      (22) on distribution of trust property or the division or termination of a trust,  
16      make distributions in divided or undivided interests, allocate particular assets in  
17      proportionate or disproportionate shares, value the trust property for those  
18      purposes, and adjust for resulting differences in valuation;  
19      (23) resolve a dispute concerning the interpretation of the trust or its  
20      administration by mediation, arbitration, or other procedure for alternative dispute  
21      resolution;

(24) prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties;

(25) sign and deliver contracts and other instruments that are useful to achieve or facilitate the exercise of the trustee's powers; and

(26) on termination of the trust, exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to it.

### Comment

This section lists the type of specific powers typically included in trust instruments. All of the powers listed here are subject to alteration in the terms of the trust. See Section 104. All of the powers listed here are also subsumed under the general authority granted in Section 815(a)(2) to exercise all powers over the trust property which an unmarried competent owner has over individually owned property, and any other powers appropriate to achieve the proper management, investment, and distribution of the trust property. As provided in Section 815(b), the exercise of a power is subject to fiduciary duties except as modified in the terms of the trust. The fact that the trustee has a power does not imply a duty that the power must be exercised.

Most of the powers listed in this section are similar to the powers listed in Section 3 of the Uniform Trustees' Powers Act (1964). Several of the paragraphs are new, however, and other powers drawn from the Trustees' Powers Act have been modified.

The powers listed here add little of substance not already granted by Section 815 and powers conferred elsewhere in the Code. While the Committee drafting this Code discussed excluding a list of specific powers, it concluded that the demand of third parties to see language expressly authorizing specific transactions required that a detailed list be retained.

Certain specific powers of a trustee which may be exercised without court approval are contained in other sections of the Code. See Sections 109(b) (transfer of principal place of administration), 413(a) (termination of uneconomic trust with value less than \$50,000), 416 (combination and division of trusts), 703(e)

1 (delegation to cotrustee), 807 (delegation to agent of powers and duties), 810(d)  
2 (joint investments), and Article 9 (Uniform Prudent Investor Act).

3 Paragraph (1) authorizes a trustee to collect trust property and collect or  
4 decline additions to the trust property. The power to collect trust property is an  
5 aspect of the trustee's duty to administer the trust. See Section 801. The trustee  
6 has a duty to enforce claims (see Section 811), the successful prosecution of which  
7 can result in trust property. The trustee also has a duty to prosecute claims against  
8 and collect trust property from a former trustee or other fiduciary. See Section 812.  
9 For a specific application of the power to reject additions to the trust property, see  
10 Section 816(13) (power to decline property with possible environmental liability).

11 Paragraph (2) authorizes a trustee to sell trust property, for cash or on  
12 credit, at public or private sale. Under the Restatement, a power of sale is implied  
13 unless limited in the terms of the trust. Restatement (Third) of Trusts: Prudent  
14 Investor Rule § 170 (1992). Despite authority to sell without security, such a sale  
15 may be imprudent. Before selling trust property, the trustee should determine that it  
16 is not the type of asset sale requiring advance notice to the qualified beneficiaries.  
17 See Section 813(c).

18 Paragraph (4) authorizes a trustee to deposit funds in an account in a  
19 regulated financial-service institution. This includes the right of a financial  
20 institution trustee to deposit funds in its own banking department. See Section  
21 802(h)(4).

22 Paragraph (5) authorizes a trustee to borrow money. Under the  
23 Restatement, the sole limitation on such borrowing is the general obligation to invest  
24 prudently. See Restatement (Third) of Trusts: Prudent Investor Rule § 191 (1992).  
25 Language clarifying that the loan may extend beyond the duration of the trust was  
26 added to negate an older view that the trustee only had power to encumber the trust  
27 property while the trust was in existence.

28 Paragraph (6) authorizes the trustee to continue, incorporate or otherwise  
29 change the form of a business. Any such decision by the trustee must be made in  
30 light of the standards of prudent investment stated in Article 9. The authority under  
31 this paragraph is broader than that granted under Section 3(c)(3) of the Uniform  
32 Trustees' Powers Act. Under the Trustees' Powers Act, a trustee could continue a  
33 business only if authorized by the terms of the trust or court order.

34 Paragraph (7) on powers with respect to securities, codifies and adds further  
35 details to the principles of Restatement (Second) of Trusts § 193 (1959).

1 Paragraph (9), authorizing the leasing of property, negates the older view,  
2 reflected in Restatement § 189 cmt. c, that a trustee could not lease property beyond  
3 the duration of the trust. Whether a longer term lease is appropriate is judged by the  
4 standards of prudence applicable to all investments.

5 Paragraph (10), authorizing a trustee to grant options with respect to sales,  
6 leases or other dispositions of property, negates the older view, reflected in  
7 Restatement (Second) of Trusts § 190 cmt. k, that a trustee could not grant another  
8 person an option to purchase trust property. Whether the granting of an option is  
9 appropriate, like all other investment decisions, is determined by whether it is a  
10 prudent investment decision as judged by the standards of Article 9.

11 Paragraph (11), authorizing a trustee to purchase insurance, empowers a  
12 trustee to implement the duty to protect trust property. See Section 809. The  
13 trustee may also insure beneficiaries, agents, and the trustee against liability,  
14 including liability for breach of trust.

15 Paragraph (13) is one of several provisions in the Code designed to address  
16 trustee concerns about possible liability for violations of environmental law. This  
17 paragraph collects all the powers relating to environmental concerns in one place  
18 even though some of the powers, such as the powers to pay expenses, compromise  
19 claims, and decline property, overlap with other paragraphs of this section (decline  
20 property, paragraph (1); compromise claims, paragraph (14); pay expenses,  
21 paragraph (15)). Numerous States have legislated on the subject of environmental  
22 liability of fiduciaries. For a representative state statute, see Tex. Prop. Code Ann.  
23 § 113.025. See also Sections 701(c)(2) (designated trustee may inspect property to  
24 determine potential violation of environmental law without having accepted  
25 trusteeship), 1010(b) (trustee not personally liable for violation of environmental law  
26 arising from ownership or control of trust property).

27 Paragraph (14), among other things, authorizes a trustee to release claims.  
28 Section 811 requires that a trustee need take only “reasonable” steps to enforce  
29 claims, meaning that a trustee may release a claim not only when it is uncollectible,  
30 but also when collection would be uneconomical. See also Restatement (Second) of  
31 Trusts § 192 (1959) (power to compromise, arbitrate and abandon claims).

32 Paragraph (15), among other things, authorizes a trustee to pay  
33 compensation to the trustee and agents without prior court approval. For the  
34 standard for setting trustee compensation, see Section 708. See also Section 709  
35 (repayment of trustee expenditures). While prior court approval is not required,  
36 Section 813(b)(4) requires that the trustee inform the qualified beneficiaries in  
37 advance of a change in the method or rate of compensation.

1 Paragraph (16) authorizes a trustee to make elections with respect to taxes.  
2 The Code leaves to other law the issue of whether the trustee, in making such  
3 elections, must make compensating adjustments in the beneficiaries' interests.

4 Paragraph (17) authorizes a trustee to take action with respect to employee  
5 benefit or retirement plans, or annuities or life insurance payable to the trustee.  
6 Typically these will be beneficiary designations which the settlor has made payable  
7 to the trustee, but the Code does not prohibit the trustee from acquiring ownership  
8 of annuities and life insurance.

9 Paragraphs (18) and (19) allow a trustee to make loans to a beneficiary or  
10 guarantee loans of a beneficiary upon such terms and conditions the trustee  
11 considers fair and reasonable. The determination of what is fair and reasonable must  
12 be made in light of the fiduciary duties of the trustee and purposes of the trust.  
13 Frequently, a trustee will make loans to a beneficiary which might be considered less  
14 than prudent in an ordinary commercial sense but which are of great benefit to the  
15 beneficiary and in carrying out the trustee's purposes. If the trustee requires  
16 security for the loan to the beneficiary, adequate security under this paragraph may  
17 consist of a charge on the beneficiary's interest in the trust. See Restatement  
18 (Second) of Trusts § 255 (1959). The interest of a beneficiary that is subject to a  
19 spendthrift restraint may not be used for security for a loan under this paragraph.  
20 See Article 5 (spendthrift protection and claims of creditors).

21 Paragraph (20) allows for the appointment of ancillary trustees in  
22 jurisdictions in which the regularly appointed trustee is unable or unwilling to act.  
23 Normally, such an appointment will relate to the management of real estate located  
24 in another jurisdiction. This paragraph allows the regularly appointed trustee to  
25 select the ancillary trustee and to confer on the ancillary trustee such powers and  
26 duties as necessary. This is also a topic which the settlor may wish to address in the  
27 terms of the trust.

28 Paragraph (21) allows a trustee to make payments to another person for the  
29 use or benefit of a beneficiary whom the trustee reasonably believes is incapacitated.  
30 While an adult relative or other person receiving funds is required to spend it on the  
31 beneficiary's behalf, it is preferable that the trustee make the distribution to a person  
32 with more formal fiduciary responsibilities. For this reason, payment may be made  
33 to an adult relative only if the trustee does not know of a conservator, guardian,  
34 custodian, or custodial trustee capable of acting for the beneficiary.

35 Paragraph (22) allows a trustee to make non-pro-rata distributions and  
36 allocate particular assets in proportionate or disproportionate shares. This power  
37 provides needed flexibility and lessens the risk that the non-pro-rata distribution will  
38 be treated as a taxable sale.



1 Paragraph (23) authorizes a trustee to resolve disputes through mediation or  
2 arbitration. The drafters of this Code strongly encourage the use of such alternate  
3 methods for resolving disputes. Arbitration is a form of nonjudicial settlement  
4 agreement authorized by Section 110. In representing beneficiaries and others in  
5 connection with arbitration or mediation, the representation principles of Article 3  
6 may be applied. Settlers wishing to encourage use of alternate dispute resolution  
7 may wish to specifically draft for such possibility.

8 Paragraph (24) authorizes a trustee to prosecute or defend an action. As to  
9 the propriety of reimbursement for attorney's fees and other expenses of an action  
10 or judicial proceeding, see Section 709 and Comment. See also Section 811 (duty  
11 to defend actions).

12 Paragraph (26), which is similar to Section 344 of the Restatement (Second)  
13 of Trusts (1959), clarifies that even though the trust has terminated, the trustee  
14 retains the powers needed to wind up the administration of the trust and distribute  
15 the remaining trust property. While such terminations should not be delayed, neither  
16 should they be hasty or ill-considered. By anticipating the termination prior to the  
17 terminating event, many of the problems that typically arise can be avoided.

#### 18 **SECTION 817. DISTRIBUTIONS UPON TERMINATION.**

19 (a) Upon termination or partial termination of a trust, the trustee may send  
20 to the beneficiaries a proposal for distribution. The right of any beneficiary to object  
21 to the proposed distribution terminates if the beneficiary does not inform the trustee  
22 of an objection within 30 days after the proposal was sent but only if the proposal  
23 notified the beneficiary of the right to object and of the time allowed for objection.

24 (b) Upon the occurrence of an event terminating or partially terminating a  
25 trust, the trustee shall proceed expeditiously to distribute the trust property to the  
26 persons entitled to it, subject to the right of the trustee to retain a reasonable reserve  
27 for the payment of debts, expenses, and taxes.

(c) A release by a beneficiary of a trustee from liability for breach of trust is invalid to the extent it was induced by improper conduct of the trustee or the beneficiary, at the time of the release, did not know of the beneficiary's rights or of the material facts relating to the breach.

### Comment

This section collects in one place several of the provisions relevant to distributions upon termination. Other provisions of the Code relevant to distributions upon termination include Section 816(26) (powers upon termination to windup administration and distribution), and 1005 (limitation of action against trustee).

Subsection (a) is based on Section 3-906(b) of the Uniform Probate Code. It addresses the dilemma that sometimes arises where the trustee is reluctant to make distribution until the beneficiary approves but the beneficiary is reluctant to approve until the assets are in hand. Subsection (a), in particular, should facilitate the making of non pro rata distributions. However, whenever practicable it is normally better practice to obtain the advance written consent of the beneficiaries.

Subsection (b) recognizes that upon an event terminating or partially terminating the trust, expeditious distribution should be encouraged to the extent reasonable under the circumstances. A trustee, however, is entitled to retain a reasonable reserve for payment of debts, expenses, and taxes. Sometimes these reserves must be quite large, for example upon the death of the beneficiary of a QTIP trust subject to federal estate tax in the beneficiary's estate. Not infrequently, a substantial reserve must be retained until the estate tax audit is concluded, which may not occur until several years after the beneficiary's death.

Subsection (c) is a specific application of Section 1009. Section 1009 addresses when any type of release by a beneficiary of a trustee is valid. Subsection (c) deals specifically with releases given upon termination of the trust. See also Restatement (Second) of Trusts § 217 (1959).



1 **ARTICLE 10**  
2 **LIABILITY OF TRUSTEES AND RIGHTS**  
3 **OF PERSONS DEALING WITH TRUSTEE**

4 **General Comment**

5 Sections 1001 through 1009 list the remedies for breach of trust, describe  
6 how money damages are to be determined, and specify potential defenses. The  
7 remedies for breach of trust are listed in Section 1001. The remedies provided are  
8 both broad and flexible. The method for determining money damages for breach of  
9 trust provided in Section 1002 is based on two principles: (1) the trust should be  
10 restored to the position it would have been in had the harm not occurred; and (2) the  
11 trustee should not be permitted to profit from the trustee's own wrong. Section  
12 1003 holds a trustee accountable for profits made from the trust even in the absence  
13 of a breach of trust. Section 1004 reaffirms the court's power in equity to award  
14 costs and attorney's fees as justice requires.

15 Sections 1005 through 1009 specify potential defenses. Section 1005  
16 provides a statute of limitations on actions against a trustee. Section 1006 protects  
17 a trustee who acts in reasonable reliance on the terms of a written trust instrument.  
18 Section 1007 protects a trustee who has exercised reasonable care to ascertain the  
19 happening of events, such as a beneficiary's marriage or death, that might affect  
20 distributions. Section 1008 describes the effect of and potential limits on use of an  
21 exculpatory clause. Section 1009 deals with the requirements for beneficiary  
22 approval of acts of the trustee that might otherwise constitute a breach of trust.

23 Sections 1010 through 1013 address trustee relations with persons other  
24 than beneficiaries. The emphasis is on encouraging trustees and third parties to  
25 engage in commercial transactions to the same extent as if the property was not held  
26 in trust. Section 1010 negates personal liability on contracts entered into by the  
27 trustee if the fiduciary capacity was properly disclosed. The trustee is also relieved  
28 from liability for torts committed in the course of administration unless the trustee  
29 was personally at fault. Section 1011 negates personal liability for contracts entered  
30 into by partnerships in which the trustee is a general partner as long as the fiduciary  
31 capacity was disclosed in the contract or partnership certificate. Section 1012  
32 protects persons other than beneficiaries who deal with a trustee in good faith and  
33 without knowledge that the trustee is exceeding a power. Section 1013 permits a  
34 third party to rely on a certification of trust, thereby reducing requests by third  
35 parties for copies of the complete trust instrument.

36 The settlor, in the terms of the trust, may not limit the rights of persons other  
37 than beneficiaries as provided in Sections 1010 through 1013, nor interfere with the

1 court's ability to take such action to remedy a breach of trust as may be necessary in  
2 the interests of justice. See Section 104.

3 **SECTION 1001. REMEDIES FOR BREACH OF TRUST.**

4 (a) A violation by a trustee of a duty the trustee owes to a beneficiary is a  
5 breach of trust.

6 (b) To remedy a breach of trust that has occurred or may occur, the court  
7 may:

8 (1) compel the trustee to perform the trustee's duties;

9 (2) enjoin the trustee from committing a breach of trust;

10 (3) compel the trustee to redress a breach of trust by paying money,  
11 restoring property, or other means;

12 (4) order a trustee to account;

13 (5) appoint a special fiduciary to take possession of the trust property  
14 and administer the trust;

15 (6) suspend or remove the trustee;

16 (7) reduce or deny compensation to the trustee;

17 (8) subject to Section 1012, void an act of the trustee, impose a lien or a  
18 constructive trust on trust property, or trace trust property wrongfully disposed of  
19 and recover the property or its proceeds; or

20 (9) order any other appropriate relief.

21 **Comment**

22 This section codifies in general terms the remedies available if a trustee has  
23 committed a breach of trust or threatens to do so. This section provides brief

1 statements of the available remedies and does not attempt to cover the refinements  
2 and exceptions developed in case law. The availability of a remedy in a particular  
3 circumstance is governed not only by this Code but is supplemented by the common  
4 law of trusts and principles of equity. See Section 107. The petitioner may seek  
5 any of the remedies that are appropriate to the particular case.

6 Beneficiaries and cotrustees have standing to bring a petition for breach of  
7 trust. Following a successor trustee's acceptance of office, a successor trustee has  
8 standing to sue a predecessor for breach of trust. See Restatement (Second) of  
9 Trusts § 200 (1959). In the case of a charitable trust, standing to sue for a breach is  
10 also in the State Attorney General and persons with a special interest. See  
11 Restatement (Second) of Trusts § 391 (1959). Under this Code, a person appointed  
12 to enforce a trust for an animal or a trust for a noncharitable purpose would have  
13 standing to sue for a breach of trust. See Sections 105(b), 407, 408. A person who  
14 may represent a beneficiary's interest under Article 3 would have standing. This  
15 comment is illustrative and not necessarily exhaustive of those who have standing.  
16 As to standing generally, see Restatement (Second) of Trusts § 200 (1959).

17 Traditionally, legal remedies for breach of trust were limited to suits to  
18 enforce unconditional obligations to pay money or deliver chattels. See Restatement  
19 (Second) of Trusts § 198 (1959). Otherwise, remedies for breach of trust were  
20 exclusively equitable, and as such, neither jury trial or punitive damages were  
21 available. See Restatement (Second) of Trusts § 197 (1959). This Code does not  
22 preclude the possibility that a particular enacting jurisdiction might allow jury trials  
23 or punitive damages in an action for breach of trust, or even classify punitive  
24 damages as an equitable remedy. Nor does this Code preclude the possibility that  
25 jury trial or punitive damages might be available in an enacting jurisdiction for  
26 actions against a trustee not arising under this Code but under other law.

27 The list of remedies listed in this section are derived from Restatement  
28 (Second) of Trusts § 199 (1959). The reference to payment of money in subsection  
29 (b)(3) includes liability that might be characterized as damages, restitution, or  
30 surcharge. For the measure of liability, see Section 1002. Subsection (b)(5) makes  
31 explicit the court's authority to appoint a special fiduciary, also sometimes referred  
32 to as a receiver. See Restatement (Second) of Trusts § 199(d) (1959). The  
33 authority of the court to appoint a special fiduciary is not limited to actions alleging  
34 breach of trust but is available whenever the court, exercising its equitable  
35 jurisdiction, concludes such appointment would promote administration of the trust.  
36 See Section 704(d) (special fiduciary may be appointed whenever court considers  
37 such appointment necessary for administration).

38 Subsection (b)(6) authorizes the court to suspend or remove the trustee. For  
39 the complete statement of grounds for trustee removal, see Section 706.

1 Subsection (b)(7), which allows the court to reduce or deny compensation,  
2 follows Section 243 of the Restatement (Second) of Trusts (1959). For the factors  
3 to consider in setting a trustee's compensation absent breach of trust, see Section  
4 708. In deciding whether to reduce or deny a trustee compensation, the court may  
5 wish to consider (1) whether the trustee acted in good faith; (2) whether the breach  
6 of trust was intentional; (3) the nature of the breach and the extent of the loss; (4)  
7 whether the trustee has restored the loss; and (5) the value of the trustee's services  
8 to the trust. See Restatement (Second) of Trusts § 243 cmt. c (1959).

9 The authority under subsection (b)(8) to set aside wrongful acts of the  
10 trustee is a corollary of the power to enjoin a threatened breach as provided in  
11 subsection (b)(2). However, in setting aside the wrongful acts of the trustee the  
12 court may not impair the rights of bona fide purchasers protected by Section 1012.  
13 See Restatement (Second) of Trusts § 202 (1959). See also G. Bogert, *The Law of*  
14 *Trusts and Trustees* § 861, at 16-17 (rev. 2d ed. 1982).

## 15 **SECTION 1002. DAMAGES FOR BREACH OF TRUST.**

16 (a) A trustee who commits a breach of trust is liable to the beneficiaries  
17 affected for the greater of:

18 (1) the amount required to restore the value of the trust property and  
19 trust distributions to what they would have been had the breach not occurred; or

20 (2) the profit the trustee made by reason of the breach.

21 (b) Except as otherwise provided in this subsection, if more than one trustee  
22 is liable to the beneficiaries for a breach of trust, a trustee is entitled to contribution  
23 from the other trustee or trustees. A trustee is not entitled to contribution if the  
24 trustee was substantially more at fault than another trustee or if the trustee  
25 committed the breach of trust in bad faith or with reckless indifference to the  
26 purposes of the trust or the interests of the beneficiaries. A trustee who received a

1 benefit from the breach of trust is not entitled to contribution from another trustee  
2 to the extent of the benefit received.

3 **Comment**

4 This section is based on Restatement (Third) of Trusts: Prudent Investor  
5 Rule § 205 (1992). If a trustee commits a breach of trust, the beneficiaries may  
6 either affirm the transaction or, if a loss has occurred, hold the trustee liable for the  
7 amount necessary to fully compensate for the consequences of the breach. This may  
8 include lost income, capital gain, or appreciation that would have resulted from  
9 proper administration. Even if a loss has not occurred, the trustee may not be  
10 allowed to benefit by reason of the trustee's improper action, and is thus  
11 accountable for any profit that the trustee may have made by reason of the breach.

12 For extensive commentary on the determination of damages, with numerous  
13 specific applications, see Restatement (Third) of Trusts: Prudent Investor Rule  
14 §§ 204-213 (1992). On the authority of a court of equity to reduce or excuse  
15 damages for breach of trust, see Restatement (Second) of Trusts § 205 cmt. g  
16 (1959).

17 The remedies provided in this section do not preclude resort to other  
18 remedies provided by this Code or available under the common law of trusts. See  
19 Sections 107 (common law of trusts) and 1001 (remedies for breach of trust). As to  
20 possible defenses of the trustee, see Sections 1005 through 1009.

21 Subsection (b) is based on Restatement (Second) of Trusts § 258 (1959).  
22 Cotrustees are in general jointly and severally liable for a breach of trust if there was  
23 joint participation in the breach. In addition, joint and several liability is imposed on  
24 a nonparticipant who, as provided in Section 703, failed to exercise reasonable care  
25 to (1) prevent a cotrustee from committing a material breach of trust, or (2) compel  
26 a cotrustee to redress a material breach of trust. However, a trustee who was  
27 substantially more at fault or committed the breach of trust in bad faith or with  
28 reckless indifference to the purposes of the trust or the interests of the beneficiaries  
29 is not entitled to contribution from the other trustees.

30 Determining degrees of comparative fault is a question of fact. The fact that  
31 one trustee was more negligent or more active than another does not necessarily  
32 establish substantial fault. Nor is a trustee substantially less at fault because the  
33 trustee did not actively participate in the breach. See *id.* cmt. e. Among the factors  
34 to consider: (1) did the trustee fraudulently induce the other trustee to join in the  
35 breach? (2) did the trustee commit the breach intentionally while the other trustee  
36 was at most negligent? (3) did the trustee, because of greater experience or  
37 expertise, control the actions of the other trustee? (4) did the trustee alone commit



1 the breach with liability imposed on the other trustee only because of an improper  
2 delegation or failure to properly monitor the actions of the cotrustee? See id. cmt.  
3 d.

4 **SECTION 1003. DAMAGES IN ABSENCE OF BREACH.**

5 (a) A trustee is accountable to a beneficiary affected for any profit made by  
6 the trustee arising from the administration of the trust, even absent a breach of trust.

7 (b) Absent a breach of trust, a trustee is not liable to a beneficiary for a loss  
8 or depreciation in the value of trust property or for not having made a profit.

9 **Comment**

10 The principle on which a trustee's duty of loyalty is premised is that a trustee  
11 should not be allowed to use the trust as a means for personal profit other than for  
12 compensation earned. While most instances of personal profit involve situations  
13 where the trustee has breached the duty of loyalty, not all cases of personal profit  
14 involve a breach of trust. Subsection (a), which holds a trustee accountable for any  
15 profit made, even absent a breach of trust, is based on Restatement (Second) of  
16 Trusts § 203 (1959).

17 A trustee is not an insurer. As provided in subsection (b), absent a breach of  
18 trust, a trustee is not liable for a loss or depreciation in the value of the trust  
19 property or for failure to make a profit. Subsection (b) is based on Restatement  
20 (Second) of Trusts § 204 (1959).

21 **SECTION 1004. ATTORNEY'S FEES AND COSTS.** In a judicial  
22 proceeding involving a trust, the court, as justice and equity may require, may award  
23 costs and expenses, including reasonable attorney's fees, to any party, to be paid by  
24 another party or from the trust that is the subject of the controversy.

25 **Comment**

26 This section is based on Massachusetts General Laws chapter 215, § 45.  
27 The court, in its discretion, may award the costs and expenses of a party, including  
28 reasonable attorney's fees, against another party or the trust. This section overlaps

1 with Section 709, which allows a trustee to recover expenditures properly incurred  
2 in the administration of the trust. Generally, litigation expenses were at common  
3 law chargeable against another party only in the case of egregious conduct such as  
4 bad faith or fraud. A beneficiary, however, could recover litigation costs from the  
5 trust if the litigation was deemed beneficial to the trust. Sometimes, litigation  
6 brought by a beneficiary involves an allegation that the trustee had committed a  
7 breach of trust. On other occasions, the suit by the beneficiary is brought because of  
8 the trustee's failure to take action against a third party, such as to recover property  
9 properly belonging to the trust. For the authority of a beneficiary to bring an action  
10 when the trustee fails to take action against a third party, see Restatement (Second)  
11 of Trusts §§ 281-282 (1959).

## 12 **SECTION 1005. LIMITATION OF ACTION AGAINST TRUSTEE.**

13 (a) A beneficiary may not commence a proceeding against a trustee for  
14 breach of trust more than one year after the date that the beneficiary or a  
15 representative of the beneficiary was sent a report that adequately set forth the facts  
16 constituting the claim and informed the beneficiary of the time allowed.

17 (b) A report adequately sets forth the facts constituting a claim if it provides  
18 sufficient information so that the beneficiary or representative knows of the claim or  
19 should have inquired into its existence.

20 (c) If subsection (a) does not apply, a beneficiary must commence a judicial  
21 proceeding against a trustee for breach of trust within five years after the first to  
22 occur of:

23 (1) the removal or resignation of the trustee;

24 (2) the termination of the beneficiary's interest in the trust; or

25 (3) the termination of the trust.

## 26 **Comment**

1           The one-year and five-year limitations periods under this section are not the  
2 only means for barring an action by a beneficiary. A beneficiary may also be  
3 foreclosed by consent, release, or ratification by the beneficiaries. See Section 1009.  
4 Claims may also be barred by principles such as estoppel and laches arising under  
5 the common law of trusts. See Section 107.

6           The representative referred to in subsection (a) is the person who may  
7 represent and bind a beneficiary as provided in Article 3. During the time that a  
8 trust is revocable and the settlor has capacity, the person holding the power to  
9 revoke is the one who must receive the report. See Section 603 (powers of settlor  
10 of revocable trust).

11           This section addresses only the issue of when the clock will start to run for  
12 purposes of the statute of limitations. If the trustee wishes to foreclose possible  
13 claims immediately, a consent to the report or other information should be obtained  
14 pursuant to Section 1009.

15           Subsection (c), which is based in part on Mo.Rev.Stat. § 456.220, is  
16 designed to provide some ultimate repose for actions against a trustee. While the  
17 five-year limitations period will normally begin to run on termination of the trust, it  
18 can also begin earlier. If a trustee leaves office prior to the termination of the trust,  
19 the limitations period for actions against that particular trustee begins to run on the  
20 date the trustee leaves office. If a beneficiary receives a final distribution prior to  
21 the date the trust terminates, the limitations period for actions by that particular  
22 beneficiary begins to run on the date of final distribution. Subsection (c) applies in  
23 cases where the trustee has failed to report to the beneficiaries or the report did not  
24 meet the disclosure requirements of subsection (b).

25           The statutes of limitations provided under this section do not expressly  
26 create exceptions for fraud or other misdeeds, the drafters preferring to leave the  
27 issue of exceptions to other law of the State.

28           For the provisions relating to the duty to report to beneficiaries, see Section  
29 813.

30           **SECTION 1006. RELIANCE ON TRUST INSTRUMENT.** A trustee who  
31 acts in reasonable reliance on the terms of the trust as expressed in the trust  
32 instrument is not liable to a beneficiary for a breach of trust to the extent the breach  
33 resulted from the reliance.

1 **Comment**

2 On occasion, the terms of the trust will differ from the an apparent plain  
3 meaning of the trust instrument. This can occur because the court, in determining  
4 the terms of the trust, is allowed to consider evidence extrinsic to the trust  
5 instrument. See Section 103(19) (definition of “terms of a trust”). Furthermore, if a  
6 trust is reformed on account of mistake of fact or law, as provided in Section 414,  
7 provisions of a trust instrument can be deleted or contradicted and provisions not in  
8 the trust instrument may be added. “Terms of a trust,” as defined in this Code and  
9 under the doctrine of reformation, reflect the guiding principle that a trust should be  
10 administered and distributed in accordance with the settlor’s intent. However, a  
11 trustee should at the same time be permitted to administer a trust with some  
12 dispatch and without concern that a reasonable reliance on the terms of the trust  
13 instrument is misplaced. This section protects a trustee who so relies on a trust  
14 instrument but only to the extent the breach of trust resulted from such reliance.  
15 This section is similar to Section 2(b) of the Uniform Prudent Investor Act, which  
16 protects a trustee from liability to the extent that the trustee acted in reasonable  
17 reliance on the provisions of the trust.

18 **SECTION 1007. EVENT AFFECTING ADMINISTRATION OR**  
19 **DISTRIBUTION.** Whenever the happening of an event, including marriage,  
20 divorce, performance of educational requirements, or death, affects the  
21 administration or distribution of a trust, a trustee who has exercised reasonable care  
22 to ascertain the happening of the event is not liable for a loss resulting from the  
23 trustee’s lack of knowledge.

24 **Comment**

25 This section is based on Washington Revised Code § 11.98.100, and is  
26 designed to encourage trustees to expeditiously administer trusts without undue  
27 concern about liability for the failure to ascertain external facts, often of a personal  
28 nature, that might affect administration or distribution of the trust. The common  
29 law, contrary to this section, imposed absolute liability against a trustee for  
30 misdelivery regardless of the trustee’s level of care. See Restatement (Second) of  
31 Trusts § 226 (1959).

32 **SECTION 1008. EXCULPATION OF TRUSTEE.**

1 (a) A term of a trust relieving a trustee of liability for breach of trust is  
2 unenforceable to the extent that it:

3 (1) relieves the trustee of liability for breach of trust committed in bad  
4 faith or with reckless indifference to the purposes of the trust or the interests of the  
5 beneficiaries; or

6 (2) was inserted as the result of an abuse by the trustee of a fiduciary or  
7 confidential relationship to the settlor.

8 (b) An exculpatory term drafted or caused to be drafted by the trustee is  
9 invalid as an abuse of a fiduciary or confidential relationship unless the trustee  
10 proves that the exculpatory term is fair under the circumstances and that its  
11 existence and contents were adequately communicated to the settlor.

#### 12 **Comment**

13 Subsection (a) is the same in substance as Section 222 of the Restatement  
14 (Second) of Trusts (1959). It is also consistent with the standards expressed in  
15 Sections 104 and 814(a) relating to the extent to which a settlor may negate a duty  
16 in the terms of the trust. There is a minimum standard of conduct to which a trustee  
17 must adhere, whether stated as a negation of a duty or in the form of an exculpatory  
18 provision. A trustee must always act in good faith and in accordance with the  
19 purposes of the trust.

20 Subsection (b) disapproves of cases such as *Marsman v. Nasca*, 573 N.E.2d  
21 1025 (Mass. App. Ct. 1991), which held that an exculpatory clause in a trust  
22 instrument drafted by the trustee was valid absent proof that it was inserted as a  
23 result of an abuse of a fiduciary relationship. For a later case where sufficient proof  
24 of abuse was present, see *Rutanan v. Ballard*, 678 N.E.2d 133 (Mass. 1997).  
25 Subsection (b) responds to the danger that the insertion of such a clause by the  
26 fiduciary or its agent may have been undisclosed or inadequately understood by the  
27 settlor. To overcome this presumption of abuse, the trustee must establish that the  
28 clause was fair and that its existence and contents were adequately communicated to  
29 the settlor. In determining whether the clause was fair, the court may wish to  
30 examine: (1) the extent of the prior relationship between the settlor and trustee; (2)  
31 whether the settlor received independent advice; (3) the sophistication of the settlor

1 with respect to business and fiduciary matters; (4) the trustee's reasons for inserting  
2 the clause; and (5) the scope of the particular provision inserted. See Restatement  
3 (Second) of Trusts § 222 cmt. d (1959).

4 **SECTION 1009. BENEFICIARY'S CONSENT, RELEASE, OR**

5 **RATIFICATION.** A trustee is not liable to a beneficiary for breach of trust if the  
6 beneficiary, while having capacity, consented to the conduct constituting the breach,  
7 released the trustee from liability for the breach, or ratified the transaction  
8 constituting the breach, unless:

9 (1) the consent, release, or ratification of the beneficiary was induced by  
10 improper conduct of the trustee; or

11 (2) at the time of the consent, release, or ratification, the beneficiary did not  
12 know of the beneficiary's rights or of the material facts relating to the breach.

13 **Comment**

14 This section is based on Sections 216 through 218 of the Restatement  
15 (Second) of Trusts (1959). When one beneficiary has consented but others have  
16 not, courts give a remedy to the nonconsenting beneficiaries. Restatement (Second)  
17 of Trusts § 216 cmt. h (1959). But consent by the settlor of a revocable trust or by  
18 the holder of a presently exercisable power of withdrawal binds all of the  
19 beneficiaries. See Section 603. A beneficiary is also bound to the extent a consent  
20 is given by a person authorized to represent the beneficiary as provided in Article 3.

21 Per Restatement (Second) of Trusts § 216(3) and comment n, a consent of a  
22 beneficiary to a self-dealing transaction by a trustee is binding only if the transaction  
23 was fair and reasonable.

24 **SECTION 1010. LIMITATION ON PERSONAL LIABILITY OF**

25 **TRUSTEE.**

(a) Except as otherwise provided in the contract, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administering of the trust if the trustee in the contract disclosed the fiduciary capacity.

(b) A trustee is 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, only if the trustee is personally at fault.

(c) A claim based on a contract entered into by a trustee in the trustee's fiduciary capacity, on an obligation arising from ownership or control of trust property, or on a tort committed in the course of administering a trust, may be asserted in a judicial proceeding against the trustee in the trustee's fiduciary capacity, whether or not the trustee is personally liable for the claim.

### Comment

This section is based on Section 7-306 of the Uniform Probate Code. However, unlike the Uniform Probate Code, which requires that the contract disclose both the representative capacity and identify the trust, subsection (a) of this section protects a trustee who reveals the fiduciary relationship, whether by indicating a signature as trustee or by simply referring to the trust. Under this section, it is assumed that all that should be required is that the other contracting party be put on notice that a trust is involved. The protection afforded the trustee by this section applies only to contracts that are properly entered into in the trustee's fiduciary capacity, meaning that the trustee is exercising an available power and is not violating a duty. This section does not excuse any liability the trustee may have for breach of trust.

Subsection (b) addresses trustee liability arising from ownership or control of trust property and for torts occurring incident to the administration of the trust. Liability in such situations is imposed on the trustee personally only if the trustee was personally at fault, either intentionally or negligently. This is contrary to

1 Restatement (Second) of Trusts § 264 (1959), which imposes liability on a trustee  
2 regardless of fault, including liability for acts of agents under respondeat superior.  
3 Responding to a particular concern of trustees, subsection (b) specifically protects a  
4 trustee from personal liability for violations of environmental law unless the trustee  
5 was personally at fault. See also Sections 701(c)(2) (nominated trustee may  
6 investigate trust property to determine potential violation of environmental law  
7 without having accepted trusteeship), and 816(13) (trustee powers with respect to  
8 possible liability for violation of environmental law).

9 Subsection (c) alters the case law rule that a trustee could not be sued in a  
10 representative capacity if the trust estate was not liable.

### 11 **SECTION 1011. INTEREST AS A GENERAL PARTNER.**

12 (a) Except as provided in subsection (c) or unless personal liability is  
13 imposed in the contract, a trustee who holds an interest as a general partner in a  
14 general or limited partnership is not personally liable on a contract entered into by  
15 the partnership after the trust's acquisition of the interest if the fiduciary capacity  
16 was disclosed in the contract or in a statement previously filed pursuant to the  
17 [Uniform Partnership Act or Uniform Limited Partnership Act].

18 (b) Except as otherwise provided in subsection (c), a trustee who holds an  
19 interest as a general partner is not personally liable for torts committed by the  
20 partnership or for obligations arising from ownership or control of the interest  
21 unless the trustee is personally at fault.

22 (c) The immunity provided by this section does not apply if an interest in the  
23 partnership is held by the trustee in a capacity other than that of trustee or is held by  
24 the trustee's spouse or the trustee's descendants, siblings, parents, or the spouse of  
25 any of them.



1 (d) If the trustee of a revocable trust holds an interest as a general partner,  
2 the settlor is personally liable for contracts and other obligations of the partnership  
3 as if the settlor were a general partner.

4 **Comment**

5 This section is modeled after Ohio Revised Code § 1339.65. While Section  
6 1011 protects a trustee from personal liability for contracts which the trustee enters  
7 into on behalf of a trust, it does not protect a trustee from personal liability for  
8 contracts entered into by a separate partnership entity of which the trustee is a  
9 general partner. This section protects the trustee whether the trustee signed the  
10 contract on behalf of the partnership or it was signed by another general partner.  
11 The trustee also is protected whether the partnership is general or limited and,  
12 similar to Section 1011, is protected from personal liability for torts committed by  
13 the partnership unless the trustee was personally at fault. Finally, protection from  
14 the partnership's contractual obligations is available only if the other party is on  
15 notice of the fiduciary relationship, either in the contract itself or in the partnership  
16 certificate on file.

17 Special protection is not needed for other business interests the trustee may  
18 own, such as an interest as a limited partner, a membership interest in an LLC, or an  
19 interest as a corporate shareholder. In all these other cases the nature of the entity  
20 or the interest owned by the trustee carries with it its own limitation on liability.

21 Certain exceptions apply. The section is not intended to be used as a device  
22 for individuals or their families to shield assets from creditor claims. Consequently,  
23 subsection (c) provides that the immunity provided by this section does not apply if  
24 an interest in the partnership is held by the trustee in a capacity other than that of  
25 trustee or is held by the trustee's spouse or the trustee's descendants, siblings,  
26 parents, or the spouse of any of them.

27 Nor can a revocable trust be used as a device for avoiding claims against the  
28 partnership. Subsection (d) imposes personal liability on the settlor for partnership  
29 contracts and other obligations of the partnership the same as if the settlor were a  
30 general partner.

31 **SECTION 1012. PROTECTION OF PERSON DEALING WITH**  
32 **TRUSTEE.**

(a) A person other than a beneficiary who in good faith assists a trustee, or who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers is protected from liability as if the trustee properly exercised the power.

(b) A person other than a beneficiary who in good faith deals with a trustee is not required to inquire into the extent of the trustee's powers or the propriety of their exercise.

(c) A person who in good faith delivers assets to a trustee need not ensure their proper application.

(d) A person other than a beneficiary who in good faith assists a former trustee, or who for value and in good faith deals with a former trustee, without knowledge that the trusteeship has terminated is protected from liability as if the former trustee were still a trustee.

(e) The protection provided by this section to persons assisting or dealing with a trustee is superseded by comparable protective provisions of other laws relating to commercial transactions or to the transfer of securities by fiduciaries.

### Comment

Subsection (a) protects two different classes; persons who assist a trustee with a transaction, and persons who deal with the trustee for value. The third person is protected in the transaction despite the fact the trustee was exceeding or improperly exercising the power as long as the assistance was provided or transaction was entered into in good faith and without knowledge. For the definition of “know,” see Section 103(9).

Subsection (b) confirms that a third party acting in good faith is not charged with a duty to inquire into the extent of a trustee's powers or the propriety of their exercise.

1 Subsection (c) protects any person, including a beneficiary, who in good  
2 faith delivers property to a trustee. The standard of protection in the Restatement is  
3 similar although more elaborate. Under the Restatement, the person delivering the  
4 property is liable only if the person, at the time of the delivery, had notice that the  
5 trustee was misapplying or intending to misapply the property delivered. See  
6 Restatement (Second) of Trusts § 321 (1959).

7 Subsection (d) extends the protections afforded by the section to assistance  
8 provided to or dealings for value with a former trustee. The third party is protected  
9 the same as if the former trustee still held the office.

10 The purpose of subsection (e) is to allow a statute relating to commercial  
11 transactions to control whenever both it and this section could apply to a  
12 transaction. Consequently, the protections provided by this section are superseded  
13 by comparable protective provisions of these other laws. The principal statutes in  
14 question are the various articles of the Uniform Commercial Code, including Article  
15 8 on the transfer of securities, as well as the Uniform Simplification of Transfer of  
16 Securities by Fiduciaries Act.

### 17 **SECTION 1013. CERTIFICATION OF TRUST.**

18 (a) Instead of providing a person other than a beneficiary with a copy of the  
19 trust instrument, the trustee may provide the person with a certification of trust  
20 containing the following information:

- 21 (1) that the trust exists and the date the trust instrument was executed;
- 22 (2) the identity of the settlor or settlors;
- 23 (3) the identity and address of the currently acting trustee or trustees;
- 24 (4) the powers of the trustee;
- 25 (5) the revocability or irrevocability of the trust and the identity of any  
26 person holding a power to revoke the trust;
- 27 (6) the authority of cotrustees to sign and whether all or less than all are  
28 required in order to exercise powers of the trustee;

1                   (7) the trust's taxpayer identification number; and

2                   (8) the manner in which title to trust property may be taken.

3                   (b) A certification of trust may be signed or acknowledged by any trustee.

4                   (c) A certification of trust must state that the trust has not been revoked,  
5                   modified, or amended in any manner that would cause the representations contained  
6                   in the certification of trust to be incorrect.

7                   (d) A certification of trust need not contain the dispositive terms of a trust.

8                   (e) A recipient of a certification of trust may require the trustee to furnish  
9                   copies of those excerpts from the original trust instrument and later amendments  
10                  which designate the trustee and confer upon the trustee the power to act in the  
11                  pending transaction.

12                  (f) A person who acts in reliance upon a certification of trust without  
13                  knowledge that the representations contained therein are incorrect is not liable to  
14                  any person for so acting and may assume without inquiry the existence of the facts  
15                  contained in the certification. Knowledge of the terms of the trust may not be  
16                  inferred solely from the fact that a copy of all or part of the trust instrument is held  
17                  by the person relying upon the certification.

18                  (g) A person who in good faith enters into a transaction in reliance upon a  
19                  certification of trust may enforce the transaction against the trust property as if the  
20                  representations contained in the certification were correct.

1 (h) A person making a demand for the trust instrument in addition to a  
2 certification of trust or excerpts is liable for damages if the court determines that the  
3 person did not act in good faith in demanding the trust instrument.

4 (i) This section does not limit the right of a person to obtain a copy of the  
5 trust instrument in a judicial proceeding concerning the trust.

6 **Comment**

7 This section, based on California Probate Code § 18100.5, is designed to  
8 protect the privacy of a trust instrument by reducing requests by third persons for  
9 complete copies of the instrument when verifying a trustee's authority. Third  
10 persons frequently insist on receiving a copy of the complete trust instrument solely  
11 to verify a specific and narrow authority of the trustee to engage in a particular  
12 transaction. While a testamentary trust, because it is created under a will, is a  
13 matter of public record, an inter vivos trust instrument is private. Such privacy is  
14 compromised, however, if the trust instrument must be widely distributed among  
15 third persons. A certification of trust is a document signed by a currently acting  
16 trustee that may include excerpts from the trust instrument necessary to facilitate the  
17 particular transaction. The benefit of a certification is that it will enable the  
18 transaction to proceed without disclosure of the trust's dispositive provisions. Nor  
19 is there a need for third persons who may already have a copy of the instrument to  
20 pry into its provisions. Persons acting in reliance on a certification may assume the  
21 truth of the certification even if they have a complete copy of the trust instrument in  
22 their possession.

23 To encourage compliance with this section, persons demanding a trust  
24 instrument despite having already been offered a certification may be liable for  
25 damages if their refusal is determined not to have been made in good faith. A  
26 person acting in good faith would include a person required to examine a complete  
27 copy of the trust instrument pursuant to due diligence standards or as required by  
28 other law. Specific examples of such due diligence and legal requirements would  
29 include (1) in connection with transactions to be executed in the capital market  
30 where documentary standards have been established in connection with underwriting  
31 concerns; (2) to satisfy documentary requirements established by state or local  
32 government or regulatory agency; (3) to satisfy documentary requirements  
33 established by a state or local government or regulatory agency; and (4) where the  
34 insurance rates or premiums or other expenses of the party would be higher absent  
35 the availability of the documentation.

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**ARTICLE 11**  
**MISCELLANEOUS PROVISIONS**

**SECTION 1101. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.

**SECTION 1102. SEVERABILITY CLAUSE.** If any provision of this [Code] or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this [Code] which can be given effect without the invalid provision or application, and to this end the provisions of this [Code] are severable.

**SECTION 1103. EFFECTIVE DATE.** This [Code] takes effect on \_\_\_\_\_.

- SECTION 1104. REPEALS.** The following Acts are repealed:
- (1) Uniform Trustee Powers Act;
  - (2) Uniform Probate Code, Article VII;
  - (3) Uniform Trusts Act (1937); and
  - (4) Uniform Prudent Investor Act.

1 **Comment**

2 For the reasons why the above uniform acts should be repealed upon  
3 enactment of this Code, see the Prefatory Note. States which have not enacted one  
4 or more of the specified uniform acts should repeal their comparable legislation.  
5 Because of the comprehensive scope of this Code, many States will have trust  
6 provisions not based on any Uniform Act that will need to be repealed upon  
7 enactment of this Code. This section does not attempt to list the types of  
8 conforming amendments, whether in the enacting State's probate code or elsewhere,  
9 that need to be made upon enactment of this Code.

10 **SECTION 1105. APPLICATION TO EXISTING RELATIONSHIPS.**

11 (a) Except as otherwise provided in this [Code], on [the effective date of  
12 this [Code]]:

13 (1) this [Code] applies to all trusts created before, on, or after [its  
14 effective date];

15 (2) this [Code] applies to all judicial proceedings concerning trusts  
16 commenced on or after [its effective date];

17 (3) this [Code] applies to judicial proceedings concerning trusts  
18 commenced before [its effective date] unless the court finds that application of a  
19 particular provision of this [Code] would substantially interfere with the effective  
20 conduct of the judicial proceedings or prejudice the rights of the parties, in which  
21 case the particular provision of this [Code] does not apply and the superseded law  
22 applies;

23 (4) any rule of construction or presumption provided in this [Code]  
24 applies to trust instruments executed before [the effective date of the [Code]] unless  
25 there is a clear indication of a contrary intent in the terms of the trust; and

(5) an act done before [the effective date of the [Code]] is not affected by this [Code].

(b) If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before [the effective date of the [Code]], that statute remains in force with respect to the right.

### Comment

This Code is intended to have the widest possible effect within constitutional limitations. Specifically, this Code applies to all trusts whenever created, to judicial proceedings concerning trusts commenced on or after its effective date, and to already existing judicial proceedings unless the court otherwise orders. In addition, any rules of construction or presumption provided in the Code apply to preexisting trusts unless there is a clear indication of a contrary intent in the trust's terms. By giving the Code the widest possible retroactive effect, the need to know two bodies of law will quickly lessen.

The Code is and cannot be fully retroactive, however. Constitutional limitations preclude retroactive application to disturb settled property rights. Also, rights already barred by a statute of limitation or rule under former law are not revived by a possibly longer statute or more liberal rule under this Code. Nor is an Act done before the effective date of the Code affected by the Code's enactment. Finally, the Code itself provides that certain of its provisions do not apply to trust instruments executed before the effective date of the Code. These include Sections 602(a) (presumption that trust is revocable) and 813(f) (provision limiting ability of settlor to waive trustee's duty to report to beneficiaries and keep them informed).