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UNIFORM TRUST ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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UNIFORM TRUST ACT

WITH PREFATORY NOTE AND REPORTER'S NOTES

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PREFATORY NOTE

The Uniform Trust Act is the first comprehensive national codification of the law of trusts. The Uniform Law Commissioners appointed a Study Committee in 1993. The Drafting Committee, appointed in 1994, met once during the 1994-1995 year, and twice yearly during 1995-1996, 1996-1997, and 1997-1998. The Act had its first reading at the Commissioners's 1998 annual meeting.

Reasons for Trust Act – There are several reasons why the drafting of a Uniform Trust Act is timely. The primary stimulus is the greater use of trusts in family estate planning in recent years, particularly the revocable living trust, even among persons of moderate wealth. 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 – a few scattered statutes and even less in the way of reported cases. 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 which 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 Act hopefully will provide States with precise guidance on trust law questions in an easily findable place.

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 Act. Others, addressing more specialized topics, will continue to be available for enactment in their free-standing form. The following are the most relevant Acts:

Uniform Trustee Powers Act – approved in 1964, it 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 rights of third parties. The Trustee Powers Act, at a minimum, needs to be updated to reflect the recently approved Uniform Prudent Investor Act. Revisions are also needed due to changes in commercial practice, such as the invention of the LLC. The substantive issues covered by the Trustee Powers Act, but with numerous updates, are fully incorporated into the draft of the Uniform Trust Act, principally a Sections 816 and 1109. States enacting the Uniform Trust Act should repeal this other uniform act.

Uniform Prudent Investor Act – approved in 1994, this Act has been enacted in over half 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. The Prudent Investor Act is incorporated into the Uniform Trust Act as Article 9. States which have enacted the Uniform Prudent Investor Act are encouraged to recodify it as part of this Act.

Uniform Principal and Income Act – a major revision of this widely enacted Uniform Act was approved in 1997. The Act extensively revises the accounting rules applicable to both trusts and estates. Article 10 of the Uniform Trust Act provides a place for the enacting jurisdiction to codify the Uniform Principal and Income Act (1997) or its other principal and income statute.

Uniform Management of Institutional Funds Act – approved in 1972, this Act has been enacted in 46 jurisdictions. This Act governs the administration of endowment funds held by charitable, religious, and other eleemosynary institutions. The Act establishes a standard of prudence for use of appreciation on assets, provides specific authority for the making of investments, authorizes the delegation of this authority, and specifies a procedure, through either donor consent or court approval, for removing restrictions on the use of donated funds.

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

Uniform Probate Code Article VII – approved in 1969, Article VII has been enacted in about 15 jurisdictions. Article VII, although titled "Trust Administration," is a modest statute, addressing only a limited number of topics, such as trust registration, jurisdiction, and trustee liability to third parties. The substance of Article VII, other than its provisions on trust registration, are absorbed into the Uniform Trust Act, the provisions on jurisdiction in Article 2, and the provision on limitation of trustee liability to third parties at Section 1108.

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

Uniform Trusts Act (1937) – this largely overlooked Act of the same name was enacted in only six States, none within the past several decades. Despite a title suggesting comprehensive coverage of its topic, this Act, like Article VII of the UPC, addresses only a limited number of topics. These include the duty of loyalty, the registration and voting of securities, and trustee liability to third persons. The 1937 Trusts Act is not being used in the drafting of the current Act. States enacting the current Uniform Trust Act should repeal this earlier namesake.

Uniform Supervision of Trustees for Charitable Purposes Act – approved in 1954, this Act has been enacted in four States. This Act is limited to mechanisms for monitoring the actions of charitable trustees and does not address the substantive law of charitable trusts, including the doctrine of cy pres. Cy pres is addressed in Section 408 of the Uniform Trust Act.

Uniform Testamentary Additions to Trusts Act – this Act is available in two versions: the 1960 Act, with 32 enactments; and the 1991 Act, with 15 enactments through 1996. This Act validates pourover devises to trusts. While not incorporated into the Uniform Trust Act, the Testamentary Additions to Trusts Act, like the Uniform Trust Act, is designed to facilitate the use of the revocable living trust.

Uniform Probate Code – approved in 1969, and enacted in close to complete form in about 20 States but influential in virtually all, the UPC overlaps with trust topics in several areas. One area of overlap, already mentioned, is UPC Article VII. Another area of overlap concerns representation of beneficiaries. UPC Section 1-403 provides principles of representation for achieving binding judicial settlements of matters involving both estates and trusts. The Uniform Trust Act adopts these representation principles, and extends them to nonjudicial settlements concerning trusts and to notices and consents required by or which may be given under the Act. See Uniform Trust Act, Article 3. A final area of overlap between the UPC and trust law topics concerns rules of construction. The UPC, in Article II, Part 7, provides rules of construction applicable to wills, trusts, and other nonprobate instruments. Similar to the UPC, the Uniform Trust Act extends the rules of will construction to revocable trusts. However, unlike the UPC, no effort is made to prescribe the substance of the rules. Section 605 extends to revocable trusts whatever rules the enacting jurisdiction already has in place on the construction of wills.

Role of Restatement of Trusts – The Restatement (Second) of Trusts was approved by the American Law Institute in 1957. But beginning in the late 1980s, work on the Restatement Third began. The portion of Restatement Third relating to the prudent investor rule and other investment topics was completed and approved in 1992. A tentative draft of the portion of Restatement Third relating to the rules on the creation and validity of trusts was approved in 1996. The Uniform Trust Act is being drafted in close coordination with the writing of the Restatement Third. To the extent feasible, the Uniform Trust Act follows the portions of the Restatement Third which have been completed to date.

Models for Drafting – While the Uniform Trust Act is the first comprehensive *Uniform* Act on the subject of trusts, comprehensive trust statutes are already in effect in several States. Notable examples include the statutes in California, Georgia, Indiana, and Texas, all of which have been referred to extensively in the drafting process. Most influential has been the 1986 California statute, which was used by the Drafting Committee as its initial model. The California statute, which is known as the Trust Law and is found at Division 9 of the California Probate Code (Sections 15000 *et seq*.), addresses more issues than do the statutes of the other States. Second, the California law draws extensively from the other state models. Most importantly, the California Law Revision Commission, which drafted the California Trust Law, based much of its Act on the Restatement (Second) of Trusts.

Act as Default Law – The Act is primarily a default statute subject to modification by the terms of the trust. But there are certain provisions not subject to change by the settlor. These are listed in Section 104 and include such things as the authority of the court to intervene as the interests of justice may require, the fundamental duty of the trustee to act in good faith and in accordance with the purposes of the trust and the interests of the beneficiaries, the effect of a spendthrift provision, and the obligation of the trustee to keep the beneficiaries reasonably informed .

Overview of Act

Article 1 – General Provisions and Definitions – In addition to definitions (Section 102), this article addresses miscellaneous but important issues, including clarification that the common law of trusts supplements the Act (Section 105, and that the settlor, absent overriding public policy concerns, is free to select the governing law with respect to the validity, effect, and interpretation of the trust's terms (Section 106).

Article 2 - Jurisdiction of Court - This article addresses selected issues involving judicial proceedings concerning trusts, particularly trusts with contacts to more than one State or country. The key concept is locating the trust's principal place of administration, which determines where the trustee and beneficiaries have consented to jurisdiction and which court has primary jurisdiction over proceedings involving the trust's administration.

Article 3 - Representation of Beneficiaries and Settlement Agreements – This article deals with the important topic of representation of beneficiaries, both representation by fiduciaries (personal representatives, guardians and conservators), and what is known as virtual representation. Also covered is representation of incapacitated settlors. The representation principles of the article apply to 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.

Article 4 – Creation, Validity, Modification and Termination of Trust – This article specifies the requirements for creating, modifying and terminating trusts. Most of the requirements relating to creation of trusts (Sections 401 through 407) track traditional doctrine, including intention, capacity, a requirement of property, and a trust purpose. This article develops a three-part classification system for trusts; noncharitable, charitable, and honorary. Noncharitable trusts require an ascertainable beneficiary and a purpose to benefit its beneficiaries. Charitable trusts, on the other hand, are by their very nature created to benefit the public at large. An honorary trust is a trust for a noncharitable purpose which is valid despite the absence of an ascertainable (i.e., human) beneficiary. These include trusts for the care of an animal and trusts for other noncharitable purposes such as the maintenance of a cemetery lot.

Sections 408 through 415 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 liberalize the common law rules but without losing sight of the principle that preserving the settlor's intent is paramount. Termination or modification may be allowed upon beneficiary consent if the trust no longer serves a material purpose or if the settlor concurs (Section 410), by the court in response to unanticipated circumstances (Section 411), or if continued administration under the trust's existing terms would be uneconomical (Section 412). Trusts may be reformed to correct a mistake of law or fact (Section 413), or modified to achieve the settlor's tax objectives (Section 414). Trusts may be combined or divided (Section 415). Charitable trusts may be modified or terminated under cy pres to better fulfill the settlor's charitable purposes (Section 408). A trustee or beneficiary has standing to petition the court with respect to a proposed termination or modification (Section 409).

Article 5 – Spendthrift Provisions and Claims by Creditors – This article addresses the validity of a spendthrift provision and other issues relating to the rights of creditors, both of the settlor and beneficiaries, to reach the trust to collect a debt. Section 501 specifies the requirements for a valid spendthrift provision and, if valid, its effect. For trusts without valid spendthrift provisions, Section 502 describes the circumstances under which a beneficiary's creditors may reach the beneficiary's interest. Section 503 lists the categories of creditors whose claims are not subject to a spendthrift bar, and the extent to which such a creditor may reach the debtor beneficiary's interest. Sections 504 through 506 address situations where the rights of a beneficiary's creditors may not depend on whether the trust contains a spendthrift provision. Section 504 deals with discretionary trusts, including trusts which provide for a standard of distribution. Section 505 addresses 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 required distribution within a reasonable time.

Article 6 - Revocable Trusts – 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 Act. Each section of this article deals with issues of significance not totally settled under current law. A general theme of this article and of the other parts of the Act is to treat the revocable trust as the functional equivalent of a will. The article specifies a standard of capacity, provides that a trust is presumed revocable unless its terms provide otherwise, prescribes the procedure for revocation or modification of a revocable trust, provides a statute of limitations on contests, and extends to revocable trusts the enacting jurisdiction's rules on construction of wills.

Article 7 - Office of Trustee – This article contains a series of default rules dealing with the office of trustee, all of which may be modified 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 of office and whether bond will be required. Section 703 covers the office of cotrustee, permitting cotrustees to act by majority action, specifying the extent to which one trustee may delegate to another, and describing the circumstances under which a cotrustee may be held responsible for the actions of the other trustee or trustees. 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 standard for determining trustee compensation and reimbursement for expenses advanced.

Article 8 - Duties and Powers of Trustee – 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. The Uniform Prudent Investor Act prescribes a trustee's responsibilities with respect to the management and investment of trust property. This article also addresses a trustee's duties with respect to distributions to beneficiaries.

Article 9 - Uniform Prudent Investor Act – This article reproduces the Uniform Prudent Investor Act as approved in 1994. Because of the widespread adoption of the Uniform Prudent Investor Act, no effort has been made to interweave the Prudent Investor Act into the preceding part of this Act. States adopting this Act which have previously enacted the Prudent Investor Act are encouraged to recodify their version of the Prudent Investor Act by reenacting it as part of this Act. By enacting the Prudent Investor Act as a separate part of this Act, uniformity with States which have enacted the Prudent Investor Act in its free-standing form will be preserved.

Article 10 - Principal and Income Act – This article provides a space for an enacting jurisdiction to reproduce the Uniform Principal and Income Act (1997) or whatever principal and income act the state may have enacted.

Article 11 - Liability of Trustees and Rights of Beneficiaries – Sections 1101 through 1107 lists the remedies for breach of trust, describes how money damages are to be determined, provides a statute of limitations on claims against a trustee, and specifies other defenses, including consent of a beneficiary and recognition of and limitations on the effect of an exculpatory clause. Sections 1108 through 1110 address trustee relations with third parties. The emphasis is on encouraging trustees and third parties to engage in commercial transactions to the same extent as would occur if the property were not held in trust. Section 1110 permits a trustee to rely on a certification of trust, thereby hopefully reducing requests by third parties for copies of the complete trust instrument.

Article 12 - Transitional and Miscellaneous Provisions – The Act is intended to have the widest possible application, consistent with constitutional limitations. The Act applies not only to trusts created on or after the effective date, but also applies to trusts in existence on the date of enactment.

UNIFORM TRUST ACT

ARTICLE 1

GENERAL PROVISIONS AND DEFINITIONS,

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

SECTION 102. DEFINITIONS. In this [Act]:

(1) "Beneficiary" means a person who (A) has any present or future beneficial interest in a trust, whether vested or contingent; or (B) holds a power of appointment over trust property.

(2) "Charitable trust" means a trust created for a charitable purpose described in Section 408. The term excludes the beneficial interest of a noncharitable beneficiary.

(3) "[Conservator]" means a person appointed by a court to manage the estate of a minor or adult individual.

(4) "Fiduciary," used as a noun, includes a personal representative, [guardian], [conservator], and trustee.

(5) "Good faith" means:

(A) when used in reference to a trustee, honesty in fact and the observance of fiduciary principles; or

(B) when used in reference to a third party, honesty in fact and the observance of reasonable standards of fair dealing.

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

(7) "Know," with respect to a fact, means to have knowledge of the fact or have reason to know, based upon all of the facts and circumstances known to the person at the time, that the particular fact exists.

(8) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

(9) "Petition" includes complaint and statement of claim.

(10) "Property" means anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein. The term includes a chose in action, claim, or beneficiary designation under a policy of insurance, financial instrument, employees' trust, or other arrangement, whether revocable or irrevocable.

(11) "Qualified beneficiary" means a beneficiary who, on the date the beneficiary's qualification is determined, is:

(A) entitled or eligible to receive a distribution of trust income or principal; or

(B) would be entitled to receive a distribution if the event causing the trust's termination occurred.

For purposes of sending notice but not for determining who must consent to specified actions, a qualified beneficiary also includes a beneficiary who has delivered to the trustee a request for special notice but excludes a beneficiary whose location is unknown to the trustee or not reasonably ascertainable.

(12) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(13) "Settlor" means a person who creates a trust. The term includes a testator. In the case of multiple settlors, a person is the settlor to the extent of the trust property attributable to that person's contribution.

(14) "Spendthrift provision" means a term of a trust which restrains [both the voluntary and involuntary transfer] [either the voluntary or involuntary transfer] of a beneficiary's interest.

(15) "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.

(16) "Terms of a trust" means the manifestation of the intent of a settlor regarding a trust's provisions.

(17) "Trust" means an express trust, charitable or noncharitable, with additions thereto, wherever and however created, including a trust created pursuant to a statute, judgment, or decree under which the trust is to be administered in the manner of an express trust.

(18) "Trustee" includes an original, additional, successor, or cotrustee.

Comment

"Beneficiary" (paragraph (1)) refers only to a beneficiary of a trust as defined in the Act. The term includes not only beneficiaries who received their interests under the terms of the trust but also beneficiaries who received their interests by any other means, including by an assignment, the exercise of a power of appointment, by a resulting trust upon the failure of an interest or gap in a disposition, or through the 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 Restatement (Third) of Trusts § 48 (Preliminary Draft No. 4, 1998). See also Restatement (Second) of Trusts § 126 cmt. f (1959).

Under the Act, only the charitable portion of a trust with both charitable and noncharitable beneficiaries qualifies as a "charitable trust" (paragraph (2)). Consequently, a split-interest trust will in certain instances be governed by two sets of provisions, one applicable to the charitable interests, the other the noncharitable.

The definition of "fiduciary" (paragraph (4)) refers to the person holding a fiduciary office as opposed to the duties or obligations of the office. A trustee may engage in transactions with another trust, decedent's estate or conservatorship estate of which the trustee is the fiduciary. See Section 802(g)(3). A trustee has a duty to redress a breach of trust committed by a former trustee or other fiduciary from whom the trustee received trust property. See Section 812.

Under the Act, more is required than honesty of intent before a trustee, in dealing with the beneficiaries, or a third party, in dealing with a trustee, can be said to have been acting in "good faith" (paragraph (5)). The trustee or third party must also have exhibited honesty in conduct. For a third party, this requires the observance of reasonable standards of fair dealing, a requirement based on comparable provisions of the Uniform Commercial Code. See Unif. Commercial Code § 3-103(4). For a trustee, honesty in conduct is exhibited by acting in accordance with fiduciary principles, particularly the obligation not to place the trustee's own interests above those of the beneficiaries. See Section 802 (duty of loyalty). The obligation of a trustee to act in good faith may not be waived in the terms of the trust. See Section 104(c) (effect of the terms of the trust; nonwaivable provisions); Section 814 (duty with regard to discretionary power). Nor is a term of a trust which exculpates a trustee for not acting in good faith enforceable. See Section 1106 (exculpation of trustee). With respect to a third person, good faith, and the associated requirement of observance of reasonable standards of fair dealing, is required before the third person may be protected in dealings with the trustee (see Section 1109), or for rejecting a certification of trust. See Section 1110.

Under the Act, a "guardian" (paragraph (6)) makes decisions with respect to personal care; a "conservator" (paragraph (3)) manages property. The terminology used is that employed in Article V of the Uniform Probate Code, and in its free-standing Uniform Guardianship and Protective Proceedings Act. Enacting jurisdictions not using these terms in the defined sense should substitute their own terminology. For this reason, both terms have been placed in brackets. The definition of "guardian" accommodates those jurisdictions which allow appointment of a guardian by a parent or spouse in addition to appointment by a court. Enacting jurisdictions which allow appointment of a guardian solely by a court should delete the bracketed language "[parent, or spouse]."

The fact that a person does not have actual knowledge of a particular fact does not mean that the person did not "know" the fact (paragraph (7)). But neither is a person charged with knowledge of facts the person would have discovered upon investigation. This definition takes an intermediate approach. A fact is known to a person if the person had actual knowledge of the fact or had reason to know of the fact's existence based on all of the circumstances and other facts actually known to the person. "Know" is used in its defined sense in Section 808 (trustee knows holder of power to direct has violated fiduciary duty owes to beneficiaries), and Section 1109 (protection of persons dealing with trustee). But actual knowledge is required if the knowledge requirement relates to a proceeding in court. See Sections 604(a) (limitation on contest of revocable trust), 307 (notice of judicial settlement), and 308 (appointment of guardian ad litem). And for certain actions, a person is charged with knowledge of facts the person would have discovered upon reasonable inquiry. See Sections 1105 (limitation of action against trustee following final report or other statement), and 1107 (nonliability of trustee for beneficiary's consent, release, or ratification).

The definition of "property" (paragraph (10)) removes any lingering uncertainty that a revocable designation under an employee plan or life insurance contract is not a sufficient property interest to activate a trust. See also Section 401 and Comment (methods of creating trust).

Because of the difficulty of identifying beneficiaries with remote contingent interests and their probable lack of interest in the day-to-day affairs of the trust, the Act uses the concept of "qualified beneficiary" (paragraph (11)) to limit the class of beneficiaries to whom certain notices must be given or consents received. The definition of qualified beneficiaries is used to define the class to whom notice must be given of a trustee resignation. See Section 705. The qualified beneficiary must receive the trustee's annual report and other notices required by Section 813. Notice to the qualified beneficiaries is also required before a trust may be combined or divided. See Section 415. Actions which may be accomplished by the consent of the qualified beneficiaries include the appointment of a successor trustee. See Section 704 (filling vacancy in trusteeship).

The qualified beneficiaries are limited to the beneficiaries currently eligible to receive a distribution from the trust as well as what might be termed the first line remaindermen, that is, the beneficiaries who would receive the principal were the event triggering the trust's termination to occur on the date in question. Such a terminating event will typically be the death or deaths of the beneficiaries currently eligible to receive the income. Should a qualified beneficiary be a minor, incapacitated, unknown or unascertained, the representation and virtual representation principles of Article 3 may apply, including the possible appointment of a guardian ad litem or special representative to represent the beneficiary's interest.

For purposes of entitlement to notice but not for determining who must consent to specified actions, a qualified beneficiary includes a beneficiary who has delivered to the trustee a request for special notice but excludes a beneficiary whose location is unknown to the trustee or not reasonably ascertainable.

Determining the identity of the "settlor" (paragraph (13)) is usually not an issue. The same person will both sign the trust instrument and fund the trust. Ascertaining the identity of the settlor becomes more difficult when more than one person signs the trust instrument or funds the trust. The fact that a person is designated as the "settlor" by the terms of the trust is not necessarily determinative. For example, the person who executes the trust instrument may be acting as the agent for the person who will be funding the trust. In that case, the person funding the trust, and not the person signing the trust instrument, will be the settlor. Similarly, should more than one person contribute to a trust, all of the contributors will ordinarily be treated as settlors in proportion to their respective contributions, regardless of which one signed the trust instrument. However, in the case of a revocable trust, transfers made to the trust by a person who did not participate in the trust's creation will frequently be intended as a donative transfer to the person who originally created the trust. In that event, only the person who created the trust, and not the later donor, will be the settlor.

Ascertaining the identity of the settlor is important for a variety of reasons. It is important for determining rights in revocable trusts. See Sections 505(a)(2)-(3) (creditor claims against settlor of revocable trust), 602 (revocation or modification of revocable trust), and 604 (limitation on contest of revocable trust). It is also important for determining rights of creditors in irrevocable trusts. See Section 505(a)(1) (creditor can reach maximum amount trustee could distribute to settlor). While the settlor of an irrevocable trust traditionally has no continuing rights over the trust except for a right to terminate the trust with the beneficiaries' consent (see Section 410), under the Act the settlor of an irrevocable trust may petition for removal of the trustee and to enforce or modify a charitable trust. See Section 706 (removal of trustee) and Section 408 (charitable trusts).

"Spendthrift provision" (paragraph (14)) means a term of a trust which restrains the transfer of a beneficiary's interest, whether by a voluntary act of the beneficiary or by an action by a beneficiary's creditor or assignee, which at least as far as the beneficiary is concerned, would be involuntary. The enacting jurisdiction must decide whether a spendthrift provision, to be valid, must restrain both voluntary and involuntary transfer or whether the settlor may choose one or the other. The effect of a valid spendthrift provision is addressed in Article 5. The presence of a spendthrift provision may also constitute a material purpose sufficient to prevent the termination of a trust by agreement of the beneficiaries, although the Act does not presume this result. See Section 410(a).

"Terms of a trust" (paragraph (16)) is a defined term used with some frequency in the Act. While the wording of a written trust instrument is almost always the most important determinant of a trust's terms, the definition is not so limited. Oral statements, the settlor's family circumstances, and, to the extent the settlor was otherwise silent, rules of construction, all may have a bearing on determining a trust's meaning. If a trust established by order of court is to be administered as an express trust, the terms of the trust are determined from the court order as interpreted in light of the general rules governing interpretation of judgments. See Restatement (Third) of Trusts § 4 and cmt. f (Tentative Draft No. 1, 1996). See also Restatement (Second) of Trusts § 4 (1959).

Not all evidence may necessarily be considered in determining the terms of a trust. A manifestation of a settlor's intention does not constitute evidence of a trust's terms if it would be inadmissible in a judicial proceeding in which the trust's terms are in question. See Restatement (Second) of Trusts § 4 cmt. a, b (1959); Restatement (Third) of Trusts § 4 cmt. b (Tentative Draft No. 1, 1996). See also Restatement (Third) Property: Donative Transfers §§ 10.2, 11.1-11.3 (Tentative Draft No. 1, 1995). For example, in many States a trust of real property is unenforceable unless evidenced by a writing, although this Act does not so require, leaving this issue to be covered, if the enacting jurisdiction so elects, by separate statute. See Section 403 (evidence of oral trust). Evidence otherwise relevant to determining the terms of a trust may also be excluded under other principles of law, such as the parol evidence rule.

Under the Act, a "trust" (paragraph (17)) means an express trust, whether private or charitable, including a trust created by court judgment or decree which is to be administered in the manner of an express trust. Excluded from the Act's coverage are constructive trusts, which are not express trusts but remedial devices imposed by law. The Act is directed primarily at express trusts which arise in an estate planning or other donative context, but the definition of "trust" is not so limited. A trust created pursuant to a divorce action would be included, even though such a trust is not donative but is created pursuant to a bargained for exchange. The extent to which even more commercially-oriented trusts are subject to the Act will vary depending on the type of trust and the laws, other than this Act, under which the trust was created. Commercial type trusts come in various forms, including trusts created pursuant to a state business trust act and trusts created administer specified funds, such as to pay a pension or manage pooled investments. See John H. Langbein, The Secret Life of the Trust: The Trust as an Instrument of Commerce, 107 Yale L.J. 165 (1997).

SECTION 103. SETTLOR'S INTENT. The manifestation of a settlor's intent regarding a trust's provisions shall be as expressed in the trust instrument and, to the extent relevant and admissible as proof in a judicial proceeding, as expressed in another writing or record or by spoken words or conduct.

SECTION 104. EFFECT OF THE TERMS OF THE TRUST; NONWAIVABLE PROVISIONS.

(a) Except as otherwise provided in subsection (c), the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary are governed by the terms of the trust.

(b) To the extent the terms of the trust do not otherwise provide, these duties, powers, relations, rights, and interests are governed by this [Act].

(c) The terms of a trust may not vary:

(1) the requirement that the trustee act in good faith and with regard to the purposes of the trust and the interests of the beneficiaries (Article 8);

(2) the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice, including:

(A) appointing a guardian ad litem (Section 308);

(B) requiring a trustee to furnish bond (Section 702);

(C) removing a trustee (Section 706);

(D) entertaining actions for breach of trust (Sections 1101 through 1105);

(3) the ability of the beneficiaries to terminate a trust which no longer serves a material purpose (Section 410);

(4) the power of the court to terminate an uneconomic trust (Section 412);

(5) the effect of a spendthrift provision and the claims of creditors (Article 5);

(6) the time period under Section 604 for contesting a revocable trust;

(7) the duties to keep the beneficiaries informed and to report to beneficiaries as required under Section 813;

(8) the rights of a third party under Sections 1108 through 1110[; and.

(9) the subject-matter jurisdiction of a court and venue for bringing a proceeding as provided in Sections 205 and 206].

Comment

A settlor is free to vary the duties prescribed by and powers listed in the Act but not without limit. A trustee must always act in good faith and in accordance with the purposes of the trust and the interests of the beneficiaries. The obligation to act in good faith and in light of fiduciary principles is a fundamental concept that applies throughout this Act. See Sections 814 (duties with regard to discretionary power), 1106 (exculpation of trustee). See also Sections 802 (duty of loyalty), and 804 (duty to act with prudence). The trustee is not required to perform a duty prescribed by the terms of the trust if performance would be impossible, invalid, illegal or contrary to public policy. See Section 405 (purposes for which trust can be created).

While a trustee generally must administer a trust in accordance with its terms and purposes, the purposes and particular terms of the trust will on occasion conflict. Should such a conflict occur because of circumstances not anticipated by the settlor, it may be appropriate for the trustee to petition under Section 411 to modify or terminate the trust.

Section 2(b) of the Uniform Prudent Investor Act, codified at Section 901(b), is similar, although unlike this section it places no express limit on the ability of a settlor to vary the terms of the trust. However, a requirement that the trustee must always act in good faith and with regard to the purposes of the trust and the interests of the beneficiaries would seem to be implied.

SECTION 105. COMMON LAW OF TRUSTS. The common law of trusts developed by case law and equity supplements this [Act] except to the extent that it is modified by this [Act] or another statute of this State.

Comment

The Act codifies those portions of the law of express trusts that are most amenable to codification. The Act is supplemented by the common law of trusts, including principles of equity, particularly as articulated in the Restatement of Trusts 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 106. CHOICE OF LAW.

(a) The validity of a trust's execution, other than a trust created by will, and the meaning and effect of the terms of a trust, are determined by the law of the State designated in those terms, unless the application of that State's law is contrary to the public policy of this State applicable to the trust.

(b) In the absence of a controlling designation in the terms of the trust:

(1) a trust not created by will is validly executed if its execution complies with the law of this State, the law of the place where at the time of execution the

settlor was domiciled, had a place of abode, or was a national, or the law of the place where at the time of execution a trustee was domiciled or had a place of business;

(2) with respect to matters other than execution, the law of the State most significantly related to the issue in question shall apply.

Comment

Subsection (a), which is derived in part from Section 2-703 of the Uniform Probate Code, allows a settlor to select the law to govern the meaning and effect of the terms of a trust, and the validity of the trust's execution, regardless of where the trust property may be physically located, whether it consists of real or personal property, and whether the trust was created by will or during the settlor's lifetime.

Subsection (a) does not attempt to specify the particular public policies sufficient to override a settlor's expression of intent. These public policies will vary depending upon the locale and may change over time. But certain examples do recur. Trusts which seek to defeat the marital property rights of a surviving spouse or to encourage a beneficiary to divorce are examples of trusts which, depending on the particular jurisdiction, may be overridden on public policy grounds. The mere fact that a term of a trust is contrary to a public policy of the forum jurisdiction does not necessarily mean that the term is invalid. The public policy violated must also have some connection to the trust. The fact that the forum is a convenient location to resolve a dispute does not mean that it should apply its own public policy restrictions if it is neither the trust's principal place of administration or another jurisdiction having a significant connection with the trust or its beneficiaries.

ARTICLE 2

JURISDICTION OF COURT

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. Many of these issues are better addressed elsewhere, such as in the State's rules of civil procedure or as provided by court rule.

While the intervention of the court in the administration of a trust is not encouraged, the jurisdiction of the court is available as invoked by persons interested in the trust or as otherwise provided by law, including by the court acting on its own initiative (Section 201). Proceedings involving the administration of a trust will normally be brought in the court at the trust's principal place of administration, which is determined under Section 202. If not specified in the terms of the trust, the principal place of administration will usually be the place where the day-to-day activity of the trust is carried out. The trustee, by operation of law, is deemed to have consented to the jurisdiction of the court at the principal place of administration (Section 203), although courts in other places may also entertain proceedings involving the administration of a trust if the parties consent or the interests of justice so require (Section 204).

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 202. Sections 205 and 206 are optional, bracketed provisions relating to subject-matter jurisdiction and venue.

The jurisdictional issues addressed in this part are also addressed in Article VII of the Uniform Probate Code, but the Drafting Committee has elected not to adopt the UPC provisions relating to trust registration. In this it is following the example of a number of States which have enacted Article VII of the UPC without the trust registration feature.

SECTION 201. ROLE OF COURT IN ADMINISTRATION OF TRUST. The court may intervene in the administration of a trust to the extent its jurisdiction is invoked by persons interested in the trust or otherwise exercised as provided by law.

The commencement of a judicial proceeding involving a trust does not result in continuing court supervision.

Comment

The Act encourages the resolution of disputes without resort to the courts. However, the court is always available to the extent its jurisdiction is invoked by persons interested in the trust. Also, this section does not restrict the court's inherent and historical jurisdiction in trust matters, including the ability to provide the trustee with instructions even in the absence of a dispute. A trustee should not resort to the court as a matter of routine. Excessive resort to the court, with its attendant costs, may constitute a breach of the duty to incur only reasonable costs of administration. See Section 806.

This section is based on Uniform Probate Code § 7-201(b). It is also consistent with National Probate Court Standard 3.2.1 (Nat'l Center for State Courts 1993) and Article III of the Uniform Probate Court, which encourage the settlement of decedent's estates with a minimum of court oversight.

The Act does not attempt to list the types of judicial proceedings involving trust administration that might be brought by a trustee or beneficiary. But such an effort is made in California Probate Code § 17200. Excluding matters not germane to the Uniform Trust Act, the California statute lists the following as items relating to the "internal affairs" of a trust:

(1) Determining questions of construction;

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

(3) Determining the validity of a trust provision;

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

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

(6) Instructing the trustee;

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

(8) Granting powers to the trustee;

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

(10) Appointing or removing a trustee;

(11) Accepting the resignation of a trustee;

(12) Compelling redress of a breach of trust by any available remedy;

(13) Approving or directing the modification or termination of a trust;

(14) Approving or directing the combination or division of trusts; and

(15) Authorizing or directing transfer of a trust or trust property to or from another jurisdiction.

SECTION 202. PRINCIPAL PLACE OF ADMINISTRATION.

(a) Except as provided in subsections (b) and (c), the principal place of a trust's administration is the usual place where the day-to-day activity of the trust is carried on by the trustee or cotrustee who is primarily responsible for its administration. The trustee is under a continuing duty to administer a trust at a place appropriate to its purposes.

(b) Without precluding other means for establishing a sufficient connection with the designated jurisdiction, a term of a trust designating the principal place of administration is valid and controlling if:

(A) a trustee is a resident of or has its principal place of business in the designated jurisdiction ; and

(B) all or part of the administration takes place in the designated jurisdiction.

(c) A trustee may change a trust's principal place of administration to another State or country if the transfer would facilitate the administration of the trust and not impair the interests of the beneficiaries. In connection with such a transfer a trustee may transfer some or all of the trust property to a different trustee outside this State if approved by all of the qualified beneficiaries or by the court. Prior to initiating a transfer, the trustee must notify the qualified beneficiaries.

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 Act, the fixing of a trust's principal place of administration will determine where the trustee and beneficiaries have consented to suit (Section 203), the circumstances when a proceeding concerning the administration of the trust may be entertained by a court of another jurisdiction (Section 204), and the rules for locating venue within a particular State (Section 206).

Subsection (a) fixes the principal place of administration as the place where the day-to-day activity of the trust is carried on by the trustee or cotrustee primarily for its administration. Settlors who expect to name a trustee or cotrustees with significant contacts in more than one State may wish to address this issue in the terms of the trust. Pursuant to subsection (b), a designation in the terms of the trust is controlling if (1) a trustee is a resident of or has its principal place of business in the designated jurisdiction, and (2) all or part of the administration takes place in the designated jurisdiction. Designating the principal place of administration should be distinguished from designating the law to determine the meaning and effect of the trust's terms, as allowed by Section 106. A settlor is free to designate one jurisdiction as the principal place of administration and another to control the meaning of the dispositive provisions.

Most trusts will be controlled by subsection (a), which fixes the principal place of administration at the place where the day-to-day activity of the trust is carried on. The place where the day-to-day activity is carried on will fix the principal place of administration even if the trust is created by will or contains real property. For financial-service institution trustees, the place where the day-to-day activity is carried on will usually be the place where the personal trust officer is located and not the place where the investments are safeguarded or records processed.

Subsection (c) addresses changing the principal place of administration. Such a change may be desirable to secure a lower state income tax rate. Other reasons may include the relocation of the trustee or beneficiaries, the appointment of a new trustee, or a change in the location of the trust investments. This section is not limited to transfers of jurisdiction to or from other States of the United States, but may include a transfer of jurisdiction to or from a different country.

Subsection (c) recognizes that a change in the principal place of administration occurs upon the trustee's removal to another State and the carrying on of the day-to-day activity of the trust in the new place. Pursuant to subsection (a) of this section, the new location will become a new principal place of administration, and under Section 203(a), the trustee will have consented to the jurisdiction of the court in the new place. However, pursuant to Section 203(c), the trustee, following the move, will also remain subject to the jurisdiction of the courts in the former place.

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

SECTION 203. JURISDICTION OVER TRUSTEE AND BENEFICIARY.

(a) By accepting the trusteeship of a trust having its principal place of administration in this State, or by moving the principal place of administration to this State, the trustee submits personally to the jurisdiction of the courts of this State as to any matter relating to the trust.

(b) A beneficiary of a trust having its principal place of administration in this State is subject to the jurisdiction of the courts of this State as to any matter relating to the trust.

(c) A trustee and beneficiary remain subject to the jurisdiction of the courts of this State even following the removal of the principal place of administration to another State or country.

Comment

This section, which is based in part on Arizona Revised Statutes § 14-7202, clarifies that the courts of the principal place of administration have jurisdiction to enter orders relating to the trust that will be binding on both the trustee and beneficiaries. Consent to jurisdiction does not dispense with any required notice, however. This Act leaves to other law the procedures for giving notice, including the extent to which substituted service might be available if a trustee or beneficiary cannot be located or evades service of process. With respect to jurisdiction over a beneficiary, the Comment to Uniform Probate Code § 7-103, upon which the Arizona statute is based, is instructive:

> It also seems reasonable to require beneficiaries to go to the seat of the trust when litigation has been instituted there concerning a trust in which they claim beneficial interests, much as the rights of shareholders of a corporation can be determined at a corporate seat. The settlor has indicated a principal place of administration by its selection of a trustee or otherwise, and it is reasonable to subject rights under the trust to the jurisdiction of the Court where the trust is properly administered.

Obtaining jurisdiction over the trustee and beneficiaries pursuant to this section does not preclude jurisdiction elsewhere on some other basis.

SECTION 204. DISMISSAL OF MATTERS RELATING TO FOREIGN TRUSTS. The court, over the objection of a party, must decline to entertain judicial proceedings brought by a trustee or beneficiary concerning the administration of a trust that has its principal place of administration outside this State unless:

(1) all appropriate parties could not be bound by litigation in the courts of the other State or country; or

(2) the court concludes that it is a more convenient forum.

Comment

This section is designed to centralize litigation involving the administration of a trust at the place of principal administration, but several exceptions are recognized. First, the court in a location other than the place of principal administration may exercise jurisdiction if doing so would prevent a substantial injustice. Second, the court may entertain the case if all appropriate parties would not be bound by a judgment of a court of the principal place of administration. Finally, actions to determine the existence or nonexistence of a trust are not subject to this section, because such actions concern whether there is even a trust to administer, not how the trustee is conducting the administration of an already existing trust. Also excluded are actions by or against third parties, such as debtors or creditors of a trust or an action by a creditor of a beneficiary. The jurisdiction of the court in such cases is to be determined under generally applicable rules of civil procedure.

[**SECTION 205. SUBJECT MATTER JURISDICTION.**

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

(b) The [designate] court has concurrent jurisdiction with other courts of this State of proceedings to determine the existence of a trust, proceedings by or against creditors or debtors of trusts, and other judicial proceedings involving trustees, beneficiaries, and third persons.]

Comment

This section provides a means for distinguishing the jurisdiction of the court with primary jurisdiction for trust matters from the jurisdiction of other courts, whether that court is denominated the probate court, chancery court, or by some other name. The section has been placed in brackets because subject-matter jurisdiction may already be addressed by other statute or court rule and may be unnecessary to address in States having unified court systems.

For an explanation of what types of matters are included in the phrase "proceedings brought by a trustee or beneficiary concerning the administration of a trust," see the Comment to Section 201. Subsection (a) of this section is derived from Section 7-201(a) of the Uniform Probate Code. Subsection (b) is based on Section 7-204 of the Uniform Probate Code.

[**SECTION 206. VENUE.**

(a) A judicial proceeding concerning a trust may be commenced in the [county] in which the trust's principal place of administration is or is to be located and, if the trust is created by will, in the [county] in which the decedent's estate is administered.

(b) If a trust created other than by will has no trustee, a judicial proceeding for the appointment of a trustee must be commenced in the [county] in which a beneficiary resides or the trust property, or some portion of the trust property, is located.

(c) A judicial proceeding other than those described in subsections (a) and (b) must be commenced in accordance with the rules of venue applicable to civil actions generally.]

Comment

This optional, bracketed section is based on Section 17005 of the California Probate Code and is made available for States which conclude that venue for a judicial proceeding involving a trust is not adequately addressed in the State's rules of civil procedure.

Subsection (b) applies only to appointment of a trustee for a trust not created by will. Judicial proceedings to appoint a trustee for a trust created by will that has no trustee are commenced in the county where the decedent's estate is administered. See subsection (a).

Subsection (c) provides venue rules applicable in cases not covered by subsections (a) and (b). This would include proceedings where jurisdiction over a trust, trust property, or parties to a trust is based on a factor other than that the principal place of administration is in this State. When the principal place of administration of a trust is in another State, but jurisdiction is proper in this State, the general rules governing venue apply.

ARTICLE 3

AGREEMENTS AND REPRESENTATION

General Comment

This article deals with the important topic of representation of beneficiaries, both representation by fiduciaries (personal representatives, guardians and conservators), and what is known as virtual representation. Virtual representation is a doctrine which allows binding representation by others of beneficiaries who are unborn or unascertained, and under more modern versions, beneficiaries who may be alive and known but who are 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 Act. 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);

(3) Notice to qualified beneficiaries of a proposed trust combination or division (Section 415);

(4) Notice to qualified beneficiary of emergency assumption of duties without accepting trusteeship (Section 701(c));

(5) Notice to qualified beneficiaries of resignation of trustee (Section 705);

(6) Appointment of successor trustee upon agreement of qualified beneficiaries (Section 704(c)(1));

(7) Notice of trustee's report (Section 813);

(8) Nonliability of trustee upon consent, release, or affirmance of beneficiary (Section 1107).

Section 302 addresses settlement agreements, both judicial and nonjudicial. 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.

Section 303 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 date the consent would otherwise become effective. The possibility that a beneficiary might object to a consent given on the beneficiary's behalf will not be germane in many cases because the person represented will be unborn or unascertained. But there are situations where the representation principles of this article can apply to adult and competent beneficiaries. For example, while the trustee of a revocable trust entitled to a pourover devise has authority under Section 305 to approve the personal representative's account on behalf of the trust beneficiaries, such consent would not be binding on a trust beneficiary who registers an objection.

Section 304 deals with the effect of a consent by the holder of a general testamentary powers of appointment. (Revocable trusts and presently exercisable general powers of appointment are covered by Section 603, which grant the settlor or holder of the power all rights of the beneficiaries or persons whose interests are subject to the power). Absent a conflict of interest, the holder of a testamentary general power of appointment may bind those whose interests are subject to the power.

Section 305 provides that a fiduciary, absent conflict of interest, may represent and bind the beneficiary or beneficiaries of the respective fiduciary relationship, whether of an estate, trust, conservatorship, or guardianship. Drawing from Section 1-403 of the Uniform Probate Code, the section also allows a parent without a conflict of interest to represent and bind a minor child. A typical example of conflict of interest is a trustee who seeks the approval of an accounting for an estate of which the trustee is acting as personal representative.

Section 306 is the virtual representation provision. It provides for representation of and the giving of a binding consent on behalf of a minor, incapacitated, unborn, or unascertained person by another beneficiary with a substantially identical interest with respect to the particular issue. Also, the minor, incapacitated, unborn, or unascertained beneficiary is bound only to the extent (1) the other beneficiary adequately represents the person's interest, (2) the person is not otherwise represented under one of the other sections of this part, and (3) there is no conflict of interest between the representative and the person represented.

Section 307 specifies the persons who must be notified to bind a beneficiary represented under this article in connection with a judicial settlement.

Section 308 authorizes the court to appoint persons to represent the interests of beneficiaries not otherwise able to represent themselves. Such appointments may be made whether or not the person might otherwise be represented as provided in this article. Subsection (a) authorizes the appointment of a guardian ad litem at any point in a judicial proceeding but to encourage such appointments only when really needed, the court must first find that representation of the beneficiary might otherwise be inadequate. Also, to encourage some flexibility in how the guardian ad litem approaches the job, the guardian ad litem, in approving a settlement, may consider general family benefit. Subsection (b) authorizes the court, in connection with a nonjudicial settlement agreement, to appoint a special representative to represent the interests of one or more beneficiaries. The distinction between a guardian ad litem and a special representative has more to do with the nature of the proceeding than the function served.

SECTION 301. REPRESENTATION; BASIC PRINCIPLES.

(a) Whenever under this [Act] a notice must be given to a beneficiary, notice to a person who may represent and bind the beneficiary under this [Article] is notice to the beneficiary.

(b) Whenever under this [Act] a consent may be given by a beneficiary, the consent of a person who may represent and bind the beneficiary under this [Article] is the consent of the beneficiary.

(c) Except as specifically limited elsewhere in this [Act], a person who under this [Article] may represent a settlor who lacks capacity may receive notice and give a binding consent on the settlor's behalf.

SECTION 302. AGREEMENTS

(a) Except to the extent that the terms of a trust indicate that the procedures specified in this [Article] do not apply, persons interested in a trust may be represented and bound with respect to an agreement as provided in this [Article], whether or not the agreement is approved by the court.

(b) Nonjudicial agreements may include only terms and conditions a court could properly approve. A nonjudicial agreement is binding even though it may effect a trust or an inalienable interest.

(c) Agreements may extend to any question or dispute involving a trust, including:

(1) the determination of the persons interested in the trust;

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

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

(4) the direction to a trustee to refrain from performing a particular act or the grant to the trustee of any necessary or desirable power;

(5) a change of trustee or determination of a trustee's compensation;

(6) a change in the principal place of administration of a trust;

(7) the modification of the trust to comply with federal and State statutes and regulations to achieve qualification for deductions, elections, or other tax provisions; and

(8) the liability of a trustee for actions or omissions to act relating to the trust.

SECTION 303. EFFECT OF CONSENT BY REPRESENTATIVE. The consent of a person who may represent another under this [Article] is binding on the person represented unless the person represented objects to the representation prior to the date the consent would otherwise have become effective.

SECTION 304. REPRESENTATION BY HOLDERS OF GENERAL TESTAMENTARY POWER OF APPOINTMENT. To the extent there is no conflict of interest between the holder of a general testamentary power of appointment and the persons represented with respect to the particular question or dispute, the holder may represent and bind the persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power.

SECTION 305. REPRESENTATION BY FIDUCIARIES AND PARENTS. To the extent there is no conflict of interest between the representative and the person represented with respect to the particular question or dispute:

(1) a [conservator] may represent and bind the person whose estate the [conservator] controls;

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

(3) an agent with authority, including one under a power of attorney, may represent and bind the principal;

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

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

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

SECTION 306. REPRESENTATION BY PERSON HAVING SUBSTANTIALLY IDENTICAL INTEREST. Unless otherwise represented, a minor or an incapacitated, unborn, or unascertained person may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent that:

(1) the person's interest is adequately represented; and

(2) there is no conflict of interest between the representative and those represented.

SECTION 307. NOTICE OF JUDICIALLY-APPROVED AGREEMENT.

(a) Notice to a person who may be represented and bound under Section 304 or 305 of an agreement to be approved by the court must be given either directly to the person or to one who may bind the person.

(b) Notice is given to minor, incapacitated, unborn, or unascertained persons who are not represented under Section 304 or 305, and who may be bound under Section 306, by giving notice to all persons whose interests in the judicial proceedings are substantially identical and whose identities are actually known.

SECTION 308. APPOINTMENT OF GUARDIAN AD LITEM OR SPECIAL REPRESENTATIVE.

(a) Even if there is representation under Section 304, 305, or 306, at any point in a judicial proceeding, if the court determines that representation of the interest might otherwise be inadequate, the court may appoint a guardian ad litem to represent the interest of and approve an agreement on behalf of a minor, incapacitated, unborn, or unascertained person, or a person whose identity or address is not actually known. If not precluded by conflict of interest, a guardian ad litem may be appointed to represent several persons or interests. In approving an agreement, a guardian ad litem may consider general family benefit.

(b) Even if there is representation under Section 304, 305, or 306, the court may appoint a special representative to represent the interests of and approve a nonjudicial agreement on behalf of designated persons. If not precluded by conflict of interest, a special representative may be appointed to represent several persons or interests. In approving the agreement, a special representative may consider general family benefit.

ARTICLE 4

CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUST

General Comment

Sections 401 through 407 specify the requirements for the creation of a trust. Most of the requirements track traditional doctrine. These sections develop a three-part classification system for trusts. Noncharitable trusts ordinarily require an ascertainable beneficiary, charitable trusts by their very nature are created to benefit the public at large. Honorary trusts are trusts for noncharitable purposes which are valid despite the absence of an ascertainable (i.e., human) beneficiary. These include trusts for the care of an animal and trusts for other noncharitable purposes such as the maintenance of a cemetery lot.

Section 401 specifies the methods by which trusts are created, such as by transfer of property, self-declaration or exercise of a power of appointment. Section 402 lists the requirements for creation of a trust whatever method may have been employed. The requirements include intention, capacity and, if applicable, the necessity for an ascertainable beneficiary. Section 403 lists some of the grounds for contesting a trust, Section 404 validates oral trusts, Section 405 enumerates the permitted purposes for which a trust may be created. The remaining sections address honorary trusts; Section 406 the trust for the care of an animal, and Section 407 the trust created for another noncharitable purpose.

Sections 409 through 415 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 liberalize the common law rules but without losing sight of the principle that preserving the settlor's intent is paramount. Termination or modification may be allowed upon beneficiary consent if the trust no longer serves a material purpose or if the settlor concurs (Section 410), by the court in response to unanticipated circumstances (Section 411), or if continued administration under the trust's existing terms would be uneconomical (Section 412). Trusts may be reformed to correct a mistake of law or fact (Section 413), or modified to achieve the settlor's tax objectives (Section 414). Trusts may be combined or divided (Section 415). Charitable trusts may be modified or terminated under cy pres to better fulfill the settlor's charitable purposes (Section 408). A trustee or beneficiary has standing to petition the court with respect to a proposed termination or modification (Section 409).

SECTION 401. METHODS OF CREATING TRUST.

(a) 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.

(b) The terms of a trust instrument may serve as a deed of conveyance to a trustee or subject identified property to a self-declaration of trust.

Comment

Subsection (a) follows Restatement (Second) of Trusts § 17 (1959) and Restatement (Third) of Trusts § 10 (Tentative Draft No. 1, 1996). Under all three methods specified in this section 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 (Preliminary Draft No. 4, 1998). 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 is a property interest sufficient to create a trust. See Section 102(10) ("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 contract at or after the settlor's death. A pourover devise to such a trust is also valid. See Uniform Probate Code § 2-511 (pourover devise to trust valid regardless of existence, size, or character of trust corpus).

While a trust created by will may come into existence immediately at the testator's death and not necessarily only upon the later transfer of title from the personal representative, the nominated trustee does not have a duty to act until there is an acceptance of the trusteeship, express or implied. See Section 701 (acceptance or rejection of trusteeship). To avoid an implied acceptance, a nominated testamentary trustee who is monitoring the actions of the personal representative but who has not yet made a final decision on acceptance should inform the beneficiaries that it has assumed only a limited role. The failure to so inform the beneficiaries could result in liability if the misleading conduct by the nominated trustee causes harm to the trust beneficiaries. See Restatement (Third) of Trusts § 35 cmt.b (Preliminary Draft No. 4, 1998). See also Restatement (Second) of Trusts § 102 cmt. c (1959).

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

While this section recognizes the established principle that a trust may be created by means of the exercise of a power of appointment (see subsection (a)(3)), this Act does not attempt to legislate comprehensively on the subject of powers of appointment but addresses only selected issues. See Sections 505(b) (creditor claims against holder of power to withdraw), 603(c) (rights of holder of power of withdrawal), and 304 (representation by holder of general testamentary power of appointment of persons subject to power). For the law on powers of appointment generally, see Restatement (Second) of Property: Donative Transfers §§ 11.1-24.4 (1986).

While trusts are usually created by a transfer of property by the settlor or by a self-declaration, trusts may also be created by the courts or by special statute. See., e.g., Unif. Probate Code § 2-212 (elective share of incapacitated surviving spouse to be held in trust on terms specified in statute); Unif. Probate Code § 5-407 (conservator may create trust with court approval); Restatement (Second) of Trusts § 17 cmt. i (1959) (trusts created by statutory right to bring wrongful death action); Restatement (Third) of Trusts § 10 cmt. b (Tentative Draft No. 1, 1996).

Subsection (b) addresses some of the practical funding concerns that arise with respect to self-declarations of trust. The very nature of the self-declaration of trust negates a requirement that title to trust assets be reregistered and retransferred into the name of the settlor as trustee. See, e.g., *In re Estate of Heggstad*, 20 Cal. Rptr. 2d 43 (Ct. App. 1993) (citing relevant sections from Restatement (Second) of Trusts). See also Restatement (Second) of Trusts § 17 cmt. a (1959); Restatement (Third) of Trusts § 10 cmt. e (Preliminary Draft No. 3, 1997). This subsection validates the practice of merely attaching a schedule listing the assets that are to be subject to the trust without executing separate instruments of transfer. To avoid possible later problems with third party transferees and to better protect the interests of the beneficiaries, it is recommended that settlors not rely on this subsection but instead perfect title to the trust assets by executing separate instruments of transfer.

Subsection (b) also addresses a similar issue which sometimes arises with respect to asset transfers to trusts in which someone other than the settlor is named as trustee. While the execution of separate instruments of transfer for each asset is recommended, this section recognizes that the trust instrument may itself contain language effectively conveying assets to the trustee.

SECTION 402. REQUIREMENTS FOR CREATION.

(a) A trust is created only if:

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

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

(3) the trust has a definite beneficiary, or is a charitable trust or a trust for the care of an animal or other valid noncharitable purpose; and

(4) except as provided in subsection (d), the same person is not the sole trustee and sole beneficiary, present and future; and

(b) A beneficiary is definite if the beneficiary may be validly ascertained now or in the future.

(c) A power in a trustee to select a beneficiary from an indefinite class is valid unless the class is so indefinite that it cannot be determined that any person falls within it. If the power is not exercised within a reasonable time, the power fails and the property subject to the power passes to those persons who would have taken the property had the power not been granted.

(d) The doctrine of merger does not apply to a trust over which the trustee holds a power of revocation or presently exercisable general power of appointment.

Comment

Subsection (a) codifies the basic requirements for the creation of a trust. To create a valid trust, the settlor must indicate an intention to create a trust. Restatement

(Second) of Trusts § 23 (1959); Restatement (Third) of Trusts § 13 (Tentative Draft No. 1, 1996). But only such manifestations of intent as are admissible as proof in a judicial proceeding may be considered. See Section 105(15) ("terms of a trust" defined).

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

Subsection (a)(3) requires that a trust, other than a charitable trust, a trust for the care of an animal, or a trust for another valid noncharitable purpose, have a definite or definitely ascertainable beneficiary. While the beneficiary will often be definitely ascertained as of the trust's creation, subsection (b) recognizes that the beneficiary may also be ascertained in the future. But a trust is not created if the beneficiary can only be ascertained beyond the applicable perpetuities period. The definite beneficiary requirement does not mean that a settlor cannot make a disposition in favor of a class of persons, a designation which by its very nature is usually to a group whose membership may change. Class designations are valid as long as the membership of the class will be finally determined within the applicable perpetuities period. For background on the definite beneficiary requirement, see Restatement (Second) of Trusts §§ 112-115, 120-121 (1959); Restatement (Third) of Trusts §§ 44-45 (Preliminary Draft No. 4, 1998).

Subsection (a)(4) addresses what is known as the doctrine of merger. Under this doctrine, as traditionally stated, a trust is not created if the settlor is the sole trustee and sole beneficiary of *all* beneficial interests. The doctrine of merger has been inappropriately applied by the courts in some jurisdictions to invalidate self-declarations of trust in which the settlor is the sole life beneficiary but other persons are designated as beneficiaries of the remainder. The doctrine of merger is properly applicable only if all beneficial interests, both life interests and remainders, are vested in the same person, whether in the settlor or someone else. On the doctrine of merger generally, see Restatement (Second) of Trusts § 341 (1959).

Subsection (b) allows a settlor to empower the trustee to select the beneficiaries even if the class from whom the selection may be made is indefinite. Such a provision would fail under traditional doctrine; it is an imperative power with no designated beneficiary capable of enforcement. But such a provision is valid under both this Act and the Restatement. If the power is not exercised within a reasonable time, the power will fail and the property will pass by resulting trust. See

Restatement (Second) of Trusts § 122 (1959); Restatement (Second) of Property: Donative Transfers § 12.1 cmt. e (1986).

SECTION 403. TRUST CREATION INDUCED BY UNDUE INFLUENCE, DURESS, FRAUD, OR MISTAKE. A trust not created by will, or any part thereof, is void if its creation was induced by undue influence, duress, fraud, or mistake.

SECTION 404. EVIDENCE OF ORAL TRUST. Except as otherwise required by a statute other than this [Act], a trust need not be evidenced by a writing or other record, but the creation of an oral trust may be established only by clear and convincing evidence.

Comment

While it is always advisable for a settlor to reduce a trust to writing, the Act validates oral trusts. Absent some specific statutory provision, such as a provision requiring that transfers of real property be in writing, a writing is not required to evidence a trust. States with statutes of frauds or other provisions requiring that the creation of certain trusts must be evidenced by a writing may wish to specifically cite such provisions.

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

SECTION 405. TRUST PURPOSES. A trust may be created only if its purposes are lawful, are not contrary to public policy, and are possible to fulfill. The purposes of a trust must be to benefit 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 (Preliminary Draft No. 4, 1998). 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 (Preliminary Draft No. 3, 1997).

For the requirement that a trust must have a purpose which is for the benefit of its beneficiaries, both in its terms and in how it is administered, see Restatement (Third) of Trusts § 27(2) and cmt. b (Preliminary Draft No. 4, 1998). Although the settlor is granted considerable latitude in defining the purposes of the trust, the requirement that a trust have a purpose which is for the benefit of its beneficiaries preclude purposes that are capricious or which largely reflect personal whim. Individuals may deal without restraint with their own property but not when impressed with a trust for the benefit of others. See Restatement (Second) of Trusts § 124 cmt. g (1959). Thus, attempts to impose unreasonable restrictions on the use of trust property, such as a provision in a noncharitable trust severely impairing the use of real property, will fail. See, e.g., *Colonial Trust v. Brown*, 135 A. 555 (Conn. 1926).

For a provision which may allow reformation of trusts which fail to comply with this section, see Section 413.

SECTION 406. TRUST FOR CARE OF ANIMAL.

(a) A trust for the care of an animal living at the settlor's death is valid. The trust terminates upon the death of all animals covered by the terms of the trust. A settlor's expressions of intent must be liberally construed to bring the transfer within this subsection and to presume against a merely precatory disposition.

(b) The intended use of property of a trust authorized by this section may be enforced by a person designated in the terms of the trust or, if none, by a person appointed by the court. A person designated or appointed to enforce the trust shall have the rights of a qualified beneficiary under this [Act]. A person with an interest in the welfare of the animal may petition for an order appointing or removing a person designated or appointed to enforce the trust.

(c) Property of a trust authorized by this section may not be applied to a use other than its intended use except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Property not required for the intended use must be distributed to the settlor or settlor's successors in interest.

Comment

This section and the next section of the Act validate so-called honorary trusts. Unlike honorary trusts created pursuant to the common law of trusts, which are arguably no more than unenforceable powers of appointment, the trusts created by this and the next section are valid and enforceable and not dependent on whether the trustee decides to honor the settlor's wishes. For a discussion of the common law doctrine, see Restatement (Second) of Trusts § 124 (1959); Restatement (Third) of Trusts § 48 (Preliminary Draft No. 3, 1997).

This section addresses a particular type of honorary trust, the trust for the care of an animal. Section 407 specifies the requirements for trusts created for other noncharitable purposes. A trust for the care of an animal may last for the life of the animal. While the animal will ordinarily be alive on the date the trust is created, an animal may be added as a beneficiary after that date as long as the addition is made prior to the settlor's death. Animals in gestation but not yet born at the time of the trust's creation may also be covered by its terms.

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

This section and the next section close this gap. The intended use of a trust authorized by either section may be enforced by a person designated in the terms of the trust or, if none, by a person appointed by the court. Should the trust be created for the care of an animal, persons with an interest in the welfare of the animal have standing to petition for such an appointment, either of themselves or of others. The person appointed by the court to enforce the trust should also be a person who has exhibited such a demonstrated interest. The concept of granting standing to a person with a demonstrated interest in the animal's welfare is derived from the Uniform Guardianship and Protective Proceedings Act (1997), which allows a person interested in the welfare of a ward or protected person to file petitions on the ward's or protected person's behalf.

Subsection (c) addresses the problem of excess funds. Should the court determine that the trust property exceeds the amount needed for the intended purpose, the excess must be distributed to those who would take the trust property if the trust were to terminate on the date of the distribution. If the terms of the trust do not direct disposition upon termination, a resulting trust is ordinarily created in the settlor. See Restatement (Third) of Trusts § 47 (Preliminary Draft No. 4, 1998). The settlor may also anticipate the problem of excess funds by directing their disposition in the terms of the trust. Absent the presence of excess funds, no portion of a trust authorized by this or the next section may be applied other than for its intended use.

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

SECTION 407. TRUST FOR VALID NONCHARITABLE PURPOSE.

Except as provided by another statute:

(1) A trust for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable purpose to be selected by the trustee is valid. The trust may not be enforced for more than 21 years;

(2) The intended use of property of a trust authorized by this section may be enforced by a person designated in the terms of the trust or, if none, by a person appointed by the court. A person designated or appointed to enforce the trust shall have the rights of a qualified beneficiary under this [Act];

(3) Property of a trust authorized by this section may not be applied to a use other than its intended use except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Property not required for the intended use must be distributed to the settlor or settlor's successors in interest.

Comment

This section authorizes two types of trusts without ascertainable beneficiaries; trusts for general but noncharitable purposes, and trusts for a specific noncharitable purpose other than the care of an animal, which is covered by Section 406. Examples of trusts for general noncharitable purposes would include a bequest of money to be distributed to such objects of benevolence as the trustee might select. At common law, such a trust was honorary but under this section such a trust is enforceable for a period of up to 21 years, the maximum period allowed under the rule against perpetuities for a disposition without lives in being.

The most common example of a trust for a specific noncharitable purpose is a trust for the care of a cemetery plot. Trusts and other funding devices for the perpetual care of cemetery plots is a topic frequently addressed by separate legislation. Such legislation will typically endeavor to provide for truly perpetual care as opposed to care limited for 21 years.

For the requirement that a trust, particularly the type of trust authorized by this section, must have a purpose that is not capricious, see Section 405 Comment. For examples of the types of trusts authorized by this section, see Restatement (Second) of Trusts § 124 (1959); Restatement (Third) of Trusts § 47 (Preliminary Draft No. 4, 1998).

This section is similar to Section 406, although less detailed. Much of the Comment to Section 406 also applies to this section.

SECTION 408. CHARITABLE TRUSTS.

(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 any other purpose the accomplishment of which is beneficial to the community. If the terms of the trust do not indicate a particular charitable purpose or designate beneficiaries, the trustee may select one or more charitable purposes or beneficiaries.

(b) If a particular charitable purpose becomes unlawful, impracticable, impossible to fulfill, or wasteful:

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

(2) the property of the trust does not revert to the settlor; and

(3) the court shall modify or terminate the trust and direct that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes.

(c) If a term of a charitable trust impairs the administration of the trust, the court may modify the term.

(d) A settlor may maintain an action to modify a charitable trust under this section or to enforce a charitable trust under this or any other section.

(e) A person expressly entitled to receive benefits under the terms of a charitable trust shall have the rights of a qualified beneficiary under this [Act].

Comment

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

This section codifies the court's inherent authority to apply cy pres. The power may be applied to modify an administrative or beneficial term. The court may order the trust terminated and distributed to other charitable entities. Partial termination may also be ordered if the trust property is more than sufficient to satisfy the trust's current purposes. Cy pres under the Act is a default rule. The court's authority is subject to the settlor's right to specify an alternate disposition.

This section modifies the doctrine of cy pres by presuming that the settlor had a general charitable intent. Under traditional doctrine, if a specific charitable purpose becomes impossible to fulfill, the courts then determine whether the settlor had a general charitable intent. If so, the trust property is diverted to other charitable purposes. If not, the charitable trust fails. In the great majority of cases the settlor would prefer that the gift not fail but be used for other charitable purposes. Upon failure of a particular charitable purpose, courts rarely divert the trust property to a noncharitable use. Courts are almost always able to find a general charitable purpose to which to apply the property, no matter how vaguely such purpose may have been expressed by the settlor. Consequently, this section preserves the property for charity. Unless the terms of the trust provide to the contrary, a charitable trust does not fail in whole or in part if the particular purpose for which the trust was created becomes impracticable, unlawful, impossible to fulfill, or wasteful. The court must instead either modify the terms of the trust or direct that the property of the trust be distributed in whole or in part in a manner best meeting the settlor's charitable purpose.

The application of cy pres requires a balancing of the needs of society against an assessment of the settlor's probable intent. In determining the settlor's probable intent, the court should consider the current and future community needs in the general field of charity for which the trust was created, the settlor's other charitable interests, and the value of the available trust property.

The doctrine of cy pres is also applied in the law applicable to other types of charitable dispositions, including charitable corporations. This section, because it is part of a Uniform Trust Act, does not control charitable dispositions made in nontrust form. However, in formulating the rules for such dispositions the courts commonly refer to the principles governing charitable trusts.

The required purposes for a charitable trust in subsection (a) restates the well-established categories of charitable purposes listed in Restatement (Second) of Trusts § 368 and ultimately derived from the Statute of Charitable Uses, 43 Eliz. I, c.4 (1601).

Subsection (a) also restates an established estate planning technique under which the trustee is permitted to select the charitable beneficiary or purposes for which distributions are to be made. See Restatement (Second) of Trusts § 396 (1959).

Subsection (d), unlike Restatement (Second) of Trusts § 391 (1959), authorizes the settlor to maintain an action to enforce or modify a charitable trust. This is consistent with Section 706, which authorizes a settlor to petition for removal of a trustee.

SECTION 409. TERMINATION OF TRUST; PETITIONS FOR APPROVAL OR DISAPPROVAL.

(a) In addition to the methods specified in Sections 410 through 412, a trust terminates if the trust is revoked or expires pursuant to its terms or if the purposes of the trust are fulfilled or becomes unlawful, impossible to fulfill, or contrary to public policy.

(b) A petition to approve or disapprove a proposed action under Sections 410 through 415 may be filed by a trustee or beneficiary, and a petition to approve or disapprove a proposed action under Section 410 may be filed by a settlor.

Comment

Subsection (a) lists the various methods and grounds by which trusts typically terminate. In addition to other powers granted under this Act or by the terms of the trust, upon termination of a trust a trustee has the powers appropriate to wind up the trust's administration. See Section 816(24).

For the requirement that a trust must have a purpose that is not illegal, impossible to fulfill, or contrary to public policy, see Section 405 and Comment.

Subsection (b) provides that petitions for approval or disapproval of proposed actions under this Sections 410 through 415 may be filed by the trustee or a beneficiary. The effect of this is to make clear that court approval or disapproval may be sought for an action which can be accomplished without court permission. This would include petitions to approve or disapprove modification or termination by beneficiary consent (Section 410), a petition questioning the trustee's distribution upon termination of a trust under $50,000 (Section 412), and a petition for approval or disapproval of a proposed trust division or consolidation (Section 415).

Subsection (b) also makes clear that the settlor is an interested person with respect to actions under Section 410 to terminate or modify a trust by beneficiary action, whether or not the settlor agrees with the beneficiary's decision.

SECTION 410. MODIFICATION OR TERMINATION OF IRREVOCABLE TRUST BY CONSENT.

(a) An irrevocable trust may be modified or terminated with consent of all of the beneficiaries if continuance of the trust on its existing terms is not necessary to further a material purpose of the trust. The inclusion of a spendthrift provision in the terms of the trust may, but is not presumed to, constitute a material purpose of the settlor.

(b) Whether or not continuance of the trust on its existing terms is necessary to further a material purpose of the settlor, an irrevocable trust may be modified or terminated upon consent of the settlor and all beneficiaries. A settlor's power to consent to a trust's termination may be exercised by an agent under a power of attorney only to the extent the power of attorney or the terms of the trust so authorize, or by a [conservator] to the extent the agent is not so authorized.

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

(d) If a beneficiary does not consent to a proposed modification or termination of a trust by the other beneficiaries or by the settlor and other beneficiaries, the court may approve the proposed modification or termination only if the court is satisfied that:

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

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

Comment

This section describes the circumstances under which an irrevocable trust may be terminated or modified 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 because of unanticipated circumstances) and 412 (termination or modification of uneconomic 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 unanimous consent without the concurrence of the settlor. Subsection (b) states the test for termination or modification by the beneficiaries with the concurrence of the settlor. Subsection (c) directs how the trust property is to be distributed following a termination under either subsection (a) or (b). Subsection (d) 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 and, except as provided in subsection (d), without court approval. 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 (a) of this section is based on Section 337 of the Restatement (Second) of Trusts (1959), except that this subsection, unlike the Restatement, deals expressly with the effect of a spendthrift provision. While the inquiry on whether continuation of a trust is necessary to further a material purpose should focus on the material purpose or purposes of the particular settlor, the 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). The insertion of a spendthrift provision, which is often added to instruments with little thought, has been a particular problem. Subsection (a) does not negate the possibility that continuation to assure spendthrift protection might be a material purpose of the particular settlor. It instead calls attention to the issue by negating the inference that inserting a spendthrift provision is always a bar to termination or modification.

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

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

Subsection (b) does not, however, impose restrictions on consent by a conservator, other than prohibiting such action if the settlor is represented by an agent. The Act instead leaves the authority of a conservator to local law. Many conservatorship statutes, in fact, recognize that termination or modification of the settlor's trust is a sufficiently important transaction that a conservator should not be allowed to consent without first consulting with and obtaining the approval of the court supervising the conservatorship. See, e.g., Unif. Probate Code § 5-407.

The provisions of Article 3 on representation, virtual representation and the appointment and approval of guardians ad litem and special representatives apply for determining whether all beneficiaries have signified consent under this section. The authority to consent on behalf of another person, however, does not include the authority to consent over the other person's objection. See Section 303. For a listing of who may consent on behalf of a beneficiary, see Sections 304, 305, and 306. A consent obtained by virtual representation is valid only if there is no conflict of interest between the representative and the person represented. Given this limitation, virtual representation will rarely be available in a trust termination case, although its use will be frequent in cases involving trust modification, such as a grant to the trustee of additional powers. If virtual representation is unavailable, Sections 308 of the Act permits the court to appoint either a guardian ad litem or special representative who may give the necessary consent to the proposed modification or termination on behalf of the minor, incapacitated, unborn, or unascertained beneficiary.

Subsection (c) recognizes that the power to terminate the trust includes the right to direct how the trust property is to be distributed. While subsection (b) requires the settlor's consent to terminate an irrevocable trust, such required consent does not extend to the subsequent distribution of the trust property. Once a termination has been approved, how the trust property is to be distributed is solely for the beneficiaries to decide.

Subsection (d) addresses situations in which a termination or modification is requested by less than all of the beneficiaries, either because a beneficiary objects, the consent of a beneficiary cannot be obtained, or virtual representation is either unavailable or its application uncertain. Subsection (d) allows the court to fashion an appropriate order protecting the interests of the nonconsenting beneficiaries while at the same time permitting the remainder of the trust property to be distributed without restriction. The order of protection for the nonconsenting beneficiaries might include continuation of the trust, the purchase of an annuity, or the valuation and cashout of the interest.

SECTION 411. MODIFICATION OR TERMINATION BECAUSE OF UNANTICIPATED CIRCUMSTANCES.

(a) The court shall modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will substantially further the settlor's purposes in creating the trust.

(b) Upon termination of a trust under this section, the trust property must be distributed in accordance with the settlor's probable intention.

Comment

This section permits modification or termination of a trust when there are circumstances not anticipated by the settlor. This may include circumstances in existence at the time of the trust's creation which were known to but not considered by the settlor. Unlike Restatement (Second) of Trusts §§ 167 and 336 (1959), upon which this section is partially based, this section allows a court to modify or terminate a trust with respect to its beneficial provisions, not merely its administrative terms.

For example, modification of the beneficial provisions to increase support of a beneficiary might be appropriate if the beneficiary has become unable to provide for support due to poor health or serious injury.

While it is necessary there be circumstances not anticipated by the settlor before the court may grant relief under this section, it is not essential that circumstances have changed. The circumstances not anticipated by the settlor may have been in existence when the trust was created. This section thus complements Section 413, which allows for reformation of a trust based on mistake of fact or law at the creation of the trust.

Relief under this section should not be lightly granted. Reasonable minds can often disagree on the purposes of a trust and on whether the settlor chose the appropriate means of implementation. For this reason, the petitioner must demonstrate that the proposed termination or modification will substantially further the settlor's objectives in creating the trust.

Upon termination under this section, subsection (b) requires that the trust be distributed in accordance with the settlor's probable intent. This requirement, which is similar to the doctrine of cy pres, 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 beneficiaries, see Section 102(11).

SECTION 412. TERMINATION OF UNECONOMIC TRUST.

(a) Except as otherwise provided by the terms of the trust, if the value of the property of a trust is less than [$50,000], the trustee may terminate the trust.

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

(c) Upon termination of a trust under this section, the trustee shall distribute the property of a noncharitable trust in accordance with the settlor's probable intention, and shall apply or distribute the property of a charitable trust in a manner consistent with the settlor's charitable purposes.

Comment

Subsection (a) assumes that a trust with a value of $50,000 or less is inherently uneconomical and may be terminated without the expense of a judicial termination proceeding. This provision is a default rule. While the creation of small charitable trusts is not encouraged, this subsection does not interfere with the right of a settlor to do so. The settlor is free to set a higher or lower figure or to specify different procedures or to prohibit termination without a court order.

Subsection (b) allows a trust to be modified or terminated if the costs of administration would otherwise be excessive. The court may terminate a trust under this section even if a settlor has forbidden such action. A court termination procedure may be utilized for a trust of any size.

Compliance with this section is within the discretion of the trustee or, if court approval is required, within the discretion of the court. When considering whether to terminate a noncharitable trust under this section, the trustee or court should consider the trust purposes. Termination under this section is not always wise. Even if administrative costs may seem expensive in relation to the size of the trust, protection of the assets from beneficiary mismanagement may indicate that the trust be continued.

While this section is not principally directed at honorary trusts, it may be so applied. See Sections 406, 407.

In order to reduce administrative costs in relation to the size of the trust, the court, instead of terminating the trust, may appoint a new trustee. Upon termination of the trust, the trust property is to be distributed, in the case of a noncharitable trust, in accordance with the settlor's probable intention, or in the case of a charitable trust, pursuant to the cy pres principles articulated in Section 408.

SECTION 413. REFORMATION TO CORRECT MISTAKES. The court may reform the terms of a trust, even if unambiguous, to conform to the settlor's intention if the failure to conform was due to a mistake of fact or law, whether in expression or inducement, and the settlor's intent can be established by clear and convincing evidence.

Comment

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

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

Reformation is different than clarification of an ambiguity. Clarification of an ambiguity involves the interpretation of a term already in the trust. Reformation, on the other hand, involves the addition of a term not originally in the trust, or the deletion of a term originally included by mistake. Because reformation involves the addition of a term to the instrument, or deletion of a term 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: 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, a 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: Donative Transfers § 12.1 cmt. d (Tentative Draft No. 1. 1995).

SECTION 414. 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 a modification shall have 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 413. Reformation under Section 413 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 beneficial 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 408), 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, not this Act. 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 415. COMBINATION AND DIVISION OF TRUSTS. On written notice to the qualified beneficiaries, the trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts, pro rata or non-pro-rata, if the combination or division does not impair the rights of any beneficiary or adversely affect the accomplishment of the trust purposes.

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. Many trust instruments and standardized estate planning forms include comprehensive provisions governing these steps.

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 beneficial 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 412. 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.

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

This section does not require that a combination or division be approved by either the court or beneficiaries. Prudence may dictate, however, that court approval under Section 409 be sought and beneficiary consent obtained whenever the terms of the trusts to be combined or the trusts that will result from a division differ substantially one from the other. For the provisions relating to beneficiary consent or ratification of a transaction, or release of trustee from liability, see Section 1107.

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

For a list of statutes authorizing division of trusts, either by the trustee or court order, see Restatement (Third) Property: Donative Transfers § 12.2 statutory note (Tentative Draft No. 1, 1995). For a provision authorizing a trustee, in distributing the assets of the divided trust, to make non-pro-rata distributions, see Section 816(20).

ARTICLE 5

SPENDTHRIFT PROVISIONS; CREDITOR CLAIMS

General Comment

This part 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. Section 501 specifies the requirements for a valid spendthrift provision and, if valid, its effect. For trusts without valid spendthrift provisions, Section 502 describes the circumstances under which a beneficiary's creditors may reach the beneficiary's interest. Section 503 lists the categories of creditors whose claims are not subject to a spendthrift bar, and the extent to which such a creditor may reach the trust. Sections 504 through 506 address special categories where the rights of a beneficiary's creditors may not depend on 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 required distribution within a reasonable time.

SECTION 501. SPENDTHRIFT PROVISION: GENERAL.

(a) A spendthrift provision is valid only if it provides for restraint of both voluntary and involuntary transfer of a beneficiary's interest.

(b) A beneficiary may not transfer an interest in a trust protected by a valid spendthrift provision, and, except as otherwise provided in this [Article], a creditor or assignee of the beneficiary may not attach the interest or a distribution by the trustee, before its receipt by the beneficiary.

ALTERNATE PROVISION

(a) A spendthrift provision is valid if it provides for restraint of either the voluntary or involuntary transfer of a beneficiary's interest.

(b) To the extent a trust is protected by a valid spendthrift provision, a beneficiary may not transfer the beneficiary's interest, and except as otherwise provided in this [Article], a creditor or assignee of the beneficiary may not attach the interest or a distribution by the trustee, before its receipt by the beneficiary.

Comment

Under this section, a settlor has the power to restrain the transfer of a beneficiary's interest, regardless of whether the beneficiary has an interest in income, in principal, or both. Unless one of the exceptions under this article applies, a creditor of the beneficiary is prohibited from attaching a protected interest and may only attempt to collect directly from the beneficiary after payment is made. This section is similar to Restatement (Second) of Trusts §§ 152-153 (1959), and Restatement (Third) of Trusts § 58 (Preliminary Draft No. 4, 1998). For the definition of spendthrift provision, see Section 102(14).

For a spendthrift provision to be effective under the Act, the enacting jurisdiction must decide whether the provision must prohibit *both* the voluntary and involuntary transfer of the beneficiary's interest, or whether a settlor will be allowed to provide that a beneficiary may not assign but creditors may collect, and vice versa.

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

While a valid spendthrift provision makes it impossible for a beneficiary to make a legally binding transfer, a trustee is not penalized for voluntarily honoring the assignment. A voluntary assignment by a beneficiary as to periodic payments otherwise due the beneficiary may be honored by a trustee but is revocable by the beneficiary at any time.

SECTION 502. CLAIM OF BENEFICIARY'S CREDITOR AGAINST TRUST WITHOUT SPENDTHRIFT PROVISION. To the extent a beneficiary's interest is not protected by a spendthrift provision, a creditor or assignee of a beneficiary may reach the beneficiary's interest in an appropriate judicial proceeding, including obtaining an order attaching present or future distributions to or for the benefit of the beneficiary.

Comment

Absent a valid spendthrift provision, the interest of a beneficiary may be reached the same as any other of the beneficiary's assets. This section does not attempt to prescribe the procedures for reaching a beneficiary's interest, preferring instead to leave that issue to the enacting State's laws on creditor rights. Consequently, the section provides that a creditor or assignee may pursue collection in "an appropriate judicial proceeding." The section does clarify, however, that an order obtained against the trustee, whatever state procedure may have been used, may extend to future distributions whether made directly to the beneficiary or to others for the beneficiary's benefit. By allowing an order to extend to future payments, the need for the creditor to periodically return to court will be reduced.

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

A creditor's attachment of a beneficiary's interest may not result in the creditor receiving all distributions that would otherwise be made to the beneficiary. State creditor law may limit the creditor to a specified percentage of a distribution. See, e.g., Cal. Prob. Code § 15306.5.

SECTION 503. EXCEPTIONS TO SPENDTHRIFT PROVISION.

(a) Even if a trust contains a spendthrift provision, a beneficiary's child or current or former spouse who has a judgment against the beneficiary for support or maintenance, or a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust, may obtain, in an appropriate judicial proceeding, an order attaching present or future distributions to or for the benefit of the beneficiary.

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

Comment

For trusts with spendthrift provisions, the effect of this section is to enable certain creditors to bypass a spendthrift restriction but only with respect to their particular claims. Under this section, exceptions are recognized for court orders for the support of a child or a current or former spouse and for certain governmental claims.

The exception in subsection (a) for orders to support a beneficiary's child or current or former spouse is in accord with Restatement (Second) of Trusts § 157 (1959), Restatement (Third) of Trusts § 59 (Preliminary Draft No. 4, 1998), and numerous state statutes. It is also consistent with federal bankruptcy law, which exempts such support orders from discharge. The effect of this exception is to permit the claimant for unpaid support to attach present or future distributions that would otherwise be made to the beneficiary. Distributions subject to attachment include distributions required by the express terms of the trust, such as mandatory payments of income, and distributions the trustee has otherwise decided to make, such as through the exercise of discretion. Subsection (a), unlike Section 504, does not authorize the spousal or child claimant to force a sale of the beneficiary's interest. For the right of a spouse or child claimant to force a distribution if the trustee has abused discretion or failed to comply with a standard for distribution, see Section 504.

Subsection (b), which is similar to Restatement (Third) of Trusts § 59 (Preliminary Draft No. 4, 1998), exempts certain governmental claims from a spendthrift bar. Federal preemption guarantees that certain federal claims, such as claims by the Internal Revenue Service, may bypass a spendthrift provision no matter what this Act might say. The case law and relevant Internal Revenue Code provisions on the exception for federal tax claims are collected in 2A Austin W. Scott & William F. Fratcher, The Law of Trusts § 157.4 (4th ed. 1987). As to claims by state governments, this subsection recognizes that States take a variety of approaches with respect to collection, depending on whether the claim is for unpaid taxes, for care provided at an institution, or for other charges. Acknowledging this diversity, subsection (b) does not prescribe a definite rule, but instead refers to other statutes of the State on whether a particular claim would be barred or exempted from a spendthrift provision. The other state statute might be a statute of the forum jurisdiction or the statute of another State.

Unlike Restatement (Second) of Trusts § 157 (1959), and Restatement (Third) of Trusts § 59 (Preliminary Draft No. 4, 1998), this Act does not provide that a spendthrift provision is unenforceable against creditors who have furnished necessary services or supplies to the beneficiary, or creditors who have furnished services or materials which have preserved or supposedly enhanced the beneficiary's interest. For a discussion of these other exceptions to the spendthrift bar, recognized in some States, see 2A Austin W. Scott & William F. Fratcher, The Law of Trusts §§ 157-157.5 (4th ed. 1987).

SECTION 504. DISCRETIONARY TRUSTS, INCLUDING TRUSTS SUBJECT TO STANDARD.

(a) Except as otherwise provided in subsection (b), whether or not the trust contains a spendthrift provision, if the terms of a trust provide that the trustee shall pay to or for the benefit of a beneficiary income or principal of the trust subject to a standard or in the discretion of the trustee, a creditor of a beneficiary may not compel a distribution from the trust, even if the trustee has failed to comply with the standard or abused the discretion.

(b) To the extent a trustee has failed to comply with a standard or abused a discretion, a distribution may be compelled in an appropriate judicial proceeding by a spouse, former spouse, or child who has a judgment against the beneficiary for support. The court shall direct the trustee to pay the spouse or child such amount as is equitable under the circumstances but not in excess of the amount that 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 501, 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 502. 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 interest of the beneficiaries.

Subsection (b) creates an exception for support claims of a spouse, former spouse, or child. While a creditor of a beneficiary may not in general assert that a trustee has abused discretion or failed to comply with a standard of distribution, such a claim may be asserted by the beneficiary's spouse, former spouse, or child, but only if made in an appropriate judicial proceeding. The court must direct the trustee to pay the spouse or child such amount as is equitable under the circumstances but not in excess of the amount the trustee was otherwise required to distribute to or for the benefit of the beneficiary. Before fixing this amount, the court with jurisdiction over the trust should consider that in setting the respective support award, an obligation on which the beneficiary has now defaulted, the family court has already considered the respective needs and assets of the family. The Act does not attempt to prescribe the particular procedural method for enforcing a support judgment against the trust, leaving that matter to local collection law. For an example, see Cal. Prob. Code § 15305.

SECTION 505. CREDITOR'S CLAIM AGAINST SETTLOR.

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

(1) A creditor or assignee of the settlor may reach the maximum amount that the trustee could pay to or for the settlor's benefit. If a trust has more than one

settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.

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

(3) After the death of a settlor, the property of a revocable trust is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and statutory allowances to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses and allowances.

(b) For purposes of this section:

(1) the holder of a presently exercisable power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and

(2) upon the lapse, release or waiver of the power, the holder is treated in the same manner as the settlor of an irrevocable trust but only to the extent the value of the property subject to the power in any calendar year did not exceed at the time of the lapse, release, or waiver the greater of the amount specified in (A) Section 2514(b)(2) or 2514(e), Internal Revenue Code of 1986, or (B) Section 2503(b), Internal Revenue Code of 1986.

Comment

Subsection (a)(1), which is based on Section 156 of the Restatement (Second) of Trusts (1959), and Restatement (Third) of Trusts § 58(2) & cmt. e (Preliminary

Draft No. 4, 1998), follows traditional doctrine in providing that a settlor who is also a beneficiary may not use the trust as a shield against the settlor's creditors. Whether the trust contains a spendthrift provision or not, a creditor of the settlor may reach the maximum amount that the trustee could have paid to the settlor-beneficiary. Should the trustee have discretion to distribute the entire income and principal to the settlor, the effect of this subsection is to place the settlor's creditors in the same position as if the trust had not been created. For the definition of "settlor," see Section 102(13).

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

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

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

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

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

Subsection (b) treats a presently exercisable general power of appointment as the functional equivalent of a power of revocation. Should the power be unlimited, the property subject to the power will be fully subject to the claims of the power holder's creditors, the same as the power holder's other assets. Should the power holder retain the power until death, the property subject to the power may be liable for claims and statutory allowances to the extent the power holder's probate estate is insufficient to satisfy those claims and allowances. For powers limited either in time or amount, such as a right to withdraw a $10,000 annual exclusion contribution within 30 days, this subsection would limit the creditor to the $10,000 contribution and require the creditor to take action prior to the expiration of the 30-day period.

This Act 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 attach a distribution directed to be made to the beneficiary by the terms of the trust if the trustee has failed to make the distribution within a reasonable time.

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 501. 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 required distribution date. Following this reasonable period, payments required 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.

ARTICLE 6

REVOCABLE TRUSTS

General Comment

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 Act. Each section of this article deals with issues of significance not totally settled under current law. This article and of the other parts of this Act 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 a trust that was revocable at death.

SECTION 601. CAPACITY OF SETTLOR TO CREATE REVOCABLE TRUST. An individual who has capacity to make a will has capacity to create a revocable trust.

Comment

This section, which is patterned after Restatement (Third) of Trusts § 11 (Tentative Draft No. 1, 1996), provides some certainty to what has become a major issue in the law of trusts due to the recent and widespread use of the revocable trust as an alternative to a will.

This section recognizes that 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 under which the property not transferred to the trust during life will, following the settlor's death, be combined with the trust property which the settlor did manage to convey. Given this primary use of the revocable trust as a device for disposing of property at death, the capacity standard for wills, and not for lifetime gifts, should apply. If lifetime management issues implicating the standard of capacity arise, they may be dealt with by reformation or other appropriate remedies that will not jeopardize the overall plan of disposition by making the standard for the trust different or higher than that for making a will. Restatement (Third) of Trusts § 11 cmt. b (Tentative Draft No. 1, 1996).

The application of the capacity standard for wills does not mean that the revocable trust must be executed with the formalities of a will. There are no execution requirements under this Act for a trust not created by will, and a trust, at least one containing personal property, may be created by an oral statement. See Section 404 and Comment. Nor does the application of the capacity standard for wills, and the fact that most States prohibit a guardian or conservator from making a will for the ward or protected person, mean that a guardian or conservator cannot create a trust, if allowed under local guardianship or conservatorship law.

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

SECTION 602. REVOCATION OR MODIFICATION OF REVOCABLE TRUST.

(a) Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or modify the trust. This subsection does not affect trusts created under instruments executed before [the effective date of this [Act]].

(b) If the trust is created or funded by more than one settlor:

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

(2) to the extent the trust consists of other property, each settlor may revoke or modify the trust as to the portion of the trust property attributable to that settlor's contribution.

(c) A trust that is revocable by the settlor may be revoked or modified:

(1) by substantially complying with the method specified by the terms of the trust; or

(2) unless the terms of the trust expressly make the specified method exclusive, by a will or any other method manifesting clear and convincing evidence of the settlor's intent.

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

(e) A settlor's powers with respect to revocation or modification may be exercised by an agent under a power of attorney only to the extent the terms of the trust or the power of attorney so authorize.

(f) A [conservator] may revoke or modify a revocable trust with the approval of the court supervising the [conservatorship].

Comment

Subsection (a), which provides that a settlor may revoke or modify a trust unless the terms of the trust expressly state that the trust is irrevocable, is contrary to the common law of trusts. The common law presumes that a trust is irrevocable absent evidence of contrary intent. See Restatement (Second) of Trusts § 330 (1959). This subsection does not govern trusts created in another State whose validity, under choice of law rules, is governed by the law of a State following the common law rule. In addition, this subsection does not prevent a trust from being reformed to make it irrevocable if the settlor was proceeding under a mistake of law at the time of its creation. See Section 413 (reformation of trust). But far easier than relying on this statute, choice of law rules, or reformation is for the drafter to simply express in the terms of the trust whether the trust is revocable or irrevocable.

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

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

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

This section does not explicitly require that the other settlor or settlors be notified if a joint trust is revoked by less than all of the settlors, but such notice would be required under Section 813(e). While the trust is revocable and the settlor has capacity, Section 813(e) provides that the duty to keep the beneficiaries reasonably informed of developments is owed exclusively to the settlor. To avoid an issue as to how this duty applies to a trust with multiple settlors, subsection (e) further provides that in the case of a trust with multiple settlors, this duty to keep the *settlor* informed extends to *all* of the settlors. Notifying the other settlor or settlors of the revocation or modification will place them in a better position to protect their interests. If the revocation or modification by less than all of the settlors breaches an implied agreement not to revoke or modify the trust, those harmed by the action could sue for breach of contract. If the trustee fails to notify the other settlor or settlors of the revocation, the parties aggrieved by the trustee's failure could sue the trustee for breach of trust.

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

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

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

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

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

Many States allow a conservator to exercise the settlor's power of revocation with the prior approval of the court supervising the conservatorship. See, e.g., Unif. Prob. Code § 5-407. Section 104 allows a settlor to direct in the terms of the trust that this other law not apply. The fact that a conservator may be prohibited from revoking the trust does not mean that the conservator is prohibited from taking appropriate action to protect the settlor's interest if the settlor, now under conservatorship, is also a beneficiary of the trust. For example, the conservator could petition for removal of the trustee. See Section 706. The conservator, acting on the settlor-beneficiary's behalf, could also bring an action to enforce the trust according to its terms. Pursuant to Section 305, a conservator may act on behalf of the beneficiary whose estate the conservator controls whenever a consent or other action by the beneficiary is required or may be given under the Act.

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

SECTION 603. OTHER RIGHTS OF SETTLOR; PRESENTLY EXERCISABLE POWERS OF WITHDRAWAL.

(a) While the trust is revocable and the settlor has capacity to revoke the trust:

(1) rights of the beneficiaries are held by, and the duties of the trustee are owed exclusively to the settlor; and

(2) the trustee may follow a written direction of the settlor, even if contrary to the terms of the trust.

(b) While the trust is revocable and the settlor does not have capacity to revoke the trust:

(1) if the settlor is represented by an agent under a power of attorney, a [conservator], or a [guardian]:

(A) rights of the beneficiaries held by, and the duties of the trustee are owed exclusively to the agent, [conservator], or [guardian]; and

(B) the trustee may follow a written direction by the agent, [conservator], or [guardian] if consistent with the terms of the trust; and

(2) if the settlor is not represented by an agent, [conservator], or [guardian], the rights of the beneficiaries are held by the beneficiaries the same as if the trust were irrevocable.

(c) The holder of a presently exercisable power of withdrawal has the rights of a settlor of a revocable trust under this section to the extent of the property subject to the power.

Comment

This section has the effect of postponing the enjoyment of rights of beneficiaries of revocable trusts until the death or incapacity of the settlor or other person holding the power to revoke the trust. This section thus recognizes that the settlor of a revocable trust is in control of the trust and should have the right to enforce the trust. Because of this degree of control, the trustee may also rely on a written direction of the settlor, even if contrary to the terms of the trust. Alternatively, the written direction of the settlor might be regarded as a modification of the trust.

Under this section, the duty to inform and report to beneficiaries is owed to the settlor of a revocable trust as long as the settlor has capacity. See also Section 813 (trustee's duty to inform and report to beneficiaries).

Should the settlor lose capacity, the duty to inform and report to beneficiaries is owed to the settlor's agent under a power of attorney, conservator, or guardian acting on the settlor's behalf. Only if there is no agent, conservator or guardian are the beneficiaries granted all rights normally afforded the beneficiaries of trusts.

Subsection (c) makes clear that a holder of a presently exercisable power of withdrawal has the same powers over the trust as the settlor of a revocable trust. Equal treatment is warranted due to the holder's equivalent power to control the trust.

SECTION 604. LIMITATION ON ACTION CONTESTING VALIDITY OF REVOCABLE TRUST. Upon the death of the settlor of a trust which was revocable at the settlor's death:

(1) a judicial proceeding to contest the validity of the trust must be commenced not later than one year following the death, unless barred earlier by adjudication, consent, or other limitation.

(2) the trustee may proceed to distribute the trust property absent actual knowledge of a pending judicial proceeding contesting the validity of the trust, or

notification by a potential contestant of a possible contest, followed by the filing of the contest within 30 days.

Comment

This section provides finality to when a contest of a revocable trust may be brought and to encourage the expeditious distribution of the trust property following the death of the settlor. Paragraph (1), which requires that a contest be brought no later than one year following the death of the settlor, applies not only to contests to invalidate the trust in its entirety but also to contests to invalidate a trust in part.

Paragraph (2), which protects a trustee in making distributions absent actual knowledge of a contest or notice that a contest will be brought, does not discharge the distributees from potential liability for what may later turn out to have been an inappropriate distribution. Should a successful contest later be brought, the contestants may also reach any trust property still in the trustee's possession.

This section does not address possible liability for the debts of the deceased settlor nor possible liability to creditors for distributing trust assets. For possible liability of the trust, see Section 505(a)(3) and Comment. Whether a trustee can be held liable for creditor claims following distribution of trust assets is addressed in proposed Uniform Probate Code § 6-102, which was approved by the Commissioners at its 1998 Annual Meeting.

SECTION 605. RULES OF CONSTRUCTION. Upon the death of the settlor of a revocable trust, the rules of construction that apply in this State to the disposition of property by will also apply to the interpretation of the terms of the trust and the disposition of the trust property.

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 standard for determining trustee compensation and reimbursement for expenses advanced.

SECTION 701. ACCEPTANCE OR REJECTION OF TRUSTEESHIP.

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

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

(2) unless the terms of the trust make the specified method exclusive, accepting delivery of the trust property, exercising powers or performing duties as trustee, or otherwise indicating an intention to accept the trusteeship.

(b) A person designated as trustee who has not yet accepted the trusteeship may reject the trusteeship. A failure to accept the trusteeship within a reasonable time after the person knows of the designation is a rejection of the trusteeship.

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

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

(2) inspect or investigate trust property to determine potential environmental liability.

Comment

This section, specifying the requirements for a valid acceptance of the trusteeship, implicates many of the same issues as arise in determining whether a trust has been revoked. Consequently, the two provisions track each other closely. Compare Section 602(c) (procedure for revoking or modifying trust). Procedures specified in the terms of the trust are recognized, but only substantial, not literal compliance is required. A failure to meet technical requirements, such as notarization of the trustee's signature, does not result in nonacceptance. Ordinarily, the trustee will indicate an acceptance by signing the trust instrument or signing a separate written instrument. However, this section recognizes any other method indicating the necessary intent, such as by knowingly exercising trustee powers, unless the terms of the trust make a specified method exclusive. This section also does not preclude an acceptance by estoppel or damages for an unreasonable delay in signifying a decision as to an acceptance or rejection. For general background on issues relating to trustee acceptance and rejection, see Restatement (Second) of Trusts § 102 (1959); Restatement (Third) of Trusts § 35 (Preliminary Draft No. 4, 1998). Consistent with Section 201, which encourages a court to intervene only when called upon by an interested party or in other special circumstance, there is no requirement that a trustee qualify in court.

To avoid the inaction that can result if the person designated as trustee fails to communicate a decision to either accept or reject the trusteeship, subsection (b) provides that a failure to accept within a reasonable time constitutes a rejection of the trusteeship. A trustee's rejection of a trust normally precludes a later acceptance of the trust but does not cause the trust to fail. See Restatement (Third) of Trusts § 35 cmt. c (Preliminary Draft No. 4, 1998). As to filling vacancies in the event of a rejection, see Section 704.

While a person designated as trustee who decides not to accept the trusteeship need not provide a formal rejection, a clear and early communication is recommended. The appropriate recipient of the written rejection depends upon the particular circumstances. Ordinarily, it would be appropriate to give the rejection to the person who informs the person of the proposed trusteeship. If judicial proceedings involving the trust are pending, the rejection could be filed with the court. In the case of a person named as trustee of a revocable trust, it would be appropriate to give the rejection to the settlor. In any event it would be best to give notice of rejection to a beneficiary with a significant interest in the trust because that beneficiary might be more motivated than others to seek appointment of a new trustee.

Subsection (c) makes clear that the authority to act in an emergency does not impose a duty to act. The person named as trustee may act in an emergency without being considered to have accepted the trusteeship but upon conclusion of the emergency the nominated trustee must clearly indicate to the settlor, if living and competent, otherwise to the qualified beneficiaries entitled to approve a trustee's report, that the person rejects the trusteeship.

SECTION 702. TRUSTEE'S BOND.

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

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

(c) The cost of a bond is charged to the trust.

Comment

This provision is consistent with the Restatement and with the bonding provisions of the Uniform Probate Code. See Restatement (Third) of Trusts § 34 cmt. a (Preliminary Draft No. 4, 1998); Unif. Probate Code §§ 3-604 (personal representatives), 5-410 (conservators), and 7-304 (trustees). Because a bond is required only if the terms of the trust require bond or a bond is found by the court to be necessary to protect the interests of beneficiaries, bond should rarely be required under the Act. This section does not specifically excuse bond for financial-service institutions with trust powers, preferring instead to leave that topic to separate legislation.

The amount of a bond otherwise required may be reduced by the value of trust property deposited in a manner that prevents its unauthorized disposition, and by the value of real property which the trustee, by express limitation of power, lacks power to convey without court authorization.

The court may excuse or otherwise modify a requirement of a bond, reduce or increase the amount of a bond, release a surety, or permit the substitution of another bond with the same or different sureties.

SECTION 703. COTRUSTEES.

(a) Cotrustees may act by majority decision.

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

(c) If a cotrustee is unavailable to perform duties because of absence, illness, or other temporary incapacity, and prompt action is necessary to accomplish the purposes of the trust or to avoid injury to the trust property, the remaining cotrustee or cotrustees may act for the trust as if they were the only trustees.

(d) If a trust has more than one trustee, each trustee shall:

(1) participate in the administration of the trust and not delegate to a cotrustee the performance of a function that the settlor reasonably expected the trustees to perform jointly; and

(2) take reasonable steps to prevent a cotrustee from committing a material breach of trust and to compel a cotrustee to redress a material breach of trust.

(e) A trustee who complies with subsection (d) is not liable for a cotrustee's action or failure to act.

Comment

Subsection (a) is in accord with Restatement (Third) of Trusts § 39 (Preliminary Draft No. 4, 1998), which rejects earlier Restatement formulations requiring unanimity among the trustees of a private trust. See Restatement (Second) of Trusts §

194 (1959). This section, consistent with the prior Restatement rule limited to charitable trusts, allows action by a majority of the trustees, whatever type of trust may be involved. See Restatement (Second) of Trusts § 383 (1959). However, the rule of this section is subject to contrary provision in the terms of the trust, as noted in the introductory clause. Should a cotrustee resign or a vacancy occur by some other means, only a majority of the remaining trustees need be counted, even though the number of trustees constituting a majority would then be less than before the vacancy occurred.

Under subsection (b), a vacancy in a cotrusteeship is disregarded if there is at least one trustee remaining in office. This is consistent with Section 704, which provides that unless the terms of the trust so require, a vacancy in a cotrusteeship need be filled only if there is no cotrustee remaining in office.

By permitting the trustees to act by a majority, subsection (a) contemplates that there may be a trustee or trustees who might dissent. A trustee who dissents is not liable to a third party for failing to join in the majority's exercise of a power. See Section 1108(c). However, should the action by the majority constitute a breach of trust, the dissenting trustee may be held liable under subsection (d) for failing to take action to rectify the improper acts of the other cotrustees. The responsibility to take action against a cotrustee codifies the substance of Sections 184 and 224 of the Restatement (Second) of Trusts (1959).

Subsection (d) also addresses the extent to which a trustee may delegate the performance of functions to a cotrustee. A trustee may not delegate to a cotrustee the performance of functions that the settlor expected the trustee to personally perform. This is consistent with Restatement (Second) of Trusts § 171, although that Restatement provision applied to all delegation, both to agents and to cotrustees. For the provision of this Act on delegation to agents, see Section 807. The exact extent to which a trustee may delegate functions to another trustee in a particular case will vary depending on the reasons the settlor decided to appoint cotrustees. The better practice is to address the division of functions in the terms of the trust, as allowed by Section 104.

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

SECTION 704. VACANCY IN TRUSTEESHIP.

(a) A vacancy in a trusteeship occurs if:

(1) a person designated as trustee rejects the trusteeship;

(2) a person named as trustee cannot be identified or does not exist;

(3) a trustee resigns;

(4) a trustee is disqualified or removed;

(5) a trustee dies; or

(6) a [guardian] or [conservator] is appointed for an individual serving or eligible to serve as trustee.

(b) A trustee must be appointed to fill a vacancy in a trusteeship only if the trust has no remaining trustee.

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

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

(2) by a person appointed by the court.

Comment

This section lists the typical ways in which a trusteeship becomes vacant and the rules on filling the vacancy. See also Sections 701 (acceptance or rejection of trusteeship), 705 (resignation of trustee), and 706 (removal of trustee).

This section addresses only circumstances when a vacancy in the trusteeship *must* be filled. The court, exercising its inherent equity authority, may always appoint additional trustees if the appointment would promote better administration of the trust. See Restatement (Second) of Trusts § 108 cmt. e (1959); Restatement (Third) of Trusts § 34 cmt. e (Preliminary Draft No. 4, 1998).

Good drafting practice suggests that the terms of the trust deal expressly with the problem of vacancies, naming successors and addressing the procedure for filling a vacancy in the absence of a named successor. This section applies only if the terms of the trust are silent or the procedure specified has for some reason not worked. Furthermore, subsection (b) clarifies that a vacancy in the cotrusteeship need be filled only if the trust has no remaining trustee. If a vacancy in the cotrusteeship is not filled, Section 703 authorizes the remaining cotrustees to continue to administer the trust.

Absent an effective provision in the terms of the trust, subsection (c)(1) permits a vacancy in the trusteeship to be filled, without the need for court approval, by a person selected by unanimous agreement of the qualified beneficiaries, who, per Section 705(a)(3), may also receive the trustee's resignation. If a trustee resigns pursuant to Section 705(a)(3), the trust may be transferred to a successor appointed pursuant to subsection (c)(1), all without court involvement.

Subsection (c)(2) authorizes the court to fill a vacancy if the trust does not name a successor who is willing to accept the trust or if the trust does not provide another method of appointment. The appointment of a successor by the court is an alternative to an appointment by the beneficiaries under subsection (c)(1). The petition may be brought by any beneficiary of the trust. Per Section 706, a beneficiary without authority to join in a beneficiary appointment may petition the court for removal of the trustee appointed by the qualified beneficiaries. For a list of factors for the court to consider in making its selection, see Restatement (Second) of Trusts § 108 cmt. d (1959); Restatement (Third) of Trusts § 34 cmt. f (Preliminary Draft No. 4, 1998).

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

SECTION 705. RESIGNATION OF TRUSTEE.

(a) A trustee may resign by any of the following methods:

(1) in the case of a revocable trust, upon at least 30 days' notice, in writing or by other record, to:

(A) the settlor if the settlor has capacity;

(B) the settlor's [conservator], [guardian], or agent if the settlor lacks capacity but is represented by a [conservator], [guardian], or agent; or

(C) the qualified beneficiaries if the settlor lacks capacity and is not represented by a [conservator], [guardian], or agent;

(2) in the case of an irrevocable trust, upon at least 30 days' notice, in writing or by other record, to the qualified beneficiaries; or

(3) with the approval of the court.

(b) A trustee who plans to resign must notify any cotrustee of the proposed resignation.

(c) A qualified beneficiary may in a writing or by other record waive a notice otherwise required under this section .

(d) In approving a resignation, the court may impose orders and conditions reasonably necessary for the protection of the trust property, including the appointment of a receiver or temporary trustee.

(e) Any liability of a resigning trustee or of any sureties on the trustee's bond for acts or omissions of a resigning trustee is not released or affected by the trustee's resignation.

Comment

This section provides several alternative methods by which a trustee may resign. As authorized by Section 104, a trustee may always resign as provided in the terms of the trust. If the terms of the trust do not provide a method for resignation or if the method for whatever reason is not followed, a trustee may resign by giving notice as provided in subsection (a)(1)-(2). Under subsection (a)(3), court approval of a resignation is required only if none of the other alternatives are available.

The persons to whom notice of a resignation must be given are generally the same as those who must approve the appointment of a successor trustee to fill a vacancy. See Section 704. For a revocable trust, notice to the settlor will ordinarily be required, but should the settlor be incapacitated, subsection (a)(1) makes provision for a substitute consent. For an irrevocable trust, subsection (a)(2) requires that notice be given to the qualified beneficiaries.

Section 813 requires a trustee's report whenever there is a change of trustees. See also Restatement (Second) of Trusts § 106 cmt. b, and Restatement (Third) of

Trusts § 36 cmt. d (Preliminary Draft No. 4, 1998), which, like subsection (e), provides that resignation does not release the resigning trustee from potential liabilities.

SECTION 706. REMOVAL OF TRUSTEE.

(a) A trustee may be removed by the court on its own initiative or on petition of a settlor, cotrustee, or beneficiary.

(b) The court may remove a trustee if:

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

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

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

(4) because of changed circumstances, unfitness, or inability to administer the trust, removal of the trustee would be in the best interests of the beneficiaries.

(c) Pending a final decision on a petition to remove the trustee, or in lieu of or in addition to removing a trustee, the court may order such appropriate relief under Section 1102 as may be necessary to protect the trust property or the interests of the beneficiaries.

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 (Preliminary Draft No. 4, 1998). 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 petition for removal does not apply to a revocable trust while the settlor has capacity. While the trust is revocable and the settlor has capacity, the settlor holds all rights that would otherwise be granted to the beneficiaries. See Section 603.

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

Subsection (b) allows removal for untoward action on the part of a trustee, such as a material breach of trust, but the section is not so limited. The grounds listed in subsection (b)(1)-(4) allow for removal under a variety of circumstances where the trustee is not acting in the best interests of the beneficiaries or in line with the expectations of the settlor.

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

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

Friction between cotrustees, inability of the trustee and beneficiaries to get along through fault of the trustee, indifference on the part of the trustee, and mediocre service may all justify removal if in the best interests of the beneficiaries and not inconsistent with the purposes of the trust.

A particularly appropriate circumstance justifying removal of the trustee is a serious breach of the trustee's duty to keep the beneficiaries reasonably informed of the administration of the trust or to comply with a beneficiary's request for information as required by Section 813. Failure to comply with this duty may make it impossible for the beneficiaries to protect their interests. It may also mask more serious violations by the trustee.

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

SECTION 707. DELIVERY OF PROPERTY BY FORMER TRUSTEE.

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

(1) a trustee who has resigned or been removed has the duties and powers of the trusteeship; and

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

Comment

This section addresses the continuing authority of a former trustee. Subject to the power of the court to make other arrangements, a former trustee has continuing authority until the property is delivered to a successor. However, if a cotrustee remains in office, there is no reason to grant such continuing authority, and none is granted. If the trustee has resigned or been removed, the continuing authority is granted to the former trustee; if the former trustee has died, to the former trustee's personal representative; if the former trustee has been adjudicated incapacitated, to the former trustee's guardian or conservator. Whether a former trustee remains in office or not, the former trustee remains liable for actions or omissions during the trustee's term of office until liability is barred.

Section 813 requires a trustee's report whenever there is a change of trustees. Section 1109(d) protects third persons who deal in good faith with a former trustee without knowledge that the person is no longer a trustee. See also Section 1102(5) (appointment of receiver or temporary trustee upon breach of trust).

SECTION 708. COMPENSATION OF TRUSTEE.

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

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

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

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

Comment

Subsection (a) establishes a standard of reasonable compensation. For a list of factors relevant in determining reasonable compensation, see Restatement (Second) of Trusts § 242 cmt. b (1959); Restatement (Third) of Trusts § 38 cmt. c (Preliminary Draft No. 4, 1998). In setting compensation, the services actually performed and responsibilities assumed by the trustee should be closely examined. For example, an adjustment in compensation may be appropriate if the trustee has delegated significant duties, such as the delegation of investment authority, to outside managers. See Section 807 (delegation by trustee), and Section 909 Comment (delegation of investment and management authority under Uniform Prudent Investor Act). On the other hand, a trustee with special skills, such as those of a real estate agent, may be entitled to extra compensation for performing services that would ordinarily be delegated. See Restatement (Second) of Trusts § 242 cmt. d (1959); Restatement (Third) of Trusts § 38 cmt. d (Preliminary Draft No. 4, 1998).

Subsection (b) permits the reasonable compensation standard to be overridden or clarified by the terms of the trust, subject to the court's inherent equity power to make adjustments downward or upward in appropriate circumstances. Whether a provision in the terms of the trust setting the amount of the trustee's compensation is binding on a successor trustee is a matter for interpretation. Also a question for interpretation is whether a beneficial provision for the trustee in the terms of the trust is in addition to or in lieu of the trustee's regular compensation. Another possible uncertainty is whether the discharge of the beneficial provision is conditional on the person performing services as trustee. See Restatement (Second) of Trusts § 242 cmt. f (1959); Restatement (Third) of Trusts § 39 cmt. e (Preliminary Draft No.4, 1998).

Compensation may be set by agreement. A trustee may enter into an agreement with the beneficiaries for lesser or increased compensation, although an agreement increasing compensation is not binding on a nonconsenting beneficiary. A trustee may agree to waive compensation and should do so prior to rendering significant services if concerned about possible gift and income tax liability on the compensation accrued prior to the waiver. See Rev. Rul. 66-167, 1966-1 C.B. 20. See also Restatement (Second) of Trusts § 242 cmt. i (1959); Restatement (Third) of Trusts § 38 cmt. f (Preliminary Draft No. 4, 1998).

The standard of reasonable compensation also applies to a trust with multiple trustees. The mere fact that a trust has more than one trustee does not mean that the trustees together are entitled to more compensation than had either acted alone. Nor does the appointment of multiple trustees mean that the trustees are eligible to receive the compensation in equal shares. The total amount of the compensation to be paid and how it will be divided depend on the totality of the circumstances. Factors to be considered include the settlor's reasons for naming multiple trustees and the level of responsibility assumed and exact services performed by each trustee.

Section 816(16) grants the trustee authority to fix and pay its compensation without the necessity of prior court review, but without precluding the right of a beneficiary to object to the compensation in a later judicial proceeding. Allowing the trustee to pay its compensation without prior court approval promotes efficient trust administration but does place a significant burden on a beneficiary who believes the compensation is unreasonable. To provide a beneficiary with time to take action, if the beneficiary believes that action is appropriate, and because of the importance of trustee's fees to the beneficiaries' interests, Section 813(b)(4) requires a trustee to provide the qualified beneficiaries with advance notice of any change in the method or rate of the trustee's compensation. Failure to provide such advance notice constitutes a breach of trust, possibly justifying removal under Section 706.

SECTION 709. REPAYMENT OF EXPENDITURES. A trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, for:

(1) expenditures that were properly incurred in the administration of the trust; and

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

Comment

A trustee has the authority to expend trust funds as necessary in the administration of the trust, including expenses incurred in the hiring of agents. See Sections 807 (delegation by trustee) and 816(16) (trustee to pay expenses of administration from trust).

Paragraph (1) clarifies that a trustee is entitled to reimbursement from the trust for incurring expenses within the trustee's authority. The trustee may also withhold appropriate reimbursement for expenses before making distributions to the beneficiaries. Restatement (Second) of Trusts § 244 cmt. b (1959); Restatement (Third) of Trusts § 38 cmt. b (Preliminary Draft No. 4, 1998). But a trustee is ordinarily not entitled to reimbursement for incurring unauthorized expenses. Such expenses are normally the personal responsibility of the trustee.

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

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

ARTICLE 8

FIDUCIARY ADMINISTRATION

General Comment

This part 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 part was drafted where possible to conform with the 1994 Uniform Prudent Investor Act, which has been enacted in over half the States. The Uniform Prudent Investor Act prescribes a trustee's responsibilities with respect to the management and investment of trust property. This Act 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 interweave the Prudent Investor Act into this part of the Act. Instead, the Prudent Investor Act is reproduced separately as Article 9. States adopting this Act which have previously enacted the Prudent Investor Act are encouraged to recodify their version of the Prudent Investor Act by reenacting it as Article 9 instead of leaving it elsewhere in their codes. Where the two Acts overlap, States should enact the provisions of this part and not the duplicative provisions of the Prudent Investor Act. To facilitate this process, the Uniform Prudent Investor Act is reproduced in full in Article 9 but provisions of that Act which duplicate provisions of this article are placed in brackets. Sections of this part 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 which have been placed in brackets, see the General Comment to Article 9.

SECTION 801. DUTY TO ADMINISTER TRUST. Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, according to its terms and purposes, and according to this [Act].

Comment

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

For background on the trustee's duty to administer the trust, see Restatement (Second) of Trusts §§ 164-169 (1959). For the provision of the Uniform Prudent Investor Act protecting a trustee in relying on the terms of the trust, see Section 901(b).

SECTION 802. DUTY OF LOYALTY.

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

(b) 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 unless the transaction was approved by the court or the beneficiary has consented to the trustee's conduct, ratified the transaction, or released the trustee as provided in Section 1107.

(c) A transaction is presumed to involve a conflict between personal and fiduciary interests if it involves a sale, encumbrance, or other transaction concerning the trust property entered into by the trustee with:

(1) the spouse, descendants, siblings, parents, agent, or attorney of a trustee; or

(2) a corporation or other enterprise, or its affiliate, in which the trustee has an interest that might affect the trustee's best judgment.

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

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

(f) A trustee may invest in securities of an investment company or investment trust to which the trustee, or its affiliate, provides services, and receive compensation from the trust for those services, if the decision to invest satisfies the prudent investor rule of [Article] 9 and the trustee discloses at least annually to the persons entitled under Section 813 to receive a copy of the trustee's annual report the rate and method by which the compensation was determined.

(g) This section does not restrict the following transactions, if fair to the beneficiaries:

(1) an agreement relating to the appointment of the trustee;

(2) the payment of reasonable compensation to the trustee, whether by agreement, the terms of the trust, or this [Act]; and

(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.

(h) Upon petition to the court by a trustee or beneficiary, the court may appoint a temporary trustee to make a decision with respect to any proposed transaction which, if entered into by the trustee, might constitute a violation of this section.

Comment

This section addresses the duty of loyalty, perhaps the most fundamental duty of the trustee. Subsection (a) states the general principle. 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. 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 account are voidable without further proof under the "no further inquiry" rule. Such transactions are irrebuttably presumed to involve a substantial conflict between personal and fiduciary interests. The appropriate result is less clear with respect to transactions 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 propriety of such transactions. Transactions between a trustee and certain relatives, business associates, or enterprises in which the trustee has a substantial beneficial interest are presumptively voidable. Transactions involving trust property with parties not on the list are not necessarily valid, however. While a presumption does not apply, a transaction may still be voided if the beneficiary proves that a substantial conflict between personal and fiduciary interests exists and that the transaction was affected by the conflict.

The right of a beneficiary to void a transaction involving a substantial conflict of interest is elective. Should the transaction prove profitable to the trust, the beneficiary will likely allow the transaction to stand. Also, as provided in subsection (b), no breach of the duty of loyalty occurs if the transaction was expressly authorized by the terms of the trust or approved by the court. In addition, a beneficiary may be precluded from acting by statute of limitations or laches, or by choosing to ratify the transaction, either prior to or subsequent to its occurrence. See Sections 1105, 1107. In determining whether a beneficiary has consented to a transaction, the principles of fiduciary and virtual representation from Article 3 may be applied.

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

Subsection (f) recognizes a special exception for a "proprietary fund," a mutual fund investment offered to customers of a financial-service institution trustee. Under such an arrangement, the mutual fund company will typically pay an annual fee based on a percentage of the fund's value to the financial-service institution trustee for providing investment advice, custody, transfer agent, distribution, or shareholder services that would otherwise be provided by agents of the fund. Subsection (f) provides that it is not a violation of the duty of loyalty for a trustee, or its affiliates, to receive compensation for providing such services as long as the trustee discloses at least annually to the beneficiaries entitled to receive a copy of the trustee's annual report the rate and method by which the compensation was determined. However, the mutual fund investment selected must be prudent in accordance with the applicable prudent investor law of the jurisdiction and the selection of a mutual fund, and the resulting delegation of certain of the trustee's functions, may be taken into account in setting the trustee's regular compensation. See Section 708 (trustee's compensation), and Article 9 (Uniform Prudent Investor Act). Provisions similar to subsection (f) are in force in a substantial majority of states.

Subsection (g) contains several exceptions to the general duty of loyalty, which apply if the transaction was fair to the beneficiaries. A trustee is allowed to negotiate in freedom about the terms of appointment and rate of compensation. Consistent with Restatement (Second) of Trusts § 170 cmt. r (1959), a trustee may also engage in a transaction involving another trust of which the trustee is also trustee, or a transaction with a decedent's or conservatorship estate of which the trustee is personal representative or conservator. With respect to a transaction involving another fiduciary role, the trustee need not give advance notice of the transaction to the beneficiaries unless required by some other provision. See, e.g., Section 814(c)(5).

Because it overlaps with subsection (a) of this section, Section 905, the section of the Uniform Prudent Investor Act pertaining to the duty of loyalty, has been placed in brackets.

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

Comment

The duty of impartiality is an important aspect of the duty of loyalty. This section is identical to Section 6 of the Uniform Prudent Investor Act, codified at Section 906, except that this section also applies to decisions by the trustee with respect to distributions. The Prudent Investor Act is limited to duties with respect to the investment and management of trust property. The differing beneficial interests for which the trustee must act impartially include those of the current beneficiaries versus those holding interests in the remainder, and among those currently eligible for distributions, the interests of those entitled or eligible to receive distributions of income versus those eligible to receive distributions of principal. In effectuating the duty to act impartially, the trustee should be particularly sensitive to allocation of receipts and disbursements between income and principal and should consider, in an appropriate case, a reallocation of income to the principal account and vice versa, if allowable under local law. For an example of such a provision, see Section 104 of 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, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

Comment

The duty to administer a trust with prudence is a fundamental duty of the trustee. This duty is not affected by whether the trustee receives compensation but may be altered by the terms of the trust. See Section 104 (effect of the terms of the trust; nonwaivable provisions). For a more detailed statement of the duty of prudence with respect to trustee investment, including a list of factors to be taken into account in determining whether the standard has been met, see Section 2 of the Uniform Prudent Investor Act, codified at Section 902 (prudent investor rule).

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

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 to not 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. The trustee must also be alert to adjusting compensation for functions which the trustee has delegated to others in order to protect the beneficiary against "double dipping." The obligation to incur only necessary costs of administration has long been part of the common law and of the Restatement. See Restatement (Second) of Trusts § 188 (1959).

Placed in brackets is Section 907, the portion of the Uniform Prudent Investor Act which overlaps with this section.

SECTION 806. TRUSTEE'S SKILLS. A trustee shall apply the full extent of the 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, has a duty to 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 and Restatement (Second) of Trusts § 174 (1959).

Placed in brackets is Section 902(f), the portion of the Uniform Prudent Investor Act which overlaps with this section.

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 a decision or 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, codified at Section 909. See Section 909 Comment; and 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 in limited circumstances, see Section 703(d)(1).

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).

Placed in brackets is Section 909, the portion of the Uniform Prudent Investor Act which overlaps with this section.

SECTION 808. POWERS TO DIRECT.

(a) If the terms of a trust grant a person other than the trustee power to direct certain actions of the trustee, the trustee shall act in accordance with the exercise of the power unless an attempted exercise is manifestly contrary to the terms of the trust or the trustee knows that the attempted exercise violates a fiduciary duty that the person holding the power owes the beneficiaries of the trust.

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

Comment

This section is derived from Restatement (Second) of Trusts § 185 (1959). Powers to direct in the terms of a trust usually relate either to choice of investment or management of closely-held business interests. A power to direct must be distinguished from a veto power. A power to direct involves action initiated and within the control of a third party. The trustee usually has no responsibility other than to carry out the direction when made. But if a third party holds a veto power, the trustee is responsible for initiating the decision, subject to the third party's approval. A trustee who administers a trust subject to a veto power occupies a position akin to that of a cotrustee and is responsible for taking appropriate action if the third party's refusal to consent would result in a breach of trust. See Restatement (Second) of Trusts § 185 cmt. g (1959); Section 703(d)(2)(duties of cotrustees).

Powers to direct take a variety of forms. Frequently, the person holding the power is directing the investment of the holder's own beneficial interest. Such self-directed accounts are particularly prevalent among trusts holding interests in employee benefit plans or individual retirement accounts. See ERISA § 404(c). But for the type of donative trust which is the primary focus of this Act, the holder of the power to direct is frequently acting on behalf of others. In that event, the holder, as provided in subsection (b), is presumptively acting in a fiduciary capacity and can be held liable should the power holder's conduct constitute a breach of trust.

Powers to direct are most effective when the trustee is not deterred from honoring the exercise of the power due to concerns about possible liability. On the other hand, the trustee does bear overall responsibility for seeing that the terms of the trust are honored. For this reason, subsection (a) provides that the trustee need not honor an attempted exercise of a power to direct if the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise violates a fiduciary duty that the holder of the power owes to the beneficiaries of the trust. For the definition of "know," see Section 102(7).

SECTION 809. CONTROL AND SAFEGUARDING OF TRUST PROPERTY. A trustee shall take steps reasonable under the circumstances to take control of and to safeguard the trust property.

Comment

This section codifies the substance of Sections 175 and 176 of the Restatement (Second) of Trusts (1959). The duty to take control of and safeguard trust property is an aspect of the trustee's duty to act with prudence. See Section 805. See also Sections 816(1) (power to collect trust property), 816(12) (power to insure trust property), and 816(13) (power to abandon trust property), This section, like the other sections in this part, is subject to limitation in the terms of the trust. For example, the settlor may provide that the spouse or other beneficiary may occupy the settlor's former residence rent free, in which event the trustee will be specifically precluded by the terms of the trust from taking complete control.

SECTION 810. SEPARATION AND IDENTIFICATION OF TRUST PROPERTY.

(a) A trustee shall keep trust property separate from the trustee's own property.

(b) Unless a trustee is a regulated financial-service institution, the trustee shall cause the trust property to be designated so that the interest of the trust, to the extent feasible, appears in records maintained by a third party.

Comment

The duty to earmark trust assets and the duty of a trustee not to mingle the assets of the trust with the trustee's own are closely related. Subsection (a), which addresses the duty not to mingle, is derived from Section 179 of the Restatement (Second) of Trusts (1959). Subsection (b), which addresses earmarking, however, broadens the standard of Restatement Second by attempting to make more precise what is meant by the phrase "the interest of the trust clearly appears." Except for a regulated financial-service institution, whose trust records are subject to regular state or federal audit, the interest of the trust must appear in the records of a third party, such as a bank or brokerage firm. Because of the serious risk of mistake or misappropriation even if disclosure is made to the beneficiaries, a noninstitutional trustee is not allowed to show the interest of the trust solely in the trustee's own internal records. Section 816(8), which allows a trustee to hold securities in nominee form, is not inconsistent with this requirement. While securities held in nominee form are not specifically registered in the name of the trustee, they are properly earmarked because the trustee's holdings are indicated in the records maintained by a third party, such as in an account at a brokerage firm.

Earmarking is not practical for all types of assets. With respect to assets not subject to registration, such as tangible personal property and bearer bonds, arranging for the trust's ownership interest to be reflected on the records of a third-party custodian would be impracticable. For this reason, subsection (b) waives separate recordkeeping for these types of assets. Under subsection (a), however, the duty of the trustee not to mingle these or any other trust assets with the trustee's own remains absolute.

SECTION 811. ENFORCEMENT AND DEFENSE OF CLAIMS. A trustee shall take reasonable steps to enforce claims of the trust and to defend against claims against the trust.

Comment

This section codifies the substance of Sections 177 and 178 of the Restatement (Second) of Trusts (1959). Under this section, it may not be reasonable to enforce a claim depending upon the likelihood of recovery and the cost of suit and enforcement.

It might also be reasonable to settle an action or suffer a default rather than to defend an action. See also Section 816(15) (power to pay, contest, settle or release claims).

SECTION 812. FORMER FIDUCIARIES. A trustee shall take reasonable steps to (i) compel a former trustee or other fiduciary to deliver trust property to the trustee, and (ii) discover and redress a breach of trust committed by the former trustee or other fiduciary.

Comment

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

This section is a specific application of Section 811 on the duty to enforce claims, which could include a claim against a predecessor trustee for breach of trust. In certain circumstances it may not be reasonable to enforce a claim against a predecessor trustee or other fiduciary, depending upon the likelihood of recovery and the cost of suit and enforcement.

As authorized by Section 1107, the beneficiaries may relieve the trustee from potential liability for acts of a predecessor trustee or other fiduciary.

SECTION 813. DUTY TO INFORM AND REPORT.

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

(b) A trustee shall:

(1) upon request of a beneficiary, promptly provide the beneficiary with a copy of the trust instrument;

(2) within 30 days after accepting a trusteeship, inform the qualified beneficiaries of the acceptance;

(3) within 30 days after the death of the settlor of a revocable trust, inform the qualified beneficiaries of the trust's existence;

(4) inform the qualified beneficiaries in advance of any change in the method or rate of the trustee's compensation; and

(5) inform the qualified beneficiaries in advance of a sale or other disposition affecting trust property that comprises a significant portion of the value of the trust property unless (i) the fair market value of the property is readily ascertainable, or (ii) such disclosure is forbidden by law or would be seriously detrimental to the interests of the beneficiaries.

(c) A trustee shall send to the qualified beneficiaries at least annually and at the termination of the trust a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation. Upon a vacancy in a trusteeship, a report shall be sent to the qualified beneficiaries by the former trustee or, if the trusteeship terminated by reason of death or incapacity, by the former trustee's personal representative, [conservator], or [guardian].

(d) A beneficiary, by a consent made in writing or by other record, may waive the right to a trustee's report or other information otherwise required to be provided under this section. The terms of a trust may dispense with the requirements of this section only as to a beneficiary who is (i) a settlor, or (ii) under 25 years of age.

(e) Except as otherwise provided by the terms of a trust, while the trust is revocable and the settlor has capacity to revoke the trust, the duties of the trustee under this section are owed exclusively to the settlor. If a trust has more than one settlor, the duties under this section are owed to all settlors.

Comment

The duty to keep the beneficiaries informed of the administration of the trust is one of the fundamental duties of a trustee. The trustee is under a duty to communicate to the beneficiary information about the administration of the trust that is reasonably necessary to enable the beneficiary to enforce the beneficiary's rights under the trust or to prevent or redress a breach of trust. See Restatement (Second) of Trusts § 173 cmt. c (1959). Ordinarily, the trustee is not under a duty to furnish information to the beneficiary in the absence of a specific request for the information. See *id.* cmt. d. Thus, the general duty provided in subsection (a) is ordinarily satisfied by complying with the annual report mandated by subsection (c) unless there are special circumstances requiring particular information to be reported to beneficiaries. However, if the trustee is dealing with the beneficiary on the trustee's own account, the trustee has a duty to communicate material facts relating to the transaction that the trustee knows or should know. See *id.*

The standard is different if the beneficiary makes a specific request for information. In that event, subsection (a) requires the trustee to promptly comply with the beneficiary's request unless unreasonable under the circumstances. Further supporting the principle that a beneficiary should be allowed to make an independent assessment of what information is relevant to protecting the beneficiary's interest, subsection (b)(1) requires the trustee to on request furnish a beneficiary with a complete copy of the trust instrument.

This section has only limited application to revocable trusts. Subsection (e) provides that during the time that a trust is revocable and the settlor has capacity, the right to request information or a copy of the trust instrument pursuant to this section belongs exclusively to the settlor. In the case of a trust with multiple settlors, subsection (e) clarifies that the beneficiaries' right to information extends to all of the settlors. Should less than all of the settlor revoke or modify the trust, the trustee must notify the other settlor or settlors of this fact. See Section 602 Comment.

To enable beneficiaries to effectively protect their interests, it is essential that they know the identity of the trustee. Subsection (b)(2) requires that a trustee inform the qualified beneficiaries of the trustee's assumption of office within 30 days of acceptance. Similar to the obligation imposed on a personal representative following admission of the will to probate, subsection (b)(3) requires the trustee of a revocable trust to inform the qualified beneficiaries, within 30 days after the settlor's death, of their respective interests in the trust. These two duties can overlap. If the death of the settlor happens to also be the occasion for the appointment of a successor trustee, the new trustee of the now formerly revocable trust would need to inform the qualified beneficiaries both of the trustee's acceptance and of the beneficiaries' respective interests.

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

Absent a specific request by a beneficiary for information, the duty to keep the beneficiaries reasonably informed is ordinarily satisfied by providing the beneficiaries with a copy of the trustee's annual report, but subsection (b)(5) requires that the beneficiaries be given advance notice of certain proposed transactions. This subsection, which is based on a provision drawn from South Dakota law, is designed to codify but make more precise the fiduciary duty delineated in such cases as *Allard v. Pacific National Bank*, 663 P.2d 104 (Wash. 1983), in which the court surcharged a trustee for failing to give the beneficiaries advance notice of the proposed sale of a parcel of real estate that was the sole asset of the trust. Cases subsequent to *Allard* have extended this duty to the sale of an interest in a closely-held business, and this subsection extends the duty to sales of tangible personal property.

Subsection (c) requires the trustee to furnish the beneficiaries with a copy of a trustee's report at least annually, at the termination of the trust, and upon a change of trustee. The term "report" instead of "accounting" is used to negate the inference that the report must be prepared in any particular format. The key factor is not the format chosen but whether the report provides the beneficiaries with the information necessary to protect their interests. Subsection (c) also addresses the responsibility for the preparation of the report upon a trustee's death or incapacity. Consistent with Section 707, the report must be prepared by the trustee's personal representative, in the event of the trustee's death, or the trustee's conservator or guardian, in the event of the trustee's incapacity. In addition, no report must be prepared if a cotrustee remains in office.

The principle that the trustee must keep the beneficiaries reasonably informed is well established. Less certain is whom among the many different types of beneficiaries such duty is owed. Subsection (a) makes the breadth of the duty more precise by providing that the duty extends only to the qualified beneficiaries, defined in Section 102(11). The result of this limitation is that the information need not be furnished to beneficiaries with remote remainder interests unless they have filed a specific request with the trustee.

Subsection (d), which allows trustee reports and other required information to be waived upon written consent, is derived from South Dakota law. However, a waiver of a trustee's report or other information is not a waiver of the trustee's accountability and potential liability for items that the report or other information would have disclosed. Subsection (d) also authorizes the creation of a "blind" trust. While the terms of the trust may not prohibit the trustee from furnishing the beneficiaries with the information required under this section, such a prohibition is valid with respect to a beneficiary who is also a settlor.

SECTION 814. DUTY WITH REGARD TO DISCRETIONARY POWER.

Notwithstanding the breadth of discretion granted to a trustee, including the use of such terms as "absolute", "sole", or "uncontrolled", the trustee shall exercise a discretionary power in good faith and with regard to the purposes of the trust and the interest of the beneficiaries.

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 the interest of the beneficiaries, and in accordance with the trustee's other duties, including the obligation to exercise reasonable skill, care and caution. See Sections 405 (trust must have purpose of benefit to beneficiaries), 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 of this section 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.

SECTION 815. GENERAL POWERS OF TRUSTEE.

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

(1) powers conferred by the terms of a trust;

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

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

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

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

(b) Except as modified by the terms of a trust, the exercise of a power is subject to fiduciary duties as prescribed by this [article].

Comment

This section is intended to grant trustees the broadest possible powers, but to be exercised always in accordance with the terms of the trust and duties of the trustee. The powers conferred elsewhere in this Act which are subsumed by this section include all of the specific powers listed in Section 816 as well as others listed in the Comment to that section. The powers conferred by this Act may be exercised without court approval. Should court approval of the exercise of a power be desired, a petition for court approval may be filed.

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

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

(1) collect trust property and receive additions to the trust property from a settlor or any other person;

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

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

(4) deposit trust funds in an account in a financial-service institution, including an institution operated by the trustee;

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

(6) advance money for the protection of the trust, for which advances, with reasonable interest, the trustee has a lien on the trust property as against a beneficiary;

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

(8) with respect to stocks or other securities, to exercise the rights of an absolute owner, including to:

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

(B) hold a security in the name of a nominee or in other form without disclosure of the trust so that title may pass by delivery;

(C) pay calls, assessments, and other sums chargeable or accruing against the securities, and to sell or exercise stock subscription or conversion rights; and

(D) deposit the securities with a financial-services institution;

(9) with respect to an interest in real property, construct, make ordinary or extraordinary repairs, alterations, or improvements in buildings or other structures, demolish improvements, raze existing or erect new party walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private, and make or vacate plats and adjust boundaries;

(10) enter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for exploration and removal of natural resources, with or without the option to purchase or renew, for a period within or extending beyond the term of the trust;

(11) grant an option involving a sale, lease, or other disposition of trust property or take an option for the acquisition of property, including an option exercisable beyond the term of the trust, and to exercise an option so acquired;

(12) insure the property of the trust against damage or loss and insure the trustee, the trustee's agents, and beneficiaries against liability to third persons arising from the administration of the trust;

(13) abandon or decline to administer property of no value or of insufficient value to justify its collection or continued administration;

(14) with respect to possible liability for environmental conditions:

(A) inspect or investigate property the trustee holds or has been asked to hold, or property owned or operated by an entity in which the trustee holds or has been asked to hold an interest, for the purpose of determining the application of environmental law with respect to the property;

(B) take action to prevent, abate, or otherwise remedy any actual or potential violation of any environmental law affecting property held directly or indirectly by the trustee, whether taken before or after the initiation of a claim or a government enforcement action;

(C) decline to accept property into trust or to disclaim any power with respect to property that has or may have environmental liability attached;

(D) compromise claims against the trust which may be asserted for an alleged violation of environmental law; and

(E) pay the costs of any inspection, review, abatement, or remedial action to comply with environmental law;

(15) pay or contest any claim, settle a claim by or against the trust by compromise or otherwise, and release, in whole or in part, a claim belonging to the trust;

(16) pay taxes, assessments, compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the administration of the trust;

(17) exercise elections with respect to federal, state, and local taxes;

(18) select a mode of payment under any employee benefit or retirement plan, annuity, or life insurance payable to the trustee, exercise rights thereunder, and take appropriate action to collect the proceeds, including exercise of the right to indemnification against expenses and liabilities;

(19) make loans out of trust property, including loans to a beneficiary on terms and conditions the trustee considers to be fair and reasonable under the circumstances,

for which loans the trustee has a lien on future distributions, and guarantee loans made by others to the beneficiary by pledging trust property;

(20) appoint a trustee to act in another State or country as to trust property located in the other jurisdiction; confer upon the appointed trustee all of the powers and duties of the appointing trustee; require that the appointed trustee furnish security; and remove any trustee so appointed;

(21) pay an amount distributable to a beneficiary under a legal disability or who the trustee reasonably believes is incapacitated, by paying it directly to the beneficiary or applying it for the beneficiary's benefit, or by paying it to:

(A) the beneficiary's [conservator] or, if the beneficiary does not have a [conservator], the beneficiary's [guardian];

(B) the beneficiary's custodian under [the Uniform Transfers to Minors Act] or custodial trustee under [the Uniform Custodial Trust Act]; or

(C) if there is no [conservator], [guardian], custodian, or custodial trustee, an adult relative or other person having legal or physical care or custody of the beneficiary;

(22) make a distribution of property and money in divided or undivided interests, pro rata or non-pro-rata, to value the trust property for such purposes and adjust for resulting differences in valuation;

(23) decide, in accordance with rules of law, how and in what proportions any receipts or disbursements shall be credited, charged or apportioned as between

principal and income, including the ability to create reserves out of income for depreciation, depletion, amortization, or obsolescence;

(24) resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternative dispute resolution;

(25) 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;

(26) sign and deliver contracts and other instruments that are useful to accomplish or facilitate the exercise of the trustee's powers; and

(27) on termination of the trust, exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to those entitled to it.

Comment

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 provisions of the Trustees' Powers Act have been modified.

Certain specific powers of a trustee which may be exercised without court approval are contained in other sections. See Sections 202 (transfer of principal place of administration), 412 (termination of trust with value less than $50,000), 415 (combination and division of trusts), 703 (delegation to cotrustee), 807 (delegation of powers and duties), and 901 *et seq.* (Uniform Prudent Investor Act).

The powers listed here add little of substance not already granted by Section 815 and powers conferred elsewhere in the Act. While the Committee drafting this Act discussed excluding a list of specific powers, it concluded that the demand of third parties to see language expressly authorizing a specific transaction required that a detailed list be retained.

Paragraph (2) authorizes a trustee to sell trust property, for cash or on credit, at public or private sale, or by exchange. Under the Restatement, a trustee may sell on credit only if security is given. Restatement (Second) of Trusts § 190 cmt. j (1959).

Paragraph (7) authorizes the trustee to continue, incorporate or otherwise change the form of a business. Any such decision by the trustee must be made in light of the standards of prudent investment stated in Part 2 of this article. The authority under this paragraph is broader than that granted under Section 3(c)(3) of the Uniform Trustees' Powers Act. Under the Trustees' Powers Act, a trustee may continue a business only if authorized by the terms of the trust or court order.

Paragraph (14), which addresses possible liability for violations of environmental law, is drawn in part from the Texas Trust Code. See Tex. Prop. Code § 113.025.

Paragraph (15) authorizes a trustee to release claims. The determination of when to release a claim depends upon the duties imposed on the trustee. As a general matter, the trustee should be able to release a claim not only when it is uncollectible, but also when collection would be uneconomical. See also Section 811 (duty to enforce claims and defend actions).

Paragraph (16) authorizes a trustee to pay compensation without prior court approval. For the standard for setting the compensation, see Section 709. See also Section 709 (repayment for expenses).

Paragraph (19) allows a trustee to make loans to or guarantee loans of a beneficiary upon such terms and conditions the trustee considers fair and reasonable. The determination of what is fair and reasonable must be made in light of the fiduciary duties of the trustee and purposes of the trust. If the trustee requires security for the loan to the beneficiary, adequate security under this paragraph may consist of a charge on the beneficiary's interest in the trust. See Restatement (Second) of Trusts § 255 (1959). The interest of a beneficiary that is subject to a spendthrift restraint may not be used for security for a loan under this paragraph. See Article 5 (spendthrift protection and claims of creditors).

Paragraph (21) allows a trustee to make payments to another person for the use or benefit of the beneficiary, including to a custodian under the Uniform Transfers to Minor Act.

Paragraph (22) allows a trustee to make non-pro-rata distributions and distribute undivided interests. The trustee also has the power to sell property in order to make the distribution. This paragraph recognizes the authority to take gains and losses into account for tax purposes when making distributions. This power provides needed flexibility and lessens the risk that the non-pro-rata distribution will be treated as a taxable sale.

Paragraph (25) authorizes a trustee to prosecute or defend an action. As to the propriety of reimbursement for attorney's fees and other expenses of an action or judicial proceeding, see Section 710 and Comment. See also Section 812 (duty to defend actions).

Paragraph (27), which is similar to Section 344 of the Restatement (Second) of Trusts (1959), clarifies that even though the trust has terminated, the trustee retains the powers needed to complete the administration of the trust and distribute the remaining trust property. While such terminations should not be delayed, neither should they be hasty or ill-considered. By anticipating the termination prior to the terminating event, many of the problems that typically arise can be avoided.

ARTICLE 9

UNIFORM PRUDENT INVESTOR ACT

General Comment

Reproduced below in its entirety is the Uniform Prudent Investor Act as approved in 1994. The text reproduced below is identical to that of the free-standing Act except for minor revisions to conform terminology. Because of the widespread adoption of the Uniform Prudent Investor Act, no effort has been made to interweave the Prudent Investor Act into this article. States adopting this Act which have previously enacted the Prudent Investor Act are encouraged to recodify their version of the Prudent Investor Act as part of this Act. Enacting the Prudent Investor Act in a unit as a separate part of this Act preserves uniformity with States which have enacted the Prudent Investor Act in its free-standing form..

The Prudent Investor Act prescribes a series of duties relevant to the *investment* and *management* of trust property. The Uniform Trust Act, Article 8 lists the duties and powers of a trustee relevant to the *investment*, *management*, and *distribution* of trust property. Because of this overlap between the two Acts, provisions of the Prudent Investor Act which duplicate Article 8 have been placed in brackets. They should not be enacted but are included here for the sake of completeness and to preserve the Comments. The provisions of the Prudent Investor Act placed in brackets and the corresponding provisions of Article 8 of this Act are as follows:

	Prudent Investor Act	**Article 5, Part 1**
Special skills	902(f)	806
Loyalty	905	802
Impartiality	906	803
Investment costs	907	805
Delegation	909	807

PREFATORY NOTE

Over the decades from the late 1960's the investment practices of fiduciaries experienced significant change. The Uniform Prudent Investor Act (UPIA) undertakes to update trust investment law in recognition of the alterations that have occurred in investment practice. These changes have occurred under the influence of a large and broadly accepted body of empirical and theoretical knowledge about the behavior of capital markets, often described as "modern portfolio theory."

This Act draws upon the revised standards for prudent trust investment promulgated by the American Law Institute in its Restatement (Third) of Trusts:

Prudent Investor Rule (1992) [hereinafter Restatement of Trusts 3d: Prudent Investor Rule; also referred to as 1992 Restatement].

Objectives of the Act. UPIA makes five fundamental alterations in the former criteria for prudent investing. All are to be found in the Restatement of Trusts 3d: Prudent Investor Rule.

(1) The standard of prudence is applied to any investment as part of the total portfolio, rather than to individual investments. In the trust setting the term "portfolio" embraces all the trust's assets. Section 902(b).

(2) The tradeoff in all investing between risk and return is identified as the fiduciary's central consideration. Section 902(b).

(3) All categoric restrictions on types of investments have been abrogated; the trustee can invest in anything that plays an appropriate role in achieving the risk/return objectives of the trust and that meets the other requirements of prudent investing. Section 902(e).

(4) The long familiar requirement that fiduciaries diversify their investments has been integrated into the definition of prudent investing. Section 903.

(5) The much criticized former rule of trust law forbidding the trustee to delegate investment and management functions has been reversed. Delegation is now permitted, subject to safeguards. Section 909.

Literature. These changes in trust investment law have been presaged in an extensive body of practical and scholarly writing. See especially the discussion and reporter's notes by Edward C. Halbach, Jr., in Restatement of Trusts 3d: Prudent Investor Rule (1992); see also Edward C. Halbach, Jr., Trust Investment Law in the Third Restatement, 27 Real Property, Probate & Trust J. 407 (1992); Bevis Longstreth, Modern Investment Management and the Prudent Man Rule (1986); Jeffrey N. Gordon, The Puzzling Persistence of the Constrained Prudent Man Rule, 62 N.Y.U.L. Rev. 52 (1987); John H. Langbein & Richard A. Posner, The Revolution in Trust Investment Law, 62 A.B.A.J. 887 (1976); Note, The Regulation of Risky Investments, 83 Harvard L. Rev. 603 (1970). A succinct account of the main findings of modern portfolio theory, written for lawyers, is Jonathan R. Macey, An Introduction to Modern Financial Theory (1991) (American College of Trust & Estate Counsel Foundation). A leading introductory text on modern portfolio theory is R.A. Brealey, An Introduction to Risk and Return from Common Stocks (2d ed. 1983).

Legislation. Most States have legislation governing trust-investment law. This Act promotes uniformity of state law on the basis of the new consensus reflected in the Restatement of Trusts 3d: Prudent Investor Rule. Some States have already acted. California, Delaware, Georgia, Minnesota, Tennessee, and Washington revised their prudent investor legislation to emphasize the total-portfolio standard of care in advance of the 1992 Restatement. These statutes are extracted and discussed in Restatement of Trusts 3d: Prudent Investor Rule § 227, reporter's note, at 60-66 (1992).

Drafters in Illinois in 1991 worked from the April 1990 "Proposed Final Draft" of the Restatement of Trusts 3d: Prudent Investor Rule and enacted legislation that is closely modeled on the new Restatement. 760 ILCS § 5/5 (prudent investing); and § 5/5.1 (delegation) (1992). As the Comments to this Uniform Prudent Investor Act reflect, the Act draws upon the Illinois statute in several sections. Virginia revised its prudent investor act in a similar vein in 1992. Virginia Code § 26-45.1 (prudent investing) (1992). Florida revised its statute in 1993. Florida Laws, ch. 93-257, amending Florida Statutes § 518.11 (prudent investing) and creating § 518.112 (delegation). New York legislation drawing on the new Restatement and on a preliminary version of this Uniform Prudent Investor Act was enacted in 1994. N.Y. Assembly Bill 11683-B, Ch. 609 (1994), adding Estates, Powers and Trusts Law § 11-2.3 (Prudent Investor Act).

Remedies. This Act does not undertake to address issues of remedy law or the computation of damages in trust matters. Remedies are the subject of a reasonably distinct body of doctrine. See generally Restatement (Second) of Trusts §§ 197-226A (1959) [hereinafter cited as Restatement of Trusts 2d; also referred to as 1959 Restatement].

Implications for charitable and pension trusts. This Act is centrally concerned with the investment responsibilities arising under the private gratuitous trust, which is the common vehicle for conditioned wealth transfer within the family. Nevertheless, the prudent investor rule also bears on charitable and pension trusts, among others. "In making investments of trust funds the trustee of a charitable trust is under a duty similar to that of the trustee of a private trust." Restatement of Trusts 2d § 389 (1959). The Employee Retirement Income Security Act (ERISA), the federal regulatory scheme for pension trusts enacted in 1974, absorbs trust-investment law through the prudence standard of ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a). The Supreme Court has said: "ERISA's legislative history confirms that the Act's fiduciary responsibility provisions 'codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts.'" *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989) (footnote omitted).

Other fiduciary relationships. The Uniform Prudent Investor Act regulates the investment responsibilities of trustees. Other fiduciaries – such as executors, conservators, and guardians of the property – sometimes have responsibilities over assets that are governed by the standards of prudent investment. It will often be appropriate for States to adapt the law governing investment by trustees under this Act to these other fiduciary regimes, taking account of such changed circumstances as the relatively short duration of most executorships and the intensity of court supervision of conservators and guardians in some jurisdictions. The present Act does not undertake to adjust trust-investment law to the special circumstances of the state schemes for administering decedents' estates or conducting the affairs of protected persons.

Although the Uniform Prudent Investor Act by its terms applies to trusts and not to charitable corporations, the standards of the Act can be expected to inform the investment responsibilities of directors and officers of charitable corporations. As the 1992 Restatement observes, "the duties of the members of the governing board of a charitable corporation are generally similar to the duties of the trustee of a charitable trust." Restatement of Trusts 3d: Prudent Investor Rule § 379, Comment *b*, at 190 (1992). See also id. § 389, Comment *b*, at 190-91 (absent contrary statute or other provision, prudent investor rule applies to investment of funds held for charitable corporations).

SECTION 901. PRUDENT INVESTOR RULE.

(a) Except as otherwise provided in subsection (b), a trustee who invests and manages trust property owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in this [article].

(b) The prudent investor rule, a default rule, may be expanded, restricted, eliminated, or otherwise altered by the terms of the trust. A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the terms of the trust.

Comment

This section imposes the obligation of prudence in the conduct of investment functions and identifies further sections of the Act that specify the attributes of prudent conduct.

Origins. The prudence standard for trust investing traces back to *Harvard College v. Amory*, 26 Mass. (9 Pick.) 446 (1830). Trustees should "observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested." Id. at 461.

Prior legislation. The Model Prudent Man Rule Statute (1942), sponsored by the American Bankers Association, undertook to codify the language of the *Amory* case. See Mayo A. Shattuck, The Development of the Prudent Man Rule for Fiduciary Investment in the United States in the Twentieth Century, 12 Ohio State L.J. 491, at 501 (1951); for the text of the model act, which inspired many state statutes, see id. at 508-09. Another prominent codification of the *Amory* standard is Uniform Probate Code § 7-302 (1969), which provides that "the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another . . . ."

Congress has imposed a comparable prudence standard for the administration of pension and employee benefit trusts in the Employee Retirement Income Security Act (ERISA), enacted in 1974. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a), provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims . . . ."

Prior Restatement. The Restatement of Trusts 2d (1959) also tracked the language of the *Amory* case: "In making investments of trust funds the trustee is under a duty to the beneficiary . . . to make such investments and only such investments as a prudent man would make of his own property having in view the preservation of the estate and the amount and regularity of the income to be derived . . . ." Restatement of Trusts 2d § 227 (1959).

Objective standard. The concept of prudence in the judicial opinions and legislation is essentially relational or comparative. It resembles in this respect the "reasonable person" rule of tort law. A prudent trustee behaves as other trustees similarly situated would behave. The standard is, therefore, objective rather than subjective. Sections 902 through 909 identify the main factors that bear on prudent investment behavior.

Variation. Almost all of the rules of trust law are default rules, that is, rules that the settlor may alter or abrogate. Subsection (b) carries forward this traditional attribute of trust law. Traditional trust law also allows the beneficiaries of the trust to excuse its performance, when they are all capable and not misinformed. Restatement of Trusts 2d § 216 (1959).

SECTION 902. STANDARD OF CARE; PORTFOLIO STRATEGY; RISK AND RETURN OBJECTIVES.

(a) A trustee shall invest and manage trust property as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

(b) A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

(c) Among circumstances that a trustee shall consider in investing and managing trust property are such of the following as are relevant to the trust or its beneficiaries:

(1) general economic conditions;

(2) the possible effect of inflation or deflation;

(3) the expected tax consequences of investment decisions or strategies;

(4) the role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property;

(5) the expected total return from income and the appreciation of capital;

(6) other resources of the beneficiaries;

(7) needs for liquidity, regularity of income, and preservation or appreciation of capital; and

(8) an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

(d) A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust property.

(e) A trustee may invest in any kind of property or type of investment consistent with the standards of this [Act].

[(f) 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, has a duty to use those special skills or expertise.]

Comment

This section is the heart of the Act. Subsections (a), (b), and (c) are patterned loosely on the language of the Restatement of Trusts 3d: Prudent Investor Rule § 227 (1992), and on the 1991 Illinois statute, 760 § ILCS 5/5a (1992). Subsection (f) is derived from Uniform Probate Code § 7-302 (1969).

Objective standard. Subsection (a) carries forward the relational and objective standard made familiar in the *Amory* case, in earlier prudent investor legislation, and in the Restatements. Early formulations of the prudent person rule were sometimes troubled by the effort to distinguish between the standard of a prudent person investing for another and investing on his or her own account. The language of subsection (a), by relating the trustee's duty to "the purposes, terms, distribution requirements, and other circumstances of the trust," should put such questions to rest. The standard is the standard of the prudent investor similarly situated.

Portfolio standard. Subsection (b) emphasizes the consolidated portfolio standard for evaluating investment decisions. An investment that might be imprudent standing alone can become prudent if undertaken in sensible relation to other trust assets, or to other nontrust assets. In the trust setting the term "portfolio" embraces the entire trust estate.

Risk and return. Subsection (b) also sounds the main theme of modern investment practice, sensitivity to the risk/return curve. See generally the works cited in the Prefatory Note to this Act, under "Literature." Returns correlate strongly with risk, but tolerance for risk varies greatly with the financial and other circumstances of the investor, or in the case of a trust, with the purposes of the trust and the relevant circumstances of the beneficiaries. A trust whose main purpose is to support an elderly widow of modest means will have a lower risk tolerance than a trust to accumulate for a young scion of great wealth.

Subsection (b) follows Restatement of Trusts 3d: Prudent Investor Rule § 227(a), which provides that the standard of prudent investing "requires the exercise of reasonable care, skill, and caution, and is to be applied to investments not in isolation but in the context of the trust portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the trust."

Factors affecting investment. Subsection (c) points to certain of the factors that commonly bear on risk/return preferences in fiduciary investing. This listing is nonexclusive. Tax considerations, such as preserving the stepped up basis on death under Internal Revenue Code § 1014 for low-basis assets, have traditionally been exceptionally important in estate planning for affluent persons. Under the present recognition rules of the federal income tax, taxable investors, including trust beneficiaries, are in general best served by an investment strategy that minimizes the taxation incident to portfolio turnover. See generally Robert H. Jeffrey & Robert D. Arnott, Is Your Alpha Big Enough to Cover Its Taxes?, Journal of Portfolio Management 15 (Spring 1993).

Another familiar example of how tax considerations bear upon trust investing: In a regime of pass-through taxation, it may be prudent for the trust to buy lower yielding tax-exempt securities for high-bracket taxpayers, whereas it would ordinarily be imprudent for the trustees of a charitable trust, whose income is tax exempt, to accept the lowered yields associated with tax-exempt securities.

When tax considerations affect beneficiaries differently, the trustee's duty of impartiality requires attention to the competing interests of each of them.

Subsection (c)(8), allowing the trustee to take into account any preferences of the beneficiaries respecting heirlooms or other prized assets, derives from the Illinois act, 760 ILCS § 5/5(a)(4) (1992).

Duty to monitor. Subsections (a) through (d) apply both to investing and managing trust assets. "Managing" embraces monitoring, that is, the trustee's continuing responsibility for oversight of the suitability of investments already made as well as the trustee's decisions respecting new investments.

Duty to investigate. Subsection (d) carries forward the traditional responsibility of the fiduciary investor to examine information likely to bear importantly on the value or the security of an investment for example, audit reports or records of title. E.g., *Estate of Collins*, 72 Cal. App. 3d 663, 139 Cal. Rptr. 644 (1977) (trustees lent on a junior mortgage on unimproved real estate, failed to have land appraised, and accepted an unaudited financial statement; held liable for losses).

Abrogating categoric restrictions. Subsection (e) clarifies that no particular kind of property or type of investment is inherently imprudent. Traditional trust law was encumbered with a variety of categoric exclusions, such as prohibitions on junior mortgages or new ventures. In some States legislation created so-called "legal lists" of approved trust investments. The universe of investment products changes incessantly. Investments that were at one time thought too risky, such as equities, or more recently, futures, are now used in fiduciary portfolios. By contrast, the investment that was at one time thought ideal for trusts, the long-term bond, has been discovered to import a level of risk and volatility – in this case, inflation risk – that had not been anticipated. Accordingly, subsection (e) follows Restatement of Trusts 3d: Prudent Investor Rule in abrogating categoric restrictions. The Restatement says: "Specific investments or techniques are not per se prudent or imprudent. The riskiness of a specific property, and thus the propriety of its inclusion in the trust estate, is not judged in the abstract but in terms of its anticipated effect on the particular trust's portfolio." Restatement of Trusts 3d: Prudent Investor Rule § 227, Comment *f*, at 24 (1992). The premise of subsection (e) is that trust beneficiaries are better protected by the emphasis on close attention to risk/return objectives as prescribed in subsection (b) than in attempts to identify categories of investment that are per se prudent or imprudent.

The Act impliedly disavows the emphasis in older law on avoiding "speculative" or "risky" investments. Low levels of risk may be appropriate in some trust settings but inappropriate in others. It is the trustee's task to invest at a risk level that is suitable to the purposes of the trust.

The abolition of categoric restrictions against types of investment in no way alters the trustee's conventional duty of loyalty, which is reiterated in Section 905. For example, were the trustee to invest in a second mortgage on a piece of real property owned by the trustee, the investment would be wrongful on account of the trustee's breach of the duty to abstain from self-dealing, even though the investment would no longer automatically offend the former categoric restriction against fiduciary investments in junior mortgages.

Professional fiduciaries. The distinction taken in subsection (f) between amateur and professional trustees is familiar law. The prudent investor standard applies to a range of fiduciaries, from the most sophisticated professional investment management firms and corporate fiduciaries, to family members of minimal experience. Because the standard of prudence is relational, it follows that the standard for professional trustees is the standard of prudent professionals; for amateurs, it is the standard of prudent amateurs. Restatement of Trusts 2d § 174 (1959) provides: "The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property; and if the trustee has or procures his appointment as trustee by representing that he has greater skill than that of a man of ordinary prudence, he is under a duty to exercise such skill." Case law strongly supports the concept of the higher standard of care for the trustee representing itself to be expert or professional. See Annot., Standard of Care Required of Trustee Representing Itself to Have Expert Knowledge or Skill, 91 A.L.R. 3d 904 (1979) and 1992 Supp. at 48-49.

The UPIA Drafting Committee declined the suggestion that the Act should create an exception to the prudent investor rule (or to the diversification requirement of Section 903 in the case of smaller trusts. The Committee believes that subsections (b) and (c) emphasize factors that are sensitive to the traits of small trusts; and that subsection (f) adjusts helpfully for the distinction between professional and amateur trusteeship. Furthermore, it is always open to the settlor of a trust under Section 901(b) to reduce the trustee's standard of care if the settlor deems such a step appropriate. The official comments to the 1992 Restatement observe that pooled investments, such as mutual funds and bank common trust funds, are especially suitable for small trusts. Restatement of Trusts 3d: Prudent Investor Rule § 227, Comments *h*, *m*, at 28, 51; reporter's note to Comment *g*, id. at 83.

Matters of proof. Although virtually all express trusts are created by a written instrument, oral trusts are known, and accordingly, this Act presupposes no formal requirement that trust terms be in writing. When there is a written trust instrument, modern authority strongly favors allowing evidence extrinsic to the instrument to be consulted for the purpose of ascertaining the settlor's intent. See Uniform Probate Code § 2-601 (1990), Comment; Restatement (Third) of Property: Donative Transfers (Preliminary Draft No. 2, ch. 11, Sept. 11, 1992).

SECTION 903. DIVERSIFICATION. A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.

Comment

The language of this section derives from Restatement of Trusts 2d § 228 (1959). ERISA insists upon a comparable rule for pension trusts. ERISA § 404(a)(1)(C), 29 U.S.C. § 1104(a)(1)(C). Case law overwhelmingly supports the duty to diversify. See Annot., Duty of Trustee to Diversify Investments, and Liability for Failure to Do So, 24 A.L.R. 3d 730 (1969) and 1992 Supp. at 78-79.

The 1992 Restatement of Trusts takes the significant step of integrating the diversification requirement into the concept of prudent investing. Section 227(b) of the 1992 Restatement treats diversification as one of the fundamental elements of prudent investing, replacing the separate section 228 of the Restatement of Trusts 2d. The message of the 1992 Restatement, carried forward in this section, is that prudent investing ordinarily requires diversification.

Circumstances can, however, overcome the duty to diversify. For example, if a tax-sensitive trust owns an underdiversified block of low-basis securities, the tax costs of recognizing the gain may outweigh the advantages of diversifying the holding. The wish to retain a family business is another situation in which the purposes of the trust sometimes override the conventional duty to diversify.

Rationale for diversification. "Diversification reduces risk . . . [because] stock price movements are not uniform. They are imperfectly correlated. This means that if one holds a well diversified portfolio, the gains in one investment will cancel out the losses in another." Jonathan R. Macey, An Introduction to Modern Financial Theory 20 (American College of Trust and Estate Counsel Foundation, 1991). For example, during the Arab oil embargo of 1973, international oil stocks suffered declines, but the shares of domestic oil producers and coal companies benefitted. Holding a broad enough portfolio allowed the investor to set off, to some extent, the losses associated with the embargo.

Modern portfolio theory divides risk into the categories of "compensated" and "uncompensated" risk. The risk of owning shares in a mature and well-managed company in a settled industry is less than the risk of owning shares in a start-up high-technology venture. The investor requires a higher expected return to induce the investor to bear the greater risk of disappointment associated with the start-up firm. This is compensated risk – the firm pays the investor for bearing the risk. By contrast, nobody pays the investor for owning too few stocks. The investor who owned only international oils in 1973 was running a risk that could have been reduced by having configured the portfolio differently – to include investments in different industries. This is uncompensated risk – nobody pays the investor for owning shares in too few industries and too few companies. Risk that can be eliminated by adding different stocks (or bonds) is uncompensated risk. The object of diversification is to minimize this uncompensated risk of having too few investments. "As long as stock prices do not move exactly together, the risk of a diversified portfolio will be less than the average risk of the separate holdings." R.A. Brealey, An Introduction to Risk and Return from Common Stocks 103 (2d ed. 1983).

There is no automatic rule for identifying how much diversification is enough. The 1992 Restatement says: "Significant diversification advantages can be achieved with a small number of well-selected securities representing different industries . . . . Broader diversification is usually to be preferred in trust investing," and pooled investment vehicles "make thorough diversification practical for most trustees." Restatement of Trusts 3d: Prudent Investor Rule § 227, General Note on Comments *e-h*, at 77 (1992). See also Macey, supra, at 23-24; Brealey, supra, at 111-13.

Diversifying by pooling. It is difficult for a small trust fund to diversify thoroughly by constructing its own portfolio of individually selected investments. Transaction costs such as the round-lot (100 share) trading economies make it relatively expensive for a small investor to assemble a broad enough portfolio to minimize uncompensated risk. For this reason, pooled investment vehicles have become the main mechanism for facilitating diversification for the investment needs of smaller trusts.

Most States have legislation authorizing common trust funds; see 3 Austin W. Scott & William F. Fratcher, The Law of Trusts § 227.9, at 463-65 n.26 (4th ed. 1988) (collecting citations to state statutes). As of 1992, 35 States and the District of Columbia had enacted the Uniform Common Trust Fund Act (UCTFA) (1938), overcoming the rule against commingling trust assets and expressly enabling banks and trust companies to establish common trust funds. 7 Uniform Laws Ann. 1992 Supp. at 130 (schedule of adopting States). The Prefatory Note to the UCTFA explains: "The purposes of such a common or joint investment fund are to diversify the investment of the several trusts and thus spread the risk of loss, and to make it easy to invest any amount of trust funds quickly and with a small amount of trouble." 7 Uniform Laws Ann. 402 (1985).

Fiduciary investing in mutual funds. Trusts can also achieve diversification by investing in mutual funds. See Restatement of Trusts 3d: Prudent Investor Rule, § 227, Comment *m*, at 99-100 (1992) (endorsing trust investment in mutual funds). ERISA § 401(b)(1), 29 U.S.C. § 1101(b)(1), expressly authorizes pension trusts to invest in mutual funds, identified as securities "issued by an investment company registered under the Investment Company Act of 1940 . . . ."

SECTION 904. DUTIES AT INCEPTION OF TRUSTEESHIP. Within a reasonable time after accepting a trusteeship or receiving trust property, a trustee shall review the trust property and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of this [part].

Comment

This section, requiring the trustee to dispose of unsuitable assets within a reasonable time, is old law, codified in Restatement of Trusts 3d: Prudent Investor Rule § 229 (1992), lightly revising Restatement of Trusts 2d § 230 (1959). The duty extends as well to investments that were proper when purchased but subsequently become improper. Restatement of Trusts 2d § 231 (1959). The same standards apply to successor trustees, see Restatement of Trusts 2d § 196 (1959).

The question of what period of time is reasonable turns on the totality of factors affecting the asset and the trust. The 1959 Restatement took the view that "[o]rdinarily any time within a year is reasonable, but under some circumstances a year may be too long a time and under other circumstances a trustee is not liable although he fails to effect the conversion for more than a year." Restatement of Trusts 2d § 230, comment *b* (1959). The 1992 Restatement retreated from this rule of thumb, saying, "No positive rule can be stated with respect to what constitutes a reasonable time for the sale or exchange of securities." Restatement of Trusts 3d: Prudent Investor Rule § 229, comment *b* (1992).

The criteria and circumstances identified in Section 902 as bearing upon the prudence of decisions to invest and manage trust assets also pertain to the prudence of decisions to retain or dispose of inception assets under this section.

[**SECTION 905. LOYALTY.** A trustee shall invest and manage the trust property solely in the interest of the beneficiaries.]

Comment

The duty of loyalty is perhaps the most characteristic rule of trust law, requiring the trustee to act exclusively for the beneficiaries, as opposed to acting for the trustee's own interest or that of third parties. The language of Section 4 of this Act derives from Restatement of Trusts 3d: Prudent Investor Rule § 170 (1992), which makes minute changes in Restatement of Trusts 2d § 170 (1959).

The concept that the duty of prudence in trust administration, especially in investing and managing trust assets, entails adherence to the duty of loyalty is familiar. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B), extracted in the

Comment to Section 1 of this Act, effectively merges the requirements of prudence and loyalty. A fiduciary cannot be prudent in the conduct of investment functions if the fiduciary is sacrificing the interests of the beneficiaries.

The duty of loyalty is not limited to settings entailing self-dealing or conflict of interest in which the trustee would benefit personally from the trust. "The trustee is under a duty to the beneficiary in administering the trust not to be guided by the interest of any third person. Thus, it is improper for the trustee to sell trust property to a third person for the purpose of benefitting the third person rather than the trust." Restatement of Trusts 2d § 170, comment *q*, at 371 (1959).

No form of so-called "social investing" is consistent with the duty of loyalty if the investment activity entails sacrificing the interests of trust beneficiaries – for example, by accepting below-market returns – in favor of the interests of the persons supposedly benefitted by pursuing the particular social cause. See, e.g., John H. Langbein & Richard Posner, Social Investing and the Law of Trusts, 79 Michigan L. Rev. 72, 96-97 (1980) (collecting authority). For pension trust assets, see generally Ian D. Lanoff, The Social Investment of Private Pension Plan Assets: May it Be Done Lawfully under ERISA?, 31 Labor L.J. 387 (1980). Commentators supporting social investing tend to concede the overriding force of the duty of loyalty. They argue instead that particular schemes of social investing may not result in below-market returns. See, e.g., Marcia O'Brien Hylton, "Socially Responsible" Investing: Doing Good Versus Doing Well in an Inefficient Market, 42 American U.L. Rev. 1 (1992). In 1994 the Department of Labor issued an Interpretive Bulletin reviewing its prior analysis of social investing questions and reiterating that pension trust fiduciaries may invest only in conformity with the prudence and loyalty standards of ERISA §§ 403-404. Interpretive Bulletin 94-1, 59 Fed. Regis. 32606 (Jun. 22, 1994), to be codified as 29 CFR § 2509.94-1. The Bulletin reminds fiduciary investors that they are prohibited from "subordinat[ing] the interests of participants and beneficiaries in their retirement income to unrelated objectives."

[**SECTION 906. IMPARTIALITY.** If a trust has two or more beneficiaries, the trustee shall act impartially in investing and managing the trust property, taking into account any differing interests of the beneficiaries.]

Comment

The duty of impartiality derives from the duty of loyalty. When the trustee owes duties to more than one beneficiary, loyalty requires the trustee to respect the interests of all the beneficiaries. Prudence in investing and administration requires the trustee to take account of the interests of all the beneficiaries for whom the trustee is acting, especially the conflicts between the interests of beneficiaries interested in income and those interested in principal.

The language of Section 6 derives from Restatement of Trusts 2d § 183 (1959); see also id., § 232. Multiple beneficiaries may be beneficiaries in succession (such as life and remainder interests) or beneficiaries with simultaneous interests (as when the income interest in a trust is being divided among several beneficiaries).

The trustee's duty of impartiality commonly affects the conduct of investment and management functions in the sphere of principal and income allocations. This Act prescribes no regime for allocating receipts and expenses. The details of such allocations are commonly handled under specialized legislation, such as the Revised Uniform Principal and Income Act (1962) (which is presently under study by the Uniform Law Commission with a view toward further revision).

[**SECTION 907. INVESTMENT COSTS.** In investing and managing trust property, a trustee may only incur costs that are appropriate and reasonable in relation to the property, the purposes of the trust, and the skills of the trustee.]

Comment

Wasting beneficiaries' money is imprudent. In devising and implementing strategies for the investment and management of trust assets, trustees are obliged to minimize costs.

The language of this section derives from Restatement of Trusts 2d § 188 (1959). The Restatement of Trusts 3d says: "Concerns over compensation and other charges are not an obstacle to a reasonable course of action using mutual funds and other pooling arrangements, but they do require special attention by a trustee. . . . [I]t is important for trustees to make careful cost comparisons, particularly among similar products of a specific type being considered for a trust portfolio." Restatement of Trusts 3d: Prudent Investor Rule § 227, comment *m*, at 58 (1992).

SECTION 908. REVIEWING COMPLIANCE. Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.

Comment

This section derives from the 1991 Illinois act, 760 ILCS 5/5(a)(2) (1992), which draws upon Restatement of Trusts 3d: Prudent Investor Rule § 227, comment *b*, at 11 (1992). Trustees are not insurers. Not every investment or management decision will turn out in the light of hindsight to have been successful. Hindsight is not the relevant standard. In the language of law and economics, the standard is ex ante, not ex post

[SECTION 909. DELEGATION OF INVESTMENT AND MANAGEMENT FUNCTIONS.

(a) A trustee may delegate investment and management functions 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 the requirements of subsection (a) is not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated.

(d) By accepting the delegation of a trust function 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 reverses the much-criticized rule that forbad trustees to delegate investment and management functions. The language of this section is derived from Restatement of Trusts 3d: Prudent Investor Rule § 171 (1992), discussed infra, and from the 1991 Illinois act, 760 ILCS § 5/5.1(b), (c)(1992).

Former law. The former nondelegation rule survived into the 1959 Restatement: "The trustee is under a duty to the beneficiary not to delegate to others the doing of acts which the trustee can reasonably be required personally to perform." The rule put a premium on the frequently arbitrary task of distinguishing discretionary functions that were thought to be nondelegable from supposedly ministerial functions that the trustee was allowed to delegate. Restatement of Trusts 2d § 171 (1959).

The Restatement of Trusts 2d admitted in a comment that "There is not a clear-cut line dividing the acts which a trustee can properly delegate from those which he cannot properly delegate." Instead, the comment directed attention to a list of factors that "may be of importance: (1) the amount of discretion involved; (2) the value and character of the property involved; (3) whether the property is principal or income; (4) the proximity or remoteness of the subject matter of the trust; (5) the character of the act as one involving professional skill or facilities possessed or not possessed by the trustee himself." Restatement of Trusts 2d § 171, comment *d* (1959). The 1959 Restatement further said: "A trustee cannot properly delegate to another power to select investments." Restatement of Trusts 2d § 171, comment *h* (1959).

For discussion and criticism of the former rule see William L. Cary & Craig B. Bright, The Delegation of Investment Responsibility for Endowment Funds, 74 Columbia L. Rev. 207 (1974); John H. Langbein & Richard A. Posner, Market Funds and Trust-Investment Law, 1976 American Bar Foundation Research J. 1, 18-24.

The modern trend to favor delegation. The trend of subsequent legislation, culminating in the Restatement of Trusts 3d: Prudent Investor Rule, has been strongly hostile to the nondelegation rule. See John H. Langbein, Reversing the Nondelegation Rule of Trust-Investment Law, 59 Missouri L. Rev. 105 (1994).

The delegation rule of the Uniform Trustee Powers Act. The Uniform Trustee Powers Act (1964) effectively abrogates the nondelegation rule. It authorizes trustees "to employ persons, including attorneys, auditors, investment advisors, or agents, even if they are associated with the trustee, to advise or assist the trustee in the performance of his administrative duties; to act without independent investigation upon their recommendations; and instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary . . . ." Uniform Trustee Powers Act § 3(24), 7B Uniform Laws Ann. 743 (1985). The Act has been enacted in 16 States, see "Record of Passage of Uniform and Model Acts as of September 30, 1993," 1993-94 Reference Book of Uniform Law Commissioners (unpaginated, following page 111) (1993).

UMIFA's delegation rule. The Uniform Management of Institutional Funds Act (1972) (UMIFA), authorizes the governing boards of eleemosynary institutions, who are trustee-like fiduciaries, to delegate investment matters either to a committee of the board or to outside investment advisors, investment counsel, managers, banks, or trust companies. UMIFA § 5, 7A Uniform Laws Ann. 705 (1985). UMIFA has been enacted in 38 States, see "Record of Passage of Uniform and Model Acts as of September 30, 1993," 1993-94 Reference Book of Uniform Law Commissioners (unpaginated, following page 111) (1993).

ERISA's delegation rule. The Employee Retirement Income Security Act of 1974, the federal statute that prescribes fiduciary standards for investing the assets of pension and employee benefit plans, allows a pension or employee benefit plan to provide that "authority to manage, acquire or dispose of assets of the plan is delegated to one or more investment managers . . . ." ERISA § 403(a)(2), 29 U.S.C. § 1103(a)(2). Commentators have explained the rationale for ERISA's encouragement of delegation:

> ERISA . . . invites the dissolution of unitary trusteeship. . . . ERISA's fractionation of traditional trusteeship reflects the complexity of the modern pension trust. Because millions, even billions of dollars can be involved, great care is required in investing and safekeeping plan assets. Administering such plans–computing and honoring benefit entitlements across decades of employment and retirement–is also a complex business. . . . Since, however, neither the sponsor nor any other single entity has a comparative advantage in performing all these functions, the tendency has been for pension plans to use a variety of specialized providers. A consulting actuary, a plan administration firm, or an insurance company may oversee the design of a plan and arrange for processing benefit claims. Investment industry professionals manage the portfolio (the largest plans spread their pension investments among dozens of money management firms).

John H. Langbein & Bruce A. Wolk, Pension and Employee Benefit Law 496 (1990).

The delegation rule of the 1992 Restatement. The Restatement of Trusts 3d: Prudent Investor Rule (1992) repeals the nondelegation rule of Restatement of Trusts 2d § 171 (1959), extracted supra, and replaces it with substitute text that reads:

> § 171. Duty with Respect to Delegation. A trustee has a duty personally to perform the responsibilities of trusteeship except as a prudent person might delegate those responsibilities to others. In deciding whether, to whom, and in what manner to delegate fiduciary authority in the administration of a trust, and thereafter

> in supervising agents, the trustee is under a duty to the beneficiaries to exercise fiduciary discretion and to act as a prudent person would act in similar circumstances.

Restatement of Trusts 3d: Prudent Investor Rule § 171 (1992). The 1992 Restatement integrates this delegation standard into the prudent investor rule of section 227, providing that "the trustee must . . . act with prudence in deciding whether and how to delegate to others . . . ." Restatement of Trusts 3d: Prudent Investor Rule § 227(c)(1992).

Protecting the beneficiary against unreasonable delegation. There is an intrinsic tension in trust law between granting trustees broad powers that facilitate flexible and efficient trust administration, on the one hand, and protecting trust beneficiaries from the misuse of such powers on the other hand. A broad set of trustees' powers, such as those found in most lawyer-drafted instruments and exemplified in the Uniform Trustees' Powers Act, permits the trustee to act vigorously and expeditiously to maximize the interests of the beneficiaries in a variety of transactions and administrative settings. Trust law relies upon the duties of loyalty and prudent administration, and upon procedural safeguards such as periodic reports and the availability of judicial oversight, to prevent the misuse of these powers. Delegation, which is a species of trustee power, raises the same tension. If the trustee delegates effectively, the beneficiaries obtain the advantage of the agent's specialized investment skills or whatever other attributes induced the trustee to delegate. But if the trustee delegates to a knave or an incompetent, the delegation can work harm upon the beneficiaries.

This section is designed to strike the appropriate balance between the advantages and the hazards of delegation. This section authorizes delegation under the limitations of subsections (a) and (b). Subsection (a) imposes duties of care, skill, and caution on the trustee in selecting the agent, in establishing the terms of the delegation, and in reviewing the agent's compliance.

The trustee's duties of care, skill, and caution in framing the terms of the delegation should protect the beneficiary against overbroad delegation. For example, a trustee could not prudently agree to an investment management agreement containing an exculpation clause that leaves the trust without recourse against reckless mismanagement. Leaving one's beneficiaries remediless against willful wrongdoing is inconsistent with the duty to use care and caution in formulating the terms of the delegation. This sense that it is imprudent to expose beneficiaries to broad exculpation clauses underlies both federal and state legislation restricting exculpation clauses, e.g., ERISA §§ 404(a)(1)(D), 410(a), 29 U.S.C. §§ 1104(a)(1)(D), 1110(a); New York Est. Powers Trusts Law § 11-1.7 (McKinney 1967).

Although subsection (c) exonerates the trustee from personal responsibility for the agent's conduct when the delegation satisfies the standards of subsection (a), subsection (b) makes the agent responsible to the trust. The beneficiaries of the trust can, therefore, rely upon the trustee to enforce the terms of the delegation.

Costs. The duty to minimize costs that is articulated in Section 907 applies to delegation as well as to other aspects of fiduciary investing. In deciding whether to delegate, the trustee must balance the projected benefits against the likely costs. Similarly, in deciding how to delegate, the trustee must take costs into account. The trustee must be alert to protect the beneficiary from "double dipping." If, for example, the trustee's regular compensation schedule presupposes that the trustee will conduct the investment management function, it should ordinarily follow that the trustee will lower its fee when delegating the investment function to an outside manager.

SECTION 910. LANGUAGE INVOKING PRUDENT INVESTOR RULE.

The following terms or comparable language in the terms of the trust, unless otherwise limited or modified, authorizes any investment or strategy permitted under this [Act]: "investments permissible by law for investment of trust funds," "legal investments," "authorized investments," "using the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital," "prudent man rule," "prudent trustee rule," "prudent person rule," and "prudent investor rule."

Comment

This provision is taken from the Illinois act, 760 ILCS § 5/5(d) (1992), and is meant to facilitate incorporation of the Act by means of the formulaic language commonly used in trust instruments.

ARTICLE 10

PRINCIPAL AND INCOME

General Comment

This Article is reserved for an enacting jurisdiction to place its principal and income law, whether the Uniform Principal and Income Act (1997), earlier uniform act, or other legislation.

ARTICLE 11

LIABILITY OF TRUSTEES AND RIGHTS OF THIRD PERSONS

General Comment

Sections 1101 through 1107 list the remedies for breach of trust, describe how money damages are to be determined, and specify some potential defenses. The remedies for breach of trust are listed in Section 1102. The remedies provided are both broad and flexible. The method for determining money damages provided in Section 1103 is based on two principles: (1) the trust should be restored to the position it would have been in had the harm not occurred; and (2) the trustee should not be permitted to profit from the trustee's own wrong. Section 1105 through 1107 specify potential defenses. Section 1105 provides a statute of limitations on actions against a trustee, Section 1106 describes the effect of and potential limits on use of an exculpatory clause, and Section 1107 deals with the requirements for beneficiary approval of acts of the trustee that might otherwise constitute a breach of trust.

Sections 1108 through 1110 address trustee relations with third parties. The emphasis is on encouraging trustees and third parties to engage in commercial transactions to the same extent as if the property was not held in trust. Section 1108 negates personal liability on contracts entered into by the trustee if the fiduciary relationship or identity of the trust was properly disclosed. The trustee is also relieved from liability for torts committed in the course of administration unless the trustee was personally at fault. Section 1109 protects third persons who deal with a trustee in good faith and without knowledge that the trustee is exceeding a power. Section 1110 permits a third party to rely on a certification of trust, thereby reducing requests by third parties for copies of the complete trust instrument.

SECTION 1101. BREACH OF TRUST FOR VIOLATION OF DUTY. A violation by a trustee of a duty the trustee owes a beneficiary is a breach of trust. The remedies of a beneficiary for breach of trust are exclusively equitable.

Comment

This section is drawn from Section 201 of the Restatement (Second) of Trusts (1959). The remedies of a beneficiary are exclusively equitable and, as such, do not include either punitive damages or jury trial. The purpose of equity is to make one whole, not penalize.

For the list of remedies, see Section 1102. For the method for determining money damages, see Section 1103.

SECTION 1102. REMEDIES FOR BREACH OF TRUST. To remedy a breach of trust that has occurred or may occur, the court may:

(1) compel the trustee to perform the trustee's duties;

(2) enjoin the trustee from committing a breach of trust;

(3) compel the trustee to redress a breach of trust by payment of money or otherwise;

(4) order a trustee to account;

(5) appoint a receiver or temporary trustee to take possession of the trust property and administer the trust;

(6) suspend or remove the trustee;

(7) reduce or deny compensation to the trustee;

(8) subject to Section 1109, void an act of the trustee, impose an equitable lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or

(9) grant any other appropriate remedy.

Comment

This section codifies in general terms the equitable remedies available to a beneficiary or cotrustee if a trustee has committed a breach of trust or threatens to do so. This section provides brief statements of the available remedies and does not attempt to set out the refinements and exceptions developed in case law. The availability of a remedy in a particular circumstance is governed by the common law of trusts, including its principles of equity. See Section 105. The petitioner may seek any of the remedies listed appropriate to the particular case.

Paragraph (1) is consistent with Restatement (Second) of Trusts § 199(a) (1959). Paragraph (2) is consistent with Restatement (Second) of Trusts § 199(b) (1959).

The reference to payment of money in paragraph (3) includes liability that might be characterized as damages, restitution, or surcharge. For the measure of liability, see Section 1103. In certain circumstances, rather than ordering the payment of money, it may be appropriate for the court to order the trustee to transfer tangible property as a remedy for breach of trust. See Restatement (Second) of Trusts § 199(c)(1959).

Paragraph (5) makes explicit the court's authority to appoint a receiver. See also Restatement (Second) of Trusts § 199(d) (1959). This paragraph also permits appointment of a temporary trustee if appointment of a receiver would be appropriate. See Section 708 (appointment of trustee to fill vacancy).

As to paragraph (6), see Restatement (Second) of Trusts § 199(e) (1959). For provisions governing disqualifying or removing trustees, see Section 706 (grounds for removal).

Paragraph (7) follows Section 243 of the Restatement (Second) of Trusts (1959).

The authority under paragraph (8) to set aside wrongful acts of the trustee is a corollary of the power to enjoin a threatened breach as provided in paragraph (2). However, in setting aside the wrongful acts of the trustee the court may not impair the rights of bona fide purchasers protected by Section 1108. See Restatement (Second) of Trusts § 202 (1959). See also G. Bogert, The Law of Trusts and Trustees § 861, at 16-17 (rev. 2d ed. 1982).

A successor trustee may also have standing to sue for a breach of trust. As to standing generally, see Restatement (Second) of Trusts § 200 (1959).

SECTION 1103. DAMAGES AGAINST TRUSTEE FOR BREACH OF TRUST. A beneficiary may charge a trustee who commits a breach of trust with the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred, or, if greater, the profit that the trustee made by reason of the breach.

Comment

This section is based on Restatement (Third) of Trusts: Prudent Investor Rule § 205 (1992).

If a trustee commits a breach of trust, the beneficiaries may either affirm the transaction or, if a loss has occurred, hold the trustee liable for the amount necessary to fully compensate for the consequences of the breach. This may include lost income, capital gain, or appreciation that would have resulted from proper administration. Even if a loss has not occurred, the trustee may not be allowed to benefit by reason of the trustee's improper action, and is thus accountable for any profit that the trustee may have made by reason of the breach.

For extensive commentary on the determination of damages, with numerous specific applications, see Restatement (Third) of Trusts: Prudent Investor Rule §§ 204-213 (1992).

The court may reduce or excuse damages in circumstances in which it is appropriate to do so. See Restatement (Second) of Trusts § 205 cmt. g (1959).

The remedies provided in this section do not preclude resort to other remedies provided by this Act or available under the common law of trusts. See Sections 105 (common law of trusts) and 1102 (remedies for breach of trust). As to possible defenses of the trustee, see Sections 1105 through 1107.

SECTION 1104. ATTORNEY'S FEES AND COSTS. In a judicial proceeding involving a trust, the court may in its discretion, as justice and equity may require, award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust which is the subject of the controversy.

SECTION 1105. LIMITATION OF ACTION AGAINST TRUSTEE AFTER FINAL REPORT OR OTHER STATEMENT.

(a) Unless previously barred by adjudication, consent, or other limitation, a claim against a trustee for breach of trust is barred as to a beneficiary to whom the trustee has sent a report or other statement adequately disclosing the claim unless (i) a judicial proceeding to assert the claim is commenced within one year after the later of the receipt of the report or statement or the termination of the trust relationship between the beneficiary and that particular trustee, and (ii) the report or other statement informs the beneficiary of this time limitation. A report or statement adequately discloses the existence of a claim if it provides sufficient information so that the beneficiary knows of the claim or reasonably should have inquired into its existence. A claim thus barred does not include an action to recover for fraud or misrepresentation related to the report or other statement.

(b) For the purpose of subsection (a), a beneficiary is deemed to have received a report or other statement:

(1) in the case of an adult, if it is sent to the adult, or if the adult lacks capacity, if it is sent to the adult's [conservator], [guardian], or agent with authority; or

(2) in the case of a minor, if it is sent to the minor's [guardian] or [conservator] or, if the minor does not have a [guardian] or [conservator], if it is sent to a parent of the minor who does not have a conflict of interest.

Comment

This section is based in part on Section 7-307 of the Uniform Probate Code. For provisions governing consent, release, and ratification by beneficiaries to relieve the trustee of liability, see Section 1107. The reference in the introductory clause to claims previously barred also includes principles such as estoppel and laches that apply under the common law of trusts. See Section 105. During the time that a trust is revocable, the person holding the power to revoke is the one who must receive the report or other statement in order to commence the running of the limitations period provided in this section. See Section 603 (rights of settlor).

Subsection (b) provides special rules concerning who must receive the report or other statement for it to have the effect of later barring claims based on the information disclosed. This subsection addresses only the issue of when the clock will start to run for purposes of the statute of limitations. Should the trustee wish immediately to foreclose possible claims based on the information disclosed, a consent to the report or other information may be obtained pursuant to Section 1107.

For the provisions relating to the duty to report information to beneficiaries, see Section 813.

SECTION 1106. EXCULPATION OF TRUSTEE.

(a) A term of the trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it:

(1) relieves a trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interest of the beneficiaries; or

(2) was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.

(b) An exculpatory term drafted by or on behalf of the trustee is presumed to have been inserted as a result of an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor.

Comment

Subsection (a) is the same in substance as Section 222 of the Restatement (Second) of Trusts (1959). It is also consistent with the standards expressed in Sections 104 and 814 relating to the extent to which a settlor may negate a duty in the terms of the trust. There is a minimum standard of conduct to which a trustee must comply, whether stated as a negation of a duty or in the form of an exculpatory provision. A trustee must always act in good faith and with regard to the purposes of the trust and the interest of the beneficiaries.

Subsection (b) disapproves of *Marsman v. Nasca*, 573 N.E.2d 1025 (Mass. App. Ct. 1991), which held that an exculpatory clause in a trust instrument drafted by the trustee was valid absent proof that it was inserted as a result of an abuse of a fiduciary relationship. Subsection (b) responds to the danger that the insertion of such a clause by the fiduciary or its agent may have been undisclosed or inadequately understood by the settlor. To overcome this presumption of abuse, the trustee must establish that the clause was fair and that its existence and contents were adequately communicated to the settlor. In determining whether the clause was fair, the court may wish to examine: (1) the extent of the prior relationship between the settlor and trustee; (2) whether the settlor received independent advice; (3) the sophistication of the settlor with respect to business and fiduciary matters; (4) the trustee's reasons for inserting the clause; and (5) the scope of the particular provision inserted. See Restatement (Second) of Trusts § 222 cmt. d (1959).

SECTION 1107. NONLIABILITY OF TRUSTEE UPON BENEFICIARY'S CONSENT, RELEASE, OR RATIFICATION. A beneficiary may not hold a trustee liable for a breach of trust if the beneficiary, while having capacity, consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless:

(1) the beneficiary at the time of the consent, release, or ratification did not know of the beneficiary's rights and of the material facts that the trustee knew, or with the exercise of reasonable inquiry, the trustee should have known, and that the trustee did not reasonably believe that the beneficiary knew; or

(2) the consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee.

Comment

This section combines Sections 216 through 218 of the Restatement (Second) of Trusts (1959). When one beneficiary has consented but others have not, courts give a remedy to the nonconsenting beneficiaries. Restatement (Second) of Trusts § 216 cmt. h (1959). But consent by the settlor of a revocable trust or by the holder of a presently exercisable power of withdrawal binds all of the beneficiaries. See Section 603.

Restatement (Second) of Trusts § 218, comment d, states that its rule relating to affirmance applies only to breaches which give beneficiaries the option to affirm or disaffirm, but that in other cases the trustee may be protected by laches.

SECTION 1108. LIMITATION ON PERSONAL LIABILITY OF TRUSTEE.

(a) Except as otherwise agreed, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administration of the trust if the trustee in the contract discloses 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 trustee who does not join in exercising a power held by three or more trustees is not liable to third persons for the consequences of the exercise of the power. A dissenting trustee who joins in an action at the direction of the majority cotrustees is not liable to third persons for the action if the dissenting trustee expressed the dissent in writing to any other cotrustee at or before the time the action was taken.

(d) 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 against the trust in a judicial proceeding against the trustee in the trustee's fiduciary capacity, whether or not the trustee is personally liable on the claim.

Comment

This section is based on Section 7-306 of the Uniform Probate Code. However, unlike the Uniform Probate Code, subsection (a) excuses the trustee from personal liability on a contract if *either* the trustee's representative capacity *or* the identity of the trust is disclosed in the contract. Under this section, it is assumed that either one of these statements in a contract puts the other contracting party 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 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 Restatement (Second) of Trusts § 264 (1959), which imposes liability on a trustee regardless of fault, including liability for acts of agents under respondeat superior.

Subsection (d) alters the case law rule that a trustee could not be sued in a representative capacity if the trust estate was not liable.

SECTION 1109. PROTECTION OF PERSON DEALING WITH TRUSTEE.

(a) A third person 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) Dealing in good faith with another person with knowledge that the other person is a trustee does not place a third person on notice to inquire into the extent of the trustee's powers or the propriety of their exercise.

(c) A third person who in good faith pays or delivers assets to a trustee is not required to see to its proper application.

(d) A person 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 person is no longer a trustee 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 secondary to that provided under comparable provisions of other laws relating to commercial transactions or to the transfer of securities by fiduciaries.

Comment

This section is originally derived from Section 7 of the Uniform Trustees' Powers Act, but with several important changes. The key to understanding the section are the definitions of "good faith" and "know," codified at Section 102(5) and (7). The definition of "good faith," with respect to third persons, requires not only honesty of intention but also observance of reasonable standards of fair dealing. The definition of "know" refers to more than actual knowledge. While a person is not charged with knowledge of facts discoverable upon reasonable inquiry, the third party is charged with knowledge of facts the person had reason to know based on the facts and circumstances actually known to the person at the time in question. In other words, if the person should have been aware of a particular fact based on the circumstances and other facts of which the person was actually aware, the person is charged with knowledge of that fact. The Uniform Trustees' Powers Act, on the other hand, by failing to define good faith, left open the issue of whether its requirement that a trustee act in good faith was totally subjective or instead contained an objective element.

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" as defined in Section 102(5) and (7).

Subsection (b) confirms that a third party acting in good faith and with knowledge that the other person is a trustee is not charged with a duty to inquire into the extent of a trustee's powers or the propriety of their exercise.

Subsection (c) negates the common law rule that a third party does not receive credit if the trustee misapplies assets paid or delivered to the trustee which are properly part of the trust. To receive the protection provided by this subsection, the third person must have been acting in good faith and without knowledge of the misapplication.

Subsection (d) extends the protections afforded by the section to assistance provided to or dealings for value with a former trustee. The third party is protected the same as if the former trustee still held the office.

Subsection (e) clarifies that the protections provided by this section will in many cases be superseded by protections provided by other statutes, in particular the statutes relating to commercial transactions or to transfers of securities by fiduciaries. The principal statutes in question are the various articles of the Uniform Commercial Code, including Article 8 on the transfer of securities, as well as the Uniform Simplification of Transfer of Securities by Fiduciaries Act.

SECTION 1110. CERTIFICATION OF TRUST.

(a) In lieu of providing a third person with a copy of the trust instrument, a trustee may present the person with a certification of trust containing statements relating, but not limited to, the following matters:

(1) the existence of the trust and the date of execution of the trust instrument;

(2) the identity of the settlor or settlors and the currently acting trustee or trustees of the trust;

(3) the powers of the trustee;

(4) the revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;

(5) if the trust has more than one trustee, the signature authority of the trustees and whether all or less than all are required to sign in order to exercise powers of the trustee;

(6) the trust's taxpayer identification number; and

(7) the manner in which title to trust property should be taken. .

(b) A certification of trust must be in the form of an acknowledgment signed by all trustees and contain a statement to that effect.

(c) A certification of trust must contain a statement that the trust has not been revoked or modified in any manner that would cause the representations contained in the certification of trust to be incorrect.

(d) A certification of trust need not contain the dispositive terms of a trust.

(e) A recipient of a certification of trust may require that the trustee provide copies of those excerpts from the original trust instrument and later modifications that designate the trustee and confer upon the trustee the power to act in the pending transaction.

(f) A person who acts in reliance upon a certification of trust without knowledge that the representations contained therein are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification. Knowledge of the terms of the trust may not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying upon the certification. A person entering into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property the same as if the representations contained in the certification were correct.

(g) A person making a demand for the trust instrument in addition to a certification of trust or excerpts is liable for damages, including reasonable attorney's fees, if the court determines that the person did not act in good faith in requesting the trust instrument.

(h) This section does not limit the rights of beneficiaries to obtain copies of the trust instrument or rights of others to obtain copies in a judicial proceeding concerning the trust.

Comment

This section, based on California Probate Code § 18100.5, is designed to protect the privacy of a trust instrument by reducing requests by third parties for complete copies of the instrument when verifying a trustee's authority. Third parties frequently insist on receiving a copy of the complete trust instrument solely to verify a specific and narrow authority of the trustee to engage in a particular transaction. While a testamentary trust, because it is created under a will, is a matter of public record, an inter vivos trust instrument is private. Such privacy is compromised, however, if the trust instrument must be widely distributed among third parties. A certification of trust is a document signed by all currently acting trustees that may include excerpts from the trust instrument necessary to facilitate the particular transaction. The benefit of a certification is that it will enable the transaction to proceed without disclosure of the trust's beneficial provisions. Nor is there a need for third parties who may already have a copy of the instrument to pry into its provisions. Persons acting in reliance on a certification may assume the truth of the certification even if they have a complete copy of the trust instrument in their possession. To encourage compliance with this section, persons demanding a trust instrument despite having already been offered a certification may be liable for damages, including reasonable attorney's fees, if their refusal is determined not to have been in good faith.

ARTICLE 12

TRANSITIONAL AND MISCELLANEOUS PROVISIONS

SECTION 1201. 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 1202. SEVERABILITY CLAUSE. If any provision of this [Act] or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

SECTION 1203. EFFECTIVE DATE.

(a) This [Act] takes effect on ______________.

(b) Except as provided elsewhere in this [Act], on [the effective date of this [Act]]:

(1) this [Act] applies to all trusts created before, on, or after [its effective date];

(2) this [Act] applies to all judicial proceedings concerning trusts commenced on or after [its effective date];

(3) this [Act] applies to judicial proceedings concerning trusts commenced before [its effective date] unless the court finds that application of a particular

provision of this [Act] would substantially interfere with the effective conduct of the judicial proceedings or the rights of the parties, in which case the particular provision of this [Act] does not apply and the superseded law applies;

(4) any rule of construction or presumption provided in this [Act] applies to trust instruments executed before [the effective date of the [Act]] unless 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 [Act]] in any proceeding and any accrued right is not impaired by this [Act].

(c) 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 [Act]], that statute remains in force with respect to that right.

Comment

This section addresses the applicability of the Act, including application to pending judicial proceedings and the administration of existing trusts. The Act is intended to receive the widest possible application. The Act applies to all trusts subject to the jurisdiction of the enacting State, whether created before or after the date of enactment. But recognizing constitutional concerns, excluded from coverage are trusts created prior to the Act's effective date if such application would impair a vested right. For such an impairment to occur, however, the trust would have to be irrevocable as of the effective date and the particular provision of the Act would have to actually reduce or otherwise threaten a beneficial interest.

SECTION 1204. SPECIFIC REPEALER AND AMENDMENTS.

[(a)] The following Acts and parts of Acts are repealed:

(1) Uniform Trustee Powers Act;

(2) Uniform Prudent Investor Act;

(3) Uniform Probate Code, Article VII;

(4) Uniform Trust Act (1937);

(7)

[(b) The following Acts and parts of Acts are amended:

(1)

(2)

(3)]

Comment

For the reasons why the above uniform acts should be repealed upon enactment of this Act, see the Prefatory Note. States which have not enacted one or more of the specified uniform acts should repeal their comparable legislation. Because of the comprehensive scope of this Act, many states will have trust provisions not based on any uniform act which will need to be repealed upon enactment of this Act. This section does not attempt to list the types of conforming amendments, whether in the enacting State's probate code or elsewhere, which will need to be made upon enactment of this Act. But blank spaces are included in subsection (b) in order to alert enacting jurisdictions to this issue.