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FOR DISCUSSION ONLY

UNIFORM TRUST ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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UNIFORM TRUST ACT

With Comments

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TRUST ACT

TABLE OF CONTENTS

TRUST ACT

ARTICLE 1
DEFINITIONS, GENERAL PROVISIONS AND JURISDICTION OF COURT

PART 1
GENERAL PROVISIONS

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

SECTION 1-102. CONSTRUCTION AGAINST IMPLIED REPEAL. This [Act] is a general act intended as a unified coverage of its subject matter and no part of it may be deemed impliedly repealed by subsequent legislation if that construction can reasonably be avoided.

Source: UPC Sec. 1-105.

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

Comment

Source: Cal. Prob. Code (CPC) Sec. 15002.

The Act codifies those portions of the law of express trusts that are most amenable to codification. The Act is supplemented by the common law of trusts, including principles of equity, particularly as presented in the Restatement of Trusts. The common law of trusts is not static but includes the contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and changing conditions.

SECTION 1-104. REPRESENTATION OF BENEFICIARIES. Whenever under this [Act] notice may be given to or, without precluding the right of a beneficiary to object, a consent may be required of a beneficiary who is a minor, incapacitated, unborn or unascertained, notice to or the consent of a person who may bind the beneficiary under [Article 6, part 3] is considered notice to or the consent of the beneficiary.

Comment

This section clarifies that the principles of representation and virtual representation stated in Article 6, Part 3 are not limited to judicial and nonjudicial settlements, but also apply to notices required or which may be given under the Act and to the effect of a beneficiary's consent to specified actions. The principles of this section apply to notices to or the consent of a particular beneficiary or of a designated class such as the qualified beneficiaries (see Section 1-201(13)), and to an action requiring notice to or the consent of all of the beneficiaries. Among the matters to which this section may apply are:

(1) Approval of a transfer of jurisdiction by the qualified beneficiaries (Section 1-305);

(2) Modification or termination of a trust upon the consent of the beneficiaries, with or without the consent of the settlor (Section 2-202);

(3) Notice to qualified beneficiaries of proposed reformation of trust (Section 2-206);

(4) Notice to qualified beneficiaries of proposed trust combination or division (Section 2-207);

(5) Notice to qualified beneficiary of emergency assumption of duties without accepting trusteeship (Section 4-101(c));

(6) Appointment of successor trustee upon agreement of qualified beneficiaries (Section 4-105(b)(2));

(7) Notice to qualified beneficiaries of resignation of trustee (Section 4-106);

(8) Notice of trustee's report (Section 4-213);

(9) Nonliability of trustee upon consent, release, or affirmance of beneficiary (Section 6-106).

SECTION 1-105. CHOICE OF LAW. The meaning and effect of the terms of a trust is determined by the law of the state selected in the terms of that trust, unless the application of that state’s law is contrary to a public policy of this State applicable to the disposition.

Comment

Source: UPC Sec. 2-703.

PART 2
DEFINITIONS

SECTION 1-201. DEFINITIONS. In this [Act]:

(1) "Beneficiary" means a person who has any present or future beneficial interest in the trust, vested or contingent.

(2) "Charitable trust" means a trust created for a charitable purpose as described in Section 5-101, excluding the interests of any noncharitable beneficiaries.

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

(4) "Court" means the [designate appropriate court].

(5) "Fiduciary," when used in reference to a person, includes a personal representative, guardian, conservator, and trustee.

(6) “Good faith” means honesty in fact and, when used in reference to a trustee, the observance of fiduciary principles, and when used in reference to a third party, the observance of reasonable commercial standards of fair dealing.

(7) "Guardian" means a person appointed by a court [,parent, or spouse] to make decisions regarding the support, care, education, health, and welfare of a minor or adult individual, but excludes a guardian ad litem.

(8) "Interested person" includes a trustee, a beneficiary, and a fiduciary representing a beneficiary. 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 judicial proceeding.

(9) “Know” or “knowledge” of a particular fact means the person had actual knowledge of or reason to know, based on all the facts and circumstances actually known to the person at the time in question, that a particular fact exists.

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

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

(12) "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.

(13) “Qualified beneficiary” means a beneficiary who, on the date in question, is entitled or eligible to receive a distribution of trust income or principal or who would be entitled to receive a distribution were the event causing the trust’s termination to occur.

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

(15) "State" means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or a territory or insular possession subject to the jurisdiction of the United States.

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

trust's provisions at the time of the trust's creation or amendment that is expressed in a manner admitting of its proof in a judicial proceeding. The terms may be expressed in writing or orally or inferred from conduct, and may include constructional preferences or rules.

(17) "Trust" means an express trust, charitable or noncharitable, with additions thereto, wherever and however created, which is used primarily for the donative transfer of property, including a trust created or determined by a statute, judgment or decree under which the trust is to be administered in the manner of an express trust. The term does not include a trust that is used primarily for business, employment, investment, or commercial transactions, such as a business trust, land trust, voting trust, common trust fund, security arrangement liquidation trusts, trust created by a deposit arrangement in a financial institution, trust created for paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind, or any arrangement under which a person is nominee or escrowee for another.

(18) "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. The term includes not only beneficiaries who received their interests under the terms of the trust but also beneficiaries who received their interests by any other means, including by an assignment, the exercise of a power of appointment, by a resulting trust upon the failure of an interest or gap in a disposition, or through the operation of an antilapse statute upon the predecease of a named beneficiary.

The fact that a person incidentally benefits from the trust does not mean that the person is a beneficiary. For example, neither a trustee nor persons hired by the trustee become beneficiaries merely because they receive compensation from the trust. See Restatement (Third) of Trusts Sec. 49 (Prelim. Draft No. 3, 1997).

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 2-303 (termination of charitable trust with uneconomically low value).

The definition of "fiduciary" (paragraph (5)) refers to the person holding a fiduciary office as opposed to the 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. See Section 4-202(e). A trustee has a duty to redress a breach of trust committed by a prior trustee or other fiduciary from whom the trustee received trust property. See Section 4-212.

Under the Act, more is required than honesty of intent before a trustee, in dealing with the beneficiaries, or a third party, in dealing with a trustee, can be said to have been acting in "good faith" (paragraph (6)). The trustee or third party must also have exhibited honesty in conduct as well as of intent. For a third party, this requires the observance of reasonable commercial standards of fair dealing, a requirement drawn from the Uniform Commercial Code. See Unif. Commercial Code Section 3-103(4). For a trustee, honesty in conduct is exhibited by acting in accordance with fiduciary principles, particularly the obligation not to place the trustee's own interests over those of the beneficiaries. See Section 4-202 (duty of loyalty). The obligation of a trustee to act in good faith is not waivable by the terms of the trust. See Section 4-201(b) (duty to administer trust; alteration by terms of trust); Section 4-214 (duty with regard to discretionary power). Nor is a term of a trust exculpating a trustee for not acting in good faith enforceable. See Section 6-105 (exculpation of trustee). For a third person, good faith, and the associated requirement of observance of reasonable commercial standards of fair dealing, is required before the third person may be protected in dealings with the trustee (see Section 6-202), or for rejecting a certification of trust proffered by the trustee. See Section 6-203.

Under the Act, a "guardian" (paragraph (7)) 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 that 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 term “interested person”(paragraph (8)) is used sparingly in the Act. The settlor is an interested person for purposes of bringing an action to enforce a charitable trust. See Section 2-302(c). Interested persons must also receive notice of judicial settlements. See Section 6-305.

The fact that a person does not have actual knowledge of a particular fact does not mean that the person did not “know” or have “knowledge” of the fact (paragraph (9)). But neither is a person charged with knowledge of facts the person would have discovered upon investigation. The definition takes an intermediate approach. A fact is known to a person if the person has actual knowledge of the fact or the person, based on circumstances actually known to the person, should have been aware of the fact’s existence. “Know” and “knowledge” is used in the defined sense in Section 4-208 (trustee knows holder of power to direct has violated fiduciary duty owes to beneficiaries), and Section 6-202 (protection of persons dealing with trustee). For knowledge relating to proceedings in court, however, actual knowledge is required. See Section 3-105(b) (limitation on contest of revocable trust); Section 6-305 (notice of judicial settlement); and Section 6-306 (appointment of guardian ad litem). But for certain actions, a person is charged with knowledge of facts the person would have discovered following reasonable inquiry. See Section 6-104 (limitation of action against trustee following final report or other statement), and Section 6-106 (nonliability of trustee for beneficiary’s consent, release, or affirmance).

The definition of "property" (paragraph (12)) 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).

Because of the difficulty of identifying beneficiaries with remote contingent interests and their probable lack of interest in the day-to-day affairs of the trust, the Act uses the concept of “qualified beneficiary” (paragraph (13)) to limit the class of beneficiaries to whom certain notices must be given or consents received. The definition of qualified beneficiaries is used to define the class to whom notice must be given of a trustee resignation. See Section 4-106. The qualified beneficiary must receive the trustee’s annual report and other notices required by Section 4-213. Notice to the qualified beneficiaries is also required before a trust can be reformed for a mistake or modified to achieve a settlor’s tax objective, and before a trust may be combined or divided. See Sections 2-206, 2-207. Actions which may be accomplished by the consent of the qualified beneficiaries include the transfer of a trust’s jurisdiction and the appointment of a successor trustee. See Sections 1-305, 4-105.

The qualified beneficiaries are limited to the beneficiaries currently eligible to receive a distribution from the trust as well as what might be termed the first line remaindermen, that is, the beneficiaries who would receive the principal were the event triggering the trust’s termination to occur on the date in question. Such a terminating event will typically be the death or deaths of the beneficiaries currently eligible to receive the income. Should a qualified beneficiary be a minor, incapacitated, unknown or unascertained, the representation and virtual representation principles of Article 6, Part 3 may apply, including the possible appointment of a guardian ad litem or special representative. Per Section 1-104, the provisions of Article 6, Part 3 apply to all beneficiary notices and consents under the Act.

Determining the identity of the "settlor" (paragraph (14)) is usually not an issue. The same person will both sign the trust instrument and fund the trust. Ascertaining the identity of the settlor becomes more difficult when more than one person signs the trust instrument or funds the trust. The fact that a person is designated as the "settlor" by the terms of the trust is not necessarily determinative. For example, the person who executes the trust instrument may be acting as the agent for the person who will be funding the trust. In that case, the person funding the trust, and not the person signing the trust instrument, will be the settlor. Similarly, should more than one person contribute to a trust, all of the contributors will ordinarily be treated as settlors in proportion to their respective contributions, regardless of which one signed the trust instrument. However, in the case of a revocable trust, transfers made to the trust by a person who did not participate in the trust's creation will frequently be intended as a donative transfer to the person who originally created the trust. In that event, only the person who created the trust, and not the later donor, will be the settlor.

Ascertaining the identity of the settlor is important for a variety of reasons. It is important for determining rights in revocable trusts. See Sections 3-102 (revocation or modification of revocable trust), 3-104 (creditor claims against revocable trust), and 3-105 (limitation on contest of revocable trust). It is also important for determining rights of creditors in irrevocable trusts. See Section 2-402(b)(2) (claims by creditor of 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 (judicial review of termination or modification by consent), and 4-107 (removal of trustee). Also, per Section 2-302(c), the settlor is an interested person in a judicial proceeding involving a charitable trust.

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

Not all evidence may necessarily be considered in determining the terms of the trust.

A manifestation of a settlor's intention does not constitute evidence of a trust's terms if it would not be 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). See also Restatement (Third) Property-Donative Transfers Sec. 10.2, 11.1-11.3 (Tent. Draft No. 1, 1995). For example, in many states a trust of real property is unenforceable unless evidenced by a writing, although this Act does not so require but leaves the issue of whether a trust must be evidenced by a writing to the discretion of the enacting jurisdiction. See Section 2-103 (requirement of writing; oral 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 (17)) means an express trust, whether private or charitable, including a trust created by court judgment or decree which is to be administered in the manner of an express trust. The Act is directed primarily at express trusts which arise in an estate planning or other donative context. Excluded from the Act's coverage are constructive trusts, which are not express trusts but remedial devices imposed by law. Also excluded from the Act's coverage are a variety of express trusts which arise primarily in a business, employment, investment or commercial context and which are regulated by other law.

PART 3
JURISDICTION OF COURT

SECTION 1-301. FUNCTION OF COURT IN ADMINISTRATION OF TRUST.

The administration of trusts shall proceed free of judicial supervision or intervention, except to the extent the jurisdiction of the court is invoked by interested parties or otherwise exercised as provided by law.

Comment

Uniform Probate Code Section 7-201(b) contains similar language. See also National Probate Court Standard 3.2.1 (Natl. Center for State Courts 1993).

SECTION 1-302. PRINCIPAL PLACE OF ADMINISTRATION.

(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), the principal place of administration is:

(1) if the trust has one trustee, the trustee's residence or usual place of business; or

(2) if the trust has more than one trustee:

(A) the usual place of business of the corporate trustee if there is but one corporate trustee;

(B) the residence or usual place of business of the individual who is a professional fiduciary if there is but one such person and no corporate cotrustee; or

(C) the residence or usual place of business of the greater number of the cotrustees, or if there is no such place, the residence or usual place of business of any of the cotrustees.

Comment

Source: CPC Section 17002; Az. Rev. Stat. Ann. Sec. 14-7202.

Section 1-305 governs the transfer of the principal place of administration to another jurisdiction.

SECTION 1-303. JURISDICTION OVER TRUSTEES AND BENEFICIARIES.

While a trust's principal place of administration is in this State:

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

(2) to the extent of their interests in the trust, all beneficiaries of the trust are subject to the jurisdiction of the courts of this State as to any matter relating to the trust.

Comment

Source: CPC Section 17003.

This section, which is intended to provide the widest possible long-arm effect consistent with constitutional principles, is based on Arizona Revised Statutes Annotated Sec. 14-7202.

SECTION 1-304. DISMISSAL OF MATTERS RELATING TO FOREIGN TRUSTS. The court shall not, over the objection of a party, entertain proceedings involving the internal affairs of a trust which is under the continuing supervision of a court outside of this State, or is registered in or has its principal place of administration outside of this State unless:

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

(2) by failing to entertain proceedings the interests of justice would be seriously impaired. The court may condition a stay or dismissal of a proceeding on the consent of any party to the jurisdiction of another court, or the court may grant a continuance or enter any other appropriate order.

Comment.

Source: Ariz. Rev. Stat. Ann. Sec. 14-7205.

This section confirms the primary jurisdiction of the court at the principal place of administration but only as to matters governing the internal affairs of trusts. Actions concerning the internal affairs of trusts include actions to:

(1) construe and determine the trust's terms;

(2) ascertain beneficiaries and determine to whom property is to pass upon a trust's

final or partial termination;

(3) settle a trustee's reports, review a trustee's actions, including the exercise of discretionary powers, and receive instructions;

(4) compel the trustee to report information about the trust;

(5) grant powers to or modify the powers of the trustee;

(6) review the reasonableness of the trustee's compensation:

(7) appoint or remove a trustee;

(8) approve the resignation of a trustee;

(9) compel redress of a breach of trust;

(10) review the modification, termination or reformation of a trust;

(11) review the combination or division of trusts;

(12) authorize the transfer of a trust or trust property to or from another jurisdiction; and

(13) determine liability of a trust for the settlor's debts, expenses of estate administration, and statutory allowances following the settlor's death.

SECTION 1-305. TRANSFER OF JURISDICTION.

(a) A trustee may change a trust's principal place of administration to another jurisdiction or transfer some or all of the trust property to a different trustee outside of this State:

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

(2) if the terms of the trust do not specify a method;

(A) with the consent of the qualified beneficiaries; or

(B) with the approval of the court, subject to such terms and conditions as the court may order.

(b) The court may approve the transfer of a trust's principal place of administration to or from this State, or of the transfer of trust property to or from this State to a new trustee, if it finds that:

(1) the transfer 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 beneficiaries;

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

(3) 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 has approved the transfer.

(c) If the court approves a transfer of a trust or of trust property to another jurisdiction, the court may require that a successor trustee be substituted 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 covered by the order.

(d) If the court approves a transfer of a trust or of trust property to this State, the court may require bond as provided in Section 4-102.

(e) Except as to its validity and the construction of its beneficial provisions, a trust transferred to this State must be administered in the same manner as a trust created in this State.

Comment

This section is not limited to transfers to or from other states of the United States, but may include a transfer to or from a different country.

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.

[SECTION 1-306. SUBJECT MATTER JURISDICTION

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

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

Comment

Source: CPC Section 17000.

Subsection (a) of this section is drawn from Section 7-201(a) of the Uniform Probate Code. Subsection (b) is drawn from Section 7-204 of the Uniform Probate Code.

[SECTION 1-307. VENUE.

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

(b) If a trust not created by will has no trustee, a judicial 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) A judicial proceeding other than those addressed in subsections (a) and (b) must be commenced in accordance with the venue rules applicable to civil actions generally.]

Comment

Source: CPC Section 17005.
See Section 1-302 (principal place of administration of trust).

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

Subsection (c), 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.

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

PART 1
CREATION AND VALIDITY OF TRUSTS

SECTION 2-101. METHODS OF CREATING TRUSTS.

(a) A trust may be created by:

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

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

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

(b) Property to be subject to a declaration of trust may be identified by the terms of the trust. A reference by the settlor in the terms of the trust to "all of my property" or words of similar import is sufficient to subject all of the settlor's property to the declaration of trust.

(c) A transfer of property to a trustee may be accomplished by the terms of the trust, which may function as a deed of conveyance.

Comment

Source: CPC Section 15200.

Subsection (a) follows Restatement (Second) of Trusts Sec. 17 (1959) and Restatement (Third) of Trusts Sec. 10 (Tent. Draft No. 1, 1996). Under all three methods specified in this section for creating a trust, the trust is not created until it receives property. For what constitutes an adequate property interest, see Restatement (Third) of Trusts Sec. 41 (Prel. Draft No. 3, 1997). The property interest necessary to fund and create a trust need not be substantial. A revocable designation of the trustee as beneficiary of a life insurance policy or employee benefit plan is a property interest sufficient to create a trust. See Section 1-201(12)("property" defined). Furthermore, the property interest need not be transferred contemporaneously with the signing of the trust instrument. A trust created by means of an instrument signed during lifetime is not invalid simply because the trustee does not receive property until a later date, including by will or contract at or after the settlor's death. A pourover devise to such a trust is also valid. See Uniform Probate Code 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 the trusteeship, 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. The failure to so inform the beneficiaries could result in liability if the misleading conduct by the nominated trustee causes harm to the trust beneficiaries. See Restatement (Third) of Trusts Sec. 36 comm. b (Prel. Draft No. 3, 1997).

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). Should the right to enforce the contract be held by the trustee, however, the chose in action thus created in the trustee is itself a property interest sufficient to create a present trust. Otherwise, the enforceable right, if held by another, does not create a present trust but may give rise to an action for breach of contract. A trust created by means of a promise enforceable by the trustee is valid notwithstanding that the trustee may resign or die before the promise is fulfilled. Unless expressly made personal, the promise can be enforced by a successor trustee. For examples of trusts created by means of promises enforceable by the trustee, see Restatement (Third) of Trusts Sec. 10 comm. e (Tent. Draft No. 1, 1996).

While this section recognizes the established principle that a trust may be created by means of the exercise of a power of appointment (see subsection (a)(3)), this Act does not attempt to legislate comprehensively on the subject of powers of appointment but addresses only selected issues. See Section 3-103(b)(rights of holder of power of withdrawal). For the law on powers of appointment generally, see Restatement (Second) of Property: Donative Transfers Sec. 11.1-24.4 (1986).

While trusts are usually created by a transfer of property by the settlor or by a self-declaration, trusts may also be created by the courts or by special statute. See., e.g., Uniform Probate Code Sec. 2-212 (elective share of incapacitated surviving spouse to be held in trust on terms specified in statute); Uniform Probate Code Sec. 5-407 (conservator may create trust with court approval); Restatement (Third) of Trusts Sec. 10 comm. b (Tent. Draft No. 1, 1996).

Subsection (b) addresses some of the practical funding concerns which have arisen with respect to self-declarations of trust. The very nature of the self-declaration of trust negates a requirement that title to trust assets be reregistered and retransferred into the name of the settlor as trustee. See, e.g., In re Estate of Heggstad, 20 Cal. Rptr. 2d 43 (App. 1993) (citing relevant sections from Restatement (Second) of Trusts). See also Restatement (Third) of Trusts Sec. 10 comm. e (Prel. Draft No. 3, 1997). This subsection validates the practice of merely attaching a schedule listing the assets that are to be subject to the trust without executing separate instruments of transfer. It also recognizes that the settlor may simply state that all of his or her then assets are to be subject to the trust. But such a generalized statement does not extend to after-acquired property. To subject after-acquired property to the trust, the settlor must either specifically and separately so declare or reregister the after-acquired assets into the settlor's name as trustee.

While subsection (b) confirms that separate documents of transfer are not required to subject specific assets to a self-declaration of trust, to avoid possible later problems with third party transferees and to better protect the interests of the beneficiaries, it is recommended that settlors not rely on the rule of this subsection but instead perfect title to the trust assets by going ahead and executing separate instruments of transfer.

Subsection (c) applies a similar rule to trusts in which someone other than the settlor is named as trustee. While the execution of separate instruments of transfer for each asset is recommended, this section recognizes that the terms of the trust may themselves include language effectively conveying assets to the trustee.

SECTION 2-102. REQUIREMENTS FOR VALIDITY.

(a) A trust is created only if:

(1) the settlor, having capacity, 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 or a trust for a valid noncharitable purpose or care of a pet animal as provided in Section 2-105, the trust has a definite beneficiary or a beneficiary who may be validly ascertained [in the future] [within the applicable perpetuities period].

(b) A power or direction to a trustee to select from an indefinite class is valid and can be exercised.

Comment

Subsection (a) codifies the basic requirements for the creation of a trust. To create a valid trust, the settlor must indicate an intention to create a trust. Restatement (Second) of Trusts 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 1-201(16) ("terms of the trust" defined).

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

Subsection (a)(2) 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, whether in the settlor or someone else. 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 (a)(3) requires that a trust, other than a charitable trust, a trust for the care of a pet animal, or a trust for a valid noncharitable purpose, must have a definite or definitely ascertainable beneficiary. While the beneficiary will often be definitely ascertained as of the trust's creation, the beneficiary may also be ascertained in the future. But a trust is not created if the beneficiary can only be ascertained beyond the applicable perpetuities period. The definite beneficiary requirement does not mean that a settlor cannot make a disposition in favor of a class of persons, a designation which by its very nature is usually to a group whose membership may change. Class designations are valid as long as the membership of the class will be finally determined within the applicable perpetuities period. For background on the definite beneficiary requirement, see Restatement (Third) of Trusts Sections 46-48 (Prel. Draft No. 3, 1997).

Subsection (b) allows a settlor to empower the trustee to select the beneficiaries even if the class from whom the selection may be made is indefinite. While such a provision would fail under traditional doctrine because it is an imperative power with no designated beneficiary capable of enforcement, such a provision is valid under both this Act and the Restatement. Should the power not be exercised within a reasonable time, the power will fail and the property pass by resulting trust. See Restatement (Second) of Trusts Sec. 122 (1959); Restatement (Second) of Property: Transfers, Sec. 12.1 comm. e (1986).

SECTION 2-103. REQUIREMENT OF WRITING; ORAL TRUSTS. Except as required by another statute, a trust need not be evidenced by a writing, but the creation of an oral trust may be established only by clear and convincing evidence.

Comment

While it is always advisable for a settlor to reduce a trust to writing, the Act validates oral trusts. Absent some specific statutory provision, such as a provision requiring that transfers of real property be in writing, no writing is required to evidence a trust. States with statutes of frauds or other provisions requiring that the creation of certain trusts must be evidenced by a writing may wish to specifically cite such provisions in lieu of the phrase "another statute."

For the Statute of Frauds generally, see Restatement (Second) of Trusts Sec. 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 writing must be signed, see Restatement (Third) of Trusts Sec. 23 (Tent. Draft No. 1, 1996). For a discussion of the law on oral trusts, see Sarajane Love, Imperfect Gifts as Declarations of Trust: An Unapologetic Anomaly, 67 Ky. L. J. 309 (1979).

SECTION 2-104. TRUST PURPOSES. A trust may only be created if its purposes are lawful, in accord with public policy, and possible to fulfill. A charitable trust must be created for a charitable purpose as specified in Section 2-301. Except as provided in Section 2-105 with respect to a trust for a valid noncharitable purpose or trust for the care of a pet animal, a noncharitable trust must have a purpose which is for the benefit of its beneficiaries.

Comment

For an explication of the requirement that a trust must have a purpose that is not unlawful or against public policy, see Restatement (Third) of Trusts Sections 28-29 (Prel. Draft No. 3, 1997). A trust with a purpose that is unlawful or against public policy is invalid. Depending on when the violation occurred, the trust may be invalid at its inception or the invalidity may occur at a later date. The invalidity may also be limited to particular provisions. Generally, a trust has a purpose which is illegal or against public policy if: (1) its performance involves the commission of a criminal or tortious act by the trustee; (2) its enforcement would otherwise be against public policy even though not criminal or tortious; (3) the settlor's purpose in creating the trust was to defraud creditors or others; or (4) the consideration for the creation of the trust was illegal. See Restatement (Third) of Trusts Sec. 28 comm. a (Prel. Draft No. 3, 1997).

For the requirement that a trust must have a purpose which is for the benefit of its beneficiaries, see Restatement (Third) of Trusts Sec. 27 (Prel. Draft No. 3, 1997). Excepted from this requirement, however, are trusts for the care of a pet animal, which may be performed for the life of the animal, and trusts for a valid noncharitable purpose, which may be performed for twenty-one years. See Section 2-105.

For a provision permitting reformation of trusts which fail to comply with this section, see Section 2-206.

SECTION 2-105. TRUST FOR VALID NONCHARITABLE PURPOSE; TRUST FOR PETS.

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

(b) A trust without a definite or definitely ascertainable beneficiary which is created for a lawful noncharitable purpose or for lawful noncharitable purposes to be selected by the trustee is valid but may not be enforced for more than [21] years.

(c) No portion of the property of a trust authorized by this section may be applied to any use other than its intended use unless the court determines that the value of the trust property substantially exceeds the amount required for the intended use.

(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

This section validates so-called honorary trusts. Unlike honorary trusts created under the common law of trusts, which are arguably no more than unenforceable powers of appointment, the trusts created by this section are valid and enforceable and not dependent on the trustee deciding on whether to honor the settlor’s wishes. For a discussion of the common law doctrine, see Restatement (Third) of Trusts Sec. 48 (Prel. Draft No. 3, 1997).

Subsection (a) addresses a particular type of honorary trust, the trust for the care of a pet animal. Subsection (b) validates other types of honorary trusts. A trust for the care of a pet animal may last for the life of the animal. While the pet will ordinarily be alive at the time of the trust' s creation, subsection (a) permits an animal to be added as a beneficiary after the date of the trust' s creation as long as such addition is made prior to the settlor' s death.

Subsection (b) places a twenty-one year limit on the duration of other types of honorary trusts, such as a trust for the care of a cemetery plot. The figure "21" is bracketed to indicate that an enacting jurisdiction may select a different duration. Trusts and other funding devices for the perpetual care of cemetery plots is a topic frequently addressed by separate legislation.

Upon termination of an honorary trust created under either subsections (a) or (b), a resulting trust is ordinarily created in the settlor unless the terms of the trust provide for a different disposition. See Restatement (Third) of Trusts Section 48 (Prel. Draft No. 3, 1997).

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

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.

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

(a) **[Honorary Trusts.]** Subject to subsection (c), if (i) a trust is for a specific lawful noncharitable purpose or for lawful noncharitable purposes to be selected by the trustee and (ii) there is no definite or definitely ascertainable beneficiary designated, the trust may be performed by the trustee for [21] years but no longer, whether or not the terms of the trust contemplate a longer duration.

(b) **[Trust for Pets.]** Subject to this subsection and subsection (c), a trust for the care of designated domestic or pet animal is valid. The trust terminates when no living animal is covered by the trust. A governing instrument must be liberally construed to bring the transfer within this subsection, to presume against the merely precatory or honorary nature of the disposition, and to carry out the general intent of the transferor. Extrinsic evidence is admissible to determine the transferor's intent.

(c) **[Additional Provisions Applicable to Honorary Trusts and Trusts for Pets.]** In addition to the provisions of subsection (a) or (b), a trust covered by either of those subsections is subject to the following provisions:

(1) Except as expressly provided otherwise in the trust instrument, no portion of the principal or income may be converted to the use of the trustee or to any use other than for the trust's purposes or for the benefit of the covered animal.

(2) Upon termination, the trustee shall transfer the unexpended trust property in the following order:

(i) as directed by the trust instrument;

(ii) if the trust was created in a nonresiduary clause in the transferor's will or in a codicil to the transferor's will, under the residuary clause in the transferor's will; and

(iii) if no taker is produced by the application of subparagraph (i) or (ii), to the transferor's heirs.

(3) The intended use of the principal or income can be enforced by an individual designated for that purpose in the trust instrument or, if none, by an individual appointed by a court upon application to it by an individual.

(4) Except as ordered by the court or required by the trust instrument, no filing, report, registration, periodic accounting, separate maintenance of funds, appointment,

or fee is required by reason of the existence of the fiduciary relationship of the trustee.

(5) A court may reduce the amount of the property transferred, if it determines that that amount substantially exceeds the amount required for the intended use. The amount of the reduction, if any, passes as unexpended trust property under subsection (c)(2).

(6) If no trustee is designated or no designated trustee is willing or able to serve, a court shall name a trustee. A court may order the transfer of the property to another trustee, if required to assure that the intended use is carried out and if no successor trustee is designated in the trust instrument or if no designated successor trustee agrees to serve or is able to serve. A court may also make such other orders and determinations as shall be advisable to carry out the intent of the transferor and the purpose of this section.]

Comment

Source: UPC Sec. 2-907.

Presented as an alternate to Section 2-105 above, this alternate copies UPC Section 2-907 without change except for the deletion of cross references to other sections of the UPC.

PART 2
MODIFICATION AND TERMINATION OF TRUSTS

SECTION 2-201. TERMINATION OF TRUST. In addition to the methods specified in Sections 2-202 through 2-205, a trust terminates when:

(1) the trust expires by its terms;

(2) the purpose of the trust is fulfilled;

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

(4) the trust is revoked.

Comment

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

This section lists the ways in which trusts typically terminate. In addition to other powers granted under this Act or by the terms of the trust, a trustee has the powers appropriate to wind up the affairs of the trust. See Section 4-302(24).

For the requirement that a trust must have a purpose that is not illegal or violative of public policy, see Section 2-104 and comments.

SECTION 2-202. MODIFICATION OR TERMINATION OF IRREVOCABLE TRUST BY CONSENT.

(a) An irrevocable trust may be modified or terminated upon the consent of all of the beneficiaries if continuance of the trust on its existing terms no longer furthers the settlor's purposes in creating the trust.

(b) Whether or not continuance of the trust on its existing terms is necessary to carry out the settlor's purposes in creating the trust, an irrevocable trust may be modified or terminated upon the consent of the settlor and all of the beneficiaries.

(c) Upon termination of a trust under this section, the trustee shall distribute the trust property as agreed by the beneficiaries.

(d) The settlor's powers with respect to termination or modification may be exercised by an agent under a power of attorney only to the extent the power of attorney expressly so authorizes. A conservator may exercise the settlor's powers under this section only if approved by the court supervising the conservatorship.

Comment

Subsection (a) of this section is based on Section 337, and subsection (b) is based on Section 338 of the Restatement (Second) of Trusts (1959), and reflect well-established trust doctrine. While the beneficiaries cannot ordinarily terminate a trust unless continuation of the trust will no longer further the settlor's purposes in creating the trust, such a finding is not required if the settlor also consents. No finding of a lack of continuing purpose for the trust is then required because all parties with a possible interest in the trust's continuation, both the settlor and beneficiaries, are agreed there is no further need for the trust.

A trust may be modified or terminated pursuant to this section without court approval and even over a trustee's objection. For the circumstances under which the settlor, trustee, or beneficiary may petition the court to approve or prevent a termination or modification under this section, see Section 2-203. For provisions governing modification or termination of trusts without the need to seek beneficiary consent, see Sections 2-204 (modification or termination due to unanticipated circumstances) and 2-205 (noncharitable 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.

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

Subsection (d) addresses the authority of an agent or conservator to act on a settlor's behalf. Consistent with Section 3-102 on revocation or modification of a revocable trust, the section assumes that a settlor, in granting an agent general authority, did not intend for the agent to have authority to consent to the termination or modification of a trust and possibly undo the settlor's estate plan. In order for an agent to validly consent to a termination or modification, such authority must be expressly conveyed in the power.

Similarly, subsection (d) assumes that the termination or modification of the settlor's trust is a sufficiently important transaction that a conservator should not be allowed to consent without first consulting with and obtaining the approval of the court supervising the conservatorship. Many conservatorship statutes, in fact, expressly require that the conservator obtain court approval to create, amend or revoke a trust. See, e.g., Uniform Probate Code Sec. 5-407.

Per Section 1-104, the provisions of Article 6, part 3 on representation, 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. The authority to consent on behalf of another person, however, does not include the authority to consent over the other person's objection. For a listing of who may consent on behalf of another person, see Sections 6-302, 6-303, and 6-304. Virtual representation will rarely be available in a trust termination case, although its use will be frequent in cases involving trust modification, such as a grant to the trustee of additional powers. A consent obtained by virtual representation is valid only if there is no conflict of interest between the representator and the persons represented.

If virtual representation is unavailable because of a conflict of interest, Sections 6-306 and 6-307 of the Act permit the court to appoint either a special representative or guardian ad litem who may give the necessary consent to the proposed modification or termination, unascertained or unborn beneficiary.

SECTION 2-203. JUDICIAL REVIEW OF TERMINATION OR MODIFICATION BY CONSENT.

(a) Upon petition by a settlor, trustee or beneficiary, the court may affirm or prevent a proposed modification or termination of a trust.

(b) If a beneficiary does not consent to a proposed modification or termination of a trust by the other beneficiaries or by the settlor and other beneficiaries, the court, with the consent of the other beneficiaries, and of the settlor, if required, may approve the proposed modification or termination, subject to such order as may be necessary to protect the rights of the beneficiaries who do not consent.

Comment

Subsection (a) permits court confirmation of a termination or modification. Such review is limited, however, to whether the termination or modification complies with the standards of Section 2-202, including whether the necessary consents have been obtained, or if the settlor is unavailable or does not agree, that continuation no longer further's the settlor's purposes in creating the trust. Other subsections or sections must be referred to for judicial approval of other types of terminations or modifications. For provisions governing judicial approval of other categories of modification or termination of trusts, see subsection (b) (modification or termination by less than all beneficiaries or by settlor and less than all beneficiaries); Section 2-204 (modification or termination because of unanticipated circumstances); Section 2-205 (termination or modification of trust with uneconomically low value); Section 2-206 (reformation of trust); and Section 2-207 (combination or division of trusts).

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

SECTION 2-204. MODIFICATION OR TERMINATION BECAUSE OF UNANTICIPATED CIRCUMSTANCES.

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

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

Comment

This section permits modification or termination of a trust when there are circumstances not anticipated by the settlor. This may include circumstances in existence at the time of the trust's creation which were known to but not considered by the settlor. Unlike Restatement (Second) of Trusts Sections 167 and 336, upon which this section is partially based, this section extends equitable deviation to the dispositive terms of a trust. Modification of the dispositive terms for the support of a beneficiary may be appropriate, for example, in a case in which the beneficiary has become unable to provide for support due to poor health or serious injury.

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

See also Section 2-104 (trust must have purpose for benefit of beneficiaries).

SECTION 2-205. NONCHARITABLE TRUST WITH UNECONOMICALLY LOW

VALUE.

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

(b) The court may modify or terminate 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.

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

Comment

Source: CPC Section 15408.

Subsection (a) assumes that a trust with a value of $50,000 or less is inherently uneconomical and may be terminated without court approval. This provision is a default rule. The settlor is free to set a higher or lower figure or to specify different procedures or to prohibit termination without a court order.

Subsection (b) establishes the general principle that trusts should be modified or terminated if the costs of administration would otherwise be excessive. A court termination procedure may be utilized for a trust of any size but most cases will involve smaller trusts although ones greater than $50,000 in value. For the comparable provision on charitable trusts, see Section 2-303.

SECTION 2-206. REFORMATION TO CORRECT MISTAKES OR ACHIEVE TAX OBJECTIVES.

(a) Without approval of court, but only following written notice to the qualified beneficiaries, a trustee may:

(1) reform the terms of a trust, even if unambiguous, to conform to the settlor's intention if the failure to conform was due to a mistake of fact or law, whether in expression or inducement, and the settlor's intent can be established. In determining the

settlor's intention, direct evidence contradicting the plain meaning of the text as well as other evidence may be considered; or

(2) modify the terms of a trust, in a manner that does not violate the settlor's probable intention, to achieve the settlor's tax objectives.

(c) On petition by a trustee or beneficiary, the court may affirm or prevent a proposed combination or division.

Comment

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

SECTION 2-207. COMBINATION AND DIVISION OF TRUSTS.

(a) Except as otherwise provided by the terms of the trust, without approval of court but only following written notice to the qualified beneficiaries, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts, if the combination or division does not impair the rights of any of the beneficiaries or substantially affect the accomplishment of the trust purposes.

(b) On petition by a trustee or beneficiary, the court may affirm or prevent a proposed combination or division.

Comment

This section, which authorizes the combination or division of trusts, is a default rule. Many trust instruments and standardized estate planning forms include comprehensive provisions addressing these subjects.

This section allows a trustee to combine two or more trusts even though their terms are not identical, although typically the trusts to be combined will have been created by different members of the same family and vary on only insignificant details, such as the presence of different perpetuities savings periods. The more the beneficial provisions of the trusts to be combined differ from each other the more likely it is that a combination will result in the reduction of some beneficiary's interest and the less likely it is that the settlor's purposes will be accomplished and the combination can be approved. Combining trusts may prompt more efficient trust administration and is sometimes an alternative to simply terminating the trusts as permitted by Section 2-205.

Division of trusts is often 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. While the terms of the trusts which result from such a division are identical, the division will permit differing investment objectives to be pursued and also allow for discretionary distributions to be made from one trust and not the other.

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

This section does not require that a combination or division be approved by either the court or beneficiaries. Prudence may dictate, however, that court approval under subsection (b) be sought and beneficiary consent obtained to the extent feasible whenever the terms of the trusts to be combined or the trusts that will result from a division differ substantially one from the other.

While the consent of the beneficiaries is not necessary before a trustee may combine or divide trusts under this section, advance notice to the qualified beneficiaries of the proposed combination or division is required. This is consistent with Section 4-213, which requires that the trustee keep the beneficiaries reasonably informed of trust administration, including the giving of advance notice to the qualified beneficiaries of several specified actions that may have a major impact on their interests.

For a list of statutes authorizing division of trusts, either by the trustee or court order, see Restatement (Third) Property: Transfers Sec. 12.2 Statutory Note (Tent. Draft No. 1, 1995). For a provision authorizing a trustee, in distributing the assets of the divided trust, to make non-pro-rata distributions, see Section 4-302(20).

PART 3
CY PRES

GENERAL COMMENT

A main 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 have long been advocated by commentators. See, e.g., Roger G. Sisson, Relaxing the Dead Hand's Grip: Charitable Efficiency and the Doctrine of Cy Pres, 74 Va. L. Rev. 635 (1988); Report, Cy Pres and Deviation: Current Trends and Application, 8 Real Prop. Prob. & Trust J. 391 (1971); Joseph A. DiClerico, Jr., Cy Pres: A Proposal for Change, 47 B.U.L. Rev. 153 (1967); Kenneth L. Karst, The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility, 73 Harv. L. Rev. 433 (1960). 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 2-301. CHARITABLE PURPOSES.

(a) 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.

(b) 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 that grants the trustee discretion to distribute the trust property for any charitable purpose or beneficiary. See Restatement (Second) of Trusts Section 396 (1959).

SECTION 2-302. APPLICATION OF CY PRES.

(a) 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 charitable purpose becomes impracticable, unlawful, or impossible to fulfill;

(2) if a particular charitable purpose becomes impracticable, unlawful, or impossible to fulfill, the trust property does not revert to the settlor, but the court shall instead modify the terms of the trust or direct that the trust property be distributed in whole or in part in a manner meeting the settlor's charitable purposes.

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

(c) The settlor is an interested person in a judicial proceeding brought to enforce a charitable trust.

Comment

This section codifies the court's inherent authority to apply cy pres. The power may be applied to modify an administrative or dispositive term. The court may order the trust terminated and distributed to other charitable entities. Partial termination may also be ordered if the trust property is more than sufficient to satisfy the trust's current 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 then 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 instead either modify the terms of the trust or direct that the property of the trust be distributed in whole or in part in a manner best meeting the settlor's charitable purposes. The effect of this provision is to ratify the actual practices of courts. Upon the failure of a particular charitable purpose, courts will rarely divert the trust property to a noncharitable use. Courts are almost always able to find a general charitable purpose to which to apply the property, no matter how vaguely such purpose may have been expressed by the settlor.

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

The doctrine of cy pres is not limited to charitable trusts, but applies as well to other types of charitable dispositions, such as not-for-profit corporations. This Section, because it is part of a Trust Act, does not apply to charitable dispositions made in nontrust form, but in formulating the rules for such dispositions the courts are of course free to refer to the principles of this Section.

Subsection (c), unlike Restatement (Second) of Trusts Sec. 391 (1959), authorizes the settlor to enforce a charitable trust.

SECTION 2-303. CHARITABLE TRUST WITH UNECONOMICALLY LOW VALUE.

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

(b) 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 modify or terminate the trust.

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

Comment

Subsection (a) strives to make charitable giving 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 is 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 with a value of less than $50,000 if such termination is prohibited by the terms of the trust.

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 pursuant to the cy pres principles articulated in Section 2-302.

For the comparable provision on termination of small noncharitable trusts, see Section 2-205. During the lifetime of the settlor, the trust property of a revocable trust is subject to the claims of the settlor's creditors.

PART 4
SPENDTHRIFT PROVISIONS AND CLAIMS BY CREDITOR OF BENEFICIARY

SECTION 2-401. SPENDTHRIFT PROVISION RECOGNIZED.

(a) Except as otherwise provided in this [part] or by Section 3-104 with respect to claims against a revocable trust, if the terms of a trust restrain both voluntary and involuntary transfer of a beneficiary's interest, the beneficiary may not transfer the interest, and a creditor or assignee of the beneficiary may not attach the interest or a distribution by the trustee prior to its receipt by the beneficiary.

(b) A reference by the settlor in the terms of the trust that the interest of a beneficiary is to be held subject to a "spendthrift trust" or words of similar import is sufficient to restrain both the voluntary and involuntary transfer of the beneficiary's entire interest.

(c) This [part] does not limit the right of a beneficiary to compel a trustee to make a distribution to which the beneficiary is entitled.

Comment

Source: CPC Section 15300-15301; Tex. Prop. Code Ann. Sec. 122.035.

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. Unless one of the exceptions under Section 2-402 applies, a creditor of the beneficiary is prohibited from attaching a protected interest and may only attempt to collect directly from the beneficiary after payment is made. This section is similar to Restatement (Second) of Trusts Sections 152-153 (1959).

For a spendthrift provision to be effective under the Act, the provision must prohibit both the voluntary and involuntary transfer of the beneficiary's interest. An attempt to restrain one type of transfer without placing restrictions on the other type is ineffective.

Subsection (b), which is derived from the Texas Trust Code, allows a settlor to provide maximum spendthrift protection simply by stating in the instrument that all interests are held subject to a "spendthrift trust" or words of similar effect. For other recognitions in this Act and elsewhere of the use of shorthand phrases to express concepts that might otherwise require detailed drafting, see Section 2-101 (reference by settlor to "all of my property" or words of similar import sufficient to subject all of settlor's then property to declaration of trust); Uniform Probate Code Sec. 2-213 (waiver of "all rights" or equivalent language in pre- or post-marital agreement sufficient to waive rights to elective share, exempt property, and homestead and family allowances).

Per subsection (c), the power to force a distribution due to an abuse of discretion or failure to comply with a standard belongs solely to the beneficiary. A creditor of a beneficiary does not stand in the shoes of the beneficiary for this purpose. Under Section 4-214, a trustee must always exercise a discretionary power in good faith and with regard to the purposes of the trust and the interest of the beneficiaries.

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

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

SECTION 2-402. CLAIMS BY CREDITOR OF BENEFICIARY.

(a) To the extent a beneficiary's interest is not protected by a spendthrift provision, a creditor or assignee of a beneficiary may secure an order from the court directing satisfaction of the creditor's or assignee's judgment from distributions the trustee is required to make to the beneficiary by the express terms of the trust or which the trustee has otherwise decided to make, either presently or in the future.

(b) Whether or not the terms of the trust contain a spendthrift provision:

(1) a creditor or assignee of a beneficiary may compel payment of a distribution required to be made to the beneficiary by the express terms of the trust if the trustee has failed to make the distribution within a reasonable time;

(2) a creditor or assignee of the settlor may reach the maximum amount that the trustee could pay to or for the settlor's benefit. If a trust has multiple settlors, the amount the creditor or assignee 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.

(c) Notwithstanding a spendthrift provision, the court shall enforce a claim by the State against a beneficiary for unpaid taxes and, in a manner that is fair and equitable in the particular case, direct the satisfaction of a judgment to support the beneficiary's children or current or former spouse, but such a claim or judgment may be satisfied only from distributions the trustee is required to make to the beneficiary by the express terms of the trust or which the trustee has otherwise decided to make, either presently or in the future.

Comment

This section addresses the rights of a beneficiary's creditors or assignees to collect a debt or assignment from the beneficiary's trust interest prior to its distribution to the beneficiary. The section applies whether or not the terms of the trust contain a spendthrift provision, but claims by the creditors or assignees of a settlor and claims against a revocable trust are dealt with elsewhere. See Section 3-104 (claims against revocable trust). Because the holders of appointment are not included within the definition of "beneficiary," this Part does not apply to creditor claims against property subject to a power of withdrawal or power of appointment. See Section 1-201(1) (definition of "beneficiary"). For creditor rights against such interests, see Restatement (Property) Second: Donative Transfers Sec. 13.1-13.7 (1986).

For trusts without a spendthrift provision, the controlling provision is subsection (a). Absent a spendthrift provision, any creditor or assignee of a beneficiary may intercept a distribution required to be made to the beneficiary by the express terms of the trust. The creditor may also intercept any other distribution which the trustee has decided to make. Typical examples of distributions required to be made by the express terms of the trust include mandatory income payments and distributions occurring upon the termination or partial termination of the trust. Distributions which the trustee has otherwise decided to make refer to proposed distributions not expressly required by the trust terms, including distributions made pursuant to the trustee's exercise of discretion and distributions made pursuant to a standard, such as amounts needed for the beneficiary's support.

The effect of a spendthrift provision is generally to totally insulate a beneficiary's interest until a distribution is made and has been received by the beneficiary. See Section 2-401. But there are certain exceptions. Whether or not a trust contains a spendthrift provision, a creditor may reach a distribution required to be paid to the beneficiary by the express terms of the trust if the trustee has failed to make the payment within a reasonable time after the required distribution date. See Subsection (b)(1). Following a reasonable period necessary to accomplish a distribution, required payments from the trust are in effect being held by the trustee as agent for the beneficiary and should be treated the same as any other of the beneficiary's personal assets.

Subsection (b)(2), which is based on Section 156 of the Restatement (Second) of Trusts (1959), recognizes an exception with respect to the beneficial interest of the settlor. Whether or not the trust contains a spendthrift provision, a creditor of the settlor may reach the maximum amount that the trustee could have paid to the settlor-beneficiary. Should the trustee have discretion to distribute the entire income and principal to the settlor, the effect of this subsection is to place the settlor's creditors in the same position as if the trust had not been created. The theory of this section, the Restatement, and also of traditional American trust doctrine is that a settlor should not be permitted to receive benefits from a trust which the settlor has created while at the same time employing the trust as a shield against the settlor's creditors. For the definition of "settlor," see Section 1-201(14).

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

For trusts with spendthrift provisions, the effect of subsection (c), where applicable, is to except certain preferred creditors from the spendthrift restriction but only with respect to their particular claims. Under this subsection, preferred positions are granted only to claims for payment of state taxes and judgments for the support of a child or a current or former spouse. Unlike the Restatement (Second) of Trusts Section 157, the Act does not create a preference for nontax claims by state governments, a Restatement provision based on scant legal authority. Nor does the Act create a preference for creditors who have furnished necessary services or supplies to the beneficiary or who have furnished services or materials which have preserved or supposedly enhanced the beneficiary's interest. For a discussion of these other exceptions to the spendthrift bar, recognized in some states, see Scott, The Law of Trusts Sec. 157 (Fratcher 4th Ed. 1987).

Under subsection (c), a preferred creditor, like a creditor of a trust without a spendthrift trust, may reach only distributions required to be made by the express terms of the trust or which the trustee had otherwise decided to make. But unlike a trust without a spendthrift provision, the court, with respect to judgments for support, has discretion in setting the amount and terms of the payment. In making this determination, the court should consider the amount of the available distributions and the present and future needs of the settlor, the spouse or former spouse, and the children. The Act does not attempt to prescribe the particular procedural methods for enforcing this right to collect from the trust, leaving that matter to local collection law. For an example of such a procedure, see Cal. Prob. Code Sec. 15305.

Subsection (c) extends a similar preference to state and local tax claims. But unlike claims for child and spousal support, the claim need not first be reduced to judgment before collecting from the trust. In the case of tax payments, the court may approve a jeopardy assessment or pre-judgment attachment the same as would apply to the beneficiary's other assets. Nor is collection by the state subject to the court's discretion. While not specifically mentioned in the Act, due to federal preemption, federal tax payments are also exempt from the spendthrift bar. Instead of trying to describe the exact parameters of the exception for federal tax payments, the drafters of the Act have left this matter entirely to federal law. For a discussion of the federal tax exception, see Scott, The Law of Trusts Sec. 157.4 (Fratcher 4th ed. 1987).

ARTICLE 3
PROVISIONS RELATING TO REVOCABLE TRUSTS

SECTION 3-101. CAPACITY OF SETTLOR TO CREATE REVOCABLE TRUST.

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

The application of the capacity standard for wills does not mean that the revocable trust must be executed with the formalities of a will. There are no execution requirements for trusts, and a trust, at least one containing personal property, may be created by an oral statement. See Section 2-103. Nor does the application of the capacity standard for wills, and the fact that most states prohibit a guardian or conservator from making a will for the ward or protected person, mean that a guardian or conservator cannot create a trust, if allowed under local guardianship or conservatorship law.

The Act does not explicitly spell out the capacity necessary to create other types of trusts, although Section 2-102 does require that the settlor have capacity. This section expressly states a capacity standard for the creation of revocable trusts because of the lack of clarity in the case law and the importance of the issue in modern estate planning. No such uncertainty exists with respect to the capacity standard for other types of trusts, however. 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 the capacity during lifetime to transfer the property free of trust. See generally Restatement (Third) of Trusts Sec. 11 (Tent. Draft No. 1, 1996).

SECTION 3-102. REVOCATION OR MODIFICATION OF REVOCABLE TRUST.

(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 the trust as to the portion of the trust contributed by that settlor, but may modify the trust only upon the joint action of all of the settlors.

[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 by either spouse acting alone;

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

(3) whether or not the trust consists of community or other property, the trust may be modified only by joint action of all of the settlors.]

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

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

(2) unless the terms of the trust expressly make the specified method exclusive, by any other method indicating an intention to revoke.

(d) Upon termination of a revocable trust, the trustee shall 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 to the extent the terms of the trust or 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 revocable trust with the approval of the court supervising the conservatorship.

Comment

Subsection (a), which provides that a settlor may revoke or modify a trust unless the terms of the trust expressly state that the trust is irrevocable, is contrary to the common law of trusts. See Restatement (Second) of Trusts Sec. 330 (1959). This subsection will not govern trusts created in another state which may follow the common law rule. In addition, this subsection does not prevent a trust from being reformed to make it irrevocable if the settlor was proceeding under a mistake of law at the time of its creation. See Section 2-206 (reformation of trust). But far easier than relying on choice of law rules or reformation is for the drafter to simply express in the terms of the trust whether the trust is revocable or irrevocable.

A power of revocation includes the power to modify. See Restatement (Second) of Trusts Section 331, comm. g (1959). An unrestricted power to modify may also include the power to revoke a trust. See Restatement (Second) of Trusts Section 331, comm. 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 revoke the portion of the trust attributable to that settlor's contribution but may modify the trust only upon the joint action of all of the settlors. The reason for the distinction is that a modification will likely affect the other settlor's portion of the trust. But in order not to inhibit free transferability of property and to avoid the taxable gift that might result were joint consent required, the Act grants settlors complete access to and a right to withdraw their own contribution without the other settlor's consent. Because of the inherent complexity of a trust with multiple settlors, better practice is not to automatically rely on the Act, which is a default rule, but to draft a specific provision addressing the settlors' situation. For the definition of "settlor," see Section 1-201(14).

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, and even then a failure to comply with a technical requirement, such as required notarization, may be excused, as long as compliance with the method specified in the terms of the trust is otherwise substantial.

While revocation is ordinarily accomplished by signing a written instrument, 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. But these less formal methods, because they provide less reliable indicia of intent, are not to be encouraged. Nor does subsection (c) 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.

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 terms of the trust or power of attorney expressly so permits. The revocable trust is granted this position of primacy because it, and not the power of attorney, is usually intended by the settlor to function as the settlor's principal property management device. The power of attorney is usually intended to act as a backstop or to address specific topics, such as the power to sign tax returns or apply for certain government benefits, which are beyond the authority which can be granted to the trustee.

Many states allow a conservator to exercise the settlor's power of revocation with the prior court approval of the court supervising the conservatorship. See, e.g., Unif. Prob. Code Sec. 5-407. The effect of subsection (f) is to allow the settlor, by the terms of the trust, to direct that this other law not apply. But the fact that the conservator is prohibited from revoking the trust does not mean that the conservator is prohibited from taking appropriate action if the settlor, now under conservatorship, is also a beneficiary of the trust. Possible remedies include removal of the trustee (see Section 4-107) and reformation of the trust (see Section 2-206). The conservator, acting on the settlor-beneficiary's behalf, could also bring an action to enforce the trust according to its terms. Per Section 1-104, a conservator may act on behalf of the beneficiary whose estate the conservator controls whenever a consent or other action by the beneficiary is required or may be given under the Act.

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

SECTION 3-103. OTHER RIGHTS OF SETTLOR; PRESENTLY EXERCISABLE POWERS OF WITHDRAWAL.

(a) Except to the extent the terms of the trust otherwise provide, while a trust is revocable and the settlor has capacity to revoke the trust, the settlor, and not the beneficiary, has the rights afforded beneficiaries under this [Act], and the duties of the trustee are owed exclusively to the settlor.

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

Comment

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

Under this section, the duty to inform and report to beneficiaries is owed to the settlor of a revocable trust as long as the settlor has capacity. See Section 4-213 (trustee's duty to inform and report 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.

This section no longer applies should the settlor 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).

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

See also Section 6-302, which authorizes the settlor of a revocable trust and the holder of a presently exercisable power of withdrawal 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.

(b) Following the death of a settlor, and subject to the settlor's right to direct that the liabilities be paid from the settlor's other financial resources, the trust property of a revocable trust which was subject to the settlor's power of revocation at the time of death is liable for 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 of trusts 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 2-402(b)(2) (claim of creditor of settlor); 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, the trust assets, following the death of the settlor, should be subject to the settlor's debts and other charges. However, in accordance with traditional doctrine, the assets of the settlor's probate estate must normally first be exhausted before the assets of the revocable trust can be reached.

This section does not attempt to address the procedural issues raised by the need to first exhaust the decedent's probate estate to reach the assets of the revocable trust. Nor does this section address the priority of the creditor claims or the possible liability of the decedent's other nonprobate assets for the decedent's debts and other charges. Subsection (b) does, however, ratify the typical pourover will, revocable trust plan, which will usually shift a portion if not all of the death-related liabilities from the probate estate to the revocable trust. As long as the rights of the creditor or family member claiming a statutory allowance are not impaired, the settlor is free to shift liability from the probate estate to the revocable trust. Not uncommonly, the probate estate will consist of tangible personal property of great sentimental but perhaps of less monetary value, while the trust will contain the liquid or marketable assets which the settlor prefers be used to pay the charges.

SECTION 3-105. LIMITATION ON CONTEST OF REVOCABLE TRUST.

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

(b) Unless the trustee has actual knowledge that a judicial proceeding contesting a revocable trust is pending, six months after the death of the settlor the trustee of the revocable trust may assume that the trust is valid and proceed to distribute the trust property in accordance with the terms of the trust without liability for so doing.

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 earlier barred. 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 the 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.

This section, placing a time limit on the right to contest a trust, applies not only to contests to invalidate the trust in its entirety but also to contests to invalidate the trust in part.

ARTICLE 4
TRUST ADMINISTRATION

PART 1
OFFICE OF TRUSTEE

SECTION 4-101. ACCEPTANCE OR REJECTION OF TRUST.

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

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

(2) unless the terms of the trust make the specified method exclusive, by accepting delivery of the trust property, exercising powers or performing duties as trustee, or

otherwise indicating an intention to accept the trusteeship.

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

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

Comment

This section, specifying the requirements for a valid acceptance of the trusteeship, implicates many of the same issues as arise in determining whether a trust has been revoked. Consequently, the provisions track each other closely. Compare Section 3-102(c) (procedure for revoking or modifying trust). While procedures specified in the terms of the trust are recognized, only substantial, not literal compliance is required. A failure to meet technical requirements, such as notarization of the trustee's signature, does not result in a nonacceptance. Ordinarily, the trustee will indicate an acceptance by signing the trust instrument or signing a separate written instrument. However, this section recognizes any other method indicating the necessary intent, such as an acceptance by oral statement or knowingly exercising trustee powers, unless the terms of the trust make a specified method exclusive. This section also does not preclude an acceptance by estoppel or damages for an unreasonable delay in signifying a decision as to an acceptance or rejection. For general background on issues relating to trustee acceptance and rejection, see Restatement (Third) of Trusts Sec. 36 (Prel. Draft No. 3, 1997).

While a person designated as trustee who decides not to accept the trusteeship need not give a formal rejection, a clear and early communication is recommended. 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 judicial 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.

To avoid the inaction that can result if the person designated as trustee fails to communicate a decision to either accept or reject, subsection (b) provides that a failure to accept within a reasonable time constitutes a rejection of the trust. A trustee's rejection of a trust normally precludes a later acceptance of the trust but does not cause the trust to fail. See Restatement (Third) of Trusts Sec. 36 comm. c (Prel. Draft No. 3, 1997). As to filling vacancies in the event of a rejection, see Section 4-105.

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

SECTION 4-102. TRUSTEE'S BOND.

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

(b) When required, the bond shall be in such amount and with such sureties and liabilities as the court may specify. The court, by requiring bond, is not precluded from later modifying or excusing the bond.

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

Comment

Source: CPC Sec.15602.

This provision is consistent with the Restatement and with the bonding provisions of the Uniform Probate Code. See Restatement (Third) of Trusts Sec. 35 comm. a (Prel. Draft No. 3, 1997); Uniform Probate Code Sections 3-604 (personal representatives), 5-410 (conservators), and 7-304 (trustees). Because a bond is required only if the terms of the trust require bond or a bond is found by the court to be necessary to protect the interests of beneficiaries, bond will rarely be required under the Act. This section does not specifically waive bond for financial institutions with trust powers, preferring instead to leave that topic to separate legislation.

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

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

SECTION 4-103. COTRUSTEES.

(a) 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 a cotrusteeship, the remaining cotrustees may act for the trust; or

(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, to the extent necessary to accomplish the purposes of the trust or to avoid irreparable injury to the trust property.

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

(1) participate in the administration of the trust and not delegate to a cotrustee the performance of functions that the settlor reasonably expected the trustee to personally perform; 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.

(c) A trustee who complies with subsection (b) is not liable for the actions or failures to act of a cotrustee.

Comment

Source: CPC Sec. 15621, 15622, 16013.

Subsection (a)(1) is in accord with Restatement (Third) of Trusts Sec. 40 (Prel. Draft No. 3, 1997), which rejects earlier Restatement formulations and allow action by a majority of the trustees. This rule is subject to contrary provision in the terms of the trust, as noted in the introductory clause. Should a cotrustee resign or a vacancy occur by some other means, only a majority of the remaining trustees need be counted, even though the number of trustees constituting a majority would then be less than before the vacancy occurred.

Under subsection (a)(2), a vacancy in a cotrusteeship is disregarded in the operation of the trust if there is at least one trustee remaining. This is consistent with Section 4-105, which provides, unless the terms of the trust state otherwise, that a vacancy in a cotrusteeship need be filled only if there is no cotrustee remaining in office. Subsection (a)(3) addresses a problem that may arise when a cotrustee is temporarily unable to perform duties but the cotrusteeship is not vacant.

Under subsection (a), 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 under subsection (b) for failing to take action to rectify the acts of the cotrustees.

Subsection (b) codifies the substance of Sections 184 and 224 of the Restatement (Second) of Trusts (1959). This subsection combines the duties of the trustee and the provision on exemption from liability for the actions of a cotrustee. This subsection also addresses the extent to which a trustee may delegate the performance of functions to a cotrustee. Consistent with Restatement (Second) of Trusts Section 171, a trustee may not delegate to a cotrustee the performance of functions that the settlor expected the trustee to personally perform. The exact extent of the delegation authority in a particular case will thus depend on the reasons why the settlor decided to appoint cotrustees. The best practice is to address the division of functions in the terms of the trust, as allowed by Section 4-201.

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

SECTION 4-104. VACANCY IN TRUSTEESHIP. There is a vacancy in the trusteeship 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;

(4) the trustee is disqualified or removed;

(5) the trustee dies; or

(6) a guardian or conservator is appointed for the individual serving or otherwise eligible to serve as trustee.

Comment

Source: CPC Section 15643.

This section lists the typical ways in which a trusteeship 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 4-101 (acceptance or rejection of trust), 4-106 (resignation and liability of resigning trustee), 4-107 (disqualification or removal of trustee).

SECTION 4-105. FILLING VACANCY.

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

(b) A vacancy in the trusteeship required to be filled 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:

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

(B) by a person appointed by the court on petition of a beneficiary or of a person named as trustee by the terms of the trust.

Comment

This section addresses only circumstances where a vacancy in the trusteeship must be filled. The court, exercising its inherent equity authority, may always appoint additional trustees if the appointment would promote better administration of the trust. See Restatement (Third) of Trusts Sec. 35 comm. e (Prel. Draft No. 3, 1997).

Good drafting practice suggests that the terms of the trust deal expressly with the problem of vacancies, naming successors and addressing other matters such as the circumstances under which a vacancy in the trusteeship need be filled. For this reason, subsection (b)(1) provides that the first choice for filling the vacancy is the person named in or nominated pursuant to the method specified by the terms of the trust. Furthermore, subsection (a) clarifies that a vacancy in the cotrusteeship must be filled only if the trust so requires. If the vacancy in the cotrusteeship is not filled, the remaining cotrustees may continue to administer the trust under Section 4-103. For a listing of the circumstances when a vacancy in the cotrusteeship may occur, see Section 4-104.

Absent an effective provision in the terms of the trust, subsection (b)(2)(A) permits a vacancy in the trusteeship to be filled, without the need for court approval, by a person selected by unanimous agreement of the qualified beneficiaries, who, per Section 4-106(a)(3), may also receive the trustee's resignation. If a trustee resigns pursuant to Section 4-106(a)(3), the trust may be transferred to a successor appointed pursuant to subsection (b)(2)(A), all without court involvement.

Subsection (b)(2)(B) authorizes the court to fill a vacancy if the trust does not name a successor who is willing to accept the trust or if the trust does not provide another method of appointment. The appointment of a successor by the court is an alternative to an appointment by the beneficiaries under subsection (b)(2)(A). The petition may be brought by any beneficiary, including beneficiaries who were without authority to participate in an appointment by the beneficiaries. Any beneficiary without authority to join in a beneficiary appointment may also petition the court to rescind the appointment by the other beneficiaries on the theory that the appointment was improvidently made. For a list of factors for the court to consider in making its selection, see Restatement (Third) of Trusts Sec. 35 comm. f (Prel. Draft No. 3, 1997).

Because the settlor of a revocable trust with capacity has all the powers of the beneficiaries, in the case of a revocable trust, the appointment of a successor will normally be made directly by the settlor. See Section 3-103. As to the duties of successor trustees, see Section 4-212.

SECTION 4-106. RESIGNATION OF TRUSTEE.

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

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

(2) in the case of a revocable trust, upon at least [30] days written notice to;

(A) the settlor if the settlor has capacity;

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

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

(3) in the case of an irrevocable trust, upon at least [30] days written notice to the qualified beneficiaries; or

(4) with the approval of the court.

(b) A qualified beneficiary, by a written consent, may waive a notice otherwise required under this section.

(c) In approving a resignation, the court 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.

(d) 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

This section provides several alternative choices for accomplishing the resignation of a trustee. As provided in subsection (a)(1), a trustee may always resign as provided by the terms of the trust. Should the terms of the trust not provide a method for resignation or should the method for whatever reason not be followed, a trustee may resign by giving notice as provided in subsection (a)(2)-(3). Under subsection (a)(4), court approval of a resignation is required only if none of the other alternatives specified are available.

The persons to whom notice of a resignation must be given are generally the same as who must approve the appointment of a successor trustee to fill a vacancy. See Section 4-105. For a revocable trust, the notice to the settlor will ordinarily be required, but should the settlor be incapacitated, subsection (a)(2) makes provision for a substitute consent. For an irrevocable trust, subsection (a)(3) requires that notice be given to the qualified beneficiaries.

Section 4-213 requires a trustee's report whenever there is a change of trustees. See also Restatement (Third) of Trusts Sec. 37 comm. d (Prel. Draft No. 3, 1997), which is in accord with subsection (d).

SECTION 4-107. DISQUALIFICATION OR REMOVAL OF TRUSTEE.

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

(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 substantially impairs the administration of the trust;

(4) if the trustee' s investments perform persistently and substantially below standard;

(5) if because of circumstances not anticipated by the settlor, disqualification or removal of the trustee would substantially further the settlor's purposes in creating the

trust; or

(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 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 38 of the Restatement (Third) of Trusts (Prel. Draft No. 3, 1997), 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 of an irrevocable trust any other rights, such as the right to an annual report or to receive other information concerning administration of the trust.

The statement of grounds for removal of the trustee by the court is taken in part from the Texas Trust Code and the Restatement. See Tex. Prop. Code Ann. Sec. 113.082(a)(Vernon 1984); Restatement (Third) of Trusts Sec. 38 comm. e (Prel. Draft No. 3, 1997). If a trustee is removed, another may be appointed to fill the vacancy as provided in Section 4-105.

Consistent with Section 2-104, which allows the court to modify or terminate a trust due to unanticipated circumstances, subsection (a)(5) similarly allows a trustee to be removed because of circumstances not anticipated by the settlor. Such circumstances might include a substantial and unanticipated change in the character of the trustee which may have occurred between the date of the trust's creation and the date the removal petition is filed.

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 substantially 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 or the court otherwise orders, and until the trust property is delivered to a successor trustee or to a person appointed by the court to receive the property:

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

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

Comment

This section addresses the continuing authority of a former trustee. Subject to the power of the court to make other arrangements, a former trustee has continuing authority until the property is delivered to a successor. However, if a cotrustee remains in office, there is no reason to grant such continuing authority and, consequently, none is granted. Should the trustee have resigned or been removed, the continuing authority is granted to the former trustee; should the former trustee have died, to the former trustee's personal representative; should the former trustee have been adjudicated incapacitated, to the former trustee's guardian or conservator. 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 a trustee's report by the trustee whenever there is a change of trustees. Section 6-202(c) 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 trusteeship), and 6-102(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 provided, except that the court may allow more or less compensation:

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

(2) if the compensation specified by the terms of the trust would be unreasonably low or high; 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 (Third) of Trusts Sec. 39 comm. c (Prel. Draft No. 3, 1997). 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. On the other hand, a trustee with special skills, such as those of a real estate agent, may be entitled to extra compensation for performing services that would ordinarily be delegated. See Restatement (Third) of Trusts Sec. 39 comm. f (Prel. Draft No. 3, 1997).

Subsection (b) permits the reasonable compensation standard to be overridden or clarified by the terms of the trust, subject to the court's inherent equity power to make adjustments downward or upward in appropriate circumstances. Whether a provision in the terms of the trust setting the amount of the trustee's compensation is binding on a successor trustee is a matter for interpretation. Also a question for interpretation is whether a beneficial provision for the trustee in the terms of the trust is in addition to or in lieu of the trustee's regular compensation. Another possible uncertainty is whether the discharge of the beneficial provision is conditional on the person performing services as trustee. See Restatement (Third) of Trusts Sec. 39 comm. e (Prel. Draft No. 3, 1997).

Compensation may also be set by agreement. A trustee may enter into an agreement with the beneficiaries for lesser or increased compensation, although an agreement increasing the compensation is not binding on a nonconsenting beneficiary. A trustee may also agree to waive compensation and should do so prior to rendering significant services if concerned about possible gift and income tax liability on the compensation accrued prior to the waiver. See Rev. Rul. 66-167, 1966-1 C.B. 20. See also Restatement (Third) of Trusts Sec. 39 comm. f (Prel. Draft No. 3, 1997).

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

Section 4-302(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 judicial 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 necessary to prevent unjust enrichment of 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 4-207 (delegation to trustee) and 4-302(15) (trustee to pay expenses of administration from trust).

Paragraph (1) clarifies that a trustee is entitled to reimbursement from the trust for incurring expenses within the trustee's authority. The trustee may also withhold appropriate reimbursement for expenses before making distributions to the beneficiaries. Restatement (Third) of Trusts Sec. 39 comm. b (Prel. Draft No. 3, 1997). 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 consider 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, a trustee is not ordinarily entitled to attorney's fees and expenses if it is determined that the trustee breached the trust. See, e.g., 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 its terms and purposes and, except to the extent the terms of the trust provide otherwise, according to this [Act].

(b) The terms of the trust may expand, restrict, eliminate, or otherwise alter the duties prescribed by this [part], and the trustee may reasonably rely on those terms, but this [Act] does not authorize a trustee to act other than in good faith and with regard to the purposes of the trust and the interest of the beneficiaries.

Comment

Source: CPC Section 16000.

Subsection (a) confirms that the overriding duty of the trustee is to follow the terms and purposes of the trust. Only if the terms of the trust are silent or for some reason invalid on a particular issue are the trustee's duties derived exclusively from the Act. Subsection (a) also confirms that a trustee does not have a duty to act until the trustee has accepted the trust. See Section 4-101 (acceptance of trust by trustee).

A settlor is free to vary the duties prescribed by this Part but only within limits. Pursuant to subsection (b), a trustee must always act in good faith and in accordance with the purposes of the trust and the interests of the beneficiaries. This obligation to act in good faith and in light of fiduciary principles is a fundamental concept the application of which is not limited to this section. See Sections 4-214 (duties with regard to discretionary powers), 6-105 (exculpation of trustee). See also Sections 4-202 (duty of loyalty), and 4-204 (duty to act with prudence). In addition and perhaps stating the obvious, the trustee is not required to perform a duty prescribed by the terms of the trust if performance would be impossible. Furthermore, the terms of a trust created for an invalid purpose are also invalid. Consequently, a trustee need not comply with a term of the trust if it requires the performance of an illegal act or an act violative of public policy.

While a trustee generally must administer a trust in accordance with its terms and purposes, the purposes and particular terms of the trust will on occasion conflict. Should such a conflict occur because of circumstances not anticipated by the settlor, it may be appropriate for the trustee to petition under Section 2-204 to modify or terminate the trust.

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

For a provision requiring the trustee to follow the terms of the trust with respect to the making of investments, see Section 4-401(b).

SECTION 4-202. DUTY OF LOYALTY.

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

(b) Any transaction involving the trust property 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 the transaction was authorized by the terms of the trust or approved by the court.

(c) A transaction is presumed to involve a substantial conflict between personal and fiduciary interests if it involves a sale, encumbrance, or other transaction concerning the trust property entered into by the trustee with the spouse, descendants, siblings, parents, agent, or attorney of a trustee, or with a corporation or other enterprise in which the trustee has a substantial beneficial interest.

(d) A transaction 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 voidable unless the trustee establishes that the transaction was fair to the beneficiary.

(e) This section does not apply to the following transactions, if fair to the beneficiaries: (A) an agreement relating to the appointment of the trustee;

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

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

(D) the investment in securities of an investment company or trust to which the trustee, or its affiliates, provides services, and the payment of compensation for such services, provided the trustee discloses at least annually to the persons entitled under Section 4-213 to receive a copy of the trustee's annual report the rate and method by which the compensation was determined.

Comment

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

Subsection (b) states the general rule with respect to transactions involving trust property. A transaction involving the trust property which is affected by a substantial conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction.

Transactions involving trust property entered into by a trustee individually are voidable without further proof under the "no further inquiry" rule stated in subsection (b).

Such transactions are irrebuttably presumed to involve a substantial conflict between personal and fiduciary interests. The appropriate result is less clear with respect to transactions entered into with persons with close business or personal ties to the trustee. Depending on the particular circumstances, such transactions may or may not be tainted by conflict of interest. Subsection (c) resolves the issue by placing the burden of proof on the trustee. Transactions between a trustee and certain relatives, business associates, or enterprises in which the trustee has a substantial beneficial interest are presumptively voidable. Transactions involving trust property with parties not on the list are not necessarily valid, however. While a presumption is not available, a transaction may still be voided if the beneficiary proves that a substantial conflict between personal and fiduciary interests exists and that the transaction was affected by the conflict.

The right of a beneficiary to void a transaction involving a substantial conflict of interest is purely elective. Should the transaction prove unprofitable, the beneficiary will likely allow the transaction to stand. Also, as provided in subsection (b), the beneficiary may be precluded from acting if the transaction was expressly authorized by the terms of the trust or approved by the court. In addition, a beneficiary may be precluded from acting by choosing to ratify the transaction, either prior to or subsequent to its occurrence, by statute of limitations, or by laches. See Sections 6-104, 6-106. In determining whether a beneficiary has consented to a transaction, the principles of fiduciary and virtual representation from Article 6, Part 3 may be applied.

Subsection (d) creates a presumption that certain transactions between a trustee and beneficiary outside of trust are an abuse of a confidential relationship by the trustee. 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 (e) contains several exceptions to the general duty of loyalty, but which apply only if the transaction was fair to the beneficiaries. A trustee is allowed to negotiate in freedom about the terms of appointment and rate of compensation. A trustee may also engage in a transaction involving another trust of which the trustee is also trustee, or a transaction with a decedent's or conservatorship estate of which the trustee is personal representative or conservator. See Restatement (Second) of Trusts Sec. 170, comm. r (1959). With respect to a transaction involving another fiduciary role, the trustee need not give advance notice of the transaction to the beneficiaries unless required by some other provision. See, e.g., Section 4-213(d) (duty to inform beneficiaries in advance of certain proposed sales). Finally, a special exception is created with respect to a "proprietary fund," a mutual fund investment offered to customers of a financial institution trustee. Under such an arrangement, the mutual fund company will typically pay fees to the financial institution trustee for providing administrative shareholder services that would otherwise be provided directly by the mutual fund. Per subsection (e), it is not a violation of the duty of loyalty for a trustee, or its affiliates, to receive compensation for providing such services as long as the trustee discloses at least annually to the beneficiaries entitled to receive a copy of the trustee's annual report the rate and method by which the compensation was determined. However, the mutual fund investment selected must be prudent and the selection of a mutual fund, and the resulting delegation of certain of the trustee's functions, may be taken into account in setting the trustee's regular compensation. See Sections 4-109 (trustee's compensation), Section 4-401 et seq. (prudent investor rule).

The duty of loyalty is applied to investment decisions in Section 4-405.

SECTION 4-203. 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

Source: Unif. Prudent Investor Act Sec. 6.

The duty of impartiality is an important aspect of the duty of loyalty. This section is identical to Section 6 of the Uniform Prudent Investor Act, except that this section also requires that the trustee take the differing interests of the beneficiaries into account when making distributions. The Prudent Investor Act is limited to duties with respect to the investment and management of trust property. The differing beneficial interests for which the trustee must act impartially include those of the current beneficiaries versus those holding interests in the remainder, and among those currently eligible for distributions, the interests of those entitled or eligible to receive distributions of income versus those eligible to receive distributions of principal. In effectuating the duty to act impartially, the trustee should be particularly sensitive to allocation of receipts and disbursements between income and principal and should consider, in an appropriate case, a reallocation of income to the principal account and vice versa, if allowable under local law. For an example of such a provision, see Revised Unif. Principal & Income Act (1997) Sec. 104.

For the specific application of the duty of impartiality to trustee investment and property management, see Section 4-406.

SECTION 4-204. PRUDENT ADMINISTRATION. A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distribution requirements,

and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

Comment

The duty to administer the trust with prudence is a fundamental duty of the trustee. This duty is not affected by whether the trustee receives compensation but may be altered by the terms of the trust. See Section 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 4-401 (prudent investor rule). This section is applicable to matters such as determining whether to make discretionary distributions, communicating with beneficiaries, and relations with creditors.

SECTION 4-205. COSTS OF ADMINISTRATION. In administering the trust, a trustee may only incur costs that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee.

Comment

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 4-407.

SECTION 4-206. TRUSTEE’S SKILLS.

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

(b) 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

Source: CPC Section 16014.

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

SECTION 4-207. DELEGATION BY TRUSTEE.

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

(1) selecting an agent;

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

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

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

(c) A trustee who complies with 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 trustee powers or duties from the trustee of a trust that is subject to the law of this State, an agent submits to the jurisdiction of the courts of this State.

(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, which is largely copied from Section 9 of the Uniform Prudent Investor Act, codified at Section 4-409, eliminates the traditional emphasis against delegation by a trustee and the often futile attempt to distinguish specified ministerial functions, which were delegable, from discretionary functions, which the trustee was required personally to perform. See Section 4-409 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. Whether particular functions of the trustee are delegable is based on whether it is a function that a prudent trustee might delegate under similar circumstances. For example, delegation of the trustee reporting 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 4-204 (trustee's standard of prudence in performing duties), 4-401 (prudent investor rule).

This section applies only to delegation to agents, and not to delegation to a cotrustee. For the provision authorizing but at the same time limiting the ability to delegate to a cotrustee, see Section 4-103(b)(1).

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

SECTION 4-208. POWERS TO DIRECT.

(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 manifestly violates the terms of the trust or the trustee knows that the attempted exercise violates a fiduciary duty that the person holding the power owes the beneficiaries of the trust.

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

Comment

This section is derived from Restatement (Second) of Trusts Section 185. Powers to direct in the terms of a trust usually relate either to choice of investment or management of closely-held business interests. A power to direct must be distinguished from a veto power. Per a power to direct, 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 4-103(b)(2)(duties of cotrustees).

Powers to direct take a variety of forms. Frequently, the person holding the power is directing the investment of the holder's own beneficial interest. Such self-directed accounts are particularly prevalent among trusts holding interests in employee benefit plans or individual retirement accounts. 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 presumptively acting in a fiduciary capacity and can be held liable should the power holder's conduct constitute a breach.

Powers to direct work most effectively when the trustee is not deterred from honoring the exercise of the power due to concerns about possible liability. On the other hand, the trustee does bear overall responsibility for seeing that the terms of the trust are honored. For this reason, subsection (a) provides that the trustee need not honor an attempted exercise of a directory power if the attempted exercise manifestly violates the terms of the trust or the trustee knows the attempted exercise violates a fiduciary duty which the holder of the power owes to the beneficiaries of the trust. For the definition of "know," see Section 1-201(9).

SECTION 4-209. CONTROL AND SAFEGUARDING OF TRUST

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

Comment

Source: CPC Section 16006.

This section codifies the substance of Sections 175 and 176 of the Restatement (Second) of Trusts (1959). The duty to take control of and safeguard trust property is an aspect of the trustee's duty to act with prudence. See Section 4-204. See also Sections 4-302(1) (power to collect, control and hold trust property), 4-302(12) (power to abandon trust property), 4-302(11) (power to insure trust property). This section, like the other sections in this Part, is subject to limitation in the terms of the trust. For example, the settlor may provide that the spouse or other beneficiary may occupy the settlor's former residence rent free, in which event the trustee will be specifically precluded by the terms of the trust from taking complete control.

SECTION 4-210. SEPARATION AND IDENTIFICATION OF TRUST PROPERTY.

(a) A trustee shall keep the trust property separate from other property of the trustee.

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

Comment

The duty to earmark trust assets and the duty of a trustee not to mingle the assets of the trust with the trustee's own are closely related. Paragraph (1), which addresses the duty not to mingle, is derived from Section 179 of the Restatement (Second) of Trusts 179 (1959). Paragraph (2), which addresses earmarking, however, is broader than the Restatement by attempting to make more precise what is meant by the phrase "the interest of the trust clearly appears." Except for a regulated financial institution, whose trust records are subject to regular state or federal audit, the interest of the trust must clearly appear in the records of a third party, such as a bank or brokerage firm. Because of the serious risk of mistake or misappropriation, a noninstitutional trustee is not allowed to show the interest of the trust solely in the trustee's own internal records. Section 4-302(7), which allows a trustee to hod securities in nominee form, is not inconsistent with this requirement. While securities held in nominee form are not specifically registered in the name of the trustee, they are properly earmarked as long as the trustee's holdings are indicated in the records maintained by a third party, such as via an account at a brokerage firm.

SECTION 4-211. ENFORCEMENT AND DEFENSE OF CLAIMS. A trustee shall take reasonable steps to enforce claims of the trust and to defend against claims against the trust.

Comment

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. It might also be reasonable to settle an action or suffer a default rather than to defend an action. See also Section 4-302(14) (power to pay, contest, settle or release claims).

SECTION 4-212. PRIOR FIDUCIARIES. A trustee shall take reasonable steps to compel a former trustee or other fiduciary to deliver trust property to the trustee, and to discover and redress a breach of trust committed by the former trustee or other fiduciary.

Comment

This section has its origins in Restatement (Second) of Trusts Sec. 223 (1959). Unlike the Restatement, however, this section is written in terms of the affirmative duties of the trustee rather than specifying actions for which the trustee will not be held liable. Also, this section applies not only to duties with respect to predecessor trustees, but also to personal representatives and conservator 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.

For a provision permitting the beneficiaries to relieve a trustee of liability for acts of a predecessor trustee or other fiduciary, see Section 6-106.

SECTION 4-213. DUTY TO INFORM AND REPORT.

(a) Subject to the rights of the settlor of a revocable trust under Section 3-103, a trustee shall keep the beneficiaries of the trust reasonably informed about the administration of the trust, and unless unreasonable under the circumstances, shall promptly respond to a beneficiary's request for information.

(b) On request of a beneficiary, a trustee shall promptly provide the beneficiary with a copy of the trust instrument.

(c) Within [30] days after accepting the trusteeship, the trustee shall inform the beneficiaries of the acceptance. Within [30] days after the death of the settlor of a revocable trust, the trustee shall inform the beneficiaries of their respective interests in the trust.

(d) A trustee shall inform the beneficiaries in advance of any change in the method or rate of the trustee's compensation. A trustee shall also inform the beneficiaries in advance of a transaction affecting trust property that comprises a significant portion of the value of the trust and whose fair market value is not readily ascertainable.

(e) A trustee shall prepare and send to the beneficiaries a report of the trust property, liabilities, receipts, and disbursements at least annually, at the termination of the trust, and upon a change of a trustee. A report on behalf of a former trustee must 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, conservator, or guardian.

(f) Copies of trustee reports, and other information required to be provided under subsections (b)-(e) shall be sent to:

(1) the qualified beneficiaries; and

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

(g) A beneficiary, by a written consent, may waive the right to a trustee's report or other information otherwise required to be provided under this section. Except as to a trustee's report or other information required to be furnished to a beneficiary who is also a settlor, the requirements of this section may not be waived by the terms of the trust.

Comment

The duty to keep the beneficiaries reasonably informed of the administration of the trust is one of the fundamental duties of a trustee. The trustee is under a duty to communicate to the beneficiary information about the administration of the trust that is reasonably necessary to enable the beneficiary to enforce the beneficiary's rights under the trust or to prevent or redress a breach of trust. See Restatement (Second) of Trusts Section 173, comment c (1959). Ordinarily, the trustee is not under a duty to furnish information to the beneficiary in the absence of a specific request for the information. See id., comm. d. Thus, the general duty provided in subsection (a) is ordinarily satisfied by complying with the annual report mandated by subsection (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.

The standard is different if the beneficiary makes a specific request for information, however. In that event, subsection (a) requires the trustee to promptly comply with the beneficiary's request unless unreasonable under the circumstances. Further recognizing this principle that the beneficiary should be allowed to make an independent assessment of what information is relevant to protecting the beneficiary's interest, subsection (b) requires the trustee to on request furnish a beneficiary with a complete copy of the trust instrument. Subsections (a) and (b) have only limited application to revocable trusts, however. During the time that a trust is revocable and the settlor has capacity, the right to request information or a copy of the trust instrument pursuant to this section does not belong to the beneficiaries but only to the settlor. See Section 3-103.

To effectively protect their interests, it is essential that the beneficiaries at least know the identity of the trustee. Subsection (c) requires that a trustee inform the beneficiaries of the trustee's acceptance of the trusteeship within thirty days. Because prior to the settlor's death the beneficiaries of a revocable trust do not even have a right to be informed of the trust's existence, subsection (c) also requires that the trustee, within thirty days following the settlor's death, inform the beneficiaries of the trust's existence and of their respective interests.

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

Consistent with the requirement that the beneficiaries receive advance notice of major transactions affecting their interests, subsection (d) also requires that the beneficiaries be told in advance of changes in the method or rate of the trustee's compensation. This might include a change in a periodic base fee, rate of percentage compensation, hourly rate, termination fee or transaction charge.

Subsection (e) requires the trustee to furnish the beneficiaries with a copy of a trustee's report at least annually, at the termination of the trust, and upon a change of trustee. The term "report" instead of "accounting" is used to negate the inference that the report must be prepared in any particular format. The key factor is not the format chosen but whether the report provides the beneficiaries with the information necessary to protect their interests. Subsection (e) also addresses the responsibility for the preparation of the report upon a trustee's death or incapacity. Consistent with Section 4-108, subsection (e) imposes the obligation to prepare the report on the trustee's personal representative, in the event of the trustee's death, or on the trustee's conservator or guardian, in the event of the trustee's incapacity.

While the principle that the trustee must keep the beneficiaries reasonably informed is well established, less certain is who among the many different types of beneficiaries must be given the required notices. Subsection (f) provides that required notices under subsections (b)-(e) must be given to the qualified beneficiaries as well as other beneficiaries who have requested a copy of the report or other information. For the definition of qualified beneficiaries, see Section 1-201(13). The result of this limitation is that the information need not be furnished to beneficiaries with remote remainder interests unless they have filed a specific request with the trustee.

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

SECTION 4-214. DUTY WITH REGARD TO DISCRETIONARY POWER.

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

Comment

Despite the breadth of discretion purportedly granted by the wording of a trust, a grant of discretion, whether with respect to management of distribution, is never absolute. A grant of discretion establishes a range within which the trustee may act. The greater the grant of discretion, the broader the range. A trustee's action must always be in good faith, with regard to the purposes of the trust and the interest of the beneficiaries, and in accordance with the trustee's other duties, including the obligation to exercise reasonable skill, care and caution. See Section 4-204 (duty to act with prudence). See also Edward C. Halbach, Jr., Problems of Discretion in Discretionary Trusts, 61 Colum. L. Rev. 1425 (1961); Restatement (Second) of Trusts Sec. 187 (1959).

PART 3.
POWERS OF TRUSTEES

SECTION 4-301. GENERAL POWERS OF TRUSTEE; STANDARD FOR EXERCISE.

(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:

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

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

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

(b) Any power granted by the terms of the trust or this [Act] must be exercised in good faith and with regard to the purposes of the trust and the interest of the beneficiaries, and except as modified by the terms of the trust, in accordance with the duties of the trustee as prescribed by Article 4, Parts 2 and 4.

Comment

This section is intended to grant trustees the broadest possible powers, but to be exercised always in accordance with the terms of the trust and fiduciary principles. The fiduciary principles referred to in this Section include all of the duties specified in Article 4, Parts 2 and 4. The powers conferred elsewhere in this Act and which are recognized by this Section include all of the specific powers listed in Section 4-302.

The powers conferred by this Act may be exercised without court approval. Should court approval of the exercise of a power be desired, a petition for court approval should be filed.

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

SECTION 4-302. SPECIFIC POWERS OF TRUSTEES. Without limiting the authority conferred by Section 4-301, a trustee may:

(1) collect trust property and receive additions to the trust property from a settlor or

any other person;

(2) acquire property for the trust, for cash or on credit, including property in which the trustee, in any fiduciary capacity, holds an undivided interest;

(3) sell property, for cash or on credit, at public or private sale, or by exchange;

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

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

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

(7) with respect to an interest in a proprietorship, partnership, limited liability company, business trust, corporation or other form of business or enterprise, continue the business or enterprise and take any action that can be taken by shareholders, members, or property owners, including changing the form of business organization, voting, or giving proxies to vote, shares of stock or membership interests, and holding a security in the name of a nominee or in other form without disclosure of the trust so that title may pass by delivery;

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

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

(10) grant an option involving a sale, lease, or other disposition of trust property or take an option for the acquisition of property, including an option exercisable beyond the term of the trust;

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

(12) abandon or decline to administer property which the trustee reasonably believes is of little or no value;

(13) inspect or investigate property that the trustee holds or has been asked to hold, or property owned or operated by an entity in which the trustee holds or has been asked to hold an interest for the purpose of determining the application of environmental law with respect to the property; 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; and decline to accept property into trust or to disclaim any power with respect to property which has or may have environmental liability attached;

(14) 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;

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

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

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

(18) 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;

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

(A) the beneficiary's conservator, or if none, the beneficiary's guardian;

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

(C) if there is no conservator, guardian, custodian, or custodial trustee, a relative or other person having physical custody of the beneficiary;

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

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

(22) prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties;

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

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

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). Several of the paragraphs are new, however, and other provisions of the Trustee's Powers Act have been modified.

Certain specific powers of a trustee which may be exercised without court approval are contained in other sections, although in some cases subject to other requirements. See Sections 1-305 (transfer of jurisdiction), 2-205 (termination of noncharitable trust with value less than $50,000), 2-206 (reformation of trust or modification to achieve tax objectives), 2-207 (combination and division of trusts), 2-303 (termination of charitable trust with value less than $50,000), 4-103 (delegation to cotrustee), 4-207 (delegation of powers and duties), and 4-401 et seq. (power to invest, delegation of investment and management functions),

Paragraph (3) authorizes a trustee to 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 (7) authorizes the trustee to continue, incorporate or otherwise change the form of a business. Any such decision by the trustee must be made in light of the standards of prudent investment stated in Part 4 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 (13), which addresses possible liability for violations of environmental law, is drawn primarily from the Texas Trust Code.

Paragraph (14) 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 (15) authorizes a trustee to pay compensation without prior court approval. For other provisions relating to trustees' compensation, see Section 4-109. See also Section 4-110 (repayment to trustees for expenses incurred).

Paragraph (18) 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 (19) allows a trustee to make payments to another person for the use or benefit of the beneficiary, including to a custodian under the Uniform Transfers to Minor Act.

Paragraph (20) 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 (22) authorizes a trustee to prosecute or defend an action. As to the propriety of reimbursement for attorney's fees and other expenses of an action or judicial proceeding, see Section 4-110 and comment. See also Sections 4-211 (duty to defend actions), 4-301(b)(exercise of powers subject to fiduciary principles), 6-202 (protection of persons dealing with trustees).

Paragraph (24), 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. While such terminations should not be delayed, neither should they be hasty or ill-considered. By anticipating the termination prior to the terminating event, many of the problems that typically arise can usually be avoided.

PART 4
UNIFORM PRUDENT INVESTOR ACT

PREFATORY NOTE

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

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

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

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

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

Modern Financial Theory (1991) (American College of Trust & Estate Counsel Foundation). A leading introductory text on modern portfolio theory is R.A. Brealey, An Introduction to Risk and Return from Common Stocks (2d ed. 1983).

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

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

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

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

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

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

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 4-401. 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 terms of the trust. A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the terms of the trust.

Comment

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

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

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

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

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

Objective standard. The concept of prudence in the judicial opinions and legislation is essentially relational or comparative. It resembles in this respect the "reasonable person" rule of tort law. A prudent trustee behaves as other trustees similarly situated would behave. The standard is, therefore, objective rather than subjective. Sections 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 4-402. 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 4-405. For example, were the trustee to invest in a second mortgage on a piece of real property owned by the trustee, the investment would be wrongful on account of the trustee's breach of the duty to abstain from self-dealing, even though the investment would no longer automatically offend the former categoric restriction against fiduciary investments in junior mortgages.

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

The UPIA Drafting Committee declined the suggestion that the Act should create an exception to the prudent investor rule (or to the diversification requirement of Section 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 4-401(b) to reduce the trustee's standard of care if the settlor deems such a step appropriate. The official comments to the 1992 Restatement observe that pooled investments, such as mutual funds and bank common trust funds, are especially suitable for small trusts. Restatement of Trusts 3d: Prudent Investor Rule § 227, Comments h, m, at 28, 51; reporter's note to Comment g, id. at 83.

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

SECTION 4-403. DIVERSIFICATION. A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.

Comment

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

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

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

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

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

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

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

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

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

SECTION 4-404. DUTIES AT INCEPTION OF TRUSTEESHIP. Within a reasonable time after accepting a trusteeship or receiving trust property, a trustee shall review the trust property and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of this [Part].

Comment

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

The question of what period of time is reasonable turns on the totality of factors affecting the asset and the trust. The 1959 Restatement took the view that "[o]rdinarily any time within a year is reasonable, but under some circumstances a year may be too long a time and under other circumstances a trustee is not liable although he fails to effect the conversion for more than a year." Restatement of Trusts 2d § 230, comment b (1959). The 1992

Restatement retreated from this rule of thumb, saying, "No positive rule can be stated with respect to what constitutes a reasonable time for the sale or exchange of securities." Restatement of Trusts 3d: Prudent Investor Rule § 229, comment b (1992).

The criteria and circumstances identified in Section 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 4-405. LOYALTY. A trustee shall invest and manage the trust property solely in the interest of the beneficiaries.

Comment

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

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

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

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

SECTION 4-406. 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 4-407. 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 4-408. REVIEWING COMPLIANCE. Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.

Comment

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

SECTION 4-409. DELEGATION OF INVESTMENT AND MANAGEMENT FUNCTIONS.

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

(1) selecting an agent;

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

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

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

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

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

Comment

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

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

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

For discussion and criticism of the former rule see William L. Cary & Craig B.

Bright, The Delegation of Investment Responsibility for Endowment Funds, 74 Columbia L. Rev. 207 (1974); John H. Langbein & Richard A. Posner, Market Funds and Trust-Investment Law, 1976 American Bar Foundation Research J. 1, 18-24.

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

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

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

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

> ERISA . . . invites the dissolution of unitary trusteeship. . . . ERISA's fractionation of traditional trusteeship reflects the complexity of the modern pension trust. Because millions, even billions of dollars can be involved, great care is required in investing and safekeeping plan assets. Administering such plans--computing and honoring benefit entitlements across decades of employment and retirement-is also a complex business. . . . Since, however, neither the sponsor nor any other single entity has a comparative advantage in performing all these functions, the tendency has been for pension plans to use a variety of specialized providers. A consulting actuary, a plan

> administration firm, or an insurance company may oversee the design of a plan and arrange for processing benefit claims. Investment industry professionals manage the portfolio (the largest plans spread their pension investments among dozens of money management firms).

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

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

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

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

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

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

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

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

Costs. The duty to minimize costs that is articulated in Section 4-407 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 4-410. LANGUAGE INVOKING PRUDENT INVESTOR RULE. The following terms or comparable language in the terms of the trust, unless otherwise limited or modified, authorizes any investment or strategy permitted under this [Act]: "investments permissible by law for investment of trust funds," "legal investments," "authorized investments," "using the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital," "prudent man rule," "prudent trustee rule," "prudent person rule," and "prudent investor rule."

Comment

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

ARTICLE 5
REVISED UNIFORM PRINCIPAL AND INCOME ACT (1997)

(This Article reserved for insertion of text and comments of Revised Uniform Principal and Income Act (1997), when available)

ARTICLE 6
LIABILITY OF TRUSTEES, RIGHTS OF THIRD PERSONS, SETTLEMENT AGREEMENTS

PART 1
LIABILITY OF TRUSTEES TO BENEFICIARIES

SECTION 6-101. BREACH OF TRUST FOR VIOLATION OF DUTY.

(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(a). See also Section 3-103(b)(holder of presently exercisable power of withdrawal 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 6-102. See also Section 6-103 (measure of liability for breach of trust).

SECTION 6-102. REMEDIES FOR BREACH OF TRUST. To remedy a breach of trust which has occurred or may occur, the court may:

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

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

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

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

(5) suspend or remove the trustee;

(6) reduce or deny compensation to the trustee;

(7) subject to Section 6-202, void an act of the trustee, impose an equitable lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or

(8) grant any other equitable remedy.

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 in the case law. The availability of a particular remedy listed in this section, and its application under the circumstances, are governed by the common law of trusts. See Section 1-103. 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 Sec. 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 6-103. The characterization of monetary liability does not affect the fact that the remedies for breach of trust are exclusively equitable, as provided in Section 6-101(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 Restatement (Second) of Trusts Sec. 199(c)(1959).

Paragraph (4) makes explicit the court's 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 disqualifying or removing trustees, see Section 4-107 (grounds for removal).

Paragraph (6) follows 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 6-202. 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 6-103. MEASURE OF DAMAGES FOR BREACH OF TRUST. A beneficiary may charge a trustee who commits a breach of trust with the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred, or, if greater, the 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 6-104 to 6-106.

The remedies provided in this section do not preclude resort to other remedies provided by this Act or available under the common law of trusts. See Sections 1-103 (common law of trusts) and 6-102 (remedies for breach of trust).

SECTION 6-104. LIMITATION OF ACTION AGAINST TRUSTEE FOLLOWING FINAL REPORT OR OTHER STATEMENT.

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

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

(1) in the case of an adult who is reasonably capable of understanding the report or other statement, if it is received by the adult personally;

(2) in the case of an adult who is not reasonably capable of understanding the

report or other statement, if it is received by the adult's conservator, guardian, or agent with authority;

(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

This section is based in part on 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 6-106. The reference in the introductory clause to claims previously barred also includes principles such as estoppel and laches that apply under the common law of trusts. See Section 1-103. During the time that a trust is revocable, the person holding the power to revoke is the one who must receive the report or other statement in order to commence the running of the limitations period provided in this section. See Section 3-103 (rights of settlor).

Subsection (b) provides special rules concerning who must receive the report or other statement for it to have the effect of later barring claims based on the information disclosed. This subsection addresses only the issue of when the clock will start to run for purposes of the statute of limitations. Should the trustee wish to immediately foreclose possible claims based on the information disclosed, a consent to the report or other information must be obtained under Section 6-106.

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

SECTION 6-105. EXCULPATION OF TRUSTEE. A term of the trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it:

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

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

relationship to the settlor. When the exculpatory clause was drafted by or on behalf of the trustee, the clause is presumed to have been inserted as a result of such abuse unless the trustee proves that the clause was fair under the circumstances and that its existence and contents were adequately communicated to the settlor.

Comment

Paragraph (1) is the same in substance as Section 222 of the Restatement (Second) of Trusts (1959). It is also consistent with the standards expressed in Sections 4-201(b) and 4-214, relating to the extent to which a settlor may negate a duty in the terms of the trust, and with the standard stated in Section 4-301(b), which provides the standard by which trustee powers must be exercised. There is a minimum standard of conduct to which a trustee must comply, whether stated as a negation of a duty or in the form of an exculpatory provision. A trustee must always act in good faith and with regard to the purposes of the trust and the interest of the beneficiaries.

Paragraph (2) disapproves cases such as Marsman v. Nasca, 573 N.E. 2d 1025 (Mass. Ct. App. 1991), which hold that an exculpatory clause in a trust instrument drafted by the trustee is valid absent proof that it was inserted as a result of an abuse of a fiduciary relationship. Paragraph (2) presumes that such an insertion occirred in an abuse of a prior fiduciary, typically attorney-client relationship, between the settlor and trustee. To overcome the presumption, the trustee must establish that the clause was fair and that its existence and contents were adequately communicated to the settlor. In determining whether the clause was fair, the court may wish to examine: (1) the extent of the prior relationship between the settlor and trustee; (2) whether the settlor received independent advice; (3) the sophistication of the settlor with respect to business and fiduciary matters; (4) the trustee's reasons for inserting the clause; and (5) the scope of the particular provision inserted. See Restatement (Second) of Trusts Sec. 222 comm. d (1959).

SECTION 6-106. NONLIABILITY OF TRUSTEE FOR BENEFICIARY'S CONSENT, RELEASE, OR AFFIRMANCE. A beneficiary may not hold a trustee liable for a breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or affirmed the transaction constituting the breach, unless:

(1) the beneficiary at the time of the consent, release, or affirmance did not

know of the beneficiary's rights and of the material facts that the trustee knew, or with the exercise of reasonably inquiry, should have known, and which the trustee did not reasonably believe that the beneficiary knew; or

(2) the consent, release, or affirmance 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 or by the holder of a presently exercisable power of withdrawal binds all of the beneficiaries. See Section 3-103.

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 2
RIGHTS OF THIRD PERSONS

SECTION 6-201. LIMITATIONS ON PERSONAL LIABILITY OF TRUSTEE.

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

(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, whether negligently or intentionally.

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

(d) A question of liability between the trust and the trustee personally may be determined in an appropriate proceeding.

Comment

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

This section is based on 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.

Subsection (b) addresses liability for situations where the trustee, either intentionally or negligently, acts, or fails to act, or commits a tort either intentionally or negligently. This is contrary to Restatement (Second) of Trusts Section 264, which imposes liability on a trustee 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 judicial proceeding in the probate court. For rules governing indemnification of trustees, see Section 4-110.

SECTION 6-202. PROTECTION OF PERSONS DEALING WITH TRUSTEE.

(a) A person who in good faith assists a trustee or who in good faith and for value deals with a trustee without knowledge that the trustee is exceeding or improperly exercising the trustee's powers is protected as though the trustee properly exercised the power.

(b) A person who in good faith deals with a person with knowledge that the person is a trustee is not solely on that account placed on notice to inquire into the extent of the trustee's powers or the propriety of their exercise or to see to the proper application of assets of the trust paid or delivered to a trustee.

(c) A person who in good faith assists a former trustee or who for value and in good faith deals with a former trustee without knowledge that the person is no longer a trustee is fully protected as if the former trustee were still a trustee.

(d) The protection provided by this section is not a substitute for protection provided to persons assisting or dealing with a trustee by comparable provisions in other law relating to commercial transactions or to the transfer of securities by fiduciaries.

Comment

This section is originally derived from Section 7 of the Uniform Trustees' Powers Act (1964), but with several important changes. The key to understanding the section are the definitions of "good faith" and "knowledge," codified at Section 1-201(6) and (9). The definition of "good faith," with respect to third persons, requires not only honesty of intention but also observance of reasonable commercial standards of fair dealing. The definition of "knowledge" refers to more than actual knowledge. While a person is not charged with knowledge of facts discoverable upon reasonable inquiry, the third party is charged with knowledge of facts the person had reason to know based on the facts and circumstances actually known to the person at the time in question. In other words, if the person should have been aware of a particular fact based on the facts and circumstances, the person is charged with knowledge of that fact. Under the Uniform Trustees' Act, the third person was charged only with actual knowledge and the Act, by failing to define good faith, left open the issue of whether good faith was totally subjective or contained an objective element.

Subsection (a) protects two different classes; persons who assist a trustee with a transaction, and persons who deal with the trustee for value. The third person is protected in the transaction despite the fact the trustee was exceeding or improperly exercising the power as long as the assistance was provided or transaction was entered into in good faith and without knowledge as defined in Section 1-201. Consequently, a third party who receives a purported gift from the trust is not protected, and the transferred property may be recovered for the trust.

Subsection (b) performs two functions. First, it negates the common law rule that a third party is charged with liability should the trustee misapply assets paid or delivered to the trustee and which are properly part of the trust. To receive this protection, however, the third person must again be acting in good faith and without knowledge of the misapplication. Second, subsection (b) confirms that a third party acting in good faith and without knowledge is not charged with a duty to inquire into the extent of the trustee's powers or the propriety of their exercise.

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

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

SECTION 6-203. CERTIFICATION OF TRUST.

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

(b) The certification must contain a statement that the trust has not been revoked, modified, or amended in any manner that 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 terms 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 is liable for damages, including reasonable 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 did not act in good 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 judicial proceeding concerning the trust.

Comment

Source: CPC Section 18100.5.

PART 3
SETTLEMENT AGREEMENTS AND REPRESENTATION

SECTION 6-301. DEFINITION AND APPLICABILITY.

(a) For purposes of this [part], "fiduciary matter" refers to any matter relating to a trust.

(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) an agent with authority may represent and bind the principal;

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

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

(6) 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 proposed judicial settlement must 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 persons whose interests in the judicial proceedings are substantially identical to those of the unborn or unascertained persons and whose identities are actually known.

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 not actually known, 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 judicial 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 AND MISCELLANEOUS PROVISIONS

SECTION 7-101. APPLICATION OF [ACT].

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

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

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

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

(3) the [Act] applies to judicial proceedings concerning trusts commenced before its effective date unless the court finds that application of a particular provision of this [Act] would substantially interfere with the effective conduct of the judicial proceedings or the rights of the parties, in which case the particular provision of this [Act] does not apply and prior law applies;

(4) any rule of construction or presumption provided in this [Act] applies to trust instruments executed before the effective date unless there is a clear indication of a contrary intent in the terms of the trust; and

(5) an act done before the effective date in any proceeding and any accrued right is not impaired by this [Act].

(c) If a right is acquired, extinguished or barred upon the expiration of a prescribed period of time which has commenced to run by the provisions of any statute before the effective date, the provisions remain in force with respect to that right.

Comment

Source: CPC Section 15001; UPC Section 8-101; S.D. Codified Laws Ann. Sec. 29A-8-101.

This section addresses the applicability of the Act, including application to pending judicial proceedings and the administration of existing trusts. The Act is intended to receive the widest possible application. The Act applies to all trusts subject to the jurisdiction of the enacting state, whether created before or after the date of enactment. But recognizing constitutional concerns, excluded from coverage are trusts created prior to the Act's effective date if such application would impair a vested right. For such an impairment to occur, however, the trust would have to be irrevocable as of the effective date and the particular provision of the Act would have to actually reduce or otherwise threaten a beneficial interest.

SECTION 7-102. SPECIFIC REPEALER AND AMENDMENTS.

(a) The following Acts and parts of Acts are repealed:

(1)

(2)

(3)

(b) The following Acts and parts of Acts are amended:

(1)

(2)

(3)

Comment

Source: UPC Sec. 8-102.

SECTION 7-103. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.

SECTION 7-104. SEVERABILITY CLAUSE. If any provision of this [Act] or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.