

DRAFT
FOR DISCUSSION ONLY

TRUST ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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TRUST ACT

With Comments

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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1 **TRUST ACT**

2 **ARTICLE 1.**
3 **DEFINITIONS AND GENERAL PROVISIONS**

4 **SECTION 1-101. SHORT TITLE.** This [Act] may be cited as the
5 [Trust Act].

6 **SECTION 1-102. DEFINITIONS.** In this [Act]:

7 (1) "Beneficiary," as it relates to a trust beneficiary,
8 includes a person who has any present or future interest in the
9 trust, vested or contingent, and also includes the owner of an
10 interest by assignment or other transfer.

11 (2) "Charitable trust" means a trust created for a
12 charitable purpose as specified in Section 5-101, excluding the
13 interests of any noncharitable beneficiary.

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

16 (4) "Court" means the [____] Court.

17 (5) "Fiduciary" includes a personal representative,
18 guardian, conservator, and trustee.

19 (6) "Guardian" means a person appointed by a court
20 [, parent, or spouse] to make decisions with respect to the
21 support, care, education, health, and welfare of a minor or adult
22 individual, but excludes one who is merely a guardian ad litem.

23 (7) "Instrument" means a signed writing.

1 (8) "Interested person" includes a trustee, a successor
2 trustee, a beneficiary, any other person having a property
3 interest in the trust, and a fiduciary representing an interested
4 person. The meaning as it relates to particular persons may vary
5 from time to time according to the particular purposes of, and
6 matters involved in, any proceeding.

7 (9) "Person" means an individual, corporation, business
8 trust, estate, trust, partnership, limited liability company,
9 association, joint venture, or any other legal or commercial
10 entity.

11 (10) "Petition" includes a complaint or statement of claim.

12 (11) "Property" means anything that may be the subject of
13 ownership, whether real or personal, legal or equitable, and any
14 interest therein, including a chose in action, claim, or
15 beneficiary designation under a policy of insurance, employees'
16 trust, or other arrangement, whether revocable or irrevocable.

17 (12) "Settlor" means a person, including a testator, who
18 creates a trust.

19 (13) "State" means a State of the United States, the
20 District of Columbia, the Commonwealth of Puerto Rico, or any
21 territory or insular possession subject to the jurisdiction of
22 the United States.

23 (14) "Term" or "terms," when used in relation to a trust,
24 means the manifestation of the settlor's intent regarding a
25 trust's provisions at the time of the trust's creation or
26 amendment. The terms may be expressed in writing or orally, or

1 may be inferred from conduct or constructional preferences or
2 rules.

3 (15) "Trust" means an express trust, charitable or
4 noncharitable, with additions thereto, wherever and however
5 created, including a trust created or determined by a judgment or
6 decree under which the trust is to be administered in the manner
7 of an express trust.

8 (16) "Trust company" means a person that has qualified to
9 engage in and conduct a trust business in this State.

10 (17) "Trustee" includes an original, additional, or
11 successor trustee, whether or not appointed or confirmed by a
12 court.

13 **Comment**

14 "Beneficiary" (paragraph (1)) refers only to a beneficiary
15 of a trust as defined in the Act. Other terms, such as "devisee"
16 or "heir", are used when the reference is to a nontrust
17 beneficiary.

18 Under the Act, only the charitable portion of a trust with
19 both charitable and noncharitable beneficiaries qualifies as a
20 "charitable trust" (paragraph (2)). Consequently, a split-
21 interest trust will in certain instances be governed by two sets
22 of provisions, one applicable to the charitable interests, the
23 other the noncharitable. Compare, e.g., Section 2-205
24 (termination of noncharitable trust with uneconomically low
25 value) with Section 5-103 (termination of charitable trust with
26 uneconomically low value).

27 The definition of "fiduciary" (paragraph (5)) refers to the
28 person holding the office as opposed to the fiduciary duties or
29 obligations of the office. A fiduciary is an "interested person"
30 (paragraph (8)) who may act on behalf of those whom the fiduciary
31 represents. A trustee may engage in transactions with another
32 trust, decedent's estate or conservatorship estate of which the
33 trustee is the fiduciary (Section 4-202(d)). A trustee has a duty
34 to redress a breach of trust committed by a predecessor fiduciary
35 from whom the trustee received trust property (Section 4-212).

36 Under the Act, a "guardian" (paragraph (6)) makes decisions
37 with respect to personal care; a "conservator" (paragraph (3))
38 manages property. Enacting jurisdictions not using these terms in
39 the defined sense may wish to substitute their own terminology.

1 The definition of "guardian" accommodates those jurisdictions,
2 including jurisdictions which have enacted the Uniform Probate
3 Code, which allow appointment of a guardian by a parent or spouse
4 in addition to the court. Enacting jurisdictions which allow
5 appointment of a guardian solely by a court should delete the
6 bracketed language.

7 The definition of "property" (paragraph (11)) removes any
8 lingering uncertainty that a revocable designation under an
9 employee plan or life insurance contract is not a sufficient
10 property interest to activate a trust. See also Section 2-101 and
11 comment (methods of creating trusts).

12 Determining the identity of the "settlor" (paragraph (12))
13 is usually not an issue. The same person will both execute the
14 trust instrument and fund the trust. Ascertaining the identity
15 of the settlor becomes more difficult when more than one person
16 executes or funds the trust. The fact that a person is designated
17 as the "settlor" by the terms of the trust is not necessarily
18 determinative. For example, the person who executes the trust
19 instrument may be acting as the agent for the person who will be
20 funding the trust. In that case, the person funding the trust,
21 and not the person executing the trust instrument, will be the
22 settlor. Similarly, should more than one person contribute to a
23 trust, the contributors will ordinarily both be treated as
24 settlors, in proportion to their respective contributions,
25 regardless of which one executed the trust instrument. However, a
26 transfer made to a revocable trust by a person who did not
27 participate in the trust's creation will frequently be intended
28 as a donative transfer to the person who originally created the
29 trust. In that event, only the person who created the trust, and
30 not the later donor, will be the settlor.

31 Ascertaining the identity of the settlor is important for a
32 variety of reasons. It is important for determining rights in
33 revocable trusts. See Sections 3-102 (revocation or modification
34 of revocable trust), 3-104 (creditors' rights against revocable
35 trust), and 3-106 (limitation on contest of revocable trust). It
36 is also important for determining rights of creditors in
37 irrevocable trusts. See Sections 2-302(3) (spendthrift
38 protection not available for settlor's creditors), and 2-304
39 (creditor of settlor may reach distributions trustee could make
40 to settlor). While the settlor of an irrevocable trust ordinarily
41 has no continuing rights except for a right to terminate the
42 trust with the beneficiaries' consent (see Section 2-202), under
43 the Act the settlor of an irrevocable trust may also petition for
44 removal of the trustee or for an order preventing the
45 beneficiaries from terminating the trust. See Sections 2-203
46 (modification or termination of irrevocable trust by
47 beneficiaries if no material purpose), and 4-107 (removal of
48 trustee). Also, per Section 5-104, the settlor is an interested
49 person in a proceeding involving a charitable trust.

50 "Term" or "terms" (paragraph (14)), as used in relation to a
51 trust, is a defined term used with some frequency in the Act.
52 While the wording of a written trust instrument is almost always

1 the most important determinant of a trust's terms, the definition
2 is not so limited. Oral statements, the settlor's family
3 circumstances, and, to the extent the settlor was otherwise
4 silent, rules of construction, all may have a bearing on
5 determining a trust's meaning. If a trust established by order of
6 court is to be administered as an express trust, the terms of the
7 trust are determined from the court order as interpreted in light
8 of the general rules governing interpretation of judgments. See
9 Restatement (Third) of Trusts Sec. 4 and comment (Tent. Draft No.
10 1, 1996).

11 Not all evidence may necessarily be considered in
12 determining the terms of the trust. For the evidence which may
13 be considered, see Restatement Third, Property (Donative
14 Transfers) Sec. 10.2, 11.1-11.3 (Tent. Draft No. 1, 1995).
15 Generally, a manifestation of a settlor's intention does not
16 constitute evidence of a trust's terms if it is not admissible in
17 a judicial proceeding in which the trust's terms are in question.
18 See Restatement (Third) of Trusts Sec. 4 comm. b (Tent. Draft No.
19 1, 1996). For example, in many states a trust of real property
20 is unenforceable unless created pursuant to a written instrument,
21 although this Act does not so require but leaves this issue to
22 the discretion of the enacting jurisdiction. See Section 2-103
23 (Statute of Frauds as applied to trusts). Evidence otherwise
24 relevant to determining the terms of the trust may also be
25 excluded under other principles of law, such as the parol
26 evidence rule.

27 Under the Act, a "trust" (paragraph (15)) means an express
28 trust, whether private or charitable, including a trust created
29 by court judgment or decree which is to be administered in the
30 manner of an express trust. While the Act is directed primarily
31 at express trusts which arise in an estate planning context, the
32 definition of "trust" is not so limited. Included within the
33 definition are a variety of express trusts, such as trusts
34 created for the purpose of paying a pension or managing pooled
35 investments, which arise primarily in a business context. The
36 extent to which such commercial trusts are subject to the more
37 detailed provisions of the Act will vary depending on the type of
38 trust and the laws, other than this Act, under which the trust
39 was created. However, because the Act applies only to express
40 trusts, the Act has no effect on the law relating to constructive
41 and resulting trusts, which are remedial devices implied by law.

42 Under the definition of "trust company" (paragraph (16)),
43 whether an entity has qualified to engage in and conduct a trust
44 business in this State depends on other law. To fall within the
45 definition of "trust company", a corporation, association, or
46 other entity must satisfy the requirements of state or federal
47 law that apply to the particular type of entity.

48 **SECTION 1-103. COMMON LAW OF TRUSTS.** Except to the extent
49 that the common law governing trusts is modified by this [Act] or

1 another statute, the common law of trusts supplements this [Act].

2 **Comment.**

3 Source: Cal. Prob. Code (CPC) Section 15002.

4 The Act is not comprehensive but codifies only those
5 portions of the law of express trusts which are most amenable to
6 codification. The Act is at all points supplemented by the rich
7 heritage of the common law, including principles of equity,
8 particularly as presented in the Restatement of Trusts. As used
9 in this section, the common law is not static but includes the
10 contemporary and evolving rules of decision developed by the
11 courts in exercise of their power to adapt the law to new
12 situations and changing conditions.

13 **ARTICLE 2.**
14 **CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF**
15 **TRUSTS**

16 **PART 1.**
17 **CREATION AND VALIDITY OF TRUSTS**

18 **SECTION 2-101. METHODS OF CREATING TRUSTS.** A trust may be
19 created by:

20 (1) Transfer of property to another person as trustee during
21 the settlor's lifetime, or by will or other instrument taking
22 effect upon the settlor's death;

23 (2) Declaration by the owner of property that the owner
24 holds property as trustee;

25 (3) Exercise of a power of appointment in favor of another
26 person as trustee; or

27 (4) A promise enforceable by the trustee to transfer
28 property to the trustee.

29 **Comment.**

30 Source: CPC Section 15200.

31 This section is based on Section 17 of the Restatement
32 (Second) of Trusts (1959) and Section 10 of the Restatement
33 (Third) of Trusts (Tent. Draft No. 1, 1996).

34 Unless the trustee acquires an enforceable right to have

1 property transferred in trust, a trust is not created until it is
2 funded. The property interest necessary to fund and create a
3 trust need not be substantial. A revocable designation of the
4 trustee as beneficiary of a life insurance policy or employee
5 benefit plan is sufficient. See Section 1-102(11) ("property"
6 defined). Furthermore, the property interest need not be
7 transferred contemporaneously with the execution of the trust
8 instrument. A trust created by means of a lifetime document is
9 not invalid simply because the trust is not created until it is
10 funded at a later date, including by will or contract at or after
11 the settlor's death. See Uniform Probate Code Sec. 2-511
12 (pourover devise to trust valid regardless of existence, size, or
13 character of trust corpus).

14 While a trust created by will may come into existence
15 immediately at the testator's death and not necessarily only upon
16 the later transfer of title from the personal representative, the
17 nominated trustee does not have a duty to act until there is an
18 acceptance of office, whether express or implied. See Section 4-
19 101 (acceptance or rejection of trust by trustee). To avoid an
20 implied acceptance, a nominated testamentary trustee who is
21 monitoring the actions of the personal representative but who has
22 not yet made a final decision on acceptance should inform the
23 beneficiaries that it has assumed only a limited role.

24 Consideration is not ordinarily required to create a trust,
25 but a promise to create a trust in the future is enforceable only
26 if the requirements for an enforceable contract are satisfied.
27 See Restatement (Third) of Trusts Sec. 15 (Tent. Draft No. 1,
28 1996).

29 A trust created by means of a promise enforceable by the
30 trustee to transfer property to the trustee is valid
31 notwithstanding that the trustee may resign or die prior to the
32 transfer. Unless expressly made personal, the promise to
33 transfer property may be enforced by a successor trustee.

34 The methods specified in this section are not exclusive.
35 For example, trusts are frequently created by court decree. See
36 Uniform Probate Code Sec. 5-407 (conservator may create trust
37 with court approval).

38 **SECTION 2-102. REQUIREMENTS FOR VALIDITY.**

39 (a) A trust is created only if:

40 (1) the settlor had capacity and indicated an intention
41 to create a trust;

42 (2) the same person is not the sole trustee and sole
43 beneficiary; and

44 (3) unless the trust is a charitable trust, an honorary

1 trust, or a trust for the care of an animal, the trust has a
2 definite beneficiary or a beneficiary who will be definitely
3 ascertained within the period of the applicable rule against
4 perpetuities.

5 (b) A definite or definitely ascertainable beneficiary
6 includes a beneficiary or class of beneficiaries designated under
7 a power to select the beneficiaries granted by the terms of the
8 trust to the trustee or another person.

9 **Comment.**

10 Source: CPC Sections 15201, 15205, 15209.

11 Subsection (a) codifies the basic requirements for the
12 creation of a trust. To create a valid trust, the settlor must
13 indicate an intention to create a trust. Restatement (Second) of
14 Trusts Sec. 23 (1959); Restatement (Third) of Trusts Sec. 13
15 (Tent. Draft No. 1, 1996). But only such manifestations of intent
16 as are admissible as proof in a judicial proceeding may be
17 considered. See Sections 1-102(14) ("terms" defined). A trust,
18 other than a charitable trust or honorary trust or trust for the
19 care of an animal, must also have a definite or definitely
20 ascertainable beneficiary. Restatement (Second) of Trusts Sec.
21 112 (1959).

22 To create a trust, a settlor must have the requisite mental
23 capacity. To create a revocable or testamentary trust, the
24 settlor must have the capacity to make a will. To create an
25 irrevocable trust, the settlor must have capacity during lifetime
26 to transfer the property free of trust. See Section 3-101
27 (capacity to create revocable trust), and see generally
28 Restatement (Third) of Trusts Sec. 11 (Tent. Draft No. 1, 1996).

29 Subsection (a) also addresses what is known as the doctrine
30 of merger. Under this doctrine, a trust is not created if the
31 settlor is the sole trustee unless there are one or more
32 beneficiaries other than the settlor. The doctrine of merger has
33 been inappropriately applied by the courts in some jurisdictions
34 to invalidate self-declarations of trust in which the settlor is
35 the sole life beneficiary but other persons are designated as
36 beneficiaries of the remainder. The doctrine of merger, however,
37 is properly applicable only if all beneficial interests, both
38 life interests and remainders, are vested in the same person.
39 Under the Act, a beneficiary of a trust includes any person who
40 has a present or future interest, vested or contingent. See
41 Section 1-102(1) ("beneficiary" defined).

42 Subsection (b) provides the settlor a greater degree of
43 flexibility in creating a trust. A disposition that would be

1 Restatement (Second) of Trusts Section 60 comment a (1959).

2 **SECTION 2-105. HONORARY TRUSTS; TRUSTS FOR PETS.**

3 (a) A trust for a lawful noncharitable purpose for which
4 there is no definite or definitely ascertainable beneficiary is
5 valid but may be performed by the trustee for only [21] years,
6 whether or not the terms of the trust contemplate a longer
7 duration.

8 (b) A trust for the care of an animal living at the
9 settlor's death is valid. The trust terminates when no living
10 animal is covered by its terms.

11 (c) No portion of the property of a trust authorized by this
12 section may be converted to any use other than its intended use
13 unless the terms of the trust so provide or the Court determines
14 that the value of the trust property substantially exceeds the
15 amount required.

16 (d) The intended use of a trust authorized by this section
17 may be enforced by a person designated for that purpose in the
18 terms of the trust or, if none, by a person appointed by the
19 Court.

20 **Comment.**

21 Source: UPC Section 2-907.

22 Subsection (a) of this section validates so-called honorary
23 trusts but places a 21-year limit on their duration. The figure
24 "21" is bracketed to indicate that an enacting jurisdiction may
25 select a different duration. Should the honorary trust fail, a
26 resulting trust is ordinarily created in the settlor unless the
27 terms of the trust provide for a different disposition.

28 Subsection (b) addresses a particular type of honorary
29 trust, a trust for the care of an animal. Subsection (b) is
30 independent of (a). A trust for the care of a designated animal
31 may last longer than 21 years if the animal is still living more

1 than 21 years after the settlor's death. While the animal
2 beneficiary will ordinarily be alive at the time of the trust's
3 creation, subsection (b) does permit an animal to be added as a
4 beneficiary after the date of the trust's creation as long as the
5 addition is made prior to the settlor's death.

6 Subsections (c) and (d) address administrative issues
7 commonly encountered in connection with honorary trusts. Unless
8 the terms of the trust provide otherwise, no portion of the trust
9 property of such a trust may be applied other than for its
10 intended use. Provision is made for partial termination, however,
11 if the trust property substantially exceeds the amount needed.

12 This section is based on Section 2-907 of the Uniform
13 Probate Code but is much less elaborate. The UPC provision also
14 addresses a number of trust issues that are covered elsewhere in
15 this Act.

16 **PART 2.**
17 **MODIFICATION AND TERMINATION OF TRUSTS**

18 **SECTION 2-201. TERMINATION OR MODIFICATION OF TRUST.**

19 (a) In addition to the methods specified in Sections 2-202
20 to 2-205, a trust terminates when:

21 (1) the term of the trust expires;

22 (2) the trust purpose is fulfilled;

23 (3) the trust purpose becomes unlawful or impossible to
24 fulfill; or

25 (4) the trust is revoked.

26 (b) On termination of a trust, the trustee may exercise the
27 powers necessary to windup the affairs of the trust and
28 distribute the trust property to those entitled.

29 **Comment.**

30 Source: CPC Section 15407; Tex. Prop. Code. Ann. Sec.
31 112.052.

32 Subsection (a) lists the ways in which trusts typically
33 terminate. Subsection (b), which is similar to Section 344 of the
34 Restatement (Second) of Trusts, clarifies that even though the
35 trust has terminated, the trustee retains the powers needed to
36 wind up the affairs of the trust and distribute the remaining

1 **SECTION 2-204. MODIFICATION OR TERMINATION DUE TO**
2 **UNANTICIPATED CIRCUMSTANCES.**

3 (a) On petition by a trustee or beneficiary, the Court shall
4 modify the administrative or dispositive provisions of a trust or
5 terminate the trust if, because of circumstances not anticipated
6 by the settlor, continuation of the trust under its terms would
7 defeat or significantly impair the accomplishment of the trust
8 purposes.

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

12 **Comment.**

13 Source: CPC Section 15409-15410.

14 The first sentence of subsection (a) is drawn from Sections
15 167 and 336 of the Restatement (Second) of Trusts (1959). See
16 also Section 4-401(b) (power of court to relieve trustee from
17 restrictions or confer additional powers).

18 This section permits modification or termination whenever
19 there are circumstances not anticipated by the settlor. This may
20 include circumstances in existence at the time of the trust's
21 creation which were not considered by the settlor. Unlike the
22 Restatement, this section extends equitable deviation to the
23 dispositive provisions of a trust. Modification of the
24 dispositive provisions for the support of a beneficiary may be
25 appropriate, for example, in a case where the beneficiary has
26 become unable to provide for support due to poor health or
27 serious injury. See, e.g., *Whittingham v. California Trust Co.*, 4
28 P.2d 142 (Cal. 1931).

29 **SECTION 2-205. NONCHARITABLE TRUST WITH UNECONOMICALLY LOW**
30 **VALUE.**

31 (a) If the value of the trust property of a noncharitable
32 trust is less than [\$50,000], the trustee may terminate the
33 trust.

1 (b) On petition by a trustee or beneficiary, the Court may
2 terminate or modify a noncharitable trust or appoint a new
3 trustee if it determines that the value of the trust property is
4 insufficient to justify the cost of administration involved and
5 that continuation of the trust under its existing terms or
6 trustee would defeat or significantly impair the accomplishment
7 of the trust purposes.

8 (c) Upon termination of a trust under this section, the
9 trustee must distribute the trust property in accordance with the
10 probable intention of the settlor under the circumstances.

11 **Comment.**

12 Source: CPC Section 15408, 15410.

13 Subsection (a) assumes that a trust with a value of \$50,000
14 or less is inherently uneconomical. Consequently, court approval
15 of the termination is not required. For the comparable provision
16 on termination of charitable trusts, see Section 5-103.

17 **SECTION 2-206. REFORMATION; TAX OBJECTIVES.**

18
19 (a) The terms of a trust may be reformed to conform to the
20 settlor's intention if the failure to conform was due to a
21 mistake of fact or law and the settlor's intent can be
22 established.

23 (b) The terms of the trust may be construed or modified, in
24 a manner that does not violate the settlor's probable intention,
25 to achieve the settlor's tax objectives.

26 **Comment.**

27 This section is based in part on Restatement (Third) of
28 Property-Donative Transfers Section 12.1-12.2 (Tent. Draft No. 1,
29 1995).

30 **SECTION 2-207. COMBINATION OF TRUSTS.**

1 (a) A trustee, without approval of court, may combine two
2 or more trusts with substantially similar beneficial interests.

3 (b) On petition by a trustee or beneficiary, the Court may
4 combine two or more trusts, whether or not the beneficial
5 interests are substantially similar, if the Court determines that
6 administration as a single trust will not defeat or significantly
7 impair the accomplishment of the trust purposes or the rights of
8 the beneficiaries.

9 **Comment.**

10 Source: CPC Section 15411.

11 Subsection (a) allows a trustee to combine two or more
12 trusts although their terms are not identical. Trusts often vary
13 in almost imperceptible ways, such as the presence of differing
14 perpetuities savings periods. The section merely requires
15 similarity of the beneficiaries' interests. The trustee's
16 management powers need not be identical.

17 Subsection (b) recognizes that the interests of efficient
18 trust administration may dictate that two or more trusts be
19 combined even though their beneficial interests are not
20 substantially similar.

21 This section applies to all trusts, whether created by will
22 or otherwise. In addition, a trust created by will may be
23 combined with a trust created during the settlor's lifetime.

24 **SECTION 2-208. DIVISION OF TRUSTS.**

25 (a) Without approval of court, a trustee may divide a trust
26 into two or more separate trusts with substantially similar
27 terms.

28 (b) On petition by a trustee or beneficiary, the Court may
29 divide a trust into two or more separate trusts, whether or not
30 their terms are similar, if the Court determines that dividing
31 the trust is in the best interest of the beneficiaries and will
32 not defeat or substantially impair the accomplishment of the
33 trust purposes or the rights of the beneficiaries.

1 **Comment.**

2 Subsection (a) recognizes that division of trusts may be
3 beneficial and, in certain circumstances, almost routine. For
4 example, a division of trusts is often necessitated by a desire
5 to obtain maximum advantage of exemptions available under the
6 federal generation-skipping tax.

7 Subsection (b) authorizes a court to divide a trust, whether
8 or not the trusts which result are identical. Conflicts among
9 beneficiaries, including differing investment objectives, may
10 often invite such a division. A division under this section does
11 not require the consent of the beneficiaries.

12 For a list of statutes authorizing division of trusts,
13 either by the trustee or court order, see Restatement Third,
14 Property (Donative Transfers), Sec. 12.2 Statutory Note (Tent.
15 Draft No. 1, 1995).

16 **PART 3.**
17 **SPENDTHRIFT PROTECTION**

18 **SECTION 2-301. SPENDTHRIFT PROTECTION RECOGNIZED.** Except
19 as otherwise provided in Section 2-302, if the terms of the trust
20 provide that a beneficiary's interest in the income or principal
21 is not subject to both voluntary or involuntary transfer, the
22 beneficiary's interest may not be transferred and is not subject
23 to enforcement of a money judgment until paid to the beneficiary.

24 **Comment.**

25 Source: CPC Section 15300-15301.

26 Under this section, a settlor has the power to restrain
27 transfer of the beneficiary's interest, regardless of the nature
28 of the interest. A restraint may be placed on an interest in the
29 income, the principal, or both. A creditor of the beneficiary is
30 prohibited from attaching a protected interest until paid to the
31 beneficiary unless one of the exceptions under Section 2-302
32 applies. This section is similar to Restatement (Second) of
33 Trusts Sections 152-153.

34 A voluntary assignment by a beneficiary as to periodic
35 payments otherwise due the beneficiary may be honored by a
36 trustee but is revocable by the beneficiary at anytime.

37 **SECTION 2-302. EXCEPTIONS TO SPENDTHRIFT PROTECTION.** A
38 term of a trust prohibiting an involuntary transfer of a

1 beneficiary's interest shall be invalid as against claims by:

2 (1) a spouse or child of the beneficiary for support, or a
3 spouse for alimony;

4 (2) a provider of necessary services rendered or necessary
5 supplies furnished to the beneficiary;

6 (3) any creditor of the beneficiary if the beneficiary is
7 the settlor;

8 (4) following an event terminating or partially terminating
9 the trust, any creditor of the beneficiary as to a distribution
10 to be made upon that event.

11 **Comment.**

12 This section states some of the important exceptions to
13 spendthrift protection. The section is not exclusive. For
14 example, the extent to which a spendthrift provision may bar
15 claims by state and local governments, particularly claims for
16 services provided to individuals with disabilities, is a matter
17 left to the enacting jurisdiction to decide. Additional
18 exceptions are also created by federal law, such as claims for
19 unpaid taxes.

20 The fact that a creditor is not subject to a spendthrift bar
21 does not mean that the creditor may collect the debt from the
22 trust. The nature of the beneficiary's interest must also be
23 considered. See Section 2-303.

24 Paragraph (1) provides that a spendthrift provision is
25 invalid as to claims of a beneficiary's spouse or child for
26 support, or a spouse for alimony. The provision extends to
27 support and alimony ordered by the court, as well as to claims
28 for support by a child or spouse during the marriage. The Act
29 does not attempt to prescribe the procedures whereby a spouse or
30 child may collect from the trust, leaving that matter to local
31 collection law. For an example of such a procedure, see Cal.
32 Prob. Code Sec. 15305.

33 Paragraph (3) provides that a spendthrift provision is
34 ineffective against a creditor of the settlor. For the amount
35 such a creditor may collect from the trust, see Section 2-304.
36 This paragraph is the same in substance as Section 156(1) of the
37 Restatement (Second) of Trusts (1959).

38 Paragraph (4) is based on Restatement (Second) of Trusts
39 Section 153 but with an important modification. Under Section
40 153, a spendthrift provision is invalid to the extent a
41 beneficiary is entitled to an immediate transfer of the principal

1 of the trust. Under Section 152, however, a creditor may not
2 reach a distribution of income until paid to the beneficiary. The
3 reason behind the Restatement's separate treatment of income and
4 principal was to prevent a creditor from reaching periodic
5 distributions while allowing a creditor to reach the assets
6 following termination of the trust and before their payment to
7 the beneficiary. Modern portfolio theory, as articulated by the
8 Uniform Prudent Investor Act, recognizes that the distinction
9 between income and principal is often artificial. Paragraph (4)
10 strives to achieve the original purpose of the Restatement
11 without relying on this often artificial distinction.
12 Consequently, following an event terminating or partially
13 terminating the trust, Paragraph (4) allows the creditor to
14 secure an order compelling payment from the terminated assets,
15 whether they consist of principal or accumulated income.
16 This section does not supersede other laws which provide
17 spendthrift protection to pension trusts and other employee
18 plans.

19 **SECTION 2-303. DISCRETIONARY TRUSTS AND TRUSTS SUBJECT TO**
20 **STANDARD.** If the terms of the trust provide that the trustee
21 shall pay to or for the benefit of a beneficiary income or
22 principal of the trust subject to a standard, in the discretion
23 of the trustee, or in the discretion of the trustee but subject
24 to a standard, the Court may order a distribution to a transferee
25 or creditor of the beneficiary only if:

26 (1) the trustee has abused the discretion or failed to
27 comply with the standard; and

28 (2) the transferee or creditor is (i) a spouse or child who
29 has a claim for support or alimony from the beneficiary, or (ii)
30 a provider of necessary services or supplies which the trustee
31 was obligated to or had discretion to provide.

32 **Comment.**

33 This section is based on but is broader than Section 155 of
34 the Restatement (Second) of Trusts, which applies only to trusts
35 over which the trustee has "uncontrolled discretion." Under this
36 section, subject to limited exceptions, a beneficiary's creditor

1 cannot compel the trustee of a discretionary trust or a trust
2 subject to a standard to pay any part of the trust to the
3 creditor, even though the beneficiary could compel the payment.
4 The creditor may be able to reach any payment the trustee
5 decides to make, however.

6 Under Section 4-214, regardless of the breadth of
7 discretion provided by the terms of the trust a trustee must
8 exercise a discretionary power within the bounds of reasonable
9 judgment and in accordance with fiduciary principles.

10 **SECTION 2-304. SELF-SETTLED TRUSTS.**

11 (a) If a settlor is a beneficiary of a trust created by the
12 settlor, a transferee or creditor of the settlor may reach the
13 maximum amount that the trustee could pay to or for the settlor's
14 benefit.

15 (b) In the case of a trust with multiple settlors, the
16 amount the creditor or transferee of a particular settlor may
17 reach may not exceed the settlor's discretionary interest in the
18 portion of the trust attributable to that settlor's contribution.

19 **Comment.**

20 Source: CPC Section 15304(b).

21 This section is drawn from Section 156(2) of the Restatement
22 (Second) of Trusts (1959). See also the comments to Restatement
23 Section 156. For the rights of creditors if the settlor has
24 retained a power of revocation, see Section 3-104. For the
25 definition of "settlor", see Section 1-102(12).

26 **ARTICLE 3.** 27 **PROVISIONS RELATING TO REVOCABLE TRUSTS**

28 **SECTION 3-101. CAPACITY TO CREATE REVOCABLE TRUST.** An
29 individual's capacity to create a revocable trust is the same as
30 the individual's capacity to make a will.

31 **Comment.**

32 The purpose of this section, which is patterned after

1 Restatement (Third) of Trusts Sec. 11 (Tent. Draft No. 1, 1996),
2 is to provide some clarification to what has become a major issue
3 in the law of trusts due to the recent and widespread use of the
4 revocable trust as an alternative to a will.

5 This section recognizes that the revocable trust is used
6 primarily as a will substitute, with its key provision being the
7 determination of the persons to receive the trust property upon
8 the settlor's death. To solidify the use of the revocable trust
9 as a device for transferring property at death, the settlor
10 usually also executes a pourover will under which property not
11 transferred to the trust during life will be consolidated with
12 the trust property following the settlor's death. Given this
13 primary use of the revocable trust as a device for disposing of
14 property at death, the capacity standard for wills, and not for
15 lifetime gifts, should apply. Should lifetime management issues
16 arise, they may be dealt with by reformation or other appropriate
17 remedies that will not jeopardize the overall plan of disposition
18 by making the standard for the trust different or higher than
19 that for making a will. Restatement (Third) of Trusts Sec. 11
20 comm. b (Tent. Draft No. 1, 1996).

21 **SECTION 3-102. REVOCATION OR MODIFICATION.**

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

26 (b) Except as otherwise provided by the terms of the trust,
27 if a trust is created or funded by more than one settlor, each
28 settlor may revoke or modify the trust as to the portion of the
29 trust contributed by that settlor.

30 **[ALTERNATIVE PROVISION FOR COMMUNITY PROPERTY STATES]**

31 [(b) Except as otherwise provided by the terms of the trust,
32 if a trust is created or funded by more than one settlor:

33 (1) to the extent the trust consists of community
34 property, the trust may be revoked or modified by either spouse
35 acting alone;

36 (2) to the extent the trust consists of other property,

1 each settlor may revoke or modify the trust as to the portion of
2 the trust contributed by that settlor.]

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

5 (1) by compliance with any method specified by the
6 terms of the trust; or

7 (2) unless the terms of the trust expressly make the
8 method specified exclusive, (i) by a writing, other than a will,
9 signed by the settlor and delivered to the trustee during the
10 settlor's lifetime, or (ii) by a later will or codicil expressly
11 referring to the trust or which makes a specific devise of
12 property of the trust.

13 (d) Upon termination of a revocable trust, the trustee must
14 distribute the trust property as the settlor directs.

15 (e) The settlor's powers with respect to revocation or
16 modification may be exercised by an agent under a power of
17 attorney only and to the extent the power of attorney expressly
18 so authorizes.

19 (f) Except to the extent prohibited by the terms of the
20 trust, a conservator may revoke or modify a trust with the
21 approval of the court supervising the conservatorship.

22 **Comment.**

23 Source: CPC 15400-15402, 15410(a).

24 Subsection (a), which provides that a settlor may revoke or
25 modify a trust unless the terms of the trust expressly state that
26 the trust is irrevocable, is contrary to the common law. See
27 Restatement (Second) of Trusts Sec. 330 (1959). This subsection
28 will not govern certain trusts created in other states. Choice of
29 law principles may dictate that the law of a state following the
30 common law rule is to govern, in which event the trust would be

1 irrevocable unless expressly made revocable. In addition, this
2 subsection does not prevent a trust from being reformed to make
3 it irrevocable if the settlor was proceeding under a mistake of
4 law at the time of its creation. See Section 2-206 (reformation
5 of trust).

6 A power of revocation includes the power to modify. See
7 Restatement (Second) of Trusts Section 331, comment g (1959). An
8 unrestricted power to modify may also include the power to revoke
9 a trust. See Restatement (Second) of Trusts Section 331, comment
10 h.

11 Subsection (b) provides a default rule for revocation or
12 modification of a trust with multiple settlors. An individual
13 settlor of such a trust may only revoke or modify the portion of
14 the trust attributable to that settlor's contribution. The effect
15 of this provision is to overrule cases such as Estate of
16 Wernicke, 20 Cal. Rptr. 2d 481 (1st Dist. 1993), which hold that
17 a trust with multiple settlors may be revoked or modified only by
18 action of all of the settlors. However, good estate planning
19 practice dictates that this topic should usually be specifically
20 addressed in the instrument. For the definition of "settlor", see
21 Section 1-102(12)

22 Under subsection (c), the settlor may revoke a revocable
23 trust by a writing delivered to the trustee or by a will even if
24 the terms of the trust specify a method of revocation. Only if
25 the method specified by the terms of the trust is exclusive are
26 use of the other methods prohibited.

27 Subsection (c) does not necessarily preclude revocation by
28 other methods, such as by oral statement or by physical act
29 coupled with a withdrawal of the property. Less formal methods,
30 because they provide less reliable indicia of intent, are not to
31 be encouraged, however. Nor does subsection © require the trustee
32 to concur in a modification of the trust. Should a modification
33 of the trust substantially change the trustee's duties, the
34 trustee is free to resign. See Section 4-106(a)(4).

35 Subsection (d), dealing with distribution of trust property
36 upon revocation, codifies a provision commonly included in
37 revocable trust instruments.

38 Under subsection (e), an agent under a power of attorney may
39 revoke a revocable trust but only to the extent the power of
40 attorney expressly so permits.

41 This section defers to other law on whether a conservator
42 may exercise a power of revocation. Many states allow for such
43 revocation with prior court approval. See, e.g., Unif. Prob. Code
44 Sec. 5-407. The effect of subsection (f) is to clarify that such
45 a revocation may be prohibited by the terms of the trust.

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

48 **SECTION 3-103. OTHER RIGHTS OF SETTLOR.** Except to the
49 extent the terms of the trust otherwise provide, while a trust is

1 revocable and the individual holding the power to revoke the
2 trust has capacity:

3 (1) the holder of the power, and not the beneficiary,
4 has the rights afforded beneficiaries under this [Act];

5 (2) the duties of the trustee are owed to the holder of
6 the power; and

7 (3) the trustee shall follow a written direction given
8 by the holder of the power to revoke or the part thereof with
9 respect to which the direction is given, including a person to
10 whom the power is delegated, without liability for so doing.

11 **Comment**

12 Source: CPC Section 15800, 16001.

13 This section has the effect of postponing the enjoyment of
14 rights of beneficiaries of revocable trusts until the death or
15 incapacity of the settlor or other person holding the power to
16 revoke the trust. See also Section 3-105 (holder of presently
17 exercisable general power of appointment treated as settlor).
18 This section thus recognizes that the holder of a power of
19 revocation is in control of the trust and should have the rights
20 to enforce the trust. A corollary principle, also recognized in
21 this section, is that the holder of the power to revoke may
22 direct the actions of the trustee.

23 Under this section, the duty to inform and account to
24 beneficiaries is owed to the person holding the power to revoke
25 during the time that the trust is presently revocable and the
26 holder of the power has capacity. See Section 4-213 (trustee's
27 duty to inform and account to beneficiaries). The introductory
28 clause recognizes that the terms of the trust may grant rights
29 to the beneficiaries which, under this section, would otherwise
30 be held by the holder of the power to revoke.

31 Paragraph (3) requires the trustee to comply with a written
32 direction of the holder of a power to revoke. A trustee who
33 wishes not to comply may choose to resign. See Section 4-
34 106(a)(4) (resignation of trustee).

35 This section no longer applies should the holder of the
36 power to revoke lose capacity. In that event, the beneficiaries
37 are granted all rights normally afforded the beneficiaries of
38 irrevocable trusts, subject to a possible right of a conservator
39 or agent to revoke or modify the trust. See Section 3-102(e)-(f).

40 See also Section 6-302, which authorizes the holder of the
41 power to revoke to represent and bind the beneficiaries to

1 judicial orders and nonjudicial settlements.

2 **SECTION 3-104. CREDITOR CLAIMS AGAINST REVOCABLE TRUST.**

3 (a) During the lifetime of the settlor, the trust property
4 of a revocable trust is subject to the claims of the settlor's
5 creditors to the extent of the settlor's power of revocation.

6 (b) Following the death of a settlor, the trust property of
7 a revocable trust which was subject to the settlor's power of
8 revocation at the time of death is subject to the claims of the
9 settlor's creditors, costs of administration of the settlor's
10 estate, and statutory allowances to the surviving spouse and
11 children to the extent the settlor's estate is inadequate to
12 satisfy those claims, costs and allowances.

13 **Comment.**

14 Source: CPC Sections 18200, 19001.

15 Subsection (a) is contrary to the common law rule as
16 expressed in the Restatement. See Restatement (Second) of Trusts
17 Section 330, comm. o (1959). But because a settlor usually also
18 retains a beneficial interest which a creditor may reach, the
19 common law rule is normally of little significance. See Section
20 2-304 (rights of creditor in self-settled trust); and Restatement
21 (Second) of Trusts Section 156(2) (1959).

22 Subsection (b) recognizes that a revocable trust is normally
23 used as a will substitute. As such, its assets, following the
24 death of the settlor, should be subject to the settlor's debts
25 and other charges. However, to promote efficiency in the
26 settlement of the settlor's estate, subsection (b) requires that
27 the assets of the settlor's probate estate be exhausted before
28 the assets of the revocable trust may be reached.

29 **SECTION 3-105. RIGHTS OF AND CREDITOR CLAIMS AGAINST**
30 **HOLDER OF POWER OF APPOINTMENT.**

31 (a) The holder of a presently exercisable general power of
32 appointment over a trust has the rights of a holder of the power

1 to revoke a trust under Section 3-103 to the extent of the
2 property subject to the power.

3 (b) Property in trust subject to a presently exercisable
4 general power of appointment is chargeable with the claims of the
5 holder's creditors, costs of administration of the holder's
6 estate, and statutory allowances of the surviving spouse and
7 children to the same extent as if the holder was a settlor and
8 the power of appointment a power of revocation.

9 **Comment.**

10 Source: CPC Section 15803.

11 This section makes clear that a holder of a presently
12 exercisable general power of appointment is treated the same as a
13 settlor of a revocable trust both in terms of powers over the
14 trust as well as obligations to creditors. Equal treatment is
15 warranted due to the holder's equivalent position to control the
16 trust. See also Section 6-302, which authorizes the holder of a
17 presently exercisable general power of appointment to represent
18 and bind the beneficiaries to judicial orders and nonjudicial
19 settlements.

20 **SECTION 3-106. LIMITATION ON CONTEST OF REVOCABLE TRUST.**

21 (a) Unless previously barred by adjudication, consent, or
22 other limitation, a proceeding to contest the validity of a
23 revocable trust must be brought no later than three years
24 following the death of the settlor.

25 (b) Unless the trustee is aware a proceeding contesting its
26 validity is pending, six months following the death of the
27 settlor the trustee of a revocable trust may assume the trust's
28 validity and proceed to distribute the trust property in
29 accordance with the terms of the trust without liability for so
30 doing, liability for an improper distribution in such case being
31 solely on the beneficiaries.

1 **Comment.**

2 The purpose of this section is to provide some finality to
3 when a contest of a revocable trust may be brought and to
4 encourage the expeditious distribution of the trust property
5 following the death of the settlor. Subsection (a), which
6 requires that a contest be brought no later than three years
7 following the death of the settlor, is consistent with the
8 Uniform Probate Code, which places a three-year limit on the
9 probate or contest of a will if not barred earlier. Subsection
10 (b) is also consistent with the Uniform Probate Code, which
11 discharges a personal representative six months following the
12 filing of a statement of informal closing, even though the
13 beneficiaries may still be liable for improper distribution.
14 Subsection (b) only protects a trustee from personal liability.
15 Should a successful contest later be brought, the contestants may
16 reach any trust property still in the trustee's possession.

17 **ARTICLE 4.**
18 **TRUST ADMINISTRATION**

19 **PART 1**
20 **OFFICE OF TRUSTEE**

21 **SECTION 4-101. ACCEPTANCE OR REJECTION OF TRUST BY TRUSTEE.**

22 (a) A person named as trustee accepts the office of trustee
23 by:

24 (1) signing the trust instrument, or signing a separate
25 written acceptance; or

26 (2) except as provided in subsection (c), knowingly
27 accepting delivery of the trust property or exercising powers or
28 performing duties as trustee.

29 (b) A person named as trustee who has not yet accepted the
30 office of trustee may in writing reject the trust.

31 (c) If there is an immediate risk of damage to the trust
32 property, the person named as trustee may act to preserve the
33 trust property without accepting the office of trustee, if within

1 a reasonable time after acting the person delivers a written
2 rejection of the trust to the settlor or, if the settlor is dead
3 or lacks capacity, to a beneficiary.

4 **Comment.**

5 Source: CPC Sections 15600, 15601; Ind. Code Ann. Sec. 30-4-
6 2-2 (West 1979).

7 This section, while listing the preferred methods of
8 acceptance, is not exclusive. This section does not preclude oral
9 acceptance, or an acceptance by estoppel or damages for an
10 unreasonable delay in signifying a decision as to an acceptance
11 or rejection.

12 The provision in subsection (a)(2) for acceptance of the
13 trust by acts of the person named as trustee is consistent with
14 case law. See, e.g., Heitman v. Cutting, 174 P. 675 (Cal. App.
15 1918).

16 The appropriate recipient of the written rejection depends
17 upon the circumstances of the particular case. Ordinarily, it
18 would be appropriate to give the rejection to the person who
19 informs the person of the proposed trusteeship. If proceedings
20 involving the trust are pending, the rejection could be filed
21 with the court clerk. In the case of a person named as trustee of
22 a revocable trust, it would be appropriate to give the rejection
23 to the settlor. In any event it would be best to give notice of
24 rejection to a beneficiary with a present interest in the trust
25 because the beneficiary would be motivated to seek appointment of
26 a new trustee.

27 A trustee's rejection of a trust normally precludes a later
28 acceptance of the trust but does not cause the trust to fail. See
29 Restatement (Second) of Trusts Section 102. As to filling
30 vacancies, see Section 4-105.

31 Subsection (c) makes clear that the authority to act in an
32 emergency does not impose a duty to act. Under this subsection,
33 the person named as trustee may act in an emergency without being
34 considered to have accepted the trust under the rule set out in
35 subsection (a)(2).

36 **SECTION 4-102. TRUSTEE'S BOND.**

37 (a) A trustee is not required to give a bond to secure
38 performance of the trustee's duties unless:

- 39 (1) a bond is required by the terms of the trust; or
40 (2) a bond is found by the Court to be necessary to
41 protect the interests of beneficiaries, whether or not bond is

1 waived by the terms of the trust.

2 (b) If a bond is required, it must be filed and in an amount
3 and with sureties and liabilities as the Court may order. The
4 Court may excuse a requirement of a bond, reduce or increase the
5 amount of a bond, release a surety, or permit the substitution of
6 another bond with the same or different sureties.

7 (c) The amount of a bond otherwise required may be reduced
8 by the value of trust property deposited with a financial
9 institution in a manner that prevents its unauthorized
10 disposition, and by the value of real property which the trustee,
11 by express limitation of power, lacks power to convey without
12 Court authorization.

13 (d) Except as otherwise provided by the terms of trust or
14 ordered by the Court, the cost of a bond is charged to the trust.

15 (e) A trust company may not be required to give a bond,
16 whether or not the terms of the trust require a bond.

17 **Comment.**

18 Source: CPC Section 15602.

19 Subsections (a)-(b) of this section are drawn from Section
20 7-304, and subsection (c) is drawn from Sections 3-604 and 5-410
21 of the Uniform Probate Code. See also Sections 4-104 (vacancy in
22 office of trustee), 4-105 (appointment of trustee to fill
23 vacancy). Because a bond is required only if the terms of the
24 trust require bond or a bond is found by the court to be
25 necessary to protect the interests of beneficiaries, bond will
26 rarely be required under the Act.

27 Subsection (e) clarifies that a trust company is not
28 required to give a bond. See Section 1-102(16) ("trust company"
29 defined). A nonprofit or charitable corporation acting as trustee
30 under a charitable trust is not, in the absence of special
31 enabling legislation, a trust company as defined in the Act, and
32 thus is subject to the provisions of subsection (a) relating to
33 when a bond is required.

34 **SECTION 4-103. ACTIONS BY COTRUSTEES.** Except as otherwise

1 provided by the terms of the trust:

2 (1) a power held by cotrustees may be exercised by majority
3 action;

4 (2) if a vacancy occurs in the office of a cotrustee, the
5 remaining cotrustees may act for the trust as if they are the
6 only trustees;

7 (3) if a cotrustee is unavailable to perform duties because
8 of absence, illness, or other temporary incapacity, the remaining
9 cotrustees may act for the trust, as if they were the only
10 trustees, if necessary to accomplish the purposes of the trust or
11 to avoid irreparable injury to the trust property.

12 **Comment.**

13 Source: CPC 15621, 15622.

14 Paragraph (1) is in accordance with Restatement (Second) of
15 Trusts Section 383, which allows action by a majority in the case
16 of charitable trusts.

17 Under paragraph (2), a vacancy in the office of a cotrustee
18 is disregarded in the operation of the trust if there is at least
19 one trustee remaining. In determining the requisite majority,
20 only a majority of the remaining trustees need be counted, even
21 though the number of trustees constituting a majority is now less
22 than before the vacancy occurred. This rule is subject to
23 contrary provision in the terms of the trust, as noted in the
24 introductory clause. See also Sections 4-104 (vacancy in office
25 of trustee), 4-105 (appointment of trustee to fill vacancy).

26 Paragraph (3) addresses a problem that may arise when a
27 cotrustee is temporarily unable to perform duties but the office
28 of trustee is not vacant.

29 Per Section 4-602, a dissenting trustee is not liable to a
30 third party for failing to join in the majority's exercise of a
31 power. However, should the action by the majority constitute a
32 breach of trust, the dissenting trustee may be held liable for
33 failing to take action to rectify the acts of the cotrustees. See
34 Section 4-208 (trustee's duties with regard to cotrustees).

35 **SECTION 4-104. VACANCY IN OFFICE OF TRUSTEE.** There is a
36 vacancy in the office of trustee if:

- 1 (1) the person named as trustee rejects the trust;
2 (2) the person named as trustee cannot be identified or does
3 not exist;
4 (3) the trustee resigns or is removed;
5 (4) the trustee dies; or
6 (5) a guardian or conservator of the trustee's person or
7 estate is appointed.

8 **Comment.**

9 Source: CPC Section 15643.

10 This section lists the typical ways in which the office of
11 trustee becomes vacant. It does not preclude other methods, such
12 as the suspension of the powers of a trust company under federal
13 or state banking regulations. For the rules on filling a vacancy,
14 see Section 4-105. See also Section 1-102(16) ("trust company"
15 defined), 4-101 (rejection of trust), 4-106 (resignation and
16 liability of resigning trustee), 4-107 (removal of trustee), 4-
17 603 (protection of third person dealing with former trustee).

18 **SECTION 4-105. FILLING VACANCY.**

19 (a) A trustee must be appointed to fill a vacancy in the
20 office of trustee only if the trust has no trustee or the terms
21 of the trust require a vacancy in the office of cotrustee to be
22 filled.

23 (b) A vacancy in the office of trustee shall be filled:

24 (1) By the person named in or nominated pursuant to the
25 method specified by the terms of the trust;

26 (2) If the terms of the trust do not name a person or
27 specify a method for filling the vacancy, or the person named or
28 nominated pursuant to the method specified fails to accept;

29 (i) By a trust company designated on agreement of
30 the adult beneficiaries specified in subsection (c); or

1 (ii) By a person appointed by the Court on
2 petition of an interested person or of a person named as trustee
3 by the terms of the trust. The Court, in selecting a trustee,
4 shall consider any nomination made by the adult beneficiaries.

5 (c) For purposes of this section, the term "adult
6 beneficiaries" shall not include (i) beneficiaries lacking
7 capacity who are not represented by a guardian, conservator, or
8 agent; and (ii) beneficiaries who are not entitled or eligible to
9 receive trust income or a distribution of principal were the
10 trust to terminate at the time the agreement is made.

11 **Comment.**

12 Source: CPC Section 15660.

13 For a listing of the circumstances when a vacancy in the
14 office of trustee may occur, see Section 4-104. Subsection (a)
15 clarifies that a vacancy in the office of a cotrustee need be
16 filled only if the trust so requires. If the vacancy in the
17 office of cotrustee is left open, the remaining cotrustees may
18 continue to administer the trust under Section 4-103, unless the
19 terms of the trust provide otherwise.

20 Subsection (b)(2)(i) permits a vacancy in the office of
21 trustee to be filled, without the need for court approval, by a
22 trust company selected by agreement of the adult beneficiaries as
23 defined in subsection (c). The adult beneficiaries who must agree
24 to the new trustee are the same as those who must consent to a
25 resignation under Section 4-106(a)(3). A trust company may be
26 appointed to fill a vacancy whether or not the former trustee was
27 a trust company. If a trustee resigns pursuant to Section 4-
28 106(a)(3), the trust may be transferred to a trust company
29 pursuant to this section, all without court approval.

30 Subsection (b)(2)(ii) authorizes the court to fill a vacancy
31 if the trust does not name a successor who is willing to accept
32 the trust or if the trust does not provide another method of
33 appointment. Requiring the court to give consideration to the
34 wishes of the beneficiaries is consistent with Restatement
35 (Second) of Trusts Section 108, comments d, i (1959).

36 For a limitation on the rights of certain beneficiaries of
37 revocable trusts, see Section 3-103. As to obligations of
38 successor trustees, see Section 4-212.

39 **SECTION 4-106. RESIGNATION OF TRUSTEE.**

1 (a) A trustee who has accepted a trust may resign by any of
2 the following methods:

3 (1) as provided by the terms of the trust;

4 (2) with the consent of the person holding the power to
5 revoke the trust if the holder has capacity or is represented by
6 a guardian, conservator, or agent;

7 (3) with the consent of the adult beneficiaries as
8 defined in Section 4-105(c) if the trust is irrevocable or the
9 holder of the power to revoke lacks capacity or is not
10 represented by a guardian, conservator, or agent;

11 (4) upon written notice to the holder of the power to
12 revoke if the holder substantially changes the trustee's duties
13 and the trustee does not concur; or

14 (5) by filing a petition to resign under Section 6-202,
15 the resignation to take effect 90 days after the filing or upon
16 approval of the petition by the Court, whichever first occurs.
17 The Court must accept the trustee's resignation but may impose
18 such orders and conditions as are reasonably necessary for the
19 protection of the trust property, including the appointment of a
20 receiver or temporary trustee.

21 (b) The liability for acts or omissions of a resigning
22 trustee or of any sureties on the trustee's bond is not released
23 or affected by the trustee's resignation.

24 **Comment.**

25 Source: CPC Section 15640, 15641.

26 This section is based in part on Section 106 of the
27 Restatement (Second) of Trusts (1959), except that under
28 subsection (a) (3) the class of persons whose consent is needed is

1 more limited and the Restatement section does not address
2 revocable trusts. Under this section, court approval is not
3 required to accomplish a resignation except under subsection
4 (a) (5). Whether court approval is required under subsection
5 (a) (1) depends on the terms of the trust. Subsection (a) (2) is a
6 provision that recognizes that the person holding the power to
7 revoke a revocable trust, and not the beneficiaries, has control
8 over the trust. See Section 3-103. Under subsection (a) (5) the
9 court has authority to accept a resignation regardless of whether
10 the trust provides a manner of resignation.

11 Section 4-213 requires an accounting whenever there is a
12 change of trustees. See also Restatement (Second) of Trusts
13 Section 106, comment a, which is in accord with subsection (b).

14 **SECTION 4-107. REMOVAL OF TRUSTEE.**

15 (a) A trustee may be removed in accordance with the terms of
16 the trust, by the Court on its own motion or on petition of a
17 settlor, cotrustee, or beneficiary under Section 6-202.

18 (b) The Court may remove a trustee, or order other
19 appropriate relief:

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

22 (2) if the trustee is unfit to administer the trust;

23 (3) if hostility or lack of cooperation among
24 cotrustees impairs the administration of the trust;

25 (4) if the trustee's investment performance is
26 persistently or seriously substandard;

27 (5) if the trustee's compensation is excessive under
28 the circumstances;

29 (6) for other good cause shown.

30 (c) If it appears to the Court that trust property or the
31 interests of a beneficiary may suffer loss or injury pending a
32 final decision on a petition for removal of a trustee, the Court

1 may suspend the powers of the trustee, compel the trustee to
2 surrender trust property to a cotrustee, receiver or temporary
3 trustee, or order other appropriate relief.

4 **Comment.**

5 Source: CPC Section 15642.

6 Subsection (a) of this section is the same in substance as
7 Section 107 of the Restatement (Second) of Trusts (1959) except
8 that it gives the settlor of an irrevocable trust the right to
9 petition for removal of a trustee. As to rights of a settlor of a
10 revocable trust, see Sections 3-102 (revocation or modification),
11 3-103 (other rights of settlor). The right to petition for
12 removal of a trustee does not give the settlor any other rights,
13 such as the right to an account or to receive information
14 concerning administration of the trust.

15 The statement of grounds for removal of the trustee by the
16 court is drawn from the Texas Trust Code and the Restatement.
17 See Tex. Prop. Code Ann. Sec. 113.082(a) (Vernon 1984);
18 Restatement (Second) of Trusts Section 107, comments b-d (1959).
19 If a trustee is removed, another may be appointed to fill the
20 vacancy as provided in Section 4-105.

21 The section does not attempt to catalog every conceivable
22 ground for removal. Subsection (a)(6) instead permits the court
23 to remove a trustee whenever there is good cause. Friction
24 between a trustee and beneficiaries which interferes with the
25 proper administration of the trust, indifference on the part of
26 the trustee, or mediocre service or investment performance may
27 all justify removal if in the best interests of the beneficiaries
28 and not inconsistent with the purposes of the trust.

29 **SECTION 4-108. DELIVERY OF PROPERTY BY FORMER TRUSTEE.**

30 Unless a cotrustee remains in office, a former trustee, or if the
31 trustee's appointment terminated because of death or disability,
32 the former trustee's personal representative or guardian or
33 conservator, is responsible for and has the powers necessary to
34 protect the trust property and other powers essential to the
35 trust's administration until the property is delivered to a
36 successor trustee or a person appointed by the Court to receive
37 the property.

1 **Comment.**

2 Source: CPC Section 15644; UPC Section 3-609.

3 This section clarifies that a trustee who has resigned or is
4 removed has the powers needed to complete the trustee's remaining
5 duties. Following the lead of the Uniform Probate Code, this
6 section also imposes a similar obligation on the personal
7 representative or guardian or conservator of a deceased or
8 incapacitated trustee. However, the obligation to carry out
9 residual duties of the former trustee applies only if no trustee
10 remains in office. Whether or not a trustee remains in office,
11 the former trustee remains liable for actions or omissions during
12 the trustee's term of office until liability is barred.

13 Section 4-213 requires an accounting whenever there is a
14 change of trustees. Section 4-603 protects third persons who deal
15 in good faith with a former trustee without knowledge that the
16 person is no longer a trustee. See also Sections 4-104 (vacancy
17 in office of trustee), and 4-502(4) (appointment of receiver or
18 temporary trustee upon breach of trust).

19 **SECTION 4-109. COMPENSATION OF TRUSTEE.**

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

23 (b) If the terms of the trust specify the trustee's
24 compensation, the trustee is entitled to be compensated as so
25 provided, except that upon proper showing, the Court may allow
26 more or less compensation:

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

29 (2) if the compensation specified by the terms of the
30 trust would be inequitable or unreasonably low or high; or

31 (3) in extraordinary circumstances calling for
32 equitable relief.

33 **Comment.**

34 Source: CPC Section 15680-15681.

35 Subsection (a) establishes a standard of reasonable

1 compensation. For a list of factors relevant in determining
2 reasonable compensation, see Restatement (Second) of Trusts
3 Section 242 (1959). In setting compensation, the services
4 actually performed and responsibilities assumed by the trustee
5 should be closely examined. For example, an adjustment in
6 compensation may be appropriate if the trustee has delegated
7 significant duties.

8 Subsection (b) permits the reasonable compensation standard
9 to be overridden or clarified by the terms of the trust, subject
10 to the court's inherent equity power to make adjustments downward
11 or upward in appropriate circumstances.

12 Section 4-402(22) grants the trustee authority to fix and
13 pay its compensation without the necessity of prior court review,
14 but without precluding the right of a beneficiary to object to
15 the compensation in a later proceeding.

16 **SECTION 4-110. REPAYMENT FOR EXPENDITURES.** A trustee is
17 entitled to be repaid out of the trust property, with interest as
18 appropriate, for:

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

21 (2) to the extent that they benefitted the trust,
22 expenditures that were not properly incurred in the
23 administration of the trust.

24 **Comment.**

25 Source: CPC Section 15684.

26 A trustee has the authority to expend trust funds as
27 necessary in the administration of the trust, including expenses
28 incurred in the hiring of agents. See Sections 4-402(22) (trustee
29 to pay expenses of administration from trust), and 4-402(26)
30 (trustee may hire agents).

31 Paragraph (1) clarifies that a trustee is entitled to
32 reimbursement from the trust for incurring expenses within the
33 trustee's authority. But a trustee is ordinarily not entitled to
34 reimbursement for incurring unauthorized expenses. Such expenses
35 are normally the personal responsibility of the trustee.

36 Only if the unauthorized expenditures benefitted the trust,
37 as provided in paragraph (2), is the trustee entitled to
38 reimbursement. The purpose of paragraph (2), which is derived
39 from Restatement (Second) of Trusts Section 245, is not to ratify
40 the unauthorized conduct of the trustee, but to prevent the
41 unjust enrichment of the trust. Given this purpose, a court, on

1 grounds of equity, may delay or even deny reimbursement for
2 expenses which benefitted the trust. For a list of factors which
3 the court may wish to take into account in making this
4 determination, see Restatement (Second) of Trusts Section 245
5 comm. g (1959).

6 Reimbursement under this section may include attorney's fees
7 and expenses incurred by the trustee in defending an action.
8 However, unless the court otherwise orders as provided in
9 paragraph (2), a trustee is not entitled to attorney's fees and
10 expenses if it is determined that the trustee breached the trust.
11 See, e.g., Estate of Gilmaker, 38 Cal. Rptr. 270 (Ct. App. 1964);
12 Estate of Vokal, 263 P.2d 64 (Cal. App. 1953).

13 **PART 2.**
14 **FIDUCIARY DUTIES OF TRUSTEE**

15 **SECTION 4-201. DUTY TO ADMINISTER TRUST; ALTERATION BY**
16 **TERMS OF TRUST.**

17 (a) On acceptance of a trust, the trustee shall administer
18 the trust according to the terms of the trust and, except to the
19 extent the terms of the trust provide otherwise, according to
20 this [Act].

21 (b) The terms of the may expand, restrict, eliminate, or
22 otherwise alter the duties prescribed by this [Part], and the
23 trustee may reasonably rely on those terms, but nothing in this
24 [Act] authorizes a trustee to act in bad faith or in disregard of
25 the purposes of the trust or the interest of the beneficiaries.

26 **Comment.**

27 Source: CPC Section 16000.

28 Subsection (a) is drawn in part from Sections 164 and 169 of
29 the Restatement (Second) of Trusts (1959). See also Sections 4-
30 101 (acceptance of trust by trustee), 3-103 (duties owed to
31 persons holding power to revoke), 3-105 (duties owed to persons
32 with presently exercisable general power of appointment), 4-203
33 (trustee's standard of prudence in performing duties). For
34 provisions permitting the beneficiaries to relieve the trustee
35 from liability, see Section 4-506.

36 Subsection (b) clarifies that the trustee's duties

1 prescribed by this Part may be altered by the terms of the trust.
2 However, a trustee may never act in bad faith or without regard
3 to the purposes of the trust or the interests of the
4 beneficiaries. For other provisions on the effect of the terms of
5 the trust, see Sections 4-214 (duties with regard to
6 discretionary powers), 4-301 (prudent investor rule), 4-401
7 (general powers of trustee and fiduciary duties), and 4-505
8 (exculpation of trustee).

9 **SECTION 4-202. DUTY OF LOYALTY; IMPARTIALITY; CONFIDENTIAL**
10 **RELATIONSHIP.**

11 (a) A trustee shall administer the trust solely in the
12 interest of the beneficiaries, and shall act with due regard to
13 their respective interests.

14 (b) Any transaction involving the trust which is affected
15 by a substantial conflict between the trustee's fiduciary and
16 personal interests is voidable by a beneficiary affected by the
17 transaction unless (i) the transaction was expressly authorized
18 by the terms of the trust; (ii) the beneficiary consented to or
19 affirmed the transaction or released the trustee from liability
20 as provided in Section 5-406; or (iii) the transaction is
21 approved by the Court after notice to interested persons. A
22 transaction affected by a substantial conflict between personal
23 and fiduciary interests includes any sale, encumbrance, or other
24 transaction involving the trust property entered into by the
25 trustee, the spouse, descendant, agent, or attorney of a trustee,
26 or corporation or other enterprise in which the trustee has a
27 substantial beneficial interest.

28 (c) A transaction not involving trust property between a
29 trustee and a beneficiary which occurs during the existence of
30 the trust or while the trustee retains significant influence over

1 the beneficiary and from which the trustee obtains an advantage
2 is an abuse of a confidential relationship unless the trustee
3 establishes that the transaction was fair.

4 (d) This section does not apply to (i) an agreement between
5 a trustee and a beneficiary relating to the appointment of the
6 trustee; (ii) the payment of compensation to the trustee, whether
7 by agreement, the terms of the trust, or this [Act]; and (iii) a
8 transaction between a trust and another trust, decedent's or
9 conservatorship estate of which the trustee is a fiduciary if the
10 transaction is fair to the beneficiaries of the trust.

11 **Comment.**

12 Source: CPC Section 16002-16004.

13 Subsection (a) of this section, which recites the trustee's
14 fundamental obligations of loyalty and impartiality, is based on
15 Sections 170(1) and 232 of the Restatement (Second) of Trusts
16 (1959). This section does not attempt to state all aspects of the
17 trustee's duty of loyalty, nor does this Part seek to cover all
18 duties that may exist. See Section 1-103 (common law of trusts).

19 Subsection (b), allowing an interested person to void
20 certain transactions tainted by a conflict of interest, is based
21 on Sections 3-713 and 5-421 of the Uniform Probate Code. Under
22 this subsection, actual proof of a conflict of interest is not
23 required if the transaction involving the trust property was
24 entered into by the trustee or certain of the trustee's
25 affiliates. For such transactions, the trustee will need to
26 obtain the approval of the beneficiaries or the court unless the
27 transaction was authorized by the terms of the trust

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

38 Subsection (d) excepts from the general duty of loyalty
39 sales or other transactions between two or more trusts that have
40 the same trustee, or transactions with a decedent's or
41 conservatorship estate of which the trustee is personal

1 representative or conservator. See Restatement (Second) of Trusts
2 Sec. 170, comm. r (1959). The trustee need not give advance
3 notice of the transaction to the beneficiaries unless required by
4 some other provision. See, e.g., Section 4-213(b) (duty to inform
5 beneficiaries in advance of certain proposed sales). For a
6 provision limiting the need to give notice, see Section 6-305
7 (notice of judicial settlement). For provisions permitting the
8 beneficiaries to relieve the trustee from liability, see Section
9 4-506. For other fundamental duties of the trustee, see Sections
10 4-201(a) (duty to administer trust), and 4-203 (standard of
11 prudence).

12 For a specific application of the duty of loyalty within the
13 context of trust investment and management, see Section 4-305.

14 **SECTION 4-203. STANDARD OF PRUDENCE.** A trustee shall
15 administer the trust with the reasonable care, skill, and caution
16 as a prudent person would, by considering the purposes, terms,
17 distribution requirements, and other circumstances of the trust.

18 **Comment.**

19 The duty to administer the trust with prudence is a
20 fundamental duty of the trustee, which is not affected by whether
21 the trustee receives compensation but which may be altered by the
22 terms of the trust. See Section 4-201(b) (alteration of duties by
23 terms of the trust). For a specialized application of this
24 standard within the context of trust investment and management,
25 see Section 4-301 (prudent investor rule). This section would be
26 applicable to matters such as determining whether to make
27 discretionary distributions, communicating with beneficiaries,
28 and relations with creditors.

29 **SECTION 4-204. COSTS OF ADMINISTRATION.** A trustee may only
30 incur costs that are reasonable in relation to the trust
31 property, purposes, and other circumstances of the trust.

32 **Comment.**

33 Source: Unif. Prudent Investor Act Sec. 7.

34 This section is consistent with the rules concerning costs
35 in Section 227(c) (3) of the Restatement (Third) of Trusts:
36 Prudent Investor Rule (1992). For related rules concerning
37 reimbursement and compensation of trustees, see Sections 4-109
38 and 4-110. The duty to minimize costs applies to delegation to
39 agents as well as to other aspects of trust administration. In
40 deciding whether and how to delegate, the trustee must be alert
41 to balancing projected benefits against the likely costs. The

1 trustee must also be alert to adjusting compensation for
2 functions which the trustee has delegated to others in order to
3 protect the beneficiary against "double dipping."

4 For a specific application of the duty to minimize costs
5 within the context of trust investment and management, see
6 Section 4-307.

7 **SECTION 4-205. SPECIAL SKILLS.**

8 (a) A trustee shall apply the full extent of the trustee's
9 skills.

10 (b) If a settlor, in selecting a trustee, has relied on the
11 trustee's representation of having special skills, the trustee
12 shall comply with the standard of the skills represented.

13 **Comment.**

14 Source: CPC Section 16014.

15 Subsection (b) is similar to the last part of Section 7-302
16 of the Uniform Probate Code (1977) and the last part of Section
17 174 of the Restatement (Second) of Trusts (1959). Subsection (b)
18 does not limit the duty provided in subsection (a). Thus, the
19 nature of the trustee's representations to the settlor leading up
20 to the selection of the trustee does not affect the trustee's
21 duty to use the full extent of the trustee's skills.

22 **SECTION 4-206. DELEGATION.**

23 (a) A trustee may not delegate to an agent or cotrustee the
24 entire administration of the trust or the responsibility to make
25 or participate in the making of decisions with respect to
26 discretionary distributions, but a trustee may otherwise delegate
27 the performance of functions that a prudent trustee of comparable
28 skills might delegate under similar circumstances.

29 (b) The trustee shall exercise reasonable care, skill, and
30 caution in:

31 (1) selecting an agent;

32 (2) establishing the scope and terms of a delegation,

1 consistent with the purposes and terms of the trust;

2 (3) periodically reviewing an agent's overall
3 performance and compliance with the terms of the delegation; and

4 (4) redressing an action or decision of an agent which
5 would constitute a breach of trust if performed by the trustee.

6 (c) A trustee who complies with the requirements of
7 subsections (a)-(b) is not liable to the beneficiaries or to the
8 trust for the decisions or actions of the agent to whom a
9 function was delegated.

10 (d) In performing a delegated function, an agent shall
11 exercise reasonable care to comply with the terms of the
12 delegation.

13 (e) By accepting the delegation of a trust function from the
14 trustee of a trust that is subject to the law of this State, an
15 agent submits to the jurisdiction of the courts of this State.

16 **Comment.**

17 This section, following the lead of the Uniform Prudent
18 Investor Act, codified at Article 4, Part 3 of this Act,
19 eliminates the traditional emphasis against delegation by a
20 trustee and the often futile attempt to distinguish between
21 specified ministerial functions, which were delegable, versus
22 discretionary functions, which the trustee was required
23 personally to perform. See Unif. Prudent Investor Act Sec. 9
24 comm.; and John H. Langbein, Reversing the Nondelegation Rule of
25 Trust-Investment Law, 59 Mo. L. Rev. 105 (1994).

26 Under this section, the emphasis is instead placed on
27 encouraging and protecting the trustee in making delegations
28 appropriate to the facts and circumstances of the particular
29 trust. Under Subsection (a), the only functions which a trustee
30 is absolutely forbidden to delegate is the entire administration
31 of the trust and the obligation to make or participate, with a
32 cotrustee, in the making of decisions with respect to
33 discretionary distributions. Allowing for delegation of the
34 entire administration would make the appointment of the trustee a
35 useless gesture. Delegation of authority to make discretionary
36 distributions is forbidden because this is the one function which

1 more than any other is intrinsic to the office of trustee.
2 However, while the trustee must make the final decision, the
3 trustee may of course seek appropriate advice.

4 Whether other functions of the trustee are properly
5 delegable is not based on some supposedly bright-line test
6 between ministerial and discretionary functions but rather on
7 whether it is a function that a prudent trustee might delegate
8 under similar circumstances. For example, delegation of the trust
9 accounting function might be proper and prudent for a family
10 member trustee but improper for a corporate trustee which holds
11 itself out as having expertise in and which is being compensated
12 for this activity.

13 This section does not mandate delegation or hold a trustee
14 liable for failing to delegate. However, such liability may be
15 imposed under some other section if the trustee, due to the
16 failure to delegate, is unable to perform in accordance with the
17 required standards of a trustee. See, e.g., Sections 4-203
18 (trustee's standard of prudence in performing duties), 4-301
19 (prudent investor rule).

20 This section applies to delegation both to agents and
21 cotrustees. In the case of delegation to a cotrustee, this
22 section should be read together with Section 4-208, which
23 requires a cotrustee to participate in trust administration and
24 to take reasonable steps to prevent or redress a breach of trust
25 committed by another trustee. Whether a trustee may delegate to a
26 cotrustee functions which cannot be delegated to an agent and
27 vice versa, will depend on the facts and circumstances of the
28 particular trust.

29 Under subsection (b) (3), the duty to review the agent's
30 overall performance includes the periodic evaluation of the
31 continued need for and appropriateness of the delegation of
32 authority. In particular circumstances, the trustee may need to
33 terminate the delegation to comply with the duty under subsection
34 (b) (1) (duty to use reasonable care, skill, and caution in
35 selecting agent).

36 For provisions permitting beneficiaries to relieve the
37 trustee from liability, see Section 4-506. See also Sections 4-
38 103 (actions by cotrustees), 4-201 (duties subject to control by
39 terms of the trust), 4-203 (trustee's standard of prudence in
40 performing duties), 4-402(13) (trustee may give proxies to vote
41 shares), 4-402(16) (authority to delegate to protective committee
42 in a reorganization), 4-402(26) (power to hire agents of trust).

43 Delegation to a cotrustee is different than a cotrustee's
44 assumption of duties due to a trustee's inability to perform the
45 office. Under 4-103(3), a cotrustee, without a delegation, may
46 assume the functions of another trustee who is unavailable to
47 perform duties because of absence, illness, or other temporary
48 incapacity.

49 **SECTION 4-207. DIRECTORY POWERS.**

50 (a) If the terms of the trust grant a person other than the

1 trustee power to direct certain actions of the trustee, the
2 trustee shall act in accordance with the exercise of the power
3 unless an attempted exercise violates the terms of the trust or
4 the trustee is aware that the attempted exercise violates a
5 fiduciary duty which the person owes the beneficiaries of the
6 trust.

7 (b) The holder of a directory power who violates a
8 fiduciary duty owed to the beneficiaries is liable for any loss
9 which results.

10 **Comment.**

11 This section is based on Restatement (Second) of Trusts
12 Section 185 and comments. Directory powers in trust instruments
13 usually relate either to choice of investment or management of
14 closely-held business interests. A directory power must be
15 distinguished from a veto power. Under a directory power, action
16 is initiated and is within the control of a third party and the
17 trustee usually has no responsibility other than to carry out the
18 direction when made. But if a third party holds a veto power, the
19 trustee is responsible for initiating the decision, subject to
20 the third party's approval. A trustee who administers a trust
21 subject to a veto power occupies a position akin to that of a
22 cotrustee and is responsible for taking appropriate action if the
23 third party's refusal to consent would result in a breach of
24 trust. See Restatement (Second) of Trusts Sec. 185 comm. g
25 (1959); Section 4-208 (duties of cotrustees).

26 Directory powers take a variety of forms. Frequently, the
27 person holding the power is directing the investment of the
28 holder's own beneficial interest. Such self-directed accounts are
29 particularly prevalent among trusts holding interests in employee
30 plans or individual retirement accounts. But for the type of
31 donative trusts subject to this Act, the holder is frequently
32 acting on behalf of others and may not even be a beneficiary of
33 the trust. In that event, the holder, as provided in subsection
34 (b), is under a fiduciary duty to the beneficiaries and liable
35 for any loss due to the breach. Furthermore, the trustee, as
36 provided in subsection (a), if aware that a breach of duty has
37 occurred, is under an obligation not to honor the holder's
38 direction.

39 In the case of a revocable trust, this section is
40 subordinate to Section 3-103(3), which requires a trustee to
41 follow the written direction of the holder of the power to
42 revoke. This would require the settlor to follow a written

1 direction of the holder which might be contrary to the direction
2 of the person to whom the settlor has granted a directory power.

3 **SECTION 4-208. COTRUSTEES.**

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

6 (1) participate in the administration of the trust; and

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

10 (b) A trustee who complies with subsection (a) is not liable
11 to the beneficiaries or to the trust for the decisions or actions
12 of a cotrustee.

13 **Comment.**

14 Source: CPC Section 16013.

15 This section codifies the substance of Sections 184 and 224
16 of the Restatement (Second) of Trusts (1959). Unlike the
17 Restatement, however, this section combines in one place both the
18 duties of the trustee and the provision on exemption from
19 liability for the actions of a cotrustee. This section should be
20 read in connection with Section 4-206, which permits a trustee to
21 delegate certain functions to a cotrustee. At a minimum, however,
22 a trustee must participate in decisions with respect to
23 discretionary distributions. The exact extent to which a trustee
24 must participate in administration beyond this minimum will
25 depend on the facts of the particular case. This section is also
26 subject to Section 4-201, which permits the settlor to allocate
27 the functions of the cotrustees in the terms of the trust.

28 If a cotrustee is also a settlor under a revocable trust, a
29 cotrustee who is not a settlor has a duty to follow the
30 directions of the settlor-cotrustee. See Section 3-103(5). That
31 duty supersedes the general duty under this section.

32 For provisions permitting beneficiaries to relieve the
33 trustee from liability, see Section 4-506.

34 **SECTION 4-209. CONTROL AND SAFEGUARDING OF TRUST PROPERTY.**

35 A trustee shall take reasonable steps under the circumstances to
36 take control of and to safeguard the trust property.

1 **Comment.**

2 Source: CPC Section 16006.

3 This section codifies the substance of Sections 175 and 176
4 of the Restatement (Second) of Trusts (1959). For provisions
5 permitting the beneficiaries to relieve the trustee from
6 liability, see Section 4-506. See also Sections 4-201 (duties
7 subject to control by terms of the trust), 4-203 (trustee's
8 standard of prudence in performing duties), 4-402(6) (power to
9 abandon trust property), 4-402(19) (power to insure trust
10 property).

11 **SECTION 4-210. SEPARATION AND IDENTIFICATION OF TRUST**

12 **PROPERTY.** A trustee shall:

13 (1) keep the trust property separate from other property of
14 the trustee; and

15 (2) cause the trust property to be designated in such a
16 manner that the interest of the trust clearly appears.

17 **Comment.**

18 Source: CPC Section 16009.

19 This section is derived from Section 179 of the Restatement
20 (Second) of Trusts (1959), except that this section permits the
21 joint investment of trust funds with the funds of others, but not
22 the trustee's own, as long as the interest of the trust clearly
23 appears. For provisions permitting beneficiaries to relieve the
24 trustee from liability, see Section 4-506. See also Sections 4-
25 201 (duties subject to control by terms of the trust), 4-203
26 (trustee's standard of prudence in performing duties), and 4-
27 402(17), which in conformity with this section, allows trustees
28 to hold property in nominee form.

29 **SECTION 4-211. ENFORCEMENT AND DEFENSE OF CLAIMS AND**

30 **ACTIONS.** A trustee shall take reasonable steps to enforce claims
31 that are part of the trust property and to defend against actions
32 that may result in a loss to the trust.

33 **Comment.**

34 Source: CPC Section 16010-16011.

35 This section codifies the substance of Sections 177 and 178
36 of the Restatement (Second) of Trusts (1959). Under this section,
37 it may not be reasonable to enforce a claim depending upon the

1 **SECTION 4-213. DUTY TO INFORM AND ACCOUNT.**

2 (a) A trustee shall keep the beneficiaries of the trust
3 reasonably informed of the administration of the trust.

4 (b) Within [30] days after accepting the office of trustee,
5 the trustee shall inform the beneficiaries of the acceptance.
6 Within [30] days after the death of the holder of a power to
7 revoke a trust, the trustee shall inform the beneficiaries of
8 their respective interests in the trust.

9 (c) A trustee shall inform the beneficiaries in advance of a
10 transaction affecting trust property comprising a significant
11 portion of the value of the trust and whose fair market value is
12 not readily ascertainable.

13 (d) On reasonable request of a beneficiary, a trustee shall
14 provide the beneficiary with a copy of the trust instrument and
15 with information about matters of administration relevant to the
16 beneficiary's interest.

17 (e) A trustee shall prepare and send to the beneficiaries an
18 account of the trust property, liabilities, receipts, and
19 disbursements at least annually, at the termination of the trust,
20 and upon a change of a trustee. An accounting on behalf of a
21 former trustee shall be prepared by the former trustee, or if the
22 trustee's appointment terminated by reason of death or
23 incapacity, by the former trustee's personal representative or
24 guardian or conservator.

25 (f) Copies of accountings and other information required
26 under this section shall be sent to:

1 (1) the adult beneficiaries as defined in Section 4-
2 105(c); and

3 (2) each beneficiary who has delivered to the trustee
4 or other fiduciary a written request for a copy of the account or
5 other information.

6 (g) An accounting and other information required under this
7 section may be waived if the persons entitled to a copy consent
8 in writing.

9 **Comment.**

10 Source: CPC Section 16060-16062, 16064; S.D. Codified Laws
11 Ann. Sec. 29A-3-715(b).

12 Subsection (a) is based on the first sentence of Section 7-
13 303 of the Uniform Probate Code (1977). The trustee is under a
14 duty to communicate to the beneficiary information about the
15 administration of the trust that is reasonably necessary to
16 enable the beneficiary to enforce the beneficiary's rights under
17 the trust or to prevent or redress a breach of trust. See
18 Restatement (Second) of Trusts Section 173, comment c (1959).
19 Ordinarily, the trustee is not under a duty to furnish
20 information to the beneficiary in the absence of a request for
21 the information. See *id.*, comment d. Thus, the general duty
22 provided in subsection (a) is ordinarily satisfied by complying
23 with subsections (d) and (e) unless there are special
24 circumstances requiring particular information to be reported to
25 beneficiaries. However, if the trustee is dealing with the
26 beneficiary on the trustee's own account, the trustee has a duty
27 to communicate material facts relating to the transaction that
28 the trustee knows or should know. The trustee also has a duty to
29 communicate material facts that affect the beneficiary's interest
30 and which the trustee knows the beneficiary does not know and
31 that the beneficiary needs to know for protection in dealing with
32 a third person. See *id.*

33 Furthermore, under subsection (c), the trustee must notify
34 the beneficiary in advance of certain proposed sales. This
35 subsection, which is based on a provision drawn from South Dakota
36 law, is designed to codify but make more precise the fiduciary
37 duty delineated in such cases as *Allard v. Pacific National Bank*,
38 663 P. 2d 104 (Wash. 1983), in which the court surcharged a
39 trustee for failing to give the beneficiaries advance notice of
40 the proposed sale of a parcel of real estate that was the sole
41 asset of the trust. Cases subsequent to *Allard* have also extended
42 this duty to the sale of an interest in a closely-held business,
43 and this subsection extends the duty to sales of tangible

1 personal property.

2 Subsection (d) is based in part on Section 7-303(b) of the
3 Uniform Probate Code, although this subsection, unlike the UPC,
4 obligates the trustee upon request to deliver a complete copy of
5 the trust instrument. The UPC lets the trustee decide which
6 portions of the trust instrument are relevant to the
7 beneficiary's interest. The availability of information on
8 request under this section does not negate the affirmative duty
9 of the trustee to provide information under the other
10 subsections. During the time that a revocable trust can be
11 revoked, the right to request information pursuant to this
12 section does not belong to the beneficiaries but only to the
13 settlor or other person having the power to revoke. See Section
14 3-103.

15 Subsection (g), which allows accountings and other required
16 information to be waived upon written consent, is derived from
17 South Dakota law.

18 **SECTION 4-214. DUTIES WITH REGARD TO DISCRETIONARY POWERS.** A

19 trustee shall exercise a discretionary power within the bounds of
20 reasonable judgment and in accordance with applicable fiduciary
21 principles and the terms of the trust. Notwithstanding the use of
22 such terms as "absolute," "sole," or "uncontrolled" in the grant
23 of discretion, a trustee shall act in accordance with fiduciary
24 principles and may not act in bad faith or in disregard of the
25 purposes of the trust or the power. Absent an abuse of
26 discretion, a trustee's exercise of discretion is not subject to
27 control by a court.

28 **Comment.**

29 This section, which applies to both powers of management and
30 powers granted with respect to distribution, is derived from
31 Restatement (Second) of Trusts Section 187 (1959). Despite the
32 breadth of discretion purportedly granted by the wording of the
33 trust, a grant of discretion is never absolute. A grant of
34 discretion establishes a range within which the trustee may act.
35 The greater the grant of discretion, the broader the range. A
36 trustee's action must always be in good faith, not induced by an
37 improper motive, and to some extent reasonable, but with more
38 flexibility in the concept of reasonableness the greater the
39 discretion given. See Edward C. Halbach, Jr., Problems of

1 Discretion in Discretionary Trusts, 61 Colum. L. Rev. 1425
2 (1961).

3 For the rights of creditors with respect to discretionary
4 trusts, see Sections 2-303. For the remedies available for breach
5 of trust, see Section 4-502.

6 **PART 3**
7 **UNIFORM PRUDENT INVESTOR ACT**

8 **PREFATORY NOTE**

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

17 This Act draws upon the revised standards for prudent trust
18 investment promulgated by the American Law Institute in its
19 Restatement (Third) of Trusts: Prudent Investor Rule (1992)
20 [hereinafter Restatement of Trusts 3d: Prudent Investor Rule;
21 also referred to as 1992 Restatement].

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

26 (1) The standard of prudence is applied to any
27 investment as part of the total portfolio, rather than to
28 individual investments. In the trust setting the term
29 "portfolio" embraces all the trust's assets. UPIA § 2(b).

30 (2) The tradeoff in all investing between risk and
31 return is identified as the fiduciary's central
32 consideration. UPIA § 2(b).

33 (3) All categoric restrictions on types of investments
34 have been abrogated; the trustee can invest in anything that
35 plays an appropriate role in achieving the risk/return
36 objectives of the trust and that meets the other
37 requirements of prudent investing. UPIA § 2(e).

38 (4) The long familiar requirement that fiduciaries
39 diversify their investments has been integrated into the
40 definition of prudent investing. UPIA § 3.

41 (5) The much criticized former rule of trust law

1 forbidding the trustee to delegate investment and management
2 functions has been reversed. Delegation is now permitted,
3 subject to safeguards. UPIA § 9.

4 **Literature.** These changes in trust investment law have been
5 presaged in an extensive body of practical and scholarly writing.
6 See especially the discussion and reporter's notes by Edward C.
7 Halbach, Jr., in Restatement of Trusts 3d: Prudent Investor Rule
8 (1992); see also Edward C. Halbach, Jr., Trust Investment Law in
9 the Third Restatement, 27 Real Property, Probate & Trust J. 407
10 (1992); Bevis Longstreth, Modern Investment Management and the
11 Prudent Man Rule (1986); Jeffrey N. Gordon, The Puzzling
12 Persistence of the Constrained Prudent Man Rule, 62 N.Y.U.L. Rev.
13 52 (1987); John H. Langbein & Richard A. Posner, The Revolution
14 in Trust Investment Law, 62 A.B.A.J. 887 (1976); Note, The
15 Regulation of Risky Investments, 83 Harvard L. Rev. 603 (1970).
16 A succinct account of the main findings of modern portfolio
17 theory, written for lawyers, is Jonathan R. Macey, An
18 Introduction to Modern Financial Theory (1991) (American College
19 of Trust & Estate Counsel Foundation). A leading introductory
20 text on modern portfolio theory is R.A. Brealey, An Introduction
21 to Risk and Return from Common Stocks (2d ed. 1983).

22 **Legislation.** Most states have legislation governing trust-
23 investment law. This Act promotes uniformity of state law on the
24 basis of the new consensus reflected in the Restatement of Trusts
25 3d: Prudent Investor Rule. Some states have already acted.
26 California, Delaware, Georgia, Minnesota, Tennessee, and
27 Washington revised their prudent investor legislation to
28 emphasize the total-portfolio standard of care in advance of the
29 1992 Restatement. These statutes are extracted and discussed in
30 Restatement of Trusts 3d: Prudent Investor Rule § 227, reporter's
31 note, at 60-66 (1992).

32 Drafters in Illinois in 1991 worked from the April 1990
33 "Proposed Final Draft" of the Restatement of Trusts 3d: Prudent
34 Investor Rule and enacted legislation that is closely modeled on
35 the new Restatement. 760 ILCS § 5/5 (prudent investing); and
36 § 5/5.1 (delegation) (1992). As the Comments to this Uniform
37 Prudent Investor Act reflect, the Act draws upon the Illinois
38 statute in several sections. Virginia revised its prudent
39 investor act in a similar vein in 1992. Virginia Code § 26-45.1
40 (prudent investing) (1992). Florida revised its statute in 1993.
41 Florida Laws, ch. 93-257, amending Florida Statutes § 518.11
42 (prudent investing) and creating § 518.112 (delegation). New
43 York legislation drawing on the new Restatement and on a
44 preliminary version of this Uniform Prudent Investor Act was
45 enacted in 1994. N.Y. Assembly Bill 11683-B, Ch. 609 (1994),
46 adding Estates, Powers and Trusts Law § 11-2.3 (Prudent Investor
47 Act).

48 **Remedies.** This Act does not undertake to address issues of
49 remedy law or the computation of damages in trust matters.

1 Remedies are the subject of a reasonably distinct body of
2 doctrine. See generally Restatement (Second) of Trusts
3 §§ 197-226A (1959) [hereinafter cited as Restatement of Trusts
4 2d; also referred to as 1959 Restatement].

5 **Implications for charitable and pension trusts.** This Act is
6 centrally concerned with the investment responsibilities arising
7 under the private gratuitous trust, which is the common vehicle
8 for conditioned wealth transfer within the family. Nevertheless,
9 the prudent investor rule also bears on charitable and pension
10 trusts, among others. "In making investments of trust funds the
11 trustee of a charitable trust is under a duty similar to that of
12 the trustee of a private trust." Restatement of Trusts 2d § 389
13 (1959). The Employee Retirement Income Security Act (ERISA), the
14 federal regulatory scheme for pension trusts enacted in 1974,
15 absorbs trust-investment law through the prudence standard of
16 ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a). The Supreme Court has
17 said: "ERISA's legislative history confirms that the Act's
18 fiduciary responsibility provisions 'codif[y] and mak[e]
19 applicable to [ERISA] fiduciaries certain principles developed in
20 the evolution of the law of trusts.'" *Firestone Tire & Rubber*
21 *Co. v. Bruch*, 489 U.S. 101, 110-11 (1989) (footnote omitted).

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

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

48 **Relationship to Uniform Trust Act.** The text of UPIA below is
49 identical to that of the free-standing Act except for minor

1 revisions to conform terminology.

2 **SECTION 4-301. PRUDENT INVESTOR RULE.**

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

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

12 **Comment.**

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

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

23 **Prior legislation.** The Model Prudent Man Rule Statute
24 (1942), sponsored by the American Bankers Association, undertook
25 to codify the language of the *Amory* case. See Mayo A. Shattuck,
26 *The Development of the Prudent Man Rule for Fiduciary Investment*
27 *in the United States in the Twentieth Century*, 12 *Ohio State L.J.*
28 491, at 501 (1951); for the text of the model act, which inspired
29 many state statutes, see *id.* at 508-09. Another prominent
30 codification of the *Amory* standard is Uniform Probate Code
31 § 7-302 (1969), which provides that "the trustee shall observe
32 the standards in dealing with the trust assets that would be
33 observed by a prudent man dealing with the property of another .
34 . . ."

35 Congress has imposed a comparable prudence standard for the
36 administration of pension and employee benefit trusts in the
37 Employee Retirement Income Security Act (ERISA), enacted in 1974.

1 ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a), provides that "a
2 fiduciary shall discharge his duties with respect to a plan
3 solely in the interest of the participants and beneficiaries and
4 . . . with the care, skill, prudence, and diligence under the
5 circumstances then prevailing that a prudent man acting in a like
6 capacity and familiar with such matters would use in the conduct
7 of an enterprise of like character and with like aims"

8 **Prior Restatement.** The Restatement of Trusts 2d (1959) also
9 tracked the language of the Amory case: "In making investments of
10 trust funds the trustee is under a duty to the beneficiary . . .
11 to make such investments and only such investments as a prudent
12 man would make of his own property having in view the
13 preservation of the estate and the amount and regularity of the
14 income to be derived" Restatement of Trusts 2d § 227
15 (1959).

16 **Objective standard.** The concept of prudence in the judicial
17 opinions and legislation is essentially relational or
18 comparative. It resembles in this respect the "reasonable
19 person" rule of tort law. A prudent trustee behaves as other
20 trustees similarly situated would behave. The standard is,
21 therefore, objective rather than subjective. Sections 4-302
22 through 4-309 identify the main factors that bear on prudent
23 investment behavior.

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

30 **SECTION 4-302. STANDARD OF CARE; PORTFOLIO STRATEGY; RISK**
31 **AND RETURN OBJECTIVES.**

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

37 (b) A trustee's investment and management decisions
38 respecting individual assets must be evaluated not in isolation

1 but in the context of the trust portfolio as a whole and as a
2 part of an overall investment strategy having risk and return
3 objectives reasonably suited to the trust.

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

7 (1) general economic conditions;

8 (2) the possible effect of inflation or deflation;

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

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

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

17 (6) other resources of the beneficiaries;

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

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

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

26 (e) A trustee may invest in any kind of property or type of

1 investment consistent with the standards of this [Act].

2 (f) A trustee who has special skills or expertise, or is
3 named trustee in reliance upon the trustee's representation that
4 the trustee has special skills or expertise, has a duty to use
5 those special skills or expertise.

6 **Comment.**

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

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

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

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

40 Subsection (b) follows Restatement of Trusts 3d: Prudent
41 Investor Rule § 227(a), which provides that the standard of
42 prudent investing "requires the exercise of reasonable care,
43 skill, and caution, and is to be applied to investments not in

1 isolation but in the context of the trust portfolio and as a part
2 of an overall investment strategy, which should incorporate risk
3 and return objectives reasonably suitable to the trust."

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

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

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

27 Subsection (c)(8), allowing the trustee to take into account
28 any preferences of the beneficiaries respecting heirlooms or
29 other prized assets, derives from the Illinois act, 760 ILCS
30 § 5/5(a)(4) (1992).

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

36 **Duty to investigate.** Subsection (d) carries forward the
37 traditional responsibility of the fiduciary investor to examine
38 information likely to bear importantly on the value or the
39 security of an investment -- for example, audit reports or
40 records of title. E.g., *Estate of Collins*, 72 Cal. App. 3d 663,
41 139 Cal. Rptr. 644 (1977) (trustees lent on a junior mortgage on
42 unimproved real estate, failed to have land appraised, and
43 accepted an unaudited financial statement; held liable for
44 losses).

45 **Abrogating categoric restrictions.** Subsection (e) clarifies
46 that no particular kind of property or type of investment is
47 inherently imprudent. Traditional trust law was encumbered with
48 a variety of categoric exclusions, such as prohibitions on junior

1 mortgages or new ventures. In some states legislation created
2 so-called "legal lists" of approved trust investments. The
3 universe of investment products changes incessantly. Investments
4 that were at one time thought too risky, such as equities, or
5 more recently, futures, are now used in fiduciary portfolios. By
6 contrast, the investment that was at one time thought ideal for
7 trusts, the long-term bond, has been discovered to import a level
8 of risk and volatility -- in this case, inflation risk -- that
9 had not been anticipated. Accordingly, subsection (e) follows
10 Restatement of Trusts 3d: Prudent Investor Rule in abrogating
11 categoric restrictions. The Restatement says: "Specific
12 investments or techniques are not per se prudent or imprudent.
13 The riskiness of a specific property, and thus the propriety of
14 its inclusion in the trust estate, is not judged in the abstract
15 but in terms of its anticipated effect on the particular trust's
16 portfolio." Restatement of Trusts 3d: Prudent Investor Rule
17 § 227, Comment f, at 24 (1992). The premise of subsection (e) is
18 that trust beneficiaries are better protected by the emphasis on
19 close attention to risk/return objectives as prescribed in
20 subsection (b) than in attempts to identify categories of
21 investment that are per se prudent or imprudent.

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

27 The abolition of categoric restrictions against types of
28 investment in no way alters the trustee's conventional duty of
29 loyalty, which is reiterated in Section 4-305. For example, were
30 the trustee to invest in a second mortgage on a piece of real
31 property owned by the trustee, the investment would be wrongful
32 on account of the trustee's breach of the duty to abstain from
33 self-dealing, even though the investment would no longer
34 automatically offend the former categoric restriction against
35 fiduciary investments in junior mortgages.

36 **Professional fiduciaries.** The distinction taken in
37 subsection (f) between amateur and professional trustees is
38 familiar law. The prudent investor standard applies to a range
39 of fiduciaries, from the most sophisticated professional
40 investment management firms and corporate fiduciaries, to family
41 members of minimal experience. Because the standard of prudence
42 is relational, it follows that the standard for professional
43 trustees is the standard of prudent professionals; for amateurs,
44 it is the standard of prudent amateurs. Restatement of Trusts 2d
45 § 174 (1959) provides: "The trustee is under a duty to the
46 beneficiary in administering the trust to exercise such care and
47 skill as a man of ordinary prudence would exercise in dealing
48 with his own property; and if the trustee has or procures his
49 appointment as trustee by representing that he has greater skill
50 than that of a man of ordinary prudence, he is under a duty to
51 exercise such skill." Case law strongly supports the concept of

1 the higher standard of care for the trustee representing itself
2 to be expert or professional. See Annot., Standard of Care
3 Required of Trustee Representing Itself to Have Expert Knowledge
4 or Skill, 91 A.L.R. 3d 904 (1979) & 1992 Supp. at 48-49.

5 The UPIA Drafting Committee declined the suggestion that the
6 Act should create an exception to the prudent investor rule (or
7 to the diversification requirement of Section 4-303 in the case
8 of smaller trusts. The Committee believes that subsections (b)
9 and (c) emphasize factors that are sensitive to the traits of
10 small trusts; and that subsection (f) adjusts helpfully for the
11 distinction between professional and amateur trusteeship.
12 Furthermore, it is always open to the settlor of a trust under
13 Section 4-301(b) to reduce the trustee's standard of care if the
14 settlor deems such a step appropriate. The official comments to
15 the 1992 Restatement observe that pooled investments, such as
16 mutual funds and bank common trust funds, are especially suitable
17 for small trusts. Restatement of Trusts 3d: Prudent Investor
18 Rule § 227, Comments h, m, at 28, 51; reporter's note to Comment
19 g, id. at 83.

20 **Matters of proof.** Although virtually all express trusts are
21 created by written instrument, oral trusts are known, and
22 accordingly, this Act presupposes no formal requirement that
23 trust terms be in writing. When there is a written trust
24 instrument, modern authority strongly favors allowing evidence
25 extrinsic to the instrument to be consulted for the purpose of
26 ascertaining the settlor's intent. See Uniform Probate Code
27 § 2-601 (1990), Comment; Restatement (Third) of Property:
28 Donative Transfers (Preliminary Draft No. 2, ch. 11, Sept. 11,
29 1992).

30 **SECTION 4-303. DIVERSIFICATION.** A trustee shall diversify
31 the investments of the trust unless the trustee reasonably
32 determines that, because of special circumstances, the purposes
33 of the trust are better served without diversifying.

34 **Comment.**

35 The language of this section derives from Restatement of
36 Trusts 2d § 228 (1959). ERISA insists upon a comparable rule for
37 pension trusts. ERISA § 404(a)(1)(C), 29 U.S.C. § 1104(a)(1)(C).
38 Case law overwhelmingly supports the duty to diversify. See
39 Annot., Duty of Trustee to Diversify Investments, and Liability
40 for Failure to Do So, 24 A.L.R. 3d 730 (1969) & 1992 Supp. at
41 78-79.

42 The 1992 Restatement of Trusts takes the significant step of
43 integrating the diversification requirement into the concept of
44 prudent investing. Section 227(b) of the 1992 Restatement treats
45 diversification as one of the fundamental elements of prudent

1 investing, replacing the separate section 228 of the Restatement
2 of Trusts 2d. The message of the 1992 Restatement, carried
3 forward in this section, is that prudent investing ordinarily
4 requires diversification.

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

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

24 Modern portfolio theory divides risk into the categories of
25 "compensated" and "uncompensated" risk. The risk of owning
26 shares in a mature and well-managed company in a settled industry
27 is less than the risk of owning shares in a start-up high-
28 technology venture. The investor requires a higher expected
29 return to induce the investor to bear the greater risk of
30 disappointment associated with the start-up firm. This is
31 compensated risk -- the firm pays the investor for bearing the
32 risk. By contrast, nobody pays the investor for owning too few
33 stocks. The investor who owned only international oils in 1973
34 was running a risk that could have been reduced by having
35 configured the portfolio differently -- to include investments in
36 different industries. This is uncompensated risk -- nobody pays
37 the investor for owning shares in too few industries and too few
38 companies. Risk that can be eliminated by adding different
39 stocks (or bonds) is uncompensated risk. The object of
40 diversification is to minimize this uncompensated risk of having
41 too few investments. "As long as stock prices do not move
42 exactly together, the risk of a diversified portfolio will be
43 less than the average risk of the separate holdings." R.A.
44 Brealey, An Introduction to Risk and Return from Common Stocks
45 103 (2d ed. 1983).

46 There is no automatic rule for identifying how much
47 diversification is enough. The 1992 Restatement says:
48 "Significant diversification advantages can be achieved with a
49 small number of well-selected securities representing different
50 industries Broader diversification is usually to be
51 preferred in trust investing," and pooled investment vehicles

1 "make thorough diversification practical for most trustees."
2 Restatement of Trusts 3d: Prudent Investor Rule § 227, General
3 Note on Comments e-h, at 77 (1992). See also Macey, supra, at
4 23-24; Brealey, supra, at 111-13.

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

14 Most states have legislation authorizing common trust funds;
15 see 3 Austin W. Scott & William F. Fratcher, The Law of Trusts
16 § 227.9, at 463-65 n.26 (4th ed. 1988) (collecting citations to
17 state statutes). As of 1992, 35 states and the District of
18 Columbia had enacted the Uniform Common Trust Fund Act (UCTFA)
19 (1938), overcoming the rule against commingling trust assets and
20 expressly enabling banks and trust companies to establish common
21 trust funds. 7 Uniform Laws Ann. 1992 Supp. at 130 (schedule of
22 adopting states). The Prefatory Note to the UCTFA explains: "The
23 purposes of such a common or joint investment fund are to
24 diversify the investment of the several trusts and thus spread
25 the risk of loss, and to make it easy to invest any amount of
26 trust funds quickly and with a small amount of trouble." 7
27 Uniform Laws Ann. 402 (1985).

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

36 **SECTION 4-304. DUTIES AT INCEPTION OF TRUSTEESHIP.** Within
37 a reasonable time after accepting a trusteeship or receiving
38 trust property, a trustee shall review the trust property and
39 make and implement decisions concerning the retention and
40 disposition of assets, in order to bring the trust portfolio into
41 compliance with the purposes, terms, distribution requirements,
42 and other circumstances of the trust, and with the requirements

1 of this [Part].

2 **Comment.**

3 This section, requiring the trustee to dispose of unsuitable
4 assets within a reasonable time, is old law, codified in
5 Restatement of Trusts 3d: Prudent Investor Rule § 229 (1992),
6 lightly revising Restatement of Trusts 2d § 230 (1959). The duty
7 extends as well to investments that were proper when purchased
8 but subsequently become improper. Restatement of Trusts 2d § 231
9 (1959). The same standards apply to successor trustees, see
10 Restatement of Trusts 2d § 196 (1959).

11 The question of what period of time is reasonable turns on
12 the totality of factors affecting the asset and the trust. The
13 1959 Restatement took the view that "[o]rdinarily any time within
14 a year is reasonable, but under some circumstances a year may be
15 too long a time and under other circumstances a trustee is not
16 liable although he fails to effect the conversion for more than a
17 year." Restatement of Trusts 2d § 230, comment b (1959). The
18 1992 Restatement retreated from this rule of thumb, saying, "No
19 positive rule can be stated with respect to what constitutes a
20 reasonable time for the sale or exchange of securities."
21 Restatement of Trusts 3d: Prudent Investor Rule § 229, comment b
22 (1992).

23 The criteria and circumstances identified in Section 4-302
24 as bearing upon the prudence of decisions to invest and manage
25 trust assets also pertain to the prudence of decisions to retain
26 or dispose of inception assets under this section.

27 **SECTION 4-305. LOYALTY.** A trustee shall invest and manage
28 the trust property solely in the interest of the beneficiaries.

29 **Comment.**

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

37 The concept that the duty of prudence in trust
38 administration, especially in investing and managing trust
39 assets, entails adherence to the duty of loyalty is familiar.
40 ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B), extracted in the
41 Comment to Section 1 of this Act, effectively merges the
42 requirements of prudence and loyalty. A fiduciary cannot be
43 prudent in the conduct of investment functions if the fiduciary
44 is sacrificing the interests of the beneficiaries.

45 The duty of loyalty is not limited to settings entailing
46 self-dealing or conflict of interest in which the trustee would

1 benefit personally from the trust. "The trustee is under a duty
2 to the beneficiary in administering the trust not to be guided by
3 the interest of any third person. Thus, it is improper for the
4 trustee to sell trust property to a third person for the purpose
5 of benefitting the third person rather than the trust."
6 Restatement of Trusts 2d § 170, comment g, at 371 (1959).

7 No form of so-called "social investing" is consistent with
8 the duty of loyalty if the investment activity entails
9 sacrificing the interests of trust beneficiaries -- for example,
10 by accepting below-market returns -- in favor of the interests of
11 the persons supposedly benefitted by pursuing the particular
12 social cause. See, e.g., John H. Langbein & Richard Posner,
13 Social Investing and the Law of Trusts, 79 Michigan L. Rev. 72,
14 96-97 (1980) (collecting authority). For pension trust assets,
15 see generally Ian D. Lanoff, The Social Investment of Private
16 Pension Plan Assets: May it Be Done Lawfully under ERISA?, 31
17 Labor L.J. 387 (1980). Commentators supporting social investing
18 tend to concede the overriding force of the duty of loyalty.
19 They argue instead that particular schemes of social investing
20 may not result in below-market returns. See, e.g., Marcia
21 O'Brien Hylton, "Socially Responsible" Investing: Doing Good
22 Versus Doing Well in an Inefficient Market, 42 American U.L. Rev.
23 1 (1992). In 1994 the Department of Labor issued an Interpretive
24 Bulletin reviewing its prior analysis of social investing
25 questions and reiterating that pension trust fiduciaries may
26 invest only in conformity with the prudence and loyalty standards
27 of ERISA §§ 403-404. Interpretive Bulletin 94-1, 59 Fed. Regis.
28 32606 (Jun. 22, 1994), to be codified as 29 CFR § 2509.94-1. The
29 Bulletin reminds fiduciary investors that they are prohibited
30 from "subordinat[ing] the interests of participants and
31 beneficiaries in their retirement income to unrelated
32 objectives."

33 **SECTION 4-306. IMPARTIALITY.** If a trust has two or more
34 beneficiaries, the trustee shall act impartially in investing and
35 managing the trust property, taking into account any differing
36 interests of the beneficiaries.

37 **Comment.**

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

1 are not insurers. Not every investment or management decision
2 will turn out in the light of hindsight to have been successful.
3 Hindsight is not the relevant standard. In the language of law
4 and economics, the standard is ex ante, not ex post

5 **SECTION 4-309. DELEGATION OF INVESTMENT AND MANAGEMENT**

6 **FUNCTIONS.**

7 (a) A trustee may delegate investment and management
8 functions that a prudent trustee of comparable skills could
9 properly delegate under the circumstances. The trustee shall
10 exercise reasonable care, skill, and caution in:

11 (1) selecting an agent;

12 (2) establishing the scope and terms of the delegation,
13 consistent with the purposes and terms of the trust; and

14 (3) periodically reviewing the agent's actions in order
15 to monitor the agent's performance and compliance with the terms
16 of the delegation.

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

20 (c) A trustee who complies with the requirements of
21 subsection (a) is not liable to the beneficiaries or to the trust
22 for the decisions or actions of the agent to whom the function
23 was delegated.

24 (d) By accepting the delegation of a trust function from
25 the trustee of a trust that is subject to the law of this State,
26 an agent submits to the jurisdiction of the courts of this State.

27 **Comment.**

28 This section reverses the much-criticized rule that forbade

1 trustees to delegate investment and management functions. The
2 language of this section is derived from Restatement of Trusts
3 3d: Prudent Investor Rule § 171 (1992), discussed *infra*, and from
4 the 1991 Illinois act, 760 ILCS § 5/5.1(b), (c) (1992).

5 **Former law.** The former nondelegation rule survived into the
6 1959 Restatement: "The trustee is under a duty to the
7 beneficiary not to delegate to others the doing of acts which the
8 trustee can reasonably be required personally to perform." The
9 rule put a premium on the frequently arbitrary task of
10 distinguishing discretionary functions that were thought to be
11 nondelegable from supposedly ministerial functions that the
12 trustee was allowed to delegate. Restatement of Trusts 2d § 171
13 (1959).

14 The Restatement of Trusts 2d admitted in a comment that
15 "There is not a clear-cut line dividing the acts which a trustee
16 can properly delegate from those which he cannot properly
17 delegate." Instead, the comment directed attention to a list of
18 factors that "may be of importance: (1) the amount of discretion
19 involved; (2) the value and character of the property involved;
20 (3) whether the property is principal or income; (4) the
21 proximity or remoteness of the subject matter of the trust; (5)
22 the character of the act as one involving professional skill or
23 facilities possessed or not possessed by the trustee himself."
24 Restatement of Trusts 2d § 171, comment d (1959). The 1959
25 Restatement further said: "A trustee cannot properly delegate to
26 another power to select investments." Restatement of Trusts 2d
27 § 171, comment h (1959).

28 For discussion and criticism of the former rule see William
29 L. Cary & Craig B. Bright, *The Delegation of Investment*
30 *Responsibility for Endowment Funds*, 74 *Columbia L. Rev.* 207
31 (1974); John H. Langbein & Richard A. Posner, *Market Funds and*
32 *Trust-Investment Law*, 1976 *American Bar Foundation Research J.* 1,
33 18-24.

34 **The modern trend to favor delegation.** The trend of
35 subsequent legislation, culminating in the Restatement of Trusts
36 3d: Prudent Investor Rule, has been strongly hostile to the
37 nondelegation rule. See John H. Langbein, *Reversing the*
38 *Nondelegation Rule of Trust-Investment Law*, 59 *Missouri L. Rev.*
39 105 (1994).

40 **The delegation rule of the Uniform Trustee Powers Act.** The
41 Uniform Trustee Powers Act (1964) effectively abrogates the
42 nondelegation rule. It authorizes trustees "to employ persons,
43 including attorneys, auditors, investment advisors, or agents,
44 even if they are associated with the trustee, to advise or assist
45 the trustee in the performance of his administrative duties; to
46 act without independent investigation upon their recommendations;
47 and instead of acting personally, to employ one or more agents to
48 perform any act of administration, whether or not discretionary .
49 . . ." Uniform Trustee Powers Act § 3(24), 7B Uniform Laws Ann.

1 743 (1985). The Act has been enacted in 16 states, see "Record of
2 Passage of Uniform and Model Acts as of September 30, 1993,"
3 1993-94 Reference Book of Uniform Law Commissioners (unpaginated,
4 following page 111) (1993).

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

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

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

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

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

1 § 171. Duty with Respect to Delegation. A trustee has
2 a duty personally to perform the responsibilities of
3 trusteeship except as a prudent person might delegate those
4 responsibilities to others. In deciding whether, to whom,
5 and in what manner to delegate fiduciary authority in the
6 administration of a trust, and thereafter in supervising
7 agents, the trustee is under a duty to the beneficiaries to
8 exercise fiduciary discretion and to act as a prudent person
9 would act in similar circumstances.

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

16 **Protecting the beneficiary against unreasonable delegation.**

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

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

43 The trustee's duties of care, skill, and caution in framing
44 the terms of the delegation should protect the beneficiary
45 against overbroad delegation. For example, a trustee could not
46 prudently agree to an investment management agreement containing
47 an exculpation clause that leaves the trust without recourse
48 against reckless mismanagement. Leaving one's beneficiaries
49 remediless against willful wrongdoing is inconsistent with the
50 duty to use care and caution in formulating the terms of the

1 delegation. This sense that it is imprudent to expose
2 beneficiaries to broad exculpation clauses underlies both federal
3 and state legislation restricting exculpation clauses, e.g.,
4 ERISA §§ 404(a)(1)(D), 410(a), 29 U.S.C. §§ 1104(a)(1)(D),
5 1110(a); New York Est. Powers Trusts Law § 11-1.7 (McKinney
6 1967).

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

13 **Costs.** The duty to minimize costs that is articulated in
14 Section 4-307 applies to delegation as well as to other aspects
15 of fiduciary investing. In deciding whether to delegate, the
16 trustee must balance the projected benefits against the likely
17 costs. Similarly, in deciding how to delegate, the trustee must
18 take costs into account. The trustee must be alert to protect
19 the beneficiary from "double dipping." If, for example, the
20 trustee's regular compensation schedule presupposes that the
21 trustee will conduct the investment management function, it
22 should ordinarily follow that the trustee will lower its fee when
23 delegating the investment function to an outside manager.

24 **SECTION 4-310. LANGUAGE INVOKING PRUDENT INVESTOR RULE.**

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

1 **Comment.**

2 This provision is taken from the Illinois act, 760 ILCS
3 § 5/5(d) (1992), and is meant to facilitate incorporation of the
4 Act by means of the formulaic language commonly used in trust
5 instruments.

6 **PART 4.**
7 **POWERS OF TRUSTEES**

8 **SECTION 4-401. GENERAL POWERS; FIDUCIARY DUTIES.**

9 (a) A trustee, without authorization by the Court, may
10 exercise:

- 11 (1) the powers conferred by the terms of the trust;
12 (2) except as limited by the terms of the trust, powers
13 conferred by this [Act].

14 (b) This [Part] does not affect the power of the Court to
15 relieve a trustee from restrictions in the terms of the trust on
16 the exercise of powers, to confer on a trustee additional powers
17 whether or not authorized by the terms of the trust, or to
18 restrict the exercise of a power otherwise given to the trustee
19 by the terms of the trust or this [Act].

20 (c) The grant of a power to a trustee, whether by the terms
21 of the trust, this [Act], or the Court, does not in itself govern
22 the exercise of the power. In exercising a power, the trustee
23 shall act in accordance with fiduciary principles.

24 **Comment.**

25 Source: CPC Section 16200-16202.
26 Subsection (a) is drawn from Sections 2(a) and 3(a) of the
27 Uniform Trustee's Powers Act (1964). The introductory clause
28 clarifies that the trustee has the powers as provided in this
29 section without the need to obtain court authorization. However,
30 if the trustee desires court approval before exercising a power
31 or desires court review after exercise of a power, the procedure
32 provided in Section 6-202 et seq. is available.

1 Subsection (a) (2) gives the trustee the powers listed in
2 Section 4-402 or provided elsewhere in the Act without the need
3 to incorporate them. See, e.g., Section 4-301 (prudent investor
4 rule).

5 The exercise of powers by the trustee is subject to various
6 important limitations as recognized in this section and as stated
7 elsewhere in the Act. Most importantly, subsection © clarifies
8 that the exercise of powers is subject to the trustee's fiduciary
9 duties. See Section 4-201 et. seq. (fiduciary duties of trustee);
10 Section 4-301 et. seq. (Uniform Prudent Investor Act). In
11 addition, subsection (a) (2) provides that the exercise of
12 statutory powers is subject to limitations provided in the trust.
13 See also Section 2-201(b) (powers after trust terminates).

14 Subsection (b) is based on Restatement (Second) of Trusts
15 Section 167 (1959), and UPC Section 5-425. For a provision
16 permitting the court to modify a trust due to unanticipated
17 circumstances, see Section 2-204.

18 Subsection (c) recognizes that a power granted to the
19 trustee from any source does not necessarily permit the exercise
20 of the power, nor does it prevent the exercise of a power in a
21 manner that conflicts with a general duty if the terms of the
22 trust so direct, or the trustee is directed so to act by a person
23 holding the power to revoke the trust (see Section 3-103(3)). For
24 example, the terms of the trust may give the trustee discretion
25 to favor one beneficiary over the others, in apparent conflict
26 with the general duty to deal with beneficiaries impartially
27 under Section 4-202(a).

28 **SECTION 4-402. SPECIFIC POWERS OF TRUSTEES.** In addition to
29 the powers conferred by the terms of the trust, a trustee may
30 perform all actions necessary to accomplish the proper
31 management, investment, and distribution of the trust property,
32 including the power to:

33 (1) collect, hold, and retain trust property received from a
34 settlor or any other person; and the property may be retained
35 even though it includes property in which the trustee is
36 personally interested;

37 (2) accept additions to the property of the trust from a
38 settlor or any other person;

39 (3) continue or participate in the operation of a business

1 or other enterprise that is part of the trust property and affect
2 an incorporation, dissolution, or other change in the form of the
3 organization of the business or enterprise;

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

7 (5) acquire or dispose of property, for cash or on credit,
8 at public or private sale, or by exchange;

9 (6) manage, control, divide, develop, improve, exchange,
10 partition, change the character of, or abandon trust property;

11 (7) encumber, mortgage, or pledge trust property for a term
12 within or extending beyond the term of the trust in connection
13 with the exercise of a power vested in the trustee;

14 (8) make ordinary or extraordinary repairs, alterations, or
15 improvements in buildings or other trust property; demolish
16 improvements; and raze existing or erect new party walls or
17 buildings;

18 (9) subdivide or develop land; dedicate land to public use;
19 make or obtain the vacation of plats and adjust boundaries;
20 adjust differences in valuation on exchange or partition by
21 giving or receiving consideration; and dedicate easements to
22 public use without consideration;

23 (10) enter into a lease for any purpose as lessor or lessee
24 with or without the option to purchase or renew and for a term
25 within or extending beyond the term of the trust;

26 (11) enter into a lease or arrangement for exploration and

1 removal of gas, oil, or other minerals or geothermal energy, and
2 enter into a community oil lease or a pooling or unitization
3 agreement;

4 (12) grant an option involving disposition of trust property
5 or take an option for the acquisition of property, including an
6 option that is exercisable beyond the duration of the trust;

7 (13) with respect to shares of stock of a domestic or
8 foreign corporation, any membership in a nonprofit corporation,
9 or other property;

10 (i) vote in person, and give proxies to exercise, any
11 voting rights with respect to the shares, memberships, or
12 property;

13 (ii) waive notice of a meeting or give consent to the
14 holding of a meeting; and

15 (iii) authorize, ratify, approve, or confirm any action
16 that could be taken by shareholders, members, or property owners;

17 (14) pay calls, assessments, and any other sums chargeable
18 or accruing against or on account of securities;

19 (15) sell or exercise stock subscription or conversion
20 rights;

21 (16) consent, directly or through a committee or other
22 agent, to the reorganization, consolidation, merger, dissolution,
23 or liquidation of a corporation or other business enterprise, and
24 participate in voting trusts, pooling arrangements, and
25 foreclosures, and in connection therewith, deposit securities
26 with and transfer title and delegate discretion to any protective

1 or other committee as the trustee considers advisable;

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

5 (18) deposit securities in a securities depository;

6 (19) insure the property of the trust against damage or loss
7 and insure the trustee against liability with respect to third
8 persons;

9 (20) borrow money for any trust purpose to be repaid from
10 trust property;

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

14 (22) pay taxes, assessments, reasonable compensation of the
15 trustee and of employees and agents of the trust, and other
16 expenses incurred in the collection, care, administration, and
17 protection of the trust;

18 (23) make loans out of trust property to a beneficiary on
19 terms and conditions the trustee considers to be fair and
20 reasonable under the circumstances; and guarantee loans to the
21 beneficiary by encumbrances on trust property;

22 (24) pay an amount distributable to a beneficiary, whether
23 or not the beneficiary is under a legal disability, by paying the
24 amount to the beneficiary or by paying the amount to another
25 person for the use or benefit of the beneficiary;

26 (25) make a distribution of property and money in divided or

1 undivided interests, pro rata or non-pro-rata, and adjust
2 resulting differences in valuation;

3 (26) employ accountants, attorneys, investment advisers,
4 appraisers or other persons, even if they are associated or
5 affiliated with the trustee, to advise or assist the trustee in
6 the performance of administrative duties;

7 (27) inspect or investigate property that the trustee has
8 been asked to hold, or property owned or operated by an entity in
9 which the trustee holds or has been asked to hold an interest
10 for the purpose of determining the application of environmental
11 law with respect to the property; and take action to prevent,
12 abate, or otherwise remedy any actual or potential violation of
13 any environmental law affecting property held directly or
14 indirectly by the trustee;

15 (28) to establish for any asset a reserve for depreciation,
16 depletion or obsolescence, and to decide, in accordance with
17 rules of law, how and in what proportions any receipts or
18 disbursements shall be credited, charged or apportioned as
19 between principal and income;

20 (29) execute and deliver instruments that are useful to
21 accomplish or facilitate the exercise of the trustee's powers;
22 and

23 (30) prosecute or defend an action, claim, or proceeding in
24 order to protect trust property and the trustee in the
25 performance of the trustee's duties.

26 **Comment.**

1 Source: CPC Section 16220-16249.

2 Most of the powers listed in this section are drawn from
3 Section 3 of the Uniform Trustee's Powers Act (1964). Paragraphs
4 (27) and (28) are new, however. In addition, several of the
5 provisions of the Trustee's Powers Act have been modified.

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

14 Paragraph (5) authorizes a trustee to acquire or dispose of
15 property, for cash or on credit, at public or private sale, or by
16 exchange. Under the Restatement, a trustee may sell on credit
17 only if security is given. Restatement(Second) of Trusts Section
18 190, comment j (1959).

19 Paragraph (21) authorizes a trustee to release claims. The
20 determination of when to release a claim depends upon the duties
21 imposed on the trustee. As a general matter, the trustee should
22 be able to release a claim not only when it is uncollectible, but
23 also when it is uneconomical to attempt to collect it. See also
24 Sections 4-211 (duty to enforce claims and defend actions).

25 Paragraph (22) authorizes a trustee to pay compensation
26 without prior court approval. For other provisions relating to
27 trustees' compensation, see Section 4-109. See also Sections 4-
28 110 (repayment to trustees for expenses incurred), 4-402
29 (26) (power to hire agents).

30 Paragraph (23) allows a trustee to make loans to or
31 guarantee loans of a beneficiary upon such terms and conditions
32 the trustee considers fair and reasonable. The determination of
33 what is fair and reasonable must be made in light of the
34 fiduciary duties of the trustee and purposes of the trust. If the
35 trustee requires security for the loan to the beneficiary,
36 adequate security under this paragraph may consist of a charge on
37 the beneficiary's interest in the trust. See Restatement (Second)
38 of Trusts Section 255 (1959). The interest of a beneficiary that
39 is subject to a spendthrift restraint may not be used for
40 security for a loan under this paragraph. See Section 2-301 et
41 seq. (spendthrift protection).

42 Paragraph (24) allows a trustee to make payments to another
43 person for the use or benefit of the beneficiary. In an
44 appropriate case, a distribution may be made to a custodian under
45 the Uniform Transfers to Minor Act.

46 Paragraph (25) allows a trustee to make non-pro rata
47 distributions and distribute undivided interests. The trustee
48 also has the power to sell property in order to make the
49 distribution. This paragraph recognizes the authority to take
50 gains and losses into account for tax purposes when making
51 distributions. This power provides needed flexibility and avoids
52 the possibility of a taxable event arising from a non-pro rata

1 distribution.

2 Paragraph (26) authorizes the hiring of agents. If the
3 trustee is in doubt concerning the propriety of hiring an agent,
4 the judicial procedure under Section 6-202 for obtaining
5 instructions is available. An agent with a close relationship
6 with the trustee or an insider may be hired when it is in the
7 best interests of the trust, taking into account the duty of
8 loyalty and duty to avoid conflicts of interest (see Section 4-
9 202), and particularly as to routine matters, but in situations
10 involving substantial matters, it is best to hire outside agents.
11 The trustee has a duty to inform certain beneficiaries of agents
12 hired, their relationship to the trustee, if any, and their
13 compensation. See also Sections 4-205 (duty to use special
14 skills), and 4-206 (delegation).

15 Paragraph (27), which addresses possible liability for
16 violations of environmental law, is based on the Texas Trust
17 Code.

18 Paragraph (30) authorizes a trustee to prosecute or defend
19 an action. As to the propriety of reimbursement for attorney's
20 fees and other expenses of an action or proceeding, see Section
21 4-110 and comment. See also Sections 4-211 (duty to defend
22 actions), 4-401(c) (exercise of powers subject to fiduciary
23 principles), 4-603 (protection of persons dealing with trustees).

24 **PART 5.**
25 **LIABILITY OF TRUSTEES TO BENEFICIARIES**

26 **SECTION 4-501. VIOLATIONS OF DUTIES; BREACH OF TRUST.**

27 (a) A violation by a trustee of a duty the trustee owes a
28 beneficiary is a breach of trust.

29 (b) The remedies of a beneficiary for breach of trust are
30 exclusively equitable.

31 **Comment.**

32 Source: CPC Section 16400, 16421.

33 Subsection (a) is drawn from Section 201 of the Restatement
34 (Second) of Trusts (1959). While a trust is revocable, the
35 trustee owes duties to the person holding the power to revoke and
36 not to the named beneficiaries. See Section 3-103; see also
37 Section 3-105 (holder of presently exercisable general power of
38 appointment treated as settlor).

39 Subsection (b) is drawn from Section 197 of the Restatement
40 (Second) of Trusts (1959). For a list of equitable remedies, see
41 Section 4-502. See also Section 4-503 (measure of liability for
42 breach of trust).

1 that the remedies for breach of trust are exclusively equitable,
2 as provided in Section 4-501(b). In certain circumstances, rather
3 than ordering the payment of money, it may be appropriate for the
4 court to order the trustee to transfer tangible property as a
5 remedy for breach of trust. See also Restatement (Second) of
6 Trusts Section 199(c) (1959).

7 Paragraph (4) makes explicit the authority to appoint a
8 receiver. See also Restatement (Second) of Trusts Section 199(d)
9 (1959). This paragraph also permits appointment of a temporary
10 trustee if appointment of a receiver would be appropriate. See
11 Section 4-105 (appointment of trustee to fill vacancy).

12 As to paragraph (5), see Restatement (Second) of Trusts
13 Section 199(e) (1959). For provisions governing removing
14 trustees, see Section 4-107 (grounds for removal).

15 Paragraph (6) is based on Section 243 of the Restatement
16 (Second) of Trusts (1959).

17 The authority under paragraph (7) to set aside wrongful acts
18 of the trustee is a corollary of the power to enjoin a threatened
19 breach as provided in paragraph (2). As recognized in the
20 introductory clause, the wrongful acts of the trustee may not be
21 set aside if to do so would impair the rights of bona fide
22 purchasers as provided in Section 4-603. See Restatement (Second)
23 of Trusts Section 202 (1959). See also G. Bogert, *The Law of*
24 *Trusts and Trustees* Sec. 861, at 16-17 (rev. 2d ed. 1982).

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

28 **SECTION 4-503. BREACH OF TRUST; LIABILITY.** A beneficiary may
29 charge a trustee who commits a breach of trust with the amount
30 required to restore the value of the trust property and trust
31 distributions to what they would have been had the breach not
32 occurred, or, if greater, the amount of profit that the trustee
33 made by reason of the breach.

34 **Comment.**

35 This section is based on Restatement (Third) of Trusts-
36 Prudent Investor Rule Section 205 (1992).

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

1 profit which the trustee may have made by reason of the breach.
2 For extensive commentary on the determination of damages, with
3 numerous specific applications, see Restatement (Third) of
4 Trusts-Prudent Investor Rule Sections 204-213 (1992).

5 The court is not precluded from reducing or excusing damages
6 if equitable to do so. See Restatement (Second) of Trusts Section
7 205, comment g (1959).

8 As to defenses of the trustee, see Sections 4-504 to 4-506.

9 The remedies provided in this section do not preclude resort
10 to other remedies provided by this Act or available under the
11 common law. See Sections 1-103 (common law of trusts), and 4-502
12 (breach of trust; actions).

13 **SECTION 4-504. LIMITATION OF ACTION AGAINST TRUSTEE**

14 **FOLLOWING FINAL ACCOUNT.**

15 (a) Unless previously barred by adjudication, consent, or
16 other limitation, a claim against a trustee for breach of trust
17 is barred as to a beneficiary who has received a final account or
18 other report adequately disclosing the existence of the claim
19 unless a proceeding to assert the claim is commenced within two
20 years after the later of (i) the receipt of the account or
21 report, or (ii) the termination of the trust relationship between
22 the trustee and beneficiary. An account or report adequately
23 discloses the existence of a claim if it provides sufficient
24 information so that the beneficiary knows of the claim or
25 reasonably should have inquired into its existence.

26 (b) For the purpose of subsection (a), a beneficiary is
27 deemed to have received an account or report:

28 (1) In the case of an adult who is reasonably capable
29 of understanding the account or report, if it is received by the
30 adult personally.

31 (2) In the case of an adult who is not reasonably
32 capable of understanding the account or report, if it is received

1 by the adult's legal representative, including a guardian ad
2 litem or other person appointed for this purpose.

3 (3) In the case of a minor, if it is received by the
4 minor's guardian or conservator or, if the minor does not have a
5 guardian or conservator, if it is received by a parent of the
6 minor who does not have a conflict of interest.

7 **Comment.**

8 Source: CPC Section 16460.

9 This section is drawn in substantial part from Section 7-307
10 of the Uniform Probate Code. For provisions governing consent,
11 release, and affirmance by beneficiaries to relieve the trustee
12 of liability, see Section 4-506. The reference in the
13 introductory clause to claims previously barred also includes
14 principles such as estoppel and laches that apply under the
15 common law. See Section 1-103 (common law of trusts). During the
16 time that a trust is revocable, the person holding the power to
17 revoke is the one who must receive the account or report in order
18 to commence the running of the limitations period provided in
19 this section. See Sections 3-103 (limits on rights of beneficiary
20 of revocable trust).

21 Subsection (b) provides special rules concerning who must
22 receive the account or report for it to have the effect of
23 barring claims based on the information disclosed. Under
24 subsection (b)(2) it may be appropriate to seek the appointment
25 of a guardian ad litem or some other person to receive accounts
26 and reports if no guardian or conservator has been appointed for
27 the person and there is serious doubt that the beneficiary can
28 understand the account or report. See Section 6-306 (appointment
29 of guardian ad litem).

30 For the provisions relating to the duty to report
31 information and account to beneficiaries, see Section 4-213.

32 **SECTION 4-505. EXCULPATION OF TRUSTEE.** A provision in the
33 terms of the trust relieving a trustee of liability for breach of
34 trust is unenforceable to the extent that it:

35 (1) relieves a trustee of liability for breach of trust
36 committed intentionally, with gross negligence, in bad faith, or
37 with reckless indifference to the interest of the beneficiary, or
38 for any profit derived by the trustee from the breach; or

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

3 **Comment.**

4 Source: CPC Section 16461.

5 This section is the same in substance as Section 222 of the
6 Restatement (Second) of Trusts (1959), except that the reference
7 to gross negligence does not appear in the Restatement. There is
8 a distinction between an exculpatory provision and the negation
9 of a duty. While the terms of the trust may negate a duty (see
10 Section 4-201(b)), if the trustee is required under the terms of
11 the trust or this Act to perform the duty, the trustee may not be
12 totally absolved from liability for a breach. See Restatement
13 (Second) of Trusts Section 222 comments b & c (1959).

14 **SECTION 4-506. BENEFICIARY'S CONSENT, RELEASE, OR**
15 **AFFIRMANCE; NONLIABILITY OF TRUSTEE.** A beneficiary may not hold
16 a trustee liable for a breach of trust if the beneficiary (i)
17 consented to the conduct constituting the breach, (ii) released
18 the trustee from liability for the breach, or (iii) affirmed the
19 transaction constituting the breach unless:

20 (1) the beneficiary at the time of the consent,
21 release, or affirmance did not know of the beneficiary's rights
22 and of the material facts the trustee knew or should have known
23 and the trustee did not reasonably believe that the beneficiary
24 knew; or

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

27 **Comment.**

28 Source: CPC Section 16463-16465.

29 This section is drawn from Sections 216 to 218 of the
30 Restatement (Second) of Trusts (1959). When one beneficiary has
31 consented but others have not, courts give a remedy to the
32 nonconsenting beneficiaries. Restatement (Second) of Trusts
33 Section 216, comment h. But consent by the settlor of a revocable
34 trust binds all the beneficiaries under Section 3-103. See also

1 Section 3-105 (consent by holder of a presently exercisable
2 general power of appointment).

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

8 **PART 6. RIGHTS OF THIRD PERSONS**

9 **SECTION 4-601. PERSONAL LIABILITY; LIMITATIONS.**

10 (a) Except as otherwise provided in the contract or in this
11 [Part], a trustee is not personally liable on a contract properly
12 entered into in the trustee's fiduciary capacity in the course of
13 administration of the trust unless the trustee fails to reveal
14 the representative capacity or identify the trust in the
15 contract.

16 (b) A trustee is personally liable for obligations arising
17 from ownership or control of trust property or for torts
18 committed in the course of administering a trust only if the
19 trustee is personally at fault.

20 (c) A claim based on a contract entered into by a trustee
21 in the trustee's representative capacity, on an obligation
22 arising from ownership or control of trust property, or on a tort
23 committed in the course of administering a trust may be asserted
24 against the trust by proceeding against the trustee in the
25 trustee's representative capacity, whether or not the trustee is
26 personally liable on the claim.

27 (d) A question of liability as between the trust and the
28 trustee personally may be determined in a proceeding under
29 Section 6-202.

1 **Comment.**

2 Source: CPC Section 18000-18002, 18004-18005.

3 This section is drawn from Section 7-306 of the Uniform
4 Probate Code (1977). However, unlike the Uniform Probate Code,
5 this section excuses the trustee from personal liability on a
6 contract if either the trustee's representative capacity or the
7 identity of the trust is revealed in the contract. Under this
8 section, it is assumed that either one of these statements in a
9 contract puts the person contracted with on notice of the fact
10 that the other person is a trustee. The protection afforded the
11 trustee by this section applies only to contracts that are
12 properly entered into in the trustee's fiduciary capacity,
13 meaning that the trustee is exercising an available power and is
14 not violating a duty. This section does not excuse any liability
15 the trustee may have for breach of trust. To fall within the rule
16 of subsection (a), either the trustee's status or the identity of
17 the trust must be revealed.

18 Under subsection (b), a trustee is "personally at fault"
19 when the trustee, either intentionally or negligently, acts, or
20 fails to act, or commits a tort either intentionally or
21 negligently. Restatement (Second) of Trusts Section 264 makes a
22 trustee liable regardless of fault, including liability for acts
23 of agents under respondeat superior.

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

27 Under subsection (d), ultimate liability between an estate
28 and trustee need not be determined before the third person's
29 claim can be satisfied. It is permissible, and may be preferable,
30 for judgment to be entered against the trust without determining
31 the trustee's ultimate liability until later. If judgment is
32 entered against the trustee individually, the question of the
33 trustee's right to reimbursement may be settled informally with
34 the beneficiaries or in a separate proceeding in the probate
35 court. For rules governing indemnification of trustees, see
36 Section 4-110. See also Section 6-202 (proceedings against
37 trustee by beneficiary).

38 **SECTION 4-602. DISSENTING COTRUSTEES.**

39 (a) A cotrustee who does not join in exercising a power is
40 not liable to a third person for the consequences of the exercise
41 of the power.

42 (b) A dissenting cotrustee who joins in an action at the
43 direction of the majority cotrustees is not liable to a third

1 person for the action if the dissenting cotrustee expresses the
2 dissent in writing to any other cotrustee at or before the action
3 is taken.

4 (c) This section does not excuse a cotrustee from liability
5 for failure to discharge a cotrustee's duties as a trustee.

6 **Comment.**

7 Source: CPC Section 18003.

8 This section is drawn from Section 114.006(a) of the Texas
9 Trust Code. See Tex. Prop. Code Ann. Sec. 114.006 (Vernon 1984).

10 As to the duties of cotrustees, see Sections 4-208. Under
11 Section 4-103, cotrustees may act by majority vote unless
12 otherwise provided by the terms of the trust.

13 **SECTION 4-603. OBLIGATIONS OF THIRD PERSONS.**

14 (a) With respect to a third person dealing with a trustee or
15 assisting a trustee in the conduct of a transaction, if the third
16 person acts in good faith and for a valuable consideration and
17 without knowledge that the trustee is exceeding the trustee's
18 powers or improperly exercising them:

19 (1) A third person is not bound to inquire as to
20 whether a trustee has power to act or is properly exercising a
21 power and may assume without inquiry the existence of a trust
22 power and its proper exercise;

23 (2) A third person is fully protected in dealing with
24 or assisting a trustee, as if the trustee has and is properly
25 exercising the power the trustee purports to exercise.

26 (b) A third person who acts in good faith is not bound to
27 ensure the proper application of trust property paid or delivered
28 to the trustee.

1 (c) If a third person acting in good faith and for a
2 valuable consideration enters into a transaction with a former
3 trustee without knowledge that the person is no longer a trustee,
4 the third person is fully protected as if the former trustee were
5 still a trustee.

6 **Comment.**

7 Source: CPC Section 18100.
8 This section is drawn from Section 7 of the Uniform
9 Trustees' Powers Act (1964).

10 **SECTION 4-604. CERTIFICATION OF TRUST.**

11 (a) A trustee may present a certification of trust to any
12 person in lieu of providing a copy of the trust instrument to
13 establish the existence or terms of the trust.

14 (b) The certification must contain a statement that the
15 trust has not been revoked, modified, or amended in any manner
16 which would cause the representations contained in the
17 certification of trust to be incorrect and must contain a
18 statement that it is being signed by all of the currently acting
19 trustees of the trust.

20 (c) A certification of trust need not contain the
21 dispositive provisions of the trust which set forth the
22 distribution of the trust estate.

23 (d) A person may require that the trustee offering the
24 certification of trust provide copies of those excerpts from the
25 original trust instrument and amendments thereto which designate
26 the trustee and confer upon the trustee the power to act in the
27 pending transaction.

1 (e) A person who acts in reliance upon a certification of
2 trust without knowledge that the representations contained
3 therein are incorrect is not liable to any person for so acting
4 and may assume without inquiry the existence of the facts
5 contained in the certification. Knowledge may not be inferred
6 solely from the fact that a copy of all or part of the trust
7 instrument is held by the person relying upon the trust
8 certification. A transaction, and a lien created thereby, entered
9 into by the trustee and a person acting in reliance upon a
10 certification of trust is enforceable against the trust assets.

11 (f) A person making a demand for the trust instrument in
12 addition to a certification of trust or excerpts shall be liable
13 for damages, including attorney's fees, incurred as a result of
14 the refusal to accept the certification of trust or excerpts in
15 lieu of the trust instrument if the Court determines that the
16 person acted in bad faith in requesting the trust instrument.

17 (g) This section does not limit the rights of beneficiaries
18 to obtain copies of the trust instrument or rights of others to
19 obtain copies in a proceeding concerning the trust.

20 **Comment.**

21 Source: CPC Section 18100.5.

22 **SECTION 4-605. LIABILITY FOR WRONGFUL TAKING, CONCEALING OF**
23 **DISPOSING OF TRUST PROPERTY.** A person who, in bad faith,
24 wrongfully takes, conceals, or disposes of trust property is
25 liable for twice the value of the property, recoverable in an
26 action by a trustee for the benefit of the trust.

1 **Comment.**

2 Source: CPC Section 16249(b).

3 **ARTICLE 5. CHARITABLE TRUSTS.**

4 **GENERAL COMMENT**

5 The purpose of this Article is to substantially broaden the
6 authority of courts and trustees to make charitable gifts more
7 effective. Many of the concepts expressed in this Article are not
8 new, but reflect the views of commentators. See, e.g., Report, Cy
9 Pres and Deviation: Current Trends and Application, 8 Real Prop.
10 Prob. & Trust J. 391 (1971); Roger G. Sisson, Relaxing the Dead
11 Head's Grip: Charitable Efficiency and the Doctrine of Cy Pres,
12 74 Va. L. Rev. 635 (1988); Kenneth L. Karst, The Efficiency of
13 the Charitable Dollar: An Unfulfilled State Responsibility, 73
14 Harv. L. Rev. 433 (1960); Joseph A. DiClerico, Jr., Cy Pres: A
15 Proposal for Change, 47 B.U.L. Rev. 153 (1967). A liberalizing
16 trend is also apparent in a number of the state statutes, with
17 the reforms in Wisconsin, from which this Article borrows
18 extensively, being the most notable. See Wis. Stat. Ann. Sec.
19 701.10.

20 **SECTION 5-101. CHARITABLE PURPOSES.** A charitable trust may
21 be created for the relief of poverty, the advancement of
22 education or religion, the promotion of health, or any other
23 purpose the accomplishment of which is beneficial to the
24 community. If the terms of the trust do not indicate a particular
25 charitable purpose or beneficiaries, the trustee may select one
26 or more charitable purposes or beneficiaries.

27 **Comment.**

28 This section, unlike the remainder of the Article, does not
29 break significant new ground, but merely restates the well-
30 established categories of charitable purposes listed in
31 Restatement (Second) of Trusts Section 368 and ultimately derived
32 from the Statute of Charitable Uses, 43 Eliz. I, c.4 (1601).

33 This section also ratifies a common estate planning
34 technique whereby the trustee is granted discretion to distribute
35 the trust property for any charitable purpose or beneficiary. See
36 Restatement (Second) of Trusts Section 396 (1959).

1 The court must consider several factors when applying cy
2 pres. The list is by no means exclusive. The application of cy
3 pres involves a difficult balancing of the needs of society
4 against an assessment of the settlor's probable intent. In
5 determining the settlor's probable intent, the court must
6 consider the current and future community needs in the general
7 field of charity for which the trust was created, the settlor's
8 other charitable interests, and the value of the available trust
9 property.

10 **SECTION 5-103. TRUST WITH UNECONOMICALLY LOW VALUE.**

11 (a) If the value of the trust property of a charitable trust
12 is less than [\$50,000], the trustee may terminate the trust

13 (b) On petition by a trustee or other interested person, if
14 the Court determines that the value of the trust property is
15 insufficient to justify the cost of administration involved, the
16 Court may appoint a new trustee or may modify or terminate the
17 trust.

18 (c) Upon termination of a trust under this section, the
19 trustee of Court shall distribute the trust property in a manner
20 consistent with the settlor's charitable purposes.

21 **Comment.**

22 Subsection (a) strives to make charitable gifting more
23 effective by permitting the nonjudicial termination of small
24 charitable trusts, thereby avoiding the expense of a judicial
25 termination proceeding. Nonjudicial termination is allowed if the
26 value of the trust property falls to less than \$50,000. While
27 the creation of small charitable trusts is not encouraged,
28 subsection (a) does not interfere with the right of a settlor to
29 create such a trust. Under this subsection, the trustee may not
30 terminate a charitable trust which has never exceeded \$50,000 in
31 value.

32 Subsection (b) authorizes the court to terminate a
33 charitable trust. Unlike subsection (a), there is no dollar
34 limit. In order to reduce administrative costs in relation to the
35 size of the trust, the court, instead of terminating the trust,
36 may appoint a new trustee. Upon termination of the trust, the
37 trust property is to be distributed as provided in Section 5-102.

38 For the comparable provision on termination of small

1 is drawn from Section 7-204 of the Uniform Probate Code.

2 **SECTION 6-102. PRINCIPAL PLACE OF ADMINISTRATION OF TRUST.**

3 (a) Unless otherwise designated in the terms of the trust,
4 the principal place of administration of a trust is the usual
5 place where the day-to-day activity of the trust is carried on by
6 the trustee or the trustee's representative who is primarily
7 responsible for the administration of the trust.

8 (b) If the principal place of administration of the trust
9 cannot be determined under subsection (a), it must be determined
10 as follows:

11 (1) If the trust has one trustee, the principal place
12 of administration of the trust is the trustee's residence or
13 usual place of business.

14 (2) If the trust has more than one trustee, the
15 principal place of administration of the trust is the residence
16 or usual place of business of any of the cotrustees as agreed
17 upon by them or, if not, the residence or usual place of business
18 of any of the cotrustees.

19 **Comment.**

20 Source: CPC Section 17002.
21 Section 6-105 governs transfer of jurisdiction over trusts
22 to and from other jurisdictions.

23 **SECTION 6-103. JURISDICTION OVER TRUSTEES AND BENEFICIARIES.**

24 (a) By accepting the trusteeship of a trust having its
25 principal place of administration in this State, the trustee
26 submits personally to the jurisdiction of the Court.

27 (b) To the extent of their interests in the trust, all

1 beneficiaries of a trust having its principal place of
2 administration in this State are subject to the jurisdiction of
3 the Court.

4 **Comment.**

5 Source: CPC Section 17003.

6 This section, which is intended to facilitate the exercise
7 of the court's power, is drawn from Section 7-103 of the Uniform
8 Probate Code. As recognized by the introductory clause,
9 constitutional limitations on assertion of jurisdiction apply to
10 the exercise of jurisdiction under this section. Consequently,
11 appropriate notice must be given to a trustee or beneficiary as a
12 condition of jurisdiction under this section. See, e.g., *Mullane*
13 *v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). This
14 section does not limit the jurisdiction of the court over the
15 trust, trust property, or parties to the trust. See also Section
16 4-101 (methods of trustee acceptance).

17 A state continues to have jurisdiction over a trustee who
18 moves to another state. See Restatement (Second) of Trusts
19 Section 199, comment f.

20 **SECTION 6-104. COUNTY OF VENUE.**

21 (a) A proceeding under this [Act] may be commenced in the
22 [county] in which the trust's principal place of administration
23 is or is to be located, and if the trust is created by will, also
24 in the [county] in which the decedent's estate is administered.

25 (b) If a trust not created by will has no trustee, a
26 proceeding for appointing a trustee shall be commenced in the
27 [county] in which either a beneficiary resides or the trust
28 property, or some portion of the trust property, is located.

29 (c) Except as otherwise provided in subsections (a) and (b),
30 a proceeding under this [Act] shall be commenced in accordance
31 with the rules applicable to civil actions generally.

32 **Comment.**

33 Source: CPC Section 17005.

34 See Section 6-102 (principal place of administration of

1 trust).

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

7 Subsection (c), which is drawn from Section 7-204 of the
8 Uniform Probate Code, provides venue rules applicable in cases
9 not covered by subsections (a) and (b). This would include cases
10 where jurisdiction over a trust, trust property, or parties to a
11 trust is based on a factor other than the presence of the
12 principal place of administration in this state. When the
13 principal place of administration of a trust is in another state,
14 but jurisdiction is proper in this State, the general rules
15 governing venue apply.

16 **SECTION 6-105. TRANSFER OF JURISDICTION.**

17 (a) The Court may transfer the place of administration of a
18 trust to or from this State or transfer some or all of the trust
19 property to a trustee in or outside this State if it finds that:

20 (1) the transfer of the trust property to a trustee in
21 this or another jurisdiction, or the transfer of the place of
22 administration of the trust to this or another jurisdiction, will
23 promote the best interest of the trust and those interested in
24 it, taking into account the economical and convenient
25 administration of the trust and the views of the adult
26 beneficiaries;

27 (2) any new trustee to whom the trust property is to be
28 transferred is qualified, willing, and able to administer the
29 trust or trust property under the terms of the trust; and

30 (3) if the trust or any portion of the trust property
31 is to be transferred to another jurisdiction and if approval of
32 the transfer by the other court is required under the law of the
33 other jurisdiction, the proper court in the other jurisdiction

1 has approved the transfer.

2 (b) If a transfer is ordered, the Court may direct the
3 manner of transfer and impose terms and conditions as may be
4 just, including a requirement for the substitution of a successor
5 trustee in any pending litigation in this State. A delivery of
6 property in accordance with the order of the Court is a full
7 discharge of the trustee with respect to all property embraced in
8 the order.

9 (c) If the Court grants a petition to transfer a trust or
10 trust property to this State, the Court shall require the trustee
11 to give a bond, if necessary under the law of the other
12 jurisdiction or of this State, and may require bond as provided
13 in Section 4-102.

14 **Comment.**

15 Source: CPC Sections 17401, 17404, 17405, 17451, 17455-
16 17457.

17 This section is not limited to transfers to or from other
18 states, but may include a transfer to or from different
19 countries. See also Section 6-101 (subject matter jurisdiction
20 of court).

21 This section provides a method whereby the court can
22 indicate its willingness to accept jurisdiction over a trust
23 administered in another jurisdiction if the law of the other
24 jurisdiction requires appointment of a trustee in the proposed
25 new place of administration before approving the transfer. See,
26 e.g., Mass. Gen. Laws Ann. ch. 206, Sec. 29 (West 1969).

27 If appropriate to facilitate transfer of the trust property
28 or the place of administration of a trust to this State, the
29 Court may issue a conditional order appointing a trustee to
30 administer the trust in this State and indicating that transfer
31 to this State will be accepted if transfer is approved by the
32 proper court of the other jurisdiction.

33 Under this section a transferred trust is treated the same
34 as a trust that was created in this State, and so is governed by
35 this Act. This section is not intended to provide choice of law
36 rules. A trust that was subject to judicial supervision in
37 another state will not be subject to continuing court
38 jurisdiction unless the terms of the trust so provide and the

1 court so determines in the order accepting transfer to this
2 state.

3 **PART 2.**
4 **JUDICIAL PROCEEDINGS CONCERNING TRUSTS**

5 **SECTION 6-201. JUDICIAL INTERVENTION INTERMITTENT.** The
6 administration of trusts shall proceed expeditiously and free of
7 judicial intervention, except to the extent the jurisdiction of
8 the Court is invoked by interested parties or otherwise exercised
9 as provided by law.

10 **Comment.**

11 Source: CPC Section 17209.
12 Uniform Probate Code Section 7-201(b) contains similar
13 language. See also Section 4-401. As to the jurisdiction of the
14 court, see Part 1 of this article.

15 **SECTION 6-202. PETITIONS; PURPOSES OF PROCEEDINGS.**

16 (a) Except as otherwise provided in Section 3-103, a trustee
17 or beneficiary of a trust may petition the Court under this
18 [Part] concerning the internal affairs of the trust or to
19 determine the existence of the trust.

20 (b) Proceedings concerning the internal affairs of a trust
21 include proceedings to:

- 22 (1) construe and determine the terms of a trust;
23 (2) determine the existence of any immunity, power,
24 privilege, duty or right;
25 (3) determine the validity of a trust provision;
26 (4) ascertain beneficiaries and determine to whom
27 property shall pass or be delivered upon final or partial
28 termination of the trust;

1 appointment may be represented and bound by the holder or holders
2 of the power.

3 **SECTION 6-303. REPRESENTATION BY FIDUCIARIES AND PARENTS.** To
4 the extent there is no conflict of interest between the
5 representor and those represented with respect to the fiduciary
6 matter:

7 (1) a conservator may represent and bind the person whose
8 estate the conservator controls;

9 (2) a guardian may represent and bind the ward if no
10 conservator of the ward's estate has been appointed;

11 (3) a trustee may represent and bind the beneficiaries of
12 the trust;

13 (4) a personal representative may represent and bind the
14 persons interested in the decedent's estate; and

15 (5) if no conservator or guardian has been appointed, a
16 parent may represent and bind a minor child.

17 **SECTION 6-304. REPRESENTATION BY HOLDERS OF SIMILAR**
18 **INTERESTS.** Unless otherwise represented, a minor or an
19 incapacitated, unborn, or unascertained person may be represented
20 by and bound by another person having a substantially identical
21 interest with respect to the fiduciary matter but only to the
22 extent that the person's interest is adequately represented.

23 **SECTION 6-305. NOTICE OF JUDICIAL SETTLEMENT.** Notice of a
24 judicial settlement shall be given to every interested person or
25 to one who can bind an interested person as described in Sections
26 6-302 and 6-303. Notice may be given to a person and to another

1 who may bind the person. Notice is given to unborn or
2 unascertained persons, who are not represented under Sections 6-
3 302 and 6-303, by giving notice to all known persons whose
4 interests in the proceedings are substantially identical to those
5 of the unborn or unascertained persons.

6 **SECTION 6-306. APPOINTMENT OF GUARDIAN AD LITEM.** At any
7 point in a judicial proceeding, the Court may appoint a guardian
8 ad litem to represent and approve a settlement on behalf of the
9 interest of a minor, an incapacitated, unborn, or unascertained
10 person, or a person whose identity or address is unknown, if the
11 Court determines that representation of the interest otherwise
12 would be inadequate. If not precluded by conflict of interest, a
13 guardian ad litem may be appointed to represent several persons
14 or interests. The Court shall set out its reasons for appointing
15 a guardian ad litem as a part of the record of the proceeding. In
16 approving a judicially supervised settlement, a guardian ad litem
17 may consider general family benefit.

18 **SECTION 6-307. APPOINTMENT OF SPECIAL REPRESENTATIVE.** In
19 connection with a nonjudicial settlement, the Court may appoint a
20 special representative to represent the interests of and approve
21 a settlement on behalf of designated persons. If not precluded by
22 conflict of interest, a special representative may be appointed
23 to represent several persons or interests. In approving a
24 settlement, a special representative may consider general family
25 benefit. As a condition for approval, a special representative
26 may require that those represented receive a benefit.

1 trustee to third persons on contracts).