DRAFT
FOR DISCUSSION ONLY

TRUST ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

January 24, 1997 Interim Draft

TRUST ACT

With Comments

Copyright 1997
By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

The ideas and conclusions herein set forth, including drafts of proposed legislation, have not been passed upon by the National Conference of Commissioners on Uniform State Laws. They do not necessarily reflect the views of the Committee, Reporters or Commissioners. Proposed statutory language, if any, may not be used to ascertain legislative meaning of any promulgated final law

DRAFTING COMMITTEE ON TRUST ACT

MAURICE A. HARTNETT, III, Supreme Court, 57 The Green, Dover, DE 19901, Chair
EX OFFICIO

BION M. GREGORY, Office of Legislative Counsel, State Capitol, Suite 3021, Sacramento, CA 95814-4996, President
JOHN H. LANGBEIN, Yale Law School, P.O. Box 208215, New Haven, CT 06520, Chair, Division D

EXECUTIVE DIRECTOR

FRED H. MILLER, University of Oklahoma, College of Law, 300 Timberdell Rd., Norman, OK 73019, Executive Director
WILLIAM J. PIERCE, 1505 Roxbury Rd., Ann Arbor, MI 48104, Executive Director Emeritus

Copies of this Act may be obtained from:
NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS
676 North St. Clair Street, Suite 1700
Chicago, IL 60611
312/915-0195

TRUST ACT

Table of Contents

Article 1. Definitions and General Provisions. . . . . . . . . 1

Section 1-101. Short Title.
Section 1-102. Definitions.
Section 1-103. Common Law of Trusts.

Article 2. Creation, Validity, Modification and Termination of Trusts. 6

Part 1. Creation and Validity of Trusts. 6

Section 2-101. Methods of Creating Trusts.
Section 2-102. Requirements for Validity.
Section 2-103. Statute of Frauds.
Section 2-104. Trust Purposes.
Section 2-105. Honorary Trusts; Trusts for Pets.

Part 2. Modification and Termination of Trusts. 12

Section 2-201. Termination or Modification of Trust.
Section 2-202. Modification or Termination by Settlor and All Beneficiaries.
Section 2-203. Modification or Termination of Irrevocable Trust By Beneficiaries if No Material Purpose.
Section 2-204. Modification or Termination Due to Unanticipated Circumstances
Section 2-205. Noncharitable Trust with Uneconomically Low Value.
Section 2-206. Reformation; Tax Objectives.
Section 2-207. Combination of Trusts.
Section 2-208. Division of Trusts.

Part 3. Spendthrift Protection. 18

Section 2-301. Spendthrift Protection Recognized.
Section 2-302. Exceptions to Spendthrift Protection.
Section 2-303. Discretionary Trusts and Trusts Subject to Standard.
Section 2-304. Self-Settled Trusts.

Article 3. Provisions Relating to Revocable Trusts. 22

Section 3-101. Capacity to Create Revocable Trust.
Section 3-102. Revocation or Modification.
Section 3-103. Other Rights of Settlor.
Section 3-104. Creditor Claims Against Revocable Trust.
Section 3-105. Rights of and Creditor Claims Against Holder of Power of Appointment.
Section 3-106. Limitation on Contest of Revocable Trusts.

Article 4. Trust Administration. 29

Part 1. Office of Trustee. 29
Section 4-101. Acceptance or Rejection of Trust by Trustee.
Section 4-102. Trustee's Bond.
Section 4-103. Actions by Cotrustees.
Section 4-104. Vacancy in Office of Trustee.
Section 4-105. Filling Vacancy.
Section 4-106. Resignation of Trustee.
Section 4-107. Removal of Trustee.
Section 4-108. Delivery of Property by Removed or Resigning Trustee.
Section 4-109. Compensation of Trustee.
Section 4-110. Repayment for Expenditures.

Part 2. Fiduciary Duties of Trustee.

Section 4-201. Duty to Administer Trust; Alteration by Terms of Trust.
Section 4-202. Duty of Loyalty; Impartiality; Confidential Relationship.
Section 4-203. Standard of Prudence.
Section 4-204. Costs of Administration.
Section 4-205. Special Skills.
Section 4-206. Delegation.
Section 4-207. Directory Powers.
Section 4-208. Cotrustees.
Section 4-209. Control and Preservation of Trust Property.
Section 4-210. Separation and Identification of Trust Property.
Section 4-211. Enforcement and Defense of Claims and Actions.
Section 4-212. Predecessor Fiduciaries.
Section 4-213. Duty to Inform and Account.
Section 4-214. Duties with Regard to Discretionary Powers.


Section 4-301. Prudent Investor Rule.
Section 4-302. Standard of Care; Portfolio Strategy; Risk and Return Objectives.
Section 4-303. Diversification.
Section 4-304. Duties at Inception of Trusteeship.
Section 4-305. Loyalty.
Section 4-306. Impartiality
Section 4-307. Investment Costs.
Section 4-308. Reviewing Compliance.
Section 4-309. Delegation of Investment and Management Functions.
Section 4-310. Language Invoking Standard of Prudent Investor Rule.


Section 4-401. General Powers; Fiduciary Duties.
Section 4-402. Specific Powers.
Part 5. Liability of Trustees to Beneficiaries . . . . . . . . 86

Section 4-501. Violations of Duties; Breach of Trust.
Section 4-502. Breach of Trust; Actions.
Section 4-503. Breach of Trust; Liability.
Section 4-504. Limitation of Action Against Trustee Following Final Account.
Section 4-505. Exculpation of Trustee.
Section 4-506. Beneficiary's Consent, Release, or Affirmance; Nonliability of Trustee.

Part 6. Rights of Third Persons . . . . . . . . . . . . . . . . . 92

Section 4-601. Personal Liability; Limitations.
Section 4-602. Dissenting Cotrustees.
Section 4-603. Protection of Third Persons.
Section 4-604. Certification of Trust.
Section 4-605. Liability for Wrongful Taking, Concealing of Disposing of Trust Property.

Article 5. Charitable Trusts . . . . . . . . . . . . . . . . . . . 97

Section 5-102. Application of Cy Pres.
Section 5-103. Trust with Uneconomically Low Value.
Section 5-104. Interested Persons; Proceedings.

Article 6. Proceedings Concerning Trusts . . . . . . . . . . . 101

Part 1. Jurisdiction and Venue . . . . . . . . . . . . . . . . . . 101

Section 6-101. Subject Matter Jurisdiction.
Section 6-102. Principal Place of Administration of Trust.
Section 6-103. Jurisdiction Over Trustees and Beneficiaries.
Section 6-104. County of Venue.
Section 6-105. Transfer of Jurisdiction.

Part 2. Judicial Proceedings Concerning Trusts . . . . . . . . 106

Section 6-201. Judicial Intervention Intermittent
Section 6-202. Petitions; Purposes of Proceedings.

Part 3. Nonjudicial Settlement . . . . . . . . . . . . . . . . . . 108

Section 6-301. Definition and Applicability.
Section 6-302. Representation By Holders of Powers
Section 6-303. Representation By Fiduciaries and Parents.
Section 6-304. Representation By Holders of Similar Interests.
Section 6-305. Notice of Judicial Settlement.
Section 6-306. Appointment of Guardian ad Litem.
Section 6-307. Appointment of Special Representative.

Article 7. Transitional Provisions . . . . . . . . . . . . . . 111
Section 7-101. General Rule Concerning Application of [Act].
TRUST ACT

ARTICLE 1.
DEFINITIONS AND GENERAL PROVISIONS

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

SECTION 1-102. DEFINITIONS. In this [Act]:
(1) "Beneficiary," as it relates to a trust beneficiary, includes a person who has any present or future interest in the trust, vested or contingent, and also includes the owner of an interest by assignment or other transfer.
(2) "Charitable trust" means a trust created for a charitable purpose as specified in Section 5-101, excluding the interests of any noncharitable beneficiary.
(3) "Conservator" means a person appointed by a court to manage the estate of a minor or adult individual.
(4) "Court" means the [_____ Court].
(5) "Fiduciary" includes a personal representative, guardian, conservator, and trustee.
(6) "Guardian" means a person appointed by a court [, parent, or spouse] to make decisions with respect to the support, care, education, health, and welfare of a minor or adult individual, but excludes one who is merely a guardian ad litem.
(7) "Instrument" means a signed writing.
(8) "Interested person" includes a trustee, a successor trustee, a beneficiary, any other person having a property interest in the trust, and a fiduciary representing an interested person. The meaning as it relates to particular persons may vary from time to time according to the particular purposes of, and matters involved in, any proceeding.

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

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

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

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

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

(14) "Term" or "terms," when used in relation to a trust, means the manifestation of the settlor's intent regarding a trust's provisions at the time of the trust's creation or amendment. The terms may be expressed in writing or orally, or
may be inferred from conduct or constructional preferences or
rules.

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

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

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

Comment

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

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

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

Under the Act, a "guardian" (paragraph (6)) makes decisions
with respect to personal care; a "conservator" (paragraph (3))
manages property. Enacting jurisdictions not using these terms in
the defined sense may wish to substitute their own terminology.
The definition of "guardian" accommodates those jurisdictions, including jurisdictions which have enacted the Uniform Probate Code, which allow appointment of a guardian by a parent or spouse in addition to the court. Enacting jurisdictions which allow appointment of a guardian solely by a court should delete the bracketed language.

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

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

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

"Term" or "terms" (paragraph (14)), as used in relation to a trust, is a defined term used with some frequency in the Act. While the wording of a written trust instrument is almost always
the most important determinant of a trust's terms, the definition is not so limited. Oral statements, the settlor's family circumstances, and, to the extent the settlor was otherwise silent, rules of construction, all may have a bearing on determining a trust's meaning. If a trust established by order of court is to be administered as an express trust, the terms of the trust are determined from the court order as interpreted in light of the general rules governing interpretation of judgments. See Restatement (Third) of Trusts Sec. 4 and comment (Tent. Draft No. 1, 1996).

Not all evidence may necessarily be considered in determining the terms of the trust. For the evidence which may be considered, see Restatement Third, Property (Donative Transfers) Sec. 10.2, 11.1-11.3 (Tent. Draft No. 1, 1995).

Generally, a manifestation of a settlor's intention does not constitute evidence of a trust's terms if it is not admissible in a judicial proceeding in which the trust's terms are in question. See Restatement (Third) of Trusts Sec. 4 comm. b (Tent. Draft No. 1, 1996). For example, in many states a trust of real property is unenforceable unless created pursuant to a written instrument, although this Act does not so require but leaves this issue to the discretion of the enacting jurisdiction. See Section 2-103 (Statute of Frauds as applied to trusts). Evidence otherwise relevant to determining the terms of the trust may also be excluded under other principles of law, such as the parol evidence rule.

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

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

SECTION 1-103. COMMON LAW OF TRUSTS. Except to the extent
another statute, the common law of trusts supplements this [Act].

Comment.

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

ARTICLE 2.
CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUSTS

PART 1.
CREATION AND VALIDITY OF TRUSTS

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

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

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

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

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

Comment.

Source: CPC Section 15200.
This section is based on Section 17 of the Restatement (Second) of Trusts (1959) and Section 10 of the Restatement (Third) of Trusts (Tent. Draft No. 1, 1996).

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

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

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

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

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

SECTION 2-102. REQUIREMENTS FOR VALIDITY.

(a) A trust is created only if:

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

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

(3) unless the trust is a charitable trust, an honorary
trust, or a trust for the care of an animal, the trust has a
definite beneficiary or a beneficiary who will be definitely
ascertained within the period of the applicable rule against
perpetuities.

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

Comment.

Source: CPC Sections 15201, 15205, 15209.
Subsection (a) codifies the basic requirements for the
creation of a trust. To create a valid trust, the settlor must
indicate an intention to create a trust. Restatement (Second) of
Trusts Sec. 23 (1959); Restatement (Third) of Trusts Sec. 13
(Tent. Draft No. 1, 1996). But only such manifestations of intent
as are admissible as proof in a judicial proceeding may be
considered. See Sections 1-102(14) ("terms" defined). A trust,
other than a charitable trust or honorary trust or trust for the
care of an animal, must also have a definite or definitely
ascertainable beneficiary. Restatement (Second) of Trusts Sec.
112 (1959).

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

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

Subsection (b) provides the settlor a greater degree of
flexibility in creating a trust. A disposition that would be
valid as a power of appointment will not fail just because it is made in trust.

SECTION 2-103. STATUTE OF FRAUDS. A trust is enforceable only to the extent it was created in compliance with [here insert reference to local Statute of Frauds or statutory requirements for transferring real property].

Comment.

While settlors are strongly encouraged to always reduce their trusts to writing, the Act does not specifically invalidate oral trusts. Rather, the extent to which a trust must be evidenced by a writing is left to the enacting jurisdiction to determine. This section is included for the convenience of enacting jurisdictions which wish to cross-refer to their already existing statutes on the subject.

For the Statute of Frauds generally, see Restatement (Second) of Trusts Sections 40 et seq. For a description of what the writing must contain assuming that a writing is required, see Restatement (Third) of Trusts Sec. 22 (Tent. Draft No. 1, 1996). For a discussion of when the written instrument must be signed, see Restatement (Third) of Trusts Sec. 23 (Tent. Draft No. 1, 1996).

SECTION 2-104. TRUST PURPOSES. A trust is created only if it has a private or charitable purpose that is not unlawful or against public policy. A trust created for a private purpose must be administered for the benefit of its beneficiaries.

Comment.

Source: CPC Section 15203.

For an explication on the requirement that a trust must have a purpose that is not unlawful or against public policy, see Restatement (Second) of Trusts Sections 59-65 (1959). A trust failing to meet this requirement may fail at its inception, or may cease to exist at a later date. Invalidity may also be limited to particular provisions. Generally, a trust will fail under this section if: (1) its performance involves the commission of a criminal or tortious act by the trustee; (2) its enforcement would otherwise be against public policy even though not criminal or tortious; (3) the settlor's purpose in creating the trust was to defraud creditors or others; or (4) the consideration for the creation of the trust was illegal. See
Restatement (Second) of Trusts Section 60 comment a (1959).

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

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

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

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

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

Comment.

Source: UPC Section 2-907.
Subsection (a) of this section validates so-called honorary trusts but places a 21-year limit on their duration. The figure "21" is bracketed to indicate that an enacting jurisdiction may select a different duration. Should the honorary trust fail, a resulting trust is ordinarily created in the settlor unless the terms of the trust provide for a different disposition.

Subsection (b) addresses a particular type of honorary trust, a trust for the care of an animal. Subsection (b) is independent of (a). A trust for the care of a designated animal may last longer than 21 years if the animal is still living more
than 21 years after the settlor's death. While the animal beneficiary will ordinarily be alive at the time of the trust's creation, subsection (b) does permit an animal to be added as a beneficiary after the date of the trust's creation as long as the addition is made prior to the settlor's death.

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

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

PART 2.
MODIFICATION AND TERMINATION OF TRUSTS

SECTION 2-201. TERMINATION OR MODIFICATION OF TRUST.

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

(1) the term of the trust expires;

(2) the trust purpose is fulfilled;

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

(4) the trust is revoked.

(b) On termination of a trust, the trustee may exercise the powers necessary to wind up the affairs of the trust and distribute the trust property to those entitled.

Comment.


Subsection (a) lists the ways in which trusts typically terminate. Subsection (b), which is similar to Section 344 of the Restatement (Second) of Trusts, clarifies that even though the trust has terminated, the trustee retains the powers needed to wind up the affairs of the trust and distribute the remaining
trust property. For other provisions relating to trustees' powers, see Sections 4-401 and 4-402.

SECTION 2-202. MODIFICATION OR TERMINATION BY SETTLOR AND ALL BENEFICIARIES.

(a) An irrevocable trust may be modified or terminated upon the consent of the settlor and all of the beneficiaries.

(b) If a beneficiary does not consent to the modification or termination of a trust, upon petition to the Court, the Court, with the consent of the settlor and other beneficiaries, may approve a requested modification or partial termination if the interests of the beneficiaries who do not consent are not substantially impaired.

(c) Upon termination of the trust, the trustee must distribute the trust property as agreed by the settlor and beneficiaries.

(d) For purposes of this section, the consent of a person who may bind a beneficiary or otherwise act on a beneficiary’s behalf as provided in [Article] 6 is considered the consent of the beneficiary.

Comment.

Source: CPC Section 15404, 15410(b).

Subsections (a) and (b) of this section are drawn from Section 338 of the Restatement (Second) of Trusts (1959). A trust may be modified or terminated pursuant to this section without court approval and even over a trustee's objection, but a court order may be sought by petition under Section 6-202.

Subsection (c) recognizes that the power to terminate the trust includes the right to direct how the trust property is to be distributed.

Subsection (d) clarifies that the provisions of Article 6 on virtual representation and the appointment and approval of guardians ad litem and special representatives apply for purposes of determining whether all beneficiaries have signified consent.
SECTION 2-203. MODIFICATION OR TERMINATION OF IRREVOCABLE

TRUST IF NO MATERIAL PURPOSE.

(a) An irrevocable trust may be terminated or modified
either by the Court or upon consent of all of the beneficiaries
if continuance of the trust on the same or different terms is not
necessary to carry out a material purpose.

(b) Upon petition to the Court by the settlor, trustee, or
other interested person, the Court may set aside an improper
termination or modification by the beneficiaries.

(c) Upon termination of the trust, the trustee must
distribute the trust property in accordance with the probable
intention of the settlor or as agreed by the beneficiaries.

(d) For purposes of this section, the consent of a person
who may bind a beneficiary or otherwise act on a beneficiary’s
behalf as provided in [Article] 6 is considered the consent of
the beneficiary.

Comment.

Source: CPC Section 15403, 15410.
This section is based in part on Section 337 of the
Restatement (Second) of Trusts (1959). The consent of the settlor
or trustee is not required, although the settlor or trustee may
petition the court to prevent the termination or modification if
the change will violate a material purpose of the trust. For
provisions governing modification or termination of trusts if the
consent of all beneficiaries cannot be obtained, see Sections 2-
204 (modification or termination due to unanticipated
circumstances) and 2-205 (trust with uneconomically low value).
This section is limited to irrevocable trusts. If the trust is
revocable by the settlor, the method of revocation specified in
Section 3-102 applies. Compare Section 2-202 (modification or
termination by settlor and all beneficiaries).

Subsection (d) clarifies that the provisions of Article 6 on
virtual representation and the appointment of and approval of
guardians ad litem and special representatives apply for purposes
of determining whether all beneficiaries have signified consent.
SECTION 2-204. MODIFICATION OR TERMINATION DUE TO UNANTICIPATED CIRCUMSTANCES.

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

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

Comment.

Source: CPC Section 15409-15410.
The first sentence of subsection (a) is drawn from Sections 167 and 336 of the Restatement (Second) of Trusts (1959). See also Section 4-401(b) (power of court to relieve trustee from restrictions or confer additional powers).

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

SECTION 2-205. NONCHARITABLE TRUST WITH UNECONOMICALLY LOW VALUE.

(a) If the value of the trust property of a noncharitable trust is less than [$50,000], the trustee may terminate the trust.
(b) On petition by a trustee or beneficiary, the Court may terminate or modify a noncharitable trust or appoint a new trustee if it determines that the value of the trust property is insufficient to justify the cost of administration involved and that continuation of the trust under its existing terms or trustee would defeat or significantly impair the accomplishment of the trust purposes.

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

Comment.

Source: CPC Section 15408, 15410.
Subsection (a) assumes that a trust with a value of $50,000 or less is inherently uneconomical. Consequently, court approval of the termination is not required. For the comparable provision on termination of charitable trusts, see Section 5-103.

SECTION 2-206. REFORMATION; TAX OBJECTIVES.

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

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

Comment.

This section is based in part on Restatement (Third) of Property-Donative Transfers Section 12.1-12.2 (Tent. Draft No. 1, 1995).
(a) A trustee, without approval of court, may combine two or more trusts with substantially similar beneficial interests.

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

Comment.

Source: CPC Section 15411.

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

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

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

SECTION 2-208. DIVISION OF TRUSTS.

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

(b) On petition by a trustee or beneficiary, the Court may divide a trust into two or more separate trusts, whether or not their terms are similar, if the Court determines that dividing the trust is in the best interest of the beneficiaries and will not defeat or substantially impair the accomplishment of the trust purposes or the rights of the beneficiaries.
Subsection (a) recognizes that division of trusts may be beneficial and, in certain circumstances, almost routine. For example, a division of trusts is often necessitated by a desire to obtain maximum advantage of exemptions available under the federal generation-skipping tax.

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

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

PART 3.
SPENDTHRIFT PROTECTION

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

Comment.

Source: CPC Section 15300-15301.

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

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

SECTION 2-302. EXCEPTIONS TO SPENDTHRIFT PROTECTION. A term of a trust prohibiting an involuntary transfer of a
beneficiary's interest shall be invalid as against claims by:

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

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

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

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

Comment.

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

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

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

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

Paragraph (4) is based on Restatement (Second) of Trusts Section 153 but with an important modification. Under Section 153, a spendthrift provision is invalid to the extent a beneficiary is entitled to an immediate transfer of the principal
of the trust. Under Section 152, however, a creditor may not
reach a distribution of income until paid to the beneficiary. The
reason behind the Restatement’s separate treatment of income and
principal was to prevent a creditor from reaching periodic
distributions while allowing a creditor to reach the assets
following termination of the trust and before their payment to
the beneficiary. Modern portfolio theory, as articulated by the
Uniform Prudent Investor Act, recognizes that the distinction
between income and principal is often artificial. Paragraph (4)
strives to achieve the original purpose of the Restatement
without relying on this often artificial distinction.
Consequently, following an event terminating or partially
terminating the trust, Paragraph (4) allows the creditor to
secure an order compelling payment from the terminated assets,
whether they consist of principal or accumulated income.
This section does not supersede other laws which provide
spendthrift protection to pension trusts and other employee
plans.

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

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

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

**Comment.**

This section is based on but is broader than Section 155 of
the Restatement (Second) of Trusts, which applies only to trusts
over which the trustee has "uncontrolled discretion." Under this
section, subject to limited exceptions, a beneficiary's creditor
cannot compel the trustee of a discretionary trust or a trust subject to a standard to pay any part of the trust to the creditor, even though the beneficiary could compel the payment. The creditor may be able to reach any payment the trustee decides to make, however.

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

SECTION 2-304. SELF-SETTLED TRUSTS.

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

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

Comment.

Source: CPC Section 15304(b).
This section is drawn from Section 156(2) of the Restatement (Second) of Trusts (1959). See also the comments to Restatement Section 156. For the rights of creditors if the settlor has retained a power of revocation, see Section 3-104. For the definition of "settlor", see Section 1-102(12).

ARTICLE 3. PROVISIONS RELATING TO REVOCABLE TRUSTS

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

Comment.

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

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

SECTION 3-102. REVOCATION OR MODIFICATION.

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

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

[ALTERNATIVE PROVISION FOR COMMUNITY PROPERTY STATES]

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

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

(2) to the extent the trust consists of other property,
each settlor may revoke or modify the trust as to the portion of
the trust contributed by that settlor.)

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

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

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

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

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

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

Comment.

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

Subsection (a), which provides that a settlor may revoke or
modify a trust unless the terms of the trust expressly state that
the trust is irrevocable, is contrary to the common law. See
Restatement (Second) of Trusts Sec. 330 (1959). This subsection
will not govern certain trusts created in other states. Choice of
law principles may dictate that the law of a state following the
common law rule is to govern, in which event the trust would be
irrevocable unless expressly made revocable. In addition, this subsection does not prevent a trust from being reformed to make it irrevocable if the settlor was proceeding under a mistake of law at the time of its creation. See Section 2-206 (reformation of trust).

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

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

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

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

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

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

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

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

SECTION 3-103. OTHER RIGHTS OF SETTLOR. Except to the extent the terms of the trust otherwise provide, while a trust is
revocable and the individual holding the power to revoke the
trust has capacity:

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

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

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

Comment

Source: CPC Section 15800, 16001.

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

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

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

This section no longer applies should the holder of the
power to revoke lose capacity. In that event, the beneficiaries
are granted all rights normally afforded the beneficiaries of
irrevocable trusts, subject to a possible right of a conservator
or agent to revoke or modify the trust. See Section 3-102(e)-(f).
See also Section 6-302, which authorizes the holder of the
power to revoke to represent and bind the beneficiaries to
judicial orders and nonjudicial settlements.

SECTION 3-104. CREDITOR CLAIMS AGAINST REVOCABLE TRUST.

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

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

Comment.

Source: CPC Sections 18200, 19001.

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

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

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

(a) The holder of a presently exercisable general power of appointment over a trust has the rights of a holder of the power
to revoke a trust under Section 3-103 to the extent of the
property subject to the power.

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

Comment.

Source: CPC Section 15803.

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

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

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

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

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

ARTICLE 4.
TRUST ADMINISTRATION

PART 1
OFFICE OF TRUSTEE

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

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

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

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

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

(c) If there is an immediate risk of damage to the trust property, the person named as trustee may act to preserve the trust property without accepting the office of trustee, if within
a reasonable time after acting the person delivers a written rejection of the trust to the settlor or, if the settlor is dead or lacks capacity, to a beneficiary.

Comment.


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

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

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

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

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

SECTION 4-102. TRUSTEE'S BOND.

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

(1) a bond is required by the terms of the trust; or

(2) a bond is found by the Court to be necessary to protect the interests of beneficiaries, whether or not bond is
waived by the terms of the trust.

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

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

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

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

Comment.

Source: CPC Section 15602.

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

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

SECTION 4-103. ACTIONS BY COTRUSTEES. Except as otherwise
provided by the terms of the trust:

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

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

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

Comment.

Source: CPC 15621, 15622.

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

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

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

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

SECTION 4-104. VACANCY IN OFFICE OF TRUSTEE. There is a vacancy in the office of trustee if:
(1) the person named as trustee rejects the trust;
(2) the person named as trustee cannot be identified or does not exist;
(3) the trustee resigns or is removed;
(4) the trustee dies; or
(5) a guardian or conservator of the trustee's person or estate is appointed.

Comment.

Source: CPC Section 15643.
This section lists the typical ways in which the office of trustee becomes vacant. It does not preclude other methods, such as the suspension of the powers of a trust company under federal or state banking regulations. For the rules on filling a vacancy, see Section 4-105. See also Section 1-102(16) ("trust company" defined), 4-101 (rejection of trust), 4-106 (resignation and liability of resigning trustee), 4-107 (removal of trustee), 4-603 (protection of third person dealing with former trustee).

SECTION 4-105. FILLING VACANCY.

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

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

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

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

(i) By a trust company designated on agreement of the adult beneficiaries specified in subsection (c); or
(ii) By a person appointed by the Court on petition of an interested person or of a person named as trustee by the terms of the trust. The Court, in selecting a trustee, shall consider any nomination made by the adult beneficiaries.

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

Comment.

Source: CPC Section 15660.

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

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

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

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

SECTION 4-106. RESIGNATION OF TRUSTEE.
(a) A trustee who has accepted a trust may resign by any of the following methods:

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

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

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

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

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

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

Comment.

Source: CPC Section 15640, 15641.
This section is based in part on Section 106 of the Restatement (Second) of Trusts (1959), except that under subsection (a)(3) the class of persons whose consent is needed is
more limited and the Restatement section does not address revocable trusts. Under this section, court approval is not required to accomplish a resignation except under subsection (a)(5). Whether court approval is required under subsection (a)(1) depends on the terms of the trust. Subsection (a)(2) is a provision that recognizes that the person holding the power to revoke a revocable trust, and not the beneficiaries, has control over the trust. See Section 3-103. Under subsection (a)(5) the court has authority to accept a resignation regardless of whether the trust provides a manner of resignation.

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

SECTION 4-107. REMOVAL OF TRUSTEE.

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

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

(1) if the trustee has committed a material breach of the trust;
(2) if the trustee is unfit to administer the trust;
(3) if hostility or lack of cooperation among cotrustees impairs the administration of the trust;
(4) if the trustee's investment performance is persistently or seriously substandard;
(5) if the trustee's compensation is excessive under the circumstances;
(6) for other good cause shown.

(c) If it appears to the Court that trust property or the interests of a beneficiary may suffer loss or injury pending a final decision on a petition for removal of a trustee, the Court
may suspend the powers of the trustee, compel the trustee to
surrender trust property to a cotrustee, receiver or temporary
trustee, or order other appropriate relief.

Comment.

Source: CPC Section 15642.

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

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

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

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

Unless a cotrustee remains in office, a former trustee, or if the
trustee’s appointment terminated because of death or disability,
the former trustee’s personal representative or guardian or
conservator, is responsible for and has the powers necessary to
protect the trust property and other powers essential to the
trust’s administration until the property is delivered to a
successor trustee or a person appointed by the Court to receive
the property.
This section clarifies that a trustee who has resigned or is removed has the powers needed to complete the trustee's remaining duties. Following the lead of the Uniform Probate Code, this section also imposes a similar obligation on the personal representative or guardian or conservator of a deceased or incapacitated trustee. However, the obligation to carry out residual duties of the former trustee applies only if no trustee remains in office. Whether or not a trustee remains in office, the former trustee remains liable for actions or omissions during the trustee’s term of office until liability is barred.

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

SECTION 4-109. COMPENSATION OF TRUSTEE.

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

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

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

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

(3) in extraordinary circumstances calling for equitable relief.

Comment.

Source: CPC Section 15680-15681.

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

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

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

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

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

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

Comment.

Source: CPC Section 15684.

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

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

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

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

**PART 2.**

**FIDUCIARY DUTIES OF TRUSTEE**

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

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

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

Comment.

Source: CPC Section 16000.

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

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

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

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

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

(c) A transaction not involving trust property between a trustee and a beneficiary which occurs during the existence of the trust or while the trustee retains significant influence over
the beneficiary and from which the trustee obtains an advantage
is an abuse of a confidential relationship unless the trustee
establishes that the transaction was fair.

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

Comment.

Source: CPC Section 16002-16004.

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

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

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

Subsection (d) excepts from the general duty of loyalty
sales or other transactions between two or more trusts that have
the same trustee, or transactions with a decedent’s or
conservatorship estate of which the trustee is personal
representative or conservator. See Restatement (Second) of Trusts Sec. 170, comm. r (1959). The trustee need not give advance notice of the transaction to the beneficiaries unless required by some other provision. See, e.g., Section 4-213(b) (duty to inform beneficiaries in advance of certain proposed sales). For a provision limiting the need to give notice, see Section 6-305 (notice of judicial settlement). For provisions permitting the beneficiaries to relieve the trustee from liability, see Section 4-506. For other fundamental duties of the trustee, see Sections 4-201(a) (duty to administer trust), and 4-203 (standard of prudence).

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

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

Comment.

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

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

Comment.

Source: Unif. Prudent Investor Act Sec. 7.

This section is consistent with the rules concerning costs in Section 227(c) (3) of the Restatement (Third) of Trusts: Prudent Investor Rule (1992). For related rules concerning reimbursement and compensation of trustees, see Sections 4-109 and 4-110. The duty to minimize costs applies to delegation to agents as well as to other aspects of trust administration. In deciding whether and how to delegate, the trustee must be alert to balancing projected benefits against the likely costs. The
trustee must also be alert to adjusting compensation for
functions which the trustee has delegated to others in order to
protect the beneficiary against "double dipping."

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

SECTION 4-205. SPECIAL SKILLS.
(a) A trustee shall apply the full extent of the trustee's
skills.

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

Comment.

Source: CPC Section 16014.
Subsection (b) is similar to the last part of Section 7-302
of the Uniform Probate Code (1977) and the last part of Section
174 of the Restatement (Second) of Trusts (1959). Subsection (b)
does not limit the duty provided in subsection (a). Thus, the
nature of the trustee's representations to the settlor leading up
to the selection of the trustee does not affect the trustee's
duty to use the full extent of the trustee's skills.

SECTION 4-206. DELEGATION.
(a) A trustee may not delegate to an agent or cotrustee the
entire administration of the trust or the responsibility to make
or participate in the making of decisions with respect to
discretionary distributions, but a trustee may otherwise delegate
the performance of functions that a prudent trustee of comparable
skills might delegate under similar circumstances.

(b) The trustee shall exercise reasonable care, skill, and
cautions in:

(1) selecting an agent;

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

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

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

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

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

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

Comment.

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

Under this section, the emphasis is instead placed on encouraging and protecting the trustee in making delegations appropriate to the facts and circumstances of the particular trust. Under Subsection (a), the only functions which a trustee is absolutely forbidden to delegate is the entire administration of the trust and the obligation to make or participate, with a cotrustee, in the making of decisions with respect to discretionary distributions. Allowing for delegation of the entire administration would make the appointment of the trustee a useless gesture. Delegation of authority to make discretionary distributions is forbidden because this is the one function which
more than any other is intrinsic to the office of trustee. However, while the trustee must make the final decision, the trustee may of course seek appropriate advice.

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

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

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

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

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

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

SECTION 4-207. DIRECTORY POWERS.

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

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

Comment.

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

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

In the case of a revocable trust, this section is
subordinate to Section 3-103(3), which requires a trustee to
follow the written direction of the holder of the power to
revoke. This would require the settlor to follow a written
direction of the holder which might be contrary to the direction of the person to whom the settlor has granted a directory power.

SECTION 4-208. COTRUSTEES.

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

1. participate in the administration of the trust; and
2. take reasonable steps to prevent a cotrustee from committing a breach of trust and to compel a cotrustee to redress a breach of trust.

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

Comment.

Source: CPC Section 16013.

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

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

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

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

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

Source: CPC Section 16006.
This section codifies the substance of Sections 175 and 176 of the Restatement (Second) of Trusts (1959). For provisions permitting the beneficiaries to relieve the trustee from liability, see Section 4-506. See also Sections 4-201 (duties subject to control by terms of the trust), 4-203 (trustee's standard of prudence in performing duties), 4-402(6) (power to abandon trust property), 4-402(19) (power to insure trust property).

SECTION 4-210. SEPARATION AND IDENTIFICATION OF TRUST PROPERTY. A trustee shall:

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

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

Comment.

Source: CPC Section 16009.
This section is derived from Section 179 of the Restatement (Second) of Trusts (1959), except that this section permits the joint investment of trust funds with the funds of others, but not the trustee’s own, as long as the interest of the trust clearly appears. For provisions permitting beneficiaries to relieve the trustee from liability, see Section 4-506. See also Sections 4-201 (duties subject to control by terms of the trust), 4-203 (trustee's standard of prudence in performing duties), and 4-402(17), which in conformity with this section, allows trustees to hold property in nominee form.

SECTION 4-211. ENFORCEMENT AND DEFENSE OF CLAIMS AND ACTIONS. A trustee shall take reasonable steps to enforce claims that are part of the trust property and to defend against actions that may result in a loss to the trust.

Comment.

Source: CPC Section 16010-16011.
This section codifies the substance of Sections 177 and 178 of the Restatement (Second) of Trusts (1959). Under this section, it may not be reasonable to enforce a claim depending upon the
likelihood of recovery and the cost of suit and enforcement. Depending on the circumstances of the case, it might also be reasonable to settle an action or suffer a default rather than to defend an action. For provisions permitting beneficiaries to relieve the trustee from liability, see Section 4-506. See also Sections 4-201 (duties subject to control by terms of the trust), 4-203 (trustee's standard of prudence in performing duties).

SECTION 4-212. PRIOR FIDUCIARIES. A trustee shall take reasonable steps to (i) compel a former trustee or other fiduciary to deliver trust property to the trustee, and (ii) redress a breach of trust known to the trustee to have been committed by a prior trustee or other fiduciary.

Comment.

Source: CPC Section 16403.
This section is the same in substance as Section 223 of the Restatement (Second) of Trusts (1959), except that this section is written in terms of the affirmative duties of the trustee rather than in terms of negation from liability. Also, unlike the Restatement, this section applies not only to duties with respect to predecessor trustees, but also to personal representatives, conservators and agents under powers of attorney from whom the trustee received trust property.

This section is a specific application of Section 4-211 on the duty to enforce claims, which could include a claim against a predecessor trustee for breach of trust. In certain circumstances it may not be reasonable to enforce a claim against a predecessor trustee or other fiduciary, depending upon the likelihood of recovery and the cost of suit and enforcement. It should also be noted that the liability to beneficiaries does not include beneficiaries under revocable trusts during the time that the trust can be revoked. See Section 3-103 (rights of settlor of revocable trust); see also Section 3-105 (holder of presently exercisable general power of appointment treated as settlor).

This section does not impose an affirmative duty on the part of a trustee to root out possible wrongdoing by a predecessor. Such a duty is negated because of the expense involved and the reluctance of many trustees to accept the office because of the possible liability. A trustee is liable, however, for breaches committed by a predecessor of which the trustee is aware and for which the trustee failed to take appropriate corrective action.

For provisions permitting a trustee to be relieved of liability for acts of a predecessor trustee or other fiduciary, see Section 4-506.
SECTION 4-213. DUTY TO INFORM AND ACCOUNT.

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

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

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

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

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

(f) Copies of accountings and other information required under this section shall be sent to:
(1) the adult beneficiaries as defined in Section 4-105(c); and

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

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

Comment.

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

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

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

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

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

SECTION 4-214. DUTIES WITH REGARD TO DISCRETIONARY POWERS. A trustee shall exercise a discretionary power within the bounds of reasonable judgment and in accordance with applicable fiduciary principles and the terms of the trust. Notwithstanding the use of such terms as "absolute," "sole," or "uncontrolled" in the grant of discretion, a trustee shall act in accordance with fiduciary principles and may not act in bad faith or in disregard of the purposes of the trust or the power. Absent an abuse of discretion, a trustee’s exercise of discretion is not subject to control by a court.

Comment.

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

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

PART 3
UNIFORM PRUDENT INVESTOR ACT

PREFATORY NOTE

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

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

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

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

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

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

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

(5) The much criticized former rule of trust law
forbidding the trustee to delegate investment and management functions has been reversed. Delegation is now permitted, subject to safeguards. UPIA § 9.


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


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

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

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

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

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

SECTION 4-301. PRUDENT INVESTOR RULE.

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

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

Comment.

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

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

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

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

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

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

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

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

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

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

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

(1) general economic conditions;
(2) the possible effect of inflation or deflation;
(3) the expected tax consequences of investment decisions or strategies;
(4) the role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property;
(5) the expected total return from income and the appreciation of capital;
(6) other resources of the beneficiaries;
(7) needs for liquidity, regularity of income, and preservation or appreciation of capital; and
(8) an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

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

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

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

Comment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Comment.
The language of this section derives from Restatement of
Trusts 2d § 228 (1959). ERISA insists upon a comparable rule for
Case law overwhelmingly supports the duty to diversify. See
Annot., Duty of Trustee to Diversify Investments, and Liability
78-79.
The 1992 Restatement of Trusts takes the significant step of
integrating the diversification requirement into the concept of
prudent investing. Section 227(b) of the 1992 Restatement treats
diversification as one of the fundamental elements of prudent
investing, replacing the separate section 228 of the Restatement
of Trusts 2d. The message of the 1992 Restatement, carried
forward in this section, is that prudent investing ordinarily
requires diversification.

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

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

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

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

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

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

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

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

Comment.

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

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

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

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

Comment.

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

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

The duty of loyalty is not limited to settings entailing self-dealing or conflict of interest in which the trustee would
benefit personally from the trust. "The trustee is under a duty to the beneficiary in administering the trust not to be guided by the interest of any third person. Thus, it is improper for the trustee to sell trust property to a third person for the purpose of benefitting the third person rather than the trust."

Restatement of Trusts 2d § 170, comment q, at 371 (1959).


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

Comment.

The duty of impartiality derives from the duty of loyalty. When the trustee owes duties to more than one beneficiary, loyalty requires the trustee to respect the interests of all the beneficiaries. Prudence in investing and administration requires the trustee to take account of the interests of all the beneficiaries for whom the trustee is acting, especially the conflicts between the interests of beneficiaries interested in income and those interested in principal.
The language of Section 6 derives from Restatement of Trusts 2d § 183 (1959); see also id., § 232. Multiple beneficiaries may be beneficiaries in succession (such as life and remainder interests) or beneficiaries with simultaneous interests (as when the income interest in a trust is being divided among several beneficiaries).

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

SECTION 4-307. INVESTMENT COSTS. In investing and managing trust property, a trustee may only incur costs that are appropriate and reasonable in relation to the property, the purposes of the trust, and the skills of the trustee.

Comment.

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

The language of Section 7 derives from Restatement of Trusts 2d § 188 (1959). The Restatement of Trusts 3d says: "Concerns over compensation and other charges are not an obstacle to a reasonable course of action using mutual funds and other pooling arrangements, but they do require special attention by a trustee. . . . [I]t is important for trustees to make careful cost comparisons, particularly among similar products of a specific type being considered for a trust portfolio." Restatement of Trusts 3d: Prudent Investor Rule § 227, comment m, at 58 (1992).

SECTION 4-308. REVIEWING COMPLIANCE. Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.

Comment.

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

SECTION 4-309. DELEGATION OF INVESTMENT AND MANAGEMENT
FUNCTIONS.

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

(1) selecting an agent;

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

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

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

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

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

Comment.

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

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

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

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

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

The delegation rule of the Uniform Trustee Powers Act. The
Uniform Trustee Powers Act (1964) effectively abrogates the
nondelegation rule. It authorizes trustees "to employ persons,
including attorneys, auditors, investment advisors, or agents,
even if they are associated with the trustee, to advise or assist
the trustee in the performance of his administrative duties; to
act without independent investigation upon their recommendations;
and instead of acting personally, to employ one or more agents to
perform any act of administration, whether or not discretionary .

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

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

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


The delegation rule of the 1992 Restatement. The Restatement of Trusts 3d: Prudent Investor Rule (1992) repeals the nondelegation rule of Restatement of Trusts 2d § 171 (1959), extracted supra, and replaces it with substitute text that reads:
§ 171. Duty with Respect to Delegation. A trustee has a duty personally to perform the responsibilities of trusteeship except as a prudent person might delegate those responsibilities to others. In deciding whether, to whom, and in what manner to delegate fiduciary authority in the administration of a trust, and thereafter in supervising agents, the trustee is under a duty to the beneficiaries to exercise fiduciary discretion and to act as a prudent person would act in similar circumstances.


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

Protecting the beneficiary against unreasonable delegation.

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

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

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

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

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

SECTION 4-310. LANGUAGE INVOKING PRUDENT INVESTOR RULE.
The following terms or comparable language in the provisions of a
trust, unless otherwise limited or modified, authorizes any
investment or strategy permitted under this [Act]: "investments
permissible by law for investment of trust funds," "legal
investments," "authorized investments," "using the judgment and
care under the circumstances then prevailing that persons of
prudence, discretion, and intelligence exercise in the management
of their own affairs, not in regard to speculation but in regard
to the permanent disposition of their funds, considering the
probable income as well as the probable safety of their capital,"
"prudent man rule," "prudent trustee rule," "prudent person
rule," and "prudent investor rule."
This provision is taken from the Illinois act, 760 ILCS § 5/5(d) (1992), and is meant to facilitate incorporation of the Act by means of the formulaic language commonly used in trust instruments.

PART 4.
POWERS OF TRUSTEES

SECTION 4-401. GENERAL POWERS; FIDUCIARY DUTIES.

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

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

(2) except as limited by the terms of the trust, powers conferred by this [Act].

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

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

Comment.

Source: CPC Section 16200-16202.
Subsection (a) is drawn from Sections 2(a) and 3(a) of the Uniform Trustee's Powers Act (1964). The introductory clause clarifies that the trustee has the powers as provided in this section without the need to obtain court authorization. However, if the trustee desires court approval before exercising a power or desires court review after exercise of a power, the procedure provided in Section 6-202 et seq. is available.
Subsection (a)(2) gives the trustee the powers listed in Section 4-402 or provided elsewhere in the Act without the need to incorporate them. See, e.g., Section 4-301 (prudent investor rule).

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

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

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

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

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

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

(3) continue or participate in the operation of a business
or other enterprise that is part of the trust property and affect an incorporation, dissolution, or other change in the form of the organization of the business or enterprise;

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

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

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

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

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

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

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

(11) enter into a lease or arrangement for exploration and
removal of gas, oil, or other minerals or geothermal energy, and enter into a community oil lease or a pooling or unitization agreement;

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

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

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

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

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

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

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

(16) consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise, and participate in voting trusts, pooling arrangements, and foreclosures, and in connection therewith, deposit securities with and transfer title and delegate discretion to any protective
or other committee as the trustee considers advisable;

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

(18) deposit securities in a securities depository;

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

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

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

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

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

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

(25) make a distribution of property and money in divided or
undivided interests, pro rata or non-pro-rata, and adjust resulting differences in valuation;

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

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

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

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

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

Comment.
Source: CPC Section 16220-16249.

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

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

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

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

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

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

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

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

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

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

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

**PART 5.**

**LIABILITY OF TRUSTEES TO BENEFICIARIES**

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

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

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

**Comment.**

Source: CPC Section 16400, 16421.

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

Subsection (b) is drawn from Section 197 of the Restatement (Second) of Trusts (1959). For a list of equitable remedies, see Section 4-502. See also Section 4-503 (measure of liability for breach of trust).
SECTION 4-502. BREACH OF TRUST; ACTIONS. To remedy a breach of trust which has occurred or may occur, a beneficiary or cotrustee of the trust may request the Court to:

1. compel the trustee to perform the trustee's duties;
2. enjoin the trustee from committing a breach of trust;
3. compel the trustee to redress a breach of trust by payment of money or otherwise;
4. appoint a receiver or temporary trustee to take possession of the trust property and administer the trust;
5. remove the trustee;
6. reduce or deny compensation to the trustee;
7. subject to Section 4-603, nullify an act of the trustee, impose an equitable lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds.

Comment.

Source: CPC Section 16420.
This section codifies in general terms the remedies available to a beneficiary or cotrustee when a trustee has committed a breach of trust or threatens to do so. The list of remedies is not necessarily exclusive and is not intended to prevent resort to any other appropriate remedy. This section provides a general list of remedies and does not attempt to set out the refinements and exceptions developed over many years by the common law. The availability of a particular remedy listed in this section, and its application under the circumstances, are governed by the common law. See Section 1-103 (common law of trusts). The petitioner may seek any one or more of the remedies listed as is appropriate in the circumstances of the case.

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

The reference to payment of money in paragraph (3) includes liability that might be characterized as damages, restitution, or surcharge. For the measure of liability, see Section 4-503. The characterization of monetary liability does not affect the fact
that the remedies for breach of trust are exclusively equitable, as provided in Section 4-501(b). In certain circumstances, rather than ordering the payment of money, it may be appropriate for the court to order the trustee to transfer tangible property as a remedy for breach of trust. See also Restatement (Second) of Trusts Section 199(c) (1959).

Paragraph (4) makes explicit the authority to appoint a receiver. See also Restatement (Second) of Trusts Section 199(d) (1959). This paragraph also permits appointment of a temporary trustee if appointment of a receiver would be appropriate. See Section 4-105 (appointment of trustee to fill vacancy). As to paragraph (5), see Restatement (Second) of Trusts Section 199(e) (1959). For provisions governing removing trustees, see Section 4-107 (grounds for removal).

Paragraph (6) is based on Section 243 of the Restatement (Second) of Trusts (1959). The authority under paragraph (7) to set aside wrongful acts of the trustee is a corollary of the power to enjoin a threatened breach as provided in paragraph (2). As recognized in the introductory clause, the wrongful acts of the trustee may not be set aside if to do so would impair the rights of bona fide purchasers as provided in Section 4-603. See Restatement (Second) of Trusts Section 202 (1959). See also G. Bogert, The Law of Trusts and Trustees Sec. 861, at 16-17 (rev. 2d ed. 1982).

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

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

Comment.

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

If a trustee commits a breach of trust, the beneficiaries may either affirm the transaction or, if a loss has occurred, hold the trustee liable for the amount necessary to fully compensate for the consequences of the breach. This may include lost income, capital gain, or appreciation that would have resulted from proper administration. Even if a loss has not occurred, the trustee may not be allowed to benefit by reason of the trustee’s improper action, and is thus accountable for any
profit which the trustee may have made by reason of the breach. For extensive commentary on the determination of damages, with numerous specific applications, see Restatement (Third) of Trusts—Prudent Investor Rule Sections 204-213 (1992).

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

As to defenses of the trustee, see Sections 4-504 to 4-506. The remedies provided in this section do not preclude resort to other remedies provided by this Act or available under the common law. See Sections 1-103 (common law of trusts), and 4-502 (breach of trust; actions).

SECTION 4-504. LIMITATION OF ACTION AGAINST TRUSTEE FOLLOWING FINAL ACCOUNT.

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

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

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

(2) In the case of an adult who is not reasonably capable of understanding the account or report, if it is received
by the adult's legal representative, including a guardian ad
litem or other person appointed for this purpose.

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

Comment.

Source: CPC Section 16460.

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

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

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

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

(1) relieves a trustee of liability for breach of trust
committed intentionally, with gross negligence, in bad faith, or
with reckless indifference to the interest of the beneficiary, or
for any profit derived by the trustee from the breach; or
(2) was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.

Comment.

Source: CPC Section 16461.
This section is the same in substance as Section 222 of the Restatement (Second) of Trusts (1959), except that the reference to gross negligence does not appear in the Restatement. There is a distinction between an exculpatory provision and the negation of a duty. While the terms of the trust may negate a duty (see Section 4-201(b)), if the trustee is required under the terms of the trust or this Act to perform the duty, the trustee may not be totally absolved from liability for a breach. See Restatement (Second) of Trusts Section 222 comments b & c (1959).

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

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

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

Comment.

Source: CPC Section 16463-16465.
This section is drawn from Sections 216 to 218 of the Restatement (Second) of Trusts (1959). When one beneficiary has consented but others have not, courts give a remedy to the nonconsenting beneficiaries. Restatement (Second) of Trusts Section 216, comment h. But consent by the settlor of a revocable trust binds all the beneficiaries under Section 3-103. See also
Section 3-105 (consent by holder of a presently exercisable
general power of appointment).

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

PART 6. RIGHTS OF THIRD PERSONS

SECTION 4-601. PERSONAL LIABILITY; LIMITATIONS.

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

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

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

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

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

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

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

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

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

SECTION 4-602. DISSenting COTRUSTEES.

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

(b) A dissenting cotrustee who joins in an action at the direction of the majority cotrustees is not liable to a third
person for the action if the dissenting cotrustee expresses the
dissent in writing to any other cotrustee at or before the action
is taken.

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

Comment.

Source: CPC Section 18003.
This section is drawn from Section 114.006(a) of the Texas
As to the duties of cotrustees, see Sections 4-208. Under
Section 4-103, cotrustees may act by majority vote unless
otherwise provided by the terms of the trust.

SECTION 4-603. OBLIGATIONS OF THIRD PERSONS.

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

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

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

(b) A third person who acts in good faith is not bound to
ensure the proper application of trust property paid or delivered
to the trustee.
(c) If a third person acting in good faith and for a valuable consideration enters into a transaction with a former trustee without knowledge that the person is no longer a trustee, the third person is fully protected as if the former trustee were still a trustee.

Comment.

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

SECTION 4-604. CERTIFICATION OF TRUST.

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

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

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

(d) A person may require that the trustee offering the certification of trust provide copies of those excerpts from the original trust instrument and amendments thereto which designate the trustee and confer upon the trustee the power to act in the pending transaction.
(e) A person who acts in reliance upon a certification of trust without knowledge that the representations contained therein are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification. Knowledge may not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying upon the trust certification. A transaction, and a lien created thereby, entered into by the trustee and a person acting in reliance upon a certification of trust is enforceable against the trust assets.

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

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

Comment.

Source: CPC Section 18100.5.

SECTION 4-605. LIABILITY FOR WRONGFUL TAKING, CONCEALING OF DISPOSING OF TRUST PROPERTY. A person who, in bad faith, wrongfully takes, conceals, or disposes of trust property is liable for twice the value of the property, recoverable in an action by a trustee for the benefit of the trust.
ARTICLE 5. CHARITABLE TRUSTS.

GENERAL COMMENT

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

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

Comment.

This section, unlike the remainder of the Article, does not break significant new ground, but merely restates the well-established categories of charitable purposes listed in Restatement (Second) of Trusts Section 368 and ultimately derived from the Statute of Charitable Uses, 43 Eliz. I, c.4 (1601). This section also ratifies a common estate planning technique whereby the trustee is granted discretion to distribute the trust property for any charitable purpose or beneficiary. See Restatement (Second) of Trusts Section 396 (1959).
SECTION 5-102. APPLICATION OF CY PRES. Unless the terms of the trust provide to the contrary:

(1) A charitable trust does not fail, in whole or in part, if a particular purpose for which the trust was created becomes impracticable, unlawful, or impossible to fulfill;

(2) If a particular charitable purpose for which a trust was created becomes impracticable, unlawful or impossible to fulfill, the Court may modify the terms of the trust or direct that the property of the trust be distributed in whole or in part in a manner best meeting the settlor's general charitable purposes. If an administrative provision of a charitable trust becomes impracticable, unlawful, impossible to fulfill or otherwise impairs the effective administration of the trust, the Court may modify the provision.

Comment.

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

This section also modifies the doctrine of cy pres. Under traditional doctrine, if a specific charitable purpose becomes impossible to fulfill, the courts embark on an elusive hunt to determine whether the settlor had a general charitable intent. If so, the trust property is diverted to other charitable purposes. But if not, the trust fails. This section is built on the assumption that in the great majority of cases the settlor would prefer that the gift be used for other charitable purposes rather than fail. Consequently, unless the terms of the trust provide expressly to the contrary, a charitable trust does not fail in whole or in part if the particular purpose for which the trust was created becomes impracticable, unlawful, or impossible to fulfill.
The court must consider several factors when applying cy pres. The list is by no means exclusive. The application of cy pres involves a difficult balancing of the needs of society against an assessment of the settlor's probable intent. In determining the settlor's probable intent, the court must consider the current and future community needs in the general field of charity for which the trust was created, the settlor's other charitable interests, and the value of the available trust property.

SECTION 5-103. TRUST WITH UNECONOMICALLY LOW VALUE.

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

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

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

Comment.

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

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

For the comparable provision on termination of small
noncharitable trusts, see Section 2-205.

SECTION 5-104. INTERESTED PERSONS; PROCEEDINGS. The settlor, the trustee, the attorney general, and any charitable entity or other person with a special interest in the trust shall be interested persons in a proceeding under this [Act] involving a charitable trust.

Comment.

This section modifies the definition of “interested person” but only in the context of charitable trusts. See Section 1-102(8) (“interested person” defined). This section, which authorizes a settlor to enforce a charitable trust, is contrary to the common law. Compare Restatement (Second) of Trusts Section 391 (1959).

ARTICLE 6.
PROCEEDINGS CONCERNING TRUSTS

PART 1.
JURISDICTION AND VENUE

[ SECTION 6-101. SUBJECT MATTER JURISDICTION

(a) The Court has exclusive jurisdiction of proceedings concerning the internal affairs of a trust.

(b) The Court has concurrent jurisdiction of actions and proceedings to determine the existence of a trust; actions and proceedings by or against creditors or debtors of trusts; and other actions and proceedings involving trustees and third persons.]

Comment.

Source: CPC Section 17000.

Subsection (a) of this section is drawn from the first sentence of Section 7-201(a) of the Uniform Probate Code. This section provides for exclusive jurisdiction in the court in matters involving the internal affairs of trusts. Subsection (b)
is drawn from Section 7-204 of the Uniform Probate Code.

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

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

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

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

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

Comment.

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

SECTION 6-103. JURISDICTION OVER TRUSTEES AND BENEFICIARIES.

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

(b) To the extent of their interests in the trust, all
beneficiaries of a trust having its principal place of administration in this State are subject to the jurisdiction of the Court.

Comment.

Source: CPC Section 17003.
This section, which is intended to facilitate the exercise of the court's power, is drawn from Section 7-103 of the Uniform Probate Code. As recognized by the introductory clause, constitutional limitations on assertion of jurisdiction apply to the exercise of jurisdiction under this section. Consequently, appropriate notice must be given to a trustee or beneficiary as a condition of jurisdiction under this section. See, e.g., Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). This section does not limit the jurisdiction of the court over the trust, trust property, or parties to the trust. See also Section 4-101 (methods of trustee acceptance).
A state continues to have jurisdiction over a trustee who moves to another state. See Restatement (Second) of Trusts Section 199, comment f.

SECTION 6-104. COUNTY OF VENUE.

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

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

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

Comment.

Source: CPC Section 17005.
See Section 6-102 (principal place of administration of
Subsection (b) applies only to appointment of a trustee for a trust not created by will. Proceedings to appoint a trustee for a trust created by will that has no trustee are commenced in the county where the decedent's estate is administered. See subsection (a).

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

SECTION 6-105. TRANSFER OF JURISDICTION.

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

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

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

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

96
has approved the transfer.

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

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

Comment.

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

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

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

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

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

**PART 2.**

**JUDICIAL PROCEEDINGS CONCERNING TRUSTS**

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

**Comment.**

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

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

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

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

(1) construe and determine the terms of a trust;
(2) determine the existence of any immunity, power, privilege, duty or right;
(3) determine the validity of a trust provision;
(4) ascertain beneficiaries and determine to whom property shall pass or be delivered upon final or partial termination of the trust;
(5) settle accounts and pass upon the acts of the trustee, including the exercise of discretionary powers;
(6) instruct the trustee;
(7) compel the trustee to report information about the trust or account to the beneficiary;
(8) grant powers to or modify powers of the trustee;
(9) fix or allow payment of the trustee's compensation or review the reasonableness of the compensation;
(10) appoint or remove a trustee;
(11) accept the resignation of a trustee;
(12) compel redress of a breach of trust by any available remedy;
(13) approve or direct the modification or termination of the trust;
(14) approve or direct the combination or division of trusts;
(15) authorize or direct transfer of a trust or trust property to or from another jurisdiction;
(16) determine liability of a trust for debts or the expenses of administration of the estate of a deceased settlor;
(17) determine any other issue that will aid in the administration of the trust.

Comment.
Source: CPC Section 17200(a).
The introductory clause of this section clarifies that the right to petition concerning the internal affairs of a revocable trust is in the settlor (or other person holding the power to revoke) instead of the beneficiaries during such time as the holder has capacity. See Section 3-103 and comment.
The items listed in subsection (b) are illustrative and not exclusive. The court has jurisdiction to hear any matter involving the administration of the trust. See Section 6-101.

PART 3.
SETTLEMENT AGREEMENTS AND REPRESENTATION.

SECTION 6-301. DEFINITION AND APPLICABILITY.

(a) For purposes of this [Part], "fiduciary matter" includes any item listed in Section 6-202(b).

(b) Persons interested in a fiduciary matter may approve a judicial settlement and represent and bind other persons interested in the fiduciary matter as provided in this [Part].

(c) Except to the extent the terms of the trust indicate that the procedures specified in this [Part] are not to apply, persons interested in a fiduciary matter may approve a nonjudicial settlement containing such terms and conditions as a court could properly approve and represent and bind other persons interested in the fiduciary matter as provided in this [Part].

SECTION 6-302. REPRESENTATION BY HOLDERS OF POWERS.

The holders or all coholders of a power of revocation or presently exercisable general power of appointment, including one in the form of a power of amendment, may represent and bind the persons whose interests (as objects, takers in default, or otherwise) are subject to the power. To the extent there is no conflict of interest between the holders and the persons represented with respect to the fiduciary matter, persons whose interests are subject to a general testamentary power of
appointment may be represented and bound by the holder or holders of the power.

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

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

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

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

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

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

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

SECTION 6-305. NOTICE OF JUDICIAL SETTLEMENT. Notice of a judicial settlement shall be given to every interested person or to one who can bind an interested person as described in Sections 6-302 and 6-303. Notice may be given to a person and to another
who may bind the person. Notice is given to unborn or
unascertained persons, who are not represented under Sections 6-
302 and 6-303, by giving notice to all known persons whose
interests in the proceedings are substantially identical to those
of the unborn or unascertained persons.

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

SECTION 6-307. APPOINTMENT OF SPECIAL REPRESENTATIVE. In
connection with a nonjudicial settlement, the Court may appoint a
special representative to represent the interests of and approve
a settlement on behalf of designated persons. If not precluded by
conflict of interest, a special representative may be appointed
to represent several persons or interests. In approving a
settlement, a special representative may consider general family
benefit. As a condition for approval, a special representative
may require that those represented receive a benefit.
ARTICLE 7.
TRANSITIONAL PROVISIONS

SECTION 7-101. GENERAL RULE CONCERNING APPLICATION OF [ACT].

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

(b) On and after the effective date, this [Act] applies to all trusts regardless of whether they were created before, on, or after its effective date.

(c) This [Act] applies to all proceedings concerning trusts commenced on or after its effective date.

(d) This [Act] applies to all proceedings concerning trusts commenced before its effective date unless the Court finds that application of a particular provision of this [Act] would substantially interfere with the effective conduct of the proceedings or the rights of the parties or other interested persons, in which case the particular provision of this [Act] does not apply and prior law applies.

Comment.

Source: CPC Section 15001.
This section provides the general rule governing the application of this Act to administration of existing trusts and pending proceedings involving trusts. For a comparable provision, see Section 8-101 of the Uniform Probate Code.

For effective dates applicable to particular matters under California law but not reproduced in this draft, see California Probate Code Sections 15401(e) (rules governing method of revocation by settlor), 16042 (interpretation of the trust terms concerning legal investments), 16062 (application of duty to account annually to beneficiaries), 16203 (application of rules governing trustees' powers), 16401(c) (application of rules governing trustees' liability to beneficiary for acts of cotrustee), 16403(c) (application of rules governing trustees' liability to beneficiary for acts of predecessor trustee), 18000(b) (application of rule governing personal liability of
trustee to third persons on contracts).