

D R A F T
FOR DISCUSSION ONLY

TRUST ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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TRUST ACT

With Comments

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Trust Act

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TRUST ACT

ARTICLE 1.DEFINITIONS AND GENERAL PROVISIONS

Section

- 1-101. Short Title.
- 1-102. Definitions.
- 1-103. General Rule Concerning Application of Act.
- 1-104. Common Law as Law of State.
- 1-105. Constructive and Resulting Trusts; Fiduciary and Confidential Relationships; Entity or Relationship Excluded from Trust Definition.
- 1-106. Application of Act to Charitable Trusts.

1-101. Short Title.

This [Act] shall be known and may be cited as the Trust Act.

1-102. Definitions.

In this [Act]:

- (1) "Account," when used to mean a contract of deposit of funds between a depositor and a financial institution, includes a checking account, savings account, certificate of deposit, share account, mutual capital certificate, and other like arrangements.
- (2) "Beneficiary" means a person to whom a donative transfer of property is made or that person's successor in interest, and:
 - (a) As it relates to the intestate estate of a decedent, means an heir.
 - (b) As it relates to the testate estate of a decedent, means a devisee.
 - (c) As it relates to a trust, means a person who has any present or future interest, vested or contingent.
 - (d) As it relates to a charitable trust, includes any person entitled to

enforce the trust.

(3) "Child" means any individual entitled to take as a child by intestate succession from the parent whose relationship is involved.

(4) "Conservatee" includes a limited conservatee.

(5) "Conservator" includes a limited conservator.

(6) "Devise," when used as a noun, means a disposition of real or personal property by will, and, when used as a verb, means to dispose of real or personal property by will.

(7) "Fiduciary" means personal representative, trustee, guardian, institution" means a state or national bank, state or conservator, or other legal representative.

(8) "Financial institution" means a state or national bank, state or federal savings and loan association or credit union, or like organization.

(9) "Heir" means any person, including the surviving spouse, who is entitled to take property of the decedent by intestate succession.

(10) "Instrument" means a will, trust, deed, or other writing that designates a beneficiary or makes a donative transfer of property.

(11) (a) Subject to subdivision (b), "interested person" includes any of the following:

(1) An heir, devisee, child, spouse, creditor, beneficiary, and any other person having a property right in or claim against a trust estate or the estate of a decedent which may be affected by the proceeding.

(2) Any person having priority for appointment as personal representative.

(3) A fiduciary representing an interested person.

(b) The meaning of "interested person" as it relates to particular persons may vary from time to time and shall be determined according to the particular

purposes of, and matter involved in, any proceeding.

(12) "Issue" of a person means all his or her lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent.

(13) "Parent" means any individual entitled to take as a parent by intestate succession from the child whose relationship is involved.

(14) "Person" means an individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership, limited liability company, association, or other entity.

(15) "Property" means anything that may be the subject of ownership and includes both real and personal property and any interest therein.

(16) "Real property" includes a leasehold interest in real property.

(17) "Security" includes any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease, collateral trust certificate, transferable share, voting trust certificate or, in general, any interest or instrument commonly known as a security, or any certificate of interest or participation, any temporary or interim certificate, receipt, or certificate of deposit for, or any warrant or right to subscribe to or purchase, any of the foregoing.

(18) "State" includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject to the legislative authority of the United States.

(19) "Surviving spouse" does not include any of the following:

(a) A person whose marriage to the decedent has been dissolved or annulled, unless, by virtue of a subsequent marriage, the person is married to the decedent at the time of death.

(b) A person who obtains or consents to a final decree or judgment of dissolution of marriage from the decedent or a final decree or judgment of annulment of their marriage, which decree or judgment is not recognized as valid in this State, unless they (1) subsequently participate in a marriage ceremony purporting to marry each to the other or (2) subsequently live together as husband and wife.

(c) A person who, following a decree or judgment of dissolution or annulment of marriage obtained by the decedent, participates in a marriage ceremony with a third person.

(d) A person who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.

(20) "Transferee" means the beneficiary, donee, or other recipient of an interest transferred by an instrument.

(21) (a) "Trust" includes the following:

(1) An express trust, private or charitable, with additions thereto, wherever and however created.

(2) A trust created or determined by a judgment or decree under which the trust is to be administered in the manner of an express trust.

(b) "Trust" excludes the following:

(1) Constructive trusts, other than those described in subdivision (2) of subsection (a), and resulting trusts.

(2) Guardianships and conservatorships.

(3) Personal representatives.

(4) Totten trust accounts.

(5) Custodial arrangements pursuant to the Uniform Gifts to Minors Act or the Uniform Transfers to Minors Act of any state.

(6) Business trusts that are taxed as partnerships or

corporations.

(7) Investment trusts subject to regulation under the laws of this state or any other jurisdiction.

(8) Common trust funds.

(9) Voting trusts.

(10) Security arrangements.

(11) Transfers in trust for purpose of suit or enforcement of a claim or right.

(12) Liquidation trusts.

(13) Trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind.

(14) Any arrangement under which a person is nominee or escrowee for another.

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

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

(24) "Will" includes codicil and any testamentary instrument which merely appoints an executor or revokes or revises another will.

Comment.

Source: California Probate Code (CPC) Sections 21-88.

Section 1-102(1) is comparable to Section 6-201(1) of the Uniform Probate Code. The term "account" is not used in the defined sense when it is used to refer to an accounting to the court. See, e.g., Sections 4-120 and 4-121 (trustee's duty to account).

Section 1-102(2) is comparable to Section 1-201(2) of the Uniform Probate Code (1987). Successors in interest include assignees and other transferees of an interest in a donative transfer of property.

Section 1-102(3) is comparable to Section 1-201(5) of the Uniform Probate Code (1987).

Section 1-102(6) is the same in substance as Section 1-201(10) of the Uniform Probate Code.

Section 1-102(7) is comparable to Section 1-201(16) of the Uniform Probate Code.

Section 1-102(9) is the same in substance as Section 1-201(17) of the Uniform Probate Code (1987).

Section 1-102(11) is the same in substance as Section 1-201(20) of the Uniform Probate Code (1987).

Section 1-102(12) is the same in substance as Section 1-201(21) of the Uniform Probate Code (1987).

Section 1-102(13) is comparable to Section 1-201(33) of the Uniform Probate Code. A stepparent is not included within the definition of "parent" on the basis of that relationship alone.

Section 1-102(14) is drawn from subdivisions (32) and (35) of Section 1-201 of the Uniform Probate Code.

Section 1-102(15) is the same in substance as Section 1-201(39) of the Uniform Probate Code.

Section 1-102(19) is drawn from Section 2-802 of the Uniform Probate Code.

Section 1-102(21) is the same in substance as Section 1-201(53) of the Uniform Probate Code.

Under Section 1-102(22), whether an entity has qualified to engage in and conduct a trust business in this state depends on other law. In order to fall within the definition of "trust company", a corporation, association, or other entity must satisfy the requirements of state or federal law that apply to the particular type of entity.

Section 1-102(23) is the same as Section 1-201(54) of the Uniform Probate Code.

Section 1-102(24) is the same as Section 1-201(48) of the Uniform Probate Code (1987).

1-103. General Rule Concerning Application of Act.

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

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

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

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

Comment.

Source: CPC Section 15001.

Section 1-103 provides the general rule governing the application of this Act to administration of existing trusts and pending proceedings involving trusts. For a comparable provision, see Section 8-101 of the Uniform Probate Code.

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

1-104. Common Law as Law of State.

Except to the extent that the common law rules governing trusts are modified by statute, the common law as to trusts is the law of this State.

Comment.

Source: CPC Section 15002.

As used in Section 1-104, the "common law" refers to the contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and to changing conditions. See, e.g., *Fletcher v. Los Angeles Trust & Sav. Bank*, 187 P. 425 (Cal. 1920). See also Section 1-106 (application of act to charitable trusts).

1-105. Constructive and Resulting Trusts.

Nothing in this [Act] affects the substantive law relating to constructive or resulting trusts.

Comment.

Source: CPC Section 15003(a).

Section 1-105 makes clear that the provision in this act, relating as they do to express trusts, have no effect on the law relating to constructive and resulting trusts. See Section 1-102(21) ("trust" defined).

1-106. Application of Act to Charitable Trusts.

Unless otherwise provided by statute, this [Act] applies to charitable trusts that are subject to the jurisdiction of the Attorney General.

Comment.

Source: CPC Section 15004.

Section 1-106 recognizes that special rules may apply to charitable trusts. See generally Restatement (Second) of Trusts Sections 348-403 (1957). Thus the rules of this Act are subordinate to contrary provisions as to trusts that are subject to the jurisdiction of the Attorney General. See also Section 2-106 (designation of beneficiary rule not applicable to charitable trusts).

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

Part

- 1. Creation And Validity of Trusts.**
- 2. Restrictions on Voluntary and Involuntary Transfers.**
- 3. Modification and Termination of Trusts.**

PART 1. CREATION AND VALIDITY OF TRUSTS

Section

- | | |
|---------------|---|
| 2-101. | Methods of Creating Trusts. |
| 2-102. | Intention to Create Trust. |
| 2-103. | Trust Property. |
| 2-104. | Trust Purpose. |
| 2-105. | Trusts for Indefinite or General Purposes. |
| 2-106. | Designation of Beneficiary. |
| 2-107. | Statute of Frauds. |
| 2-108. | Oral Trusts of Personal Property. |
| 2-109. | Consideration. |
| 2-110. | Exception to Doctrine of Merger. |
| 2-111. | Trusts for Noncharitable Corporation,
Unincorporated Society, or for Lawful
Noncharitable Purpose; Duration. |
| 2-112. | Trusts for Care of Animals; Duration. |
| 2-101. | Methods of Creating Trusts. |

Subject to other provisions of this [Part], a trust may

be created by any of the following methods:

(1) A declaration by the owner of property that the owner holds the property as trustee.

(2) A transfer of property by the owner during the owner's lifetime to another person as trustee.

(3) A transfer of property by the owner, by will or by other instrument taking effect upon the death of the owner, to another person as trustee.

(4) An exercise of a power of appointment to another person as trustee.

(5) An enforceable promise to create a trust.

Comment.

Source: CPC Section 15200.

Section 2-101 is drawn from Section 17 of the Restatement (Second) of Trusts (1957). A declaration under subsection (a) must satisfy the requirements of Section 2-107 (Statute of Frauds as applied to trust of real property) or 2-108 (oral trust of personal property), if applicable. A trust may be created for the benefit of the settlor or of a third person (including the trustee). See Sections 2-106 (designation of beneficiary), 2-110 (exception to doctrine of merger). Consideration is not required to create a trust. See Section 2-109. Subsection (e) is worded differently from the corresponding provision in the Restatement to avoid the implication that it deals with the question of the time of creation of such a trust.

2-102. Intention to Create Trust.

A trust is created only if the settlor properly manifests an intention to create a trust.

Comment.

Source: CPC Section 15201.

Section 2-102 codifies Section 23 of the Restatement (Second) of Trusts (1957). Special requirements may apply to the manifestation of the settlor's intent. See Sections 2-107 (Statute of Frauds as applied to trust of real property), 2-108 (oral trust of personal property).

2-103. Trust Property.

A trust is created only if there is trust property.

Comment.

Source: CPC Section 15202.

Section 2-103 is the same as Section 74 of the Restatement (Second) of Trusts (1957). See also Section 1-102(15) ("property" defined). For additional comments concerning the nature of property required to form a trust, see Restatement (Second) of Trusts Sections 75-86 (1957).

2-104. Trust Purpose.

A trust may be created for any purpose that is not illegal or against public policy.

Comment.

Source: CPC Section 15203.

Illegality and public policy are discussed in Restatement (Second) of Trusts Sections 60-65.

2-105. Trusts for Indefinite or General Purposes.

A trust created for an indefinite or general purpose is not invalid for that reason if it can be determined with

reasonable certainty that a particular use of the trust property comes within that purpose.

Comment.

Source: CPC Section 15204.

Under Section 2-105, a trust for indefinite or general purposes may be created and enforced, even though it is not limited to charitable purposes. This changes the rule applicable under cases such as *In re Estate of Sutro*, 102 P. 920 (Cal. 1970). This section is not intended to affect the law relating to the purposes for which a charitable trust may be created. Contrast Restatement (Second) of Trusts Section 123, under which a trust is unenforceable if its purposes are indefinite or unenforceable.

2-106. Designation of Beneficiary.

(a) A trust, other than a charitable trust, is created only if there is a beneficiary.

(b) The requirement of subsection (a) is satisfied if the trust instrument provides for either of the following:

(1) A beneficiary or class of beneficiaries that is ascertainable with reasonable certainty or that is sufficiently described so it can be determined that some person meets the description or is within the class.

(2) A grant of a power to the trustee or some other person to select the beneficiaries based on a standard or in the discretion of the trustee or other person.

Comment.

Source: CPC Section 15205.

As provided in subsection (a), Section 2-106 does not

govern the beneficiary designations in charitable trusts. This subject is left to case law. See Section 1-104 (common law as law of state).

Subsection (b) requires that the beneficiary be indicated with "reasonable certainty," and also permits trusts to describe a beneficiary or class of beneficiaries in a less strict fashion so long as it can be determined that someone satisfies the criteria in the trust instrument. Under subsection (b)(1), the determination of the class of beneficiaries can satisfy the requirements of this section of the class is ascertainable presently or in the future. Subsection (b)(2) affords the settlor a greater degree of flexibility in creating a trust. Under subsection (b)(2), a disposition that would be valid as a power of appointment will not fail just because it is made in trust.

2-107. Statute of Frauds.

A trust in relation to real property is not valid unless evidenced by one of the following methods:

(a) By a written instrument signed by the trustee, or by the trustee's agent if authorized in writing to do so.

(b) By a written instrument conveying the trust property signed by the settlor, or by the settlor's agent if authorized in writing to do so.

(c) By operation of law.

Comment.

Source: CPC Section 15206.

See also Section 1-105 (law relating to constructive and resulting trusts remains unaffected). For the Statute of Frauds generally, see Restatement (Second) of Trusts Sections 40 et seq.

2-108. Oral Trusts of Personal Property.

(a) The existence and terms of an oral trust of

personal property may be established only by clear and convincing evidence.

(b) The oral declaration of the settlor, standing alone, is not sufficient evidence of the creation of a trust of personal property.

(c) In the case of an oral trust, a reference in this [Act] or elsewhere to a trust instrument or declaration means the terms of the trust as established pursuant to subsection (a).

Comment.

Source: CPC Section 15207.

Subsection (a) of Section 2-108 codifies the rule requiring clear and convincing evidence of the creation of an oral trust in personal property. See, e.g., *Lefrooth v. Prentice*, 259 P. 947 (Cal. 1927); *Monell v. College of Physicians and Surgeons*, 17 Cal. Rptr. 744 (App. 1961). Under this rule, circumstantial evidence is not sufficient. See *Fahrney v. Wilson*, 4 Cal. Rptr. 670 (App. 1960).

Subsection (b) states a requirement for the validity of oral trusts. Under subsection (b), a delivery of personal property to another person accompanied by an oral declaration by the transferor that the transferee holds it in trust for a beneficiary creates a valid oral trust. Constructive delivery, such as by earmarking property or recording it in the name of the transferee, is also sufficient to comply with subsection (b).

Subsection (c) is intended to facilitate application of trust statutes to properly established oral trusts. Although Section 2-301 provides that a trust is revocable unless the trust instrument expressly makes it irrevocable, an oral trust may be shown to be irrevocable pursuant to this section.

Nothing in this section affects the law concerning constructive trusts. See Section 1-105 and the Comment thereto. Hence, in appropriate circumstances, an attempted disposition of property that fails to satisfy the requirements for an oral trust under Section 2-108 may be remedied through the mechanism of a constructive trust.

2-109. Consideration.

Consideration is not 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.

Comment.

Source: CPC Section 15208.

Section 2-109 is drawn from Section 112.003 of the Texas Trust Code. For a provision relating to an enforceable promise to create a trust, see Section 2-101(e). Restatement (Second) of Trusts Sections 28-30 is similar.

2-110. Exception to Doctrine of Merger.

If a trust provides for one or more successor beneficiaries after the death of the settlor, the trust is not invalid, merged, or terminated in either of the following circumstances:

(a) Where there is one settlor who is the sole trustee and the sole beneficiary during the settlor's lifetime.

(b) Where there are two or more settlors, one or more of whom are trustees, and the beneficial interest in the trust is in one or more of the settlors during the lifetime of the settlors.

Comment.

Source: CPC Section 15209.

See In re Estate of Washburn, 106 P. 415 (Cal. App. 1910) (merger of legal and equitable estates). Restatement (Second) of Trusts Section 341 is consistent with this section.

**2-111. Trusts for Noncharitable Corporation,
Unincorporated Society, or for Lawful
Noncharitable Purpose; Duration.**

A trust for a noncharitable corporation or unincorporated society or for a lawful noncharitable purpose may be performed by the trustee for only 21 years, whether or not there is a beneficiary who can seek enforcement or termination of the trust and whether or not the terms of the trust contemplate a longer duration.

Comment.

Source: CPC Section 15211.

This topic is also addressed by Section 2-907 of the Uniform Probate Code.

2-112. Trusts for Care of Animals; Duration.

A trust for the care of a designated domestic or pet animal may be performed by the trustee for the life of the animal, whether or not there is a beneficiary who can seek enforcement or termination of the trust and whether or not the terms of the trust contemplate a longer duration.

Comment.

Source: CPC Section 15212.

Section 2-907 of the Uniform Probate Code is much more elaborate. A trust to alleviate the suffering of animals in general, as opposed to care of a specific animal, is charitable and can last indefinitely. See Restatement (Second) of Trusts Section 374, comment c.

PART 2.RESTRICTIONS ON VOLUNTARY AND INVOLUNTARY TRANSFERS

Section

- 2-201. Restraint on Transfer of Income.**
- 2-202. Restraint on Transfer of Principal.**
- 2-203. Trust for Support.**
- 2-204. Transferee or Creditor of Beneficiary; Power to
Compel Trustee to Pay Any Amount; Liability of
Trustees to Creditor.**
- 2-205. Cases in which Settlor is Beneficiary.**
- 2-206. Claims for Child or Spousal Support.**
- 2-207. Income in Excess of Amount for Education and
Support; Application to Creditors' Claim.**
- 2-208. Subsequent Modification of Court Order.**
- 2-209. Disclaimer Not a Transfer.**

- 2-201. Restraint on Transfer of Income.**

Except as provided in Sections 2-205 and 2-206, if the trust instrument provides that a beneficiary's interest in income is not subject to voluntary or involuntary transfer, the beneficiary's interest in income under the trust may not be transferred and is not subject to enforcement of a money judgment until paid to the beneficiary.

Comment.

Source: CPC Section 15300.

Under Section 2-201, a settlor has the power to restrain transfer of the beneficiary's interest in income, and is free to impose a restraint for a term of years.

For qualifications of the protection provided by Section 2-201, see Sections 2-205 (settlor as beneficiary), 2-206 (claim for child or spousal support), 2-207 (amount of

income in excess of amount needed for education and support subject to creditors' claims). Once the income is paid to the beneficiary, it is subject to claims of creditors.

This section is similar to Restatement (Second) of Trusts Section 152.

2-202. Restraint on Transfer of Principal.

(a) Except as provided in subsection (b) and in Sections 2-205 and 2-206, if the trust instrument provides that a beneficiary's interest in principal is not subject to voluntary or involuntary transfer, the beneficiary's interest in principal may not be transferred and is not subject to enforcement of a money judgment until paid to the beneficiary.

(b) After an amount of principal has become due and payable to the beneficiary under the trust instrument, upon petition to the court by a judgment creditor, the court, in its discretion, may order the trustee to satisfy all or part of the money judgment out of that principal amount.

Comment.

Source: CPC Section 15301.

Subsection (a) of Section 2-202 makes clear that a restraint on voluntary or involuntary transfer of principal is valid.

Subsection (b) permits a creditor to reach principal that is due or payable to the beneficiary, notwithstanding a spendthrift provision in the trust.

For qualifications of the protection provided by Section 2-202, see Sections 2-205 (settlor as beneficiary), 2-206 (claim for child or spousal support), 2-207 (amount of income in excess of amount needed for education and support subject to creditors' claims). Where trust principal that was subject to a restraint on transfer has been paid to the

beneficiary, it is subject to the claims against the beneficiary.

This section is similar to Restatement (Second) of Trusts Section 153.

2-203. Trust for Support.

Except as provided in Sections 2-205 and 2-206, if the trust instrument provides that the trustee shall pay income or principal or both for the education or support of a beneficiary, the beneficiary's interest in income or principal or both under the trust, to the extent the income or principal or both is necessary for the education or support of the beneficiary, may not be transferred and is not subject to the enforcement of a money judgment until paid to the beneficiary.

Comment.

Source: CPC Section 15302.

Section 2-203 is the same in substance as Section 154 of the Restatement (Second) of Trusts (1957), but is drafted to make clear that the protection applies to the extent that a trust provides for the education or support of the beneficiary and not only where the trust provides solely for the payment of an amount for education or support.

For qualifications of the protection provided by Section 2-203, see Sections 2-205 (settlor as beneficiary), 2-206 (claim for child or spousal support), 2-207 (amount of income in excess of amount needed for education and support subject to creditors' claims).

2-204. Discretion of Trustee; Transferee or Creditor of Beneficiary; Power to Compel Trustee to Pay Any Amount; Liability of Trustee to Creditor.

(a) If the trust instrument provides that the trustee shall pay to or for the benefit of a beneficiary so much of the income or principal or both as the trustee in the trustee's discretion sees fit to pay, a transferee or creditor of the beneficiary may not compel the trustee to pay any amount that may be paid only in the exercise of the trustee's discretion.

(b) If the trustee has knowledge of the transfer of the beneficiary's interest or has been served with process by a judgment creditor seeking to reach the beneficiary's interest, and the trustee pays to or for the benefit of the beneficiary any part of the income or principal that may be paid only in the exercise of the trustee's discretion, the trustee is liable to the transferee or creditor to the extent that the payment to or for the benefit of the beneficiary impairs the right of the transferee or creditor. This subsection does not apply if the beneficiary's interest in the trust is subject to a restraint on transfer that is valid under Section 2-201 or 2-202.

(c) This section applies regardless of whether the trust instrument provides a standard for the exercise of the trustee's discretion.

(d) Nothing in this section limits any right the beneficiary may have to compel the trustee to pay to or for the benefit of the beneficiary all or part of the income or principal.

Comment.

Source: CPC Section 15303.

Subsections (a) and (b) of Section 2-204 are drawn from Section 155 of the Restatement (Second) of Trusts (1957), and provide that a judgment creditor cannot compel the trustee of a discretionary trust to pay any part of the discretionary trust income or principal, although a judgment creditor may be able to reach any payment the trustee does decide to make.

Unlike Section 155 of the Restatement, Section 2-204 applies whether or not the trustee's discretion is subject to a standard. See Section 2-204(c). The Restatement provision applies only where the trustee has "uncontrolled discretion." Accordingly, under Section 2-204, even though the beneficiary of the trust could compel the trustee to make payment pursuant to the standard set out in the trust instrument, the transferee or creditor has no similar right to compel the payment.

Subsection (d) of Section 2-204 makes clear that the section does not affect or limit any right the beneficiary (as distinguished from a transferee or creditor of the beneficiary) may have to compel payment.

See Section 4-122, which requires trustees to exercise discretion reasonably.

2-205. Cases in which Settlor is Beneficiary.

(a) If the settlor is a beneficiary of a trust created by the settlor and the settlor's interest is subject to a provision restraining the voluntary or involuntary transfer of the settlor's interest, the restraint is invalid against transferees or creditors of the settlor. The invalidity of the restraint on transfer does not affect the validity of the trust.

(b) If the settlor is the beneficiary of a trust created by the settlor and the trust instrument provides that the trustee shall pay income or principal or both for the education or support of the beneficiary or gives the

trustee discretion to determine the amount of income or principal or both to be paid to or for the benefit of the settlor, a transferee or creditor of the settlor may reach the maximum amount that the trustee could pay to or for the benefit of the settlor under the trust instrument, not exceeding the amount of the settlor's proportionate contribution to the trust.

Comment.

Source: CPC Section 15304.

The first sentence of subsection (a) of Section 2-205 is the same in substance as Section 156(1) of the Restatement (Second) of Trusts (1957). See the comments to Restatement Section 156. This section does not affect the protection of certain pension trusts. See Section 1-102(21) ("trusts" defined to exclude trusts for the primary purpose of paying pensions.)

Subsection (b) is drawn from Section 156(2) of the Restatement (Second) of Trusts (1957). See also the comments to Restatement Section 156.

A person who furnishes the consideration for the creation of a trust is the settlor. See *McColgan v. Walter Magee, Inc.*, 155 P. 995 (Cal. 1916); *Parscal v. Parscal*, 196 Cal. Rptr. 462 (App. 1983).

2-206. Claims for Child or Spousal Support.

(a) As used in this section, "support judgment" means a money judgment for support of the trust beneficiary's spouse or former spouse or minor child.

(b) If the beneficiary has the right under the trust to compel the trustee to pay income or principal or both to or for the benefit of the beneficiary, the court may, to the extent that the court determines it is equitable and

reasonable under the circumstances of the particular case, order the trustee to satisfy all or part of the support judgment out of all or part of those payments as they become due and payable, presently or in the future.

(c) Whether or not the beneficiary has the right under the trust to compel the trustee to pay income or principal or both to or for the benefit of the beneficiary, the court may, to the extent that the court determines it is equitable and reasonable under the circumstances of the particular case, order the trustee to satisfy all or part of the support judgment out of all or part of future payments that the trustee, pursuant to the exercise of the trustee's discretion, determines to make to or for the benefit of the beneficiary.

(d) This section applies to a support judgment notwithstanding any provision in the trust instrument.

Comment.

Source: CPC Section 15305.

Section 2-206 reflects the same public policy as Section 157(a) of the Restatement (Second) of Trusts (1957).

Although a trust is a spendthrift trust or a trust for support, the interest of the beneficiary can be reached in satisfaction of a money judgment against the beneficiary for child or spousal support. In some cases a spendthrift clause may be construed as not intended to exclude the beneficiary's dependents. Even if the clause is construed as applicable to claims of the dependents for support, it is against public policy to give full effect to the provision. A provision in the trust is not effective to exempt the trust from enforcement of a judgment for support of a minor child or support of a spouse or former spouse. See

subsection (b). As a general rule, the beneficiary should not be permitted to have the enjoyment of the interest under the trust while neglecting to support his or her dependents. It is a matter for the exercise of discretion by the court as to how much of the amount payable to the beneficiary under the trust should be applied for such support and how much the beneficiary should receive. Even though the beneficiary's spouse has obtained an order directing the beneficiary to pay a specified amount for support, the spouse cannot compel the trustee to pay the full amount ordered unless the court determines that it is equitable and reasonable under the circumstances of the particular case to compel the trustee to make the payment. The result is much the same as though the trust were created not solely for the benefit of the beneficiary, but also for the benefit of the beneficiary's dependents.

2-207. Income in Excess of Amount for Education and Support; Application to Creditors' Claim.

Notwithstanding a restraint on transfer of a beneficiary's interest in the trust under Section 2-201 or 2-202, any amount to which the beneficiary is entitled under the trust instrument or that the trustee, in the exercise of the trustee's discretion, has determined to pay to the beneficiary in excess of the amount that is or will be necessary for the education and support of the beneficiary may be applied to the satisfaction of a money judgment against the beneficiary.

Comment.

Source: CPC Section 15307.

While Section 2-206 permits only certain preferred creditors to reach the beneficiary's interest in the trust, Section 2-207 permits an ordinary creditor to reach income under limited circumstances. It should also be noted, however, that a creditor does not have the power to compel

the trustee to exercise discretion. See Section 2-204.

The introductory clause of Section 2-207 makes clear that this section applies only to a trust in which transfer of the beneficiary's interest is restrained. Section 2-207 does not apply to enforcement against a trust that does not restrain transfer of the beneficiary's interest; the entire interest of a beneficiary under such a trust may be applied to the satisfaction of a money judgment.

A station-in-life test is used to determine the amount necessary for education and support under this section. If the trustee has discretion to determine the disposition of the trust income, the trustee may be able to defeat the creditor's attempt to reach the excess income under this section by reducing the amount to be paid to the beneficiary to the amount determined by the court to be necessary for the support and education of the beneficiary.

Other provisions may permit a creditor of the beneficiary to satisfy all or part of the creditor's claim out of all or part of the payments of the income or principal as they fall due, presently or in the future. See Sections 2-206 (child or spousal support); see also Section 2-205 (settlor as beneficiary).

The burden of proof to establish that there is surplus income rests on the claimant. See *In re Estate of Lawrence*, 72 Cal. Rptr. 851 (App. 1968).

2-208. Subsequent Modification of Court Order.

Any order entered by a court under Section 2-206 or 2-207 is subject to modification upon petition of an interested person filed in the court where the order was made.

Comment.

Source: CPC Section 15308.

Section 2-208 is drawn from Wisconsin law. See Wis. Stat. Ann. § 701.06(7) (West 1981). See also Section 1-102(11) ("interested person" defined).

2-209. Disclaimer Not a Transfer.

A disclaimer or renunciation by a beneficiary of all or part of his or her interest under a trust shall not be considered a transfer under Section 2-201 or 2-202.

Comment.

Source: CPC Section 15309.
Section 2-209 is drawn from Wisconsin law. See Wis. Stat. Ann. § 701.06(3) (West 1981).

**PART 3. MODIFICATION AND TERMINATION
OF TRUSTS**

Section

- 2-301. Presumption of Revocability.**
- 2-302. Methods of Revocation by Settlor; Limit on Modification or Revocation Pursuant to Power of Attorney.**
- 2-303. Power to Revoke Includes Power to Modify.**
- 2-304. Modification or Termination of Irrevocable Trust by All Beneficiaries.**
- 2-305. Modification or Termination by Settlor and All Beneficiaries.**
- 2-306. Guardian Ad Litem.**
- 2-307. Presumption of Fertility Rebuttable.**
- 2-308. Termination of Trust.**
- 2-309. Trust with Uneconomically Low Principal.**
- 2-310. Modification or Termination in Changed Circumstances.**
- 2-311. Disposition of Property Upon Termination.**
- 2-312. Combinations of Similar Trusts.**
- 2-313. Division of Trusts.**
- 2-314. Ineffectiveness of Trust Non-Termination Provision.**
- 2-315. Continued Existence After Expiration; Termination.**
- 2-301. Presumption of Revocability.**

Unless a trust is expressly made irrevocable by the trust instrument, the trust is revocable by the settlor. This section applies only where the settlor is domiciled in this state when the trust is created, where the trust

instrument is executed in this state, or where the trust instrument provides that the law of this state governs the trust.

Comment.

Source: CPC Section 15400.

For the procedure for revoking a trust, see Section 2-302. See also Section 2-303 (power to revoke includes power to modify). The presumption of revocability is this section is contrary to the common law. See Restatement (Second) of Trusts Section 330. Even a trust which is expressly irrevocable may be terminated under certain circumstances. See Sections 2-304, 2-305, 2-310, 2-311.

2-302. Method of Revocation by Settlor; Limit on Modification or Revocation Pursuant to Power of Attorney.

(a) A trust that is revocable by the settlor may be revoked in whole or in part by any of the following methods:

(1) By compliance with any method of revocation provided in the trust instrument.

(2) By a writing (other than a will) signed by the settlor and delivered to the trustee during the lifetime of the settlor. If the trust instrument explicitly makes the method of revocation provided in the trust instrument the exclusive method of revocation, the trust may not be revoked pursuant to this subdivision.

(b) Unless otherwise provided in the instrument, if a trust is created by more than one settlor, each settlor may

revoke the trust as to the portion of the trust contributed by that settlor. (c) A trust may not be modified or revoked by an attorney in fact under a power of attorney unless it is expressly permitted by the trust instrument.

(d) Nothing in this section limits the authority to modify or terminate a trust pursuant to Section 2-304 or 2-305 in an appropriate case.

Comment.

Source: CPC Section 15401.

The settlor may revoke a revocable trust in the manner provided in subsection (a)(2) of Section 2-302, unless there is a contrary provision in the trust. The settlor may not revoke a trust by a will under subsection (a)(2), even if the will purporting to revoke is delivered to the trustee during the lifetime of the settlor. However the settlor may revoke by will if the trust so provides, pursuant to subsection (a)(1). See Restatement (Second) of Trusts Section 330, comment j (1957).

Under subsection (c), a provision in the power of attorney permitting the attorney in fact to revoke the trust is ineffective unless the trust instrument expressly authorizes revocation by the attorney in fact.

Subsection (d) clarifies the relation of this section to other sections permitting modification and termination of trusts.

2-303. Power to Revoke Includes Power to Modify.

Unless the trust instrument provides otherwise, if a trust is revocable by the settlor, the settlor may modify the trust by the procedure for revocation.

Comment.

Source: CPC Section 15402.

Section 2-303 codifies the general rule that a power of revocation implies the power of modification. See Restatement (Second) of Trusts Section 331, comment g (1957). An unrestricted power to modify may also include the power to revoke a trust. See Restatement (Second) of Trusts Section 331, comment h. See also Sections 3-101 (trustee's acceptance of modification of trust), 3-102 (trustee's rejection of modification of trust).

**2-304. Modification or Termination of Irrevocable Trust
by All Beneficiaries.**

(a) Except as provided in subsection (b), if all beneficiaries of an irrevocable trust consent, they may compel modification or termination of the trust upon petition to the court.

(b) If the continuance of the trust is necessary to carry out a material purpose of the trust, the trust cannot be modified or terminated unless the court, in its discretion, determines that the reason for doing so under the circumstances outweighs the interest in accomplishing a material purpose of the trust. Under this section the court does not have discretion to permit termination of a trust that is subject to a valid restraint on transfer of the beneficiary's interest as provided in [Part] 2 (commencing with Section 2-201).

Comment.

Source: CPC Section 15403.

Section 2-304 is drawn from Section 337 of the Restatement (Second) of Trusts (1957). Unlike the Restatement, however, subsection (b) gives the court some

discretion in applying the material purposes doctrine except in situations where transfer of the beneficiary's interest is restrained, such as by a spendthrift provision. See Section 2-201 (restraint on transfer of beneficiary's interest). Section 2-304 permits termination of an irrevocable trust with the consent of all beneficiaries where the trust provides for successive beneficiaries or postpones enjoyment of a beneficiary's interest. Section 2-304 is intended to provide some degree of flexibility in applying the material purposes doctrine in situations where transfer of the beneficiary's interest is not restrained. For provisions governing judicial proceedings, see Section 5-201 et seq. See also Section 2-307 (no conclusive presumption of fertility). For provisions governing modification and termination of trusts where the consent of all beneficiaries cannot be obtained, see Sections 2-309 (trust with uneconomically low principal) and 2-310 (modification or termination by court order in changed circumstances). Subsection (a) limits the application of this section to irrevocable trusts since if the trust is revocable by the settlor, the method of revocation is governed by Section 2-302. Compare Section 2-305 (modification or termination by settlor and all beneficiaries).

2-305. Modification or Termination by Settlor and All Beneficiaries.

(a) If the settlor and all beneficiaries of a trust consent, they may compel the modification or termination of the trust.

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

(c) If the trust provides for the disposition of

principal to a class of persons described only as "heirs" or "next of kin" of the settlor, or using other words that describe the class of all persons who would take under the rules of intestacy, the court may limit the class of beneficiaries whose consent is needed to compel the modification or termination of the trust to the beneficiaries who are reasonably likely to take under the circumstances.

Comment.

Source: CPC Section 15404.

Subsections (a) and (b) of Section 2-305 are drawn from Section 338 of the Restatement (Second) of Trusts (1957). A trust may be modified or terminated pursuant to this section without court approval, but a court order may be sought by petition under Section 5-201. A revocable trust may be modified or terminated pursuant to this section, as in a case where the method of modification or revocation specified in the trust is found to be overly restrictive. See Section 2-302; compare Section 3-202 (consent by beneficiary of revocable trust). However, nothing in this section affects the right of a settlor to revoke or modify a revocable trust under Section 2-302. See also Section 2-307 (no conclusive presumption of fertility). A trust may be modified or terminated under this section regardless of any provision in the trust restraining transfer of the beneficiary's interest and regardless of whether its purposes have been achieved. See Restatement (Second) of Trusts Section 338, comments b-d.

Subsection (c) reinstates a limited form of the doctrine of worthier title. Under this subsection, the need to obtain the consent of persons constituting the class of heirs or next of kin of the settlor may be excused by the court as to beneficiaries (typically unborn or remote beneficiaries) who are not reasonably likely to take principal under the trust. This limitation protects the interests of beneficiaries who are likely to take while permitting the settlor to modify or terminate an otherwise irrevocable trust in line with the probable intent of the settlor.

2-306. Guardian Ad Litem.

For the purposes of Sections 2-304 and 2-305, the consent of a beneficiary who lacks legal capacity, including a minor, or who is an unascertained or unborn person may be given in proceedings before the court by a guardian ad litem, if it would be appropriate to do so. In determining whether to give consent, the guardian ad litem may rely on general family benefit accruing to living members of the beneficiary's family as a basis for approving a modification or termination of the trust.

Comment.

Source: CPC Section 15405.

Section 2-306 recognizes that, where appropriate, a guardian ad litem may give consent to modification or termination on behalf of certain incapacitated beneficiaries. The second sentence of this section permits a non-pecuniary quid pro quo as a basis for protecting the interests of the beneficiaries represented by the guardian ad litem. This provision is drawn from Wisconsin law. See Wis. Stat. Ann. § 701.12(2) (West 1981). Under this rule, the guardian ad litem may rely on the assumption that a benefit conferred on potential parents will ultimately benefit a child who might be born into the family. On the quid pro quo doctrine generally, see *Hatch v. Riggs Nat'l Bank*, 361 F.2d 559 (D.C. Cir. 1966).

2-307. Presumption of Fertility Rebuttable.

In determining the class of beneficiaries whose consent is necessary to modify or terminate a trust pursuant to Section 2-304 or 2-305, the presumption of fertility is

rebuttable.

Comment.

Source: CPC Section 15406.

Section 2-307 abandons the "fertile octogenarian" doctrine as applied in the context of trust termination. Under this section, the way is open for the court to approve a termination where the possibility of the birth of additional beneficiaries is negligible. See Restatement (Second) of Trusts Section 340, comment e (1957). Section 2-307 thus adopts the modern view that fertility may not be a realistic issue or is subject to proof. See 4 A. Scott, The Law of Trusts § 340.1, at 2713 (3d ed. 1967). According to the Restatement, a court may require a bond to protect possible children.

2-308. Termination of Trust.

(a) A trust terminates when any of the following occurs:

- (1) The term of the trust expires.
- (2) The trust purpose is fulfilled.
- (3) The trust purpose becomes unlawful.
- (4) The trust purpose becomes impossible to fulfill.
- (5) The trust is revoked.

(b) On termination of the trust, the trustee continues to have the powers reasonably necessary under the circumstances to wind up the affairs of the trust.

Comment.

Source: CPC Section 15407.

Subsection (a) of Section 2-308 lists the ways in which

trusts typically may terminate. See Restatement (Second) of Trusts Section 334 (1957).

Subsection (b) makes clear that even though the trust has terminated, the trustee retains limited powers needed to wind up the affairs of the trust. For other provisions relating to trustees' powers, see Section 4-201 et seq.

As to a trust purpose becoming unlawful or impossible, see Restatement (Second) of Trusts Section 335. Subsection (b) is similar to Section 344 of the Restatement.

2-309. Trust with Uneconomically Low Principal.

(a) On petition by a trustee or beneficiary, if the court determines that the fair market value of the principal of a trust has become so low in relation to the cost of administration that continuation of the trust under its existing terms will defeat or substantially impair the accomplishment of its purposes, the court may, in its discretion and in a manner that conforms as nearly as possible to the intention of the settlor, order any of the following:

- (1) Termination of the trust.
- (2) Modification of the trust.
- (3) Appointment of a new trustee.

(b) Notwithstanding subsection (a), if the trust principal does not exceed [\$20,000] in value, the trustee has the power to terminate the trust.

(c) The existence of a trust provision restraining transfer of the beneficiary's interest does not prevent application of this section.

Comment.

Source: CPC Section 15408.

For provisions governing judicial proceedings, see Section 5-201 et seq. See also Section 3-201 (limits on rights of beneficiary of revocable trust).

Subsection (b) gives the trustee the power to terminate a trust with a principal value of \$20,000 or less. In such case, the trustee need not seek court approval for termination of the trust; the presumption is established that a \$20,000 trust is inherently uneconomical. See Section 2-311 (disposition of property upon termination).

2-310. Modification or Termination in Changed Circumstances.

(a) On petition by a trustee or beneficiary, the court may modify the administrative or dispositive provisions of the trust or terminate the trust if, owing to circumstances not known to the settlor and not anticipated by the settlor, the continuation of the trust under its terms would defeat or substantially impair the accomplishment of the purposes of the trust. In this case, if necessary to carry out the purposes of the trust, the court may order the trustee to do acts that are not authorized or are forbidden by the trust instrument.

(b) The court shall consider a trust provision restraining transfer of the beneficiary's interest as a factor in making its decision whether to modify or terminate the trust, but the court is not precluded from exercising its discretion to modify or terminate the trust solely because of a restraint on transfer.

Comment.

Source: CPC Section 15409.

Subsection (a) of Section 2-310 is drawn from Sections 167 and 336 of the Restatement (Second) of Trusts (1957). See also Sections 3-201 (limits on rights of beneficiary of revocable trust), 4-202 (power of court to relieve trustee from restrictions on powers).

Subsection (b) is drawn from a provision of the Texas Trust Code. See Tex. Prop. Code Ann. § 112.054 (Vernon 1984). Modification of the dispositive provisions of a trust for the support of a beneficiary may be appropriate, for example, in a case where the beneficiary has become unable to support himself or herself due to poor health or serious injury. See, e.g., *Whittingham v. California Trust Co.*, 4 P.2d 142 (Cal. 1931).

2-311. Disposition of Property Upon Termination.

At the termination of a trust, the trust property shall be disposed of as follows:

(a) In the case of a trust that is revoked by the settlor, as directed by the settlor.

(b) In the case of a trust that is terminated by the consent of the settlor and all beneficiaries, as agreed by the settlor and all beneficiaries.

(c) In any other case, as provided in the trust instrument or in a manner directed by the court that conforms as nearly as possible to the intention of the settlor as expressed in the trust instrument.

(d) If a trust is terminated by the trustee pursuant to subsection (b) of Section 2-309, the trust property may be distributed as determined by the trustee pursuant to the standard provided in subsection (c) without the need for a

court order. Where the trust instrument does not provide a manner of distribution at termination and the settlor's intent is not adequately expressed in the trust instrument, the trustee may distribute the trust property to the living beneficiaries on an actuarial basis.

Comment.

Source: CPC Section 15410.

Subsections (a) and (b) of Section 2-311 recognize that the persons holding the power to modify a trust have the power to direct the manner of distribution of property upon termination. See Section 2-303 (power to revoke includes power to modify), 2-304 (termination by all beneficiaries), 2-305 (termination by settlor and all beneficiaries).

Subsection (c) applies to the cases not described in subsections (a) and (b). Subsection (c) applies to cases where the trust terminates under its own terms, such as the expiration of a term of years or the occurrence of an event. See Section 2-308(a)(1)-(2). Subsection (c) also applies to cases where the trust is terminated pursuant to a court order without the consent of the settlor and beneficiaries. See Sections 2-308(a)(3) (termination where trust purpose becomes unlawful), 2-309 (termination of trust with uneconomically low principal), 2-310 (termination in changed circumstances). The last sentence of subsection (c) provides for its application in a case where a trustee has terminated a trust having a principal value of \$20,000 or less pursuant to Section 2-309(b).

Subsection (d) provides a default rule for disposition of trust property upon termination of a trust worth less than \$20,000.

In appropriate circumstances, distributions on termination of a trust may be made to a custodian for a minor under the Uniform Transfers to Minors Act.

2-312. Combinations of Similar Trusts.

If the terms of two or more trusts are substantially similar, on petition by a trustee or beneficiary, the court, for good cause shown, may combine the trusts if the court

determines that administration as a single trust will not defeat or substantially impair the accomplishment of the trust purposes or the interests of the beneficiaries.

Comment.

Source: CPC Section 15411.

Section 2-312 applies to living trusts as well as testamentary trusts. In addition, a living trust and a testamentary trust may be combined under Section 2-312. Trusts may be combined pursuant to Section 2-312 only upon a petition. See also Section 3-201 (limits on rights of beneficiary of revocable trust).

2-313. Division of Trusts.

On petition by a trustee or beneficiary, the court, for good cause shown, may divide a trust into two or more separate trusts, if the court determines that dividing the trust will not defeat or substantially impair the accomplishment of the trust purposes or the interests of the beneficiaries.

Comment.

Source: CPC Section 15412.

Section 2-313 provides a standard intended to protect the interests of beneficiaries without necessarily requiring their consent. Division of a trust may be appropriate, for example, in a situation where different members of a family desire their own separate trusts because of a disagreement or where a beneficiary has moved to a different part of the country. For provisions governing judicial proceedings, see Section 5-201 et seq. See also Section 3-201 (limits on rights of beneficiary of revocable trust). Courts have allowed trusts to be divided in order to allow maximum advantage of exemptions allowed by the federal generation-skipping tax.

2-314. Ineffectiveness of Trust Non-Termination Provision.

A trust provision, express or implied, that the trust may not be terminated is ineffective insofar as it purports to be applicable after the expiration of the longer of the periods provided by the [Uniform Statutory Rule Against Perpetuities].

Comment.

Source: CPC Section 15413.

This section applies the longer of the two time periods applicable under the Uniform Statutory Rule Against Perpetuities. This section is consistent with Restatement (Second) of Trusts Section 62, comment o.

2-315. Continued Existence After Expiration; Termination.

Notwithstanding any other provision in this Part, if a trust continues in existence after the expiration of the longer of the periods provided by the [Uniform Statutory Rule Against Perpetuities], the trust may be terminated in either of the following manners:

(a) On petition by a majority of the beneficiaries.

(b) On petition by the Attorney General or by any person who would be affected by the termination, if the court finds that the termination would be in the public

interest or in the best interest of a majority of the persons who would be affected by the termination.

Comment.

Source: CPC Section 15414.

The introductory clause recognizes that this section is an exception to the general rules concerning trust termination provided in this Act. Termination under this section is permissible after the longer of the two time periods applicable under the statutory rule: (1) lives in being plus 21 years or (2) 90 years after creation of the interest.

ARTICLE 3. TRUSTEES AND BENEFICIARIES

Part

1. Trustees.
2. Beneficiaries.

PART 1. TRUSTEES

Subpart

1. General Provisions.
2. Cotrustees.
3. Resignation and Removal of Trustees.
4. Appointment of Trustees.
5. Compensation and Indemnification of Trustees.

SUBPART 1. GENERAL PROVISIONS

Section

- 3-101. Acceptance of Trust by Trustee.
- 3-102. Rejection of Trust; Nonliability.
- 3-103. Trustee's Bond.

- 3-101. Acceptance of Trust by Trustee.

(a) The person named as trustee may accept the trust, or a modification of the trust, by one of the following methods:

- (1) Signing the trust instrument or the trust

instrument as modified, or signing a separate written acceptance.

(2) Knowingly exercising powers or performing duties under the trust instrument or the trust instrument as modified, except as provided in subsection (b).

(b) In a case where there is an immediate risk of damage to the trust property, the person named as trustee may act to preserve the trust property without accepting the trust or a modification of the trust, if within a reasonable time after acting the person delivers a written rejection of the trust or the modification of the trust to the settlor or, if the settlor is dead or incompetent, to a beneficiary. This subsection does not impose a duty on the person named as trustee to act.

Comment.

Source: CPC Section 15600.

Subsection (a) of Section 3-101 is drawn from the Indiana Trust Code. See Ind. Code Ann. § 30-4-2-2(a)-(b) (West 1979). The provision in subsection (a)(2) for acceptance of the trust by acts of the person named as trustee is consistent with case law. See, e.g., *Heitman v. Cutting*, 174 P. 675 (Cal. App. 1918).

Subsection (b) is drawn from the Indiana Trust Code. See Ind. Code Ann. § 30-4-2-2(d) (West 1979). The last sentence makes clear that the authority to act in an emergency does not impose a duty to act. The intention of this subsection is to permit the person named as trustee to act in an emergency without being considered to have accepted the trust under the rule set out in subsection (a)(2). See also Section 3-102 (rejection of trust).

The rules governing acceptance of the trust at the commencement of the trust apply by analogy to acceptance of a modification of the trust. Thus, for example, a trustee is not subject to liability for breach of a new duty imposed

through a modification of the trust unless the trustee signs the trust as modified or a separate acceptance under subsection (a) (1) or performs the new duty under subsection (a) (2).

Mere failure to act is not an acceptance. See Section 3-102. As to resignation by a trustee after acceptance, see Section 3-107.

3-102. Rejection of Trust; Nonliability.

(a) A person named as trustee may in writing reject the trust or a modification of the trust.

(b) If the person named as trustee does not accept the trust or a modification of the trust by a method provided in

subsection (a) of Section 3-101 within a reasonable time after learning of being named as trustee or of the modification, the person has rejected the trust or the modification.

(c) A person named as trustee who rejects the trust or a modification of the trust is not liable with respect to the rejected trust or modification.

Comment.

Source: CPC Section 15601.

Section 3-102 is drawn from the Indiana Trust Code. See Ind. Code Ann. § 30-4-2-2(c) (West 1979). Under this section, a trustee may reject new duties without having to resign as trustee. However, if a modification is rejected, the trustee remains subject to the duties and liabilities under the trust as it existed before the modification. The provision in subsection (c) that a trustee who rejects the trust is not liable is consistent with Sections 4-101 (duty to administer trust upon acceptance) and 4-301 (violation of duty is breach of trust). See also Section 3-101 (appointment of trustee to fill vacancy). The appropriate recipient of the written rejection depends upon the

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

A trustee's rejection of a trust normally precludes his or her later accepting the trust but it does not cause the trust to fail under Restatement (Second) of Trusts Section 102. As to filling vacancies, see Section 3-110.

3-103. Trustee's Bond.

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

(1) A bond is required by the trust instrument.

(2) Notwithstanding a waiver of a bond in the trust instrument, a bond is found by the court to be necessary to protect the interests of beneficiaries.

(3) An individual who is not named as a trustee in the trust instrument is appointed as a trustee by the court.

(b) Notwithstanding subsection (a)(1), the court may excuse a requirement of a bond, reduce or increase the amount of a bond, release a surety, or permit the substitution of another bond with the same or different sureties.

(c) If a bond is required, it shall be filed or served and shall be in the amount and with sureties and liabilities

ordered by the court.

(d) Except as otherwise provided in the trust instrument or ordered by the court, the cost of the bond shall be charged against the trust.

(e) A trust company may not be required to give a bond, notwithstanding a contrary provision in the trust instrument.

Comment.

Source: CPC Section 15602.

Subsections (a)-(c) of Section 3-103 are drawn from Section 7-304 of the Uniform Probate Code (1977). See also Sections 3-110 (vacancy in office of trustee), 3-113 (appointment of trustee to fill vacancy).

Subsection (e) makes clear that a trust company is not required to give a bond. See Section 1-102(22) ("trust company" defined). A nonprofit or charitable corporation that acts as trustee under a charitable trust is not a trust company, as defined in Section 1-102(22), and thus is subject to the provisions of subdivisions (1) and (2) of subsection (a) of this section relating to when a bond is required. A bond is required if the trust instrument requires it (subject to the court's power to excuse the bond) or if the bond is found by the court to be necessary to protect the interests of beneficiaries. But a bond is not required of a nonprofit or charitable corporation that is appointed as trustee under a charitable trust merely because the corporation is not named as a trustee in the trust instrument.

SUBPART 2.COTRUSTEES

Section

- 3-104. Actions by Cotrustees.**
- 3-105. Vacancy in Office of Cotrustee.**
- 3-106. Temporary Incapacity of Cotrustee.**

- 3-104. Actions by Cotrustees.**

Unless otherwise provided in the trust instrument, a

power vested in two or more trustees may only be exercised by their unanimous action.

Comment.

Source: CPC Section 15620.

See also Section 4-303 (trustee's liability to beneficiary for acts of cotrustee). This section is in accordance with Restatement (Second) of Trusts Section 194, but Section 383 of the Restatement allows action by a majority in the case of charitable trusts.

3-105. Vacancy in Office of Cotrustee.

Unless otherwise provided in the trust instrument, if a vacancy occurs in the office of a cotrustee, the remaining cotrustee or cotrustees may act for the trust as if they are the only trustees.

Comment.

Source: CPC Section 15621.

Under Section 3-105, a vacancy in the office of a cotrustee is disregarded in the operation of the trust so long as there is at least one trustee remaining. If the trust provides for majority rule, the remaining trustees act by majority vote of their number, even though the number of trustees constituting a majority is now less than before the vacancy occurred. In effect, the vacant positions are not counted in determining a quorum or in determining the number constituting a majority. This rule is subject to contrary provision in the trust instrument, as noted in the introductory clause. See also Sections 3-110 (vacancy in office of trustee), 3-113 (appointment of trustee to fill vacancy).

3-106. Temporary Incapacity of Cotrustee.

Unless otherwise provided in the trust instrument, if a

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

Comment.

Source: CPC Section 15622.

Section 3-106 is intended to deal with the problem that may arise where a cotrustee is temporarily unable to fulfill its duties but the office of trustee is not vacant as under Section 3-105.

SUBPART 3. RESIGNATION AND REMOVAL OF TRUSTEES

Section

- 3-107. Resignation of Trustee.**
- 3-108. Liability of Resigning Trustee.**
- 3-109. Removal of Trustee.**
- 3-110. Vacancy in Office of Trustee.**
- 3-111. Former Trustees; Delivery of Property.**
- 3-112. Nonrevocable Trusts; Trustee's Refusal to Transfer Administration of Trust.**

3-107. Resignation of Trustee.

A trustee who has accepted the trust may resign only by one of the following methods:

- (a) As provided in the trust instrument.
- (b) In the case of a revocable trust, with the consent of the person holding the power to revoke the trust.
- (c) In the case of a trust that is not revocable, with the consent of all adult beneficiaries who are receiving or

are entitled to receive income under the trust or to receive a distribution of principal if the trust were terminated at the time consent is sought. If a beneficiary has a conservator, the conservator may consent to the trustee's resignation on behalf of the conservatee without obtaining court approval. Without limiting the power of the beneficiary to consent to the trustee's resignation, if the beneficiary has designated an attorney in fact who has the power under the power of attorney to consent to the trustee's resignation, the attorney in fact may consent to the resignation.

(d) Pursuant to a court order obtained on petition by the trustee under Section 5-201. The court shall accept the trustee's resignation and may make any orders necessary for the preservation of the trust property, including the appointment of a receiver or a temporary trustee.

Comment.

Source: CPC Section 15640.

Subsections (a), (c), and (d) of Section 3-107 are similar to Section 106 of the Restatement (Second) of Trusts (1957), except that the class of persons whose consent is needed under subsection (c) is more restricted. For a provision governing acceptance of the trust, see Section 3-101. Under Section 3-107, court approval is not required to accomplish a revision except under subsection (d). Whether court approval is required under subsection (a) depends on the terms of the trust. Subsection (b) is a provision that recognizes that the person holding the power to revoke a revocable trust has control over the trust rather than the beneficiaries. See Section 3-201. The last two sentences of subsection (c) makes clear that a conservator may consent to the resignation without the need to obtain approval of

the court in which the conservatorship is pending. Under subsection (d) the court has authority to accept a resignation regardless of whether the trust provides a manner of resignation.

Section 4-120 requires an accounting whenever there is a change of trustees.

3-108. Liability of Resigning Trustee.

The liability for acts or omissions of a resigning trustee or of the sureties on the trustee's bond, if any, is not released or affected in any manner by the trustee's resignation.

Comment.

Source: CPC Section 15641.

See also Sections 4-310 (limitations on proceedings against trustee), 4-311 (exculpation of trustee). See also Restatement (Second) of Trusts Section 106, comment a, which is in accord with this section.

3-109. Removal of Trustee.

(a) A trustee may be removed in accordance with the trust instrument, by the court on its own motion, or on petition of a settlor, cotrustee, or beneficiary under Section 5-201.

(b) The grounds for removal of a trustee by the court include the following:

(1) Where the trustee has committed a breach of the trust.

(2) Where the trustee is insolvent or otherwise

unfit to administer the trust.

(3) Where hostility or lack of cooperation among cotrustees impairs the administration of the trust.

(4) Where the trustee fails or declines to act.

(5) Where the trustee's compensation is excessive under the circumstances.

(7) For other good cause.

(c) If it appears to the court that trust property or the interests of a beneficiary may suffer loss or injury pending a decision on a petition for removal of a trustee and any appellate review, the court may, on its own motion or on petition of a cotrustee or beneficiary, compel the trustee whose removal is sought to surrender trust property to a cotrustee or to a receiver or temporary trustee. The court may also suspend the powers of the trustee to the extent the court deems necessary.

Comment.

Source: CPC Section 15642.

Subsection (a) of Section 3-109 is the same in substance as Section 107 of the Restatement (Second) of Trusts (1957) except that it gives the settlor of an irrevocable living trust the right to petition for removal of a trustee. As to rights of a settlor of a revocable trust, see Sections 2-302 (revocation by settlor), 2-303 (modification by settlor of revocable trust), 3-201 (rights of person holding power of revocation). The right to petition for removal of a trustee does not give the settlor any other rights, such as the right to an account or to receive information concerning administration of the trust.

The statement of grounds for removal of the trustee by the court is drawn from the Texas Trust Code and the Restatement. See Tex. Prop. Code Ann. § 113.082(a) (Vernon

1984); Restatement (Second) of Trusts Section 107, comments b-d (1957). If a trustee is removed, another may be appointed to fill the vacancy as provided in Section 3-113. For the procedure applicable to judicial removal proceedings, see Section 5-201 et seq.

3-110. Vacancy in Office of Trustee.

There is a vacancy in the office of trustee in any of the following circumstances:

- (a) The person named as trustee rejects the trust.
- (b) The person named as trustee cannot be identified or does not exist.
- (c) The trustee resigns or is removed.
- (d) The trustee dies.
- (e) A conservator or guardian of the person or estate of an individual trustee is appointed.
- (f) The trustee files a petition for adjudication of bankruptcy or for approval of an arrangement, composition, or other extension under the federal Bankruptcy Code, or a petition filed against the trustee for any of these purposes is approved.
- (g) A trust company's charter is revoked or powers are suspended, if the revocation or suspension is to be in effect for a period of 30 days or more.
- (h) A receiver is appointed for a trust company if the appointment is not vacated within a period of 30 days.

Comment.

Source: CPC Section 15643.

For rules concerning filling a vacancy, see Section 3-113. See also Section 1-102(22) ("trust company" defined), 3-102 (rejection of trust), 3-107 (resignation of trustee), 3-108 (liability of resigning trustee), 3-109 (removal of trustee), 4-310 (limitations on proceedings against trustee), 6-204 (protection of third person dealing with former trustee).

3-111. Former Trustees; Delivery of Property.

When a vacancy has occurred in the office of trustee, the former trustee who holds property of the trust shall deliver the trust property to the successor trustee or a person appointed by the court to receive the property and remains responsible for the trust property until it is delivered. A trustee who has resigned or is removed has the powers reasonably necessary under the circumstances to preserve the trust property until it is delivered to the successor trustee and to perform actions necessary to complete the resigning or removed trustee's administration of the trust.

Comment.

Source: CPC Section 15644.

See Section 3-110 (vacancy in office of trustee); see also Section 4-305(a)(4) (appointment of receiver or temporary trustee upon breach of trust). The second sentence makes clear that a trustee who has resigned or is removed has the powers needed to complete the trustee's remaining duties. The trustee who has resigned remains liable for actions or omissions during his or her term as trustee even after the property is delivered to the successor until liability is barred. See Section 4-310 (limitations on proceedings against trustee).

Section 4-120 requires an accounting whenever there is a change of trustees. Section 6-203 protects third persons who deal in good faith with a former trustee without knowledge that he or she is no longer a trustee.

**3-112. Nonrevocable Trusts; Trustee's Refusal to Transfer
Administration of Trust.**

If the trustee of a trust that is not revocable has refused to transfer administration of the trust to a successor trust company on request of the beneficiaries described in subsection (c) of Section 3-107 and the court in subsequent proceedings under Section 5-201 makes an order removing the existing trustee and appointing a trust company as successor trustee, the court may, in its discretion, award costs and reasonable attorney's fees incurred by the petitioner in the proceeding to be paid by the trustee or from the trust as ordered by the court.

Comment.

Source: CPC Section 15645.

Section 3-112 is a provision intended to encourage an out of court solution where the beneficiaries of a trust want to transfer administration of the trust to a successor corporate trustee. For provisions concerning consent to transfer of the trust to a successor trust company, see Sections 3-107 (resignation of trustee) and 3-113 (appointment to fill vacancy in office of trustee).

SUBPART 4.APPOINTMENT OF TRUSTEES

Section

3-113. Vacancy, Appointment.

3-113. Vacancy; Appointment.

(a) If the trust has no trustee or if the trust instrument requires a vacancy in the office of a cotrustee to be filled, the vacancy shall be filled as provided in this section.

(b) If the trust instrument provides a practical method of appointing a trustee or names the person to fill the vacancy, the vacancy shall be filled as provided in the trust instrument.

(c) If the vacancy in the office of trustee is not filled as provided in subsection (b), the vacancy may be filled by a trust company that has agreed to accept the trust on agreement of all adult beneficiaries who are receiving or are entitled to receive income under the trust or to receive a distribution of principal if the trust were terminated at the time the agreement is made. If a beneficiary has a conservator, the conservator may agree to the successor trustee on behalf of the conservatee without obtaining court approval. Without limiting the power of the beneficiary to agree to the successor trustee, if the beneficiary has designated an attorney in fact who has the power under the power of attorney to agree to the successor trustee, the attorney in fact may agree to the successor trustee.

(d) If the vacancy in the office of trustee is not filled as provided in subsection (b) or (c), on petition of

any interested person or any person named as trustee in the trust instrument, the court may, in its discretion, appoint a trustee to fill the vacancy. If the trust provides for more than one trustee, the court may, in its discretion, appoint the original number or any lesser number of trustees. In selecting a trustee, the court shall give consideration to any nomination by the beneficiaries who are 14 years of age or older.

Comment.

Source: CPC Section 15660.

For a provision governing the occurrence of vacancies in the office of trustee, see Section 3-110. Subsection (a) makes clear that the vacancy in the office of a cotrustee must be filled only if the trust so requires. If the vacancy in the office of cotrustee is not filled, the remaining cotrustees may continue to administer the trust under Section 3-105, unless the trust instrument provides otherwise.

Subsection (c) permits a vacancy in the office of trustee to be filled, without the need for court approval, by a trust company selected by agreement of the adult beneficiaries of the trust. The persons who must agree to the new trustee are the same as those who must consent to a resignation under Section 3-107(c). A vacancy may be filled under subsection (c) whether or not the former trustee was a trust company. If a trustee resigns pursuant to Section 3-107(c), the trust may be transferred to a trust company pursuant to Section 3-113(c), all without court approval.

Subsection (d) gives the court discretion to fill a vacancy in a case where the trust does not name a successor who is willing to accept the trust, where the trust does not provide a practical method of appointment, or where the trust does not require the vacancy to be filled. For a limitation on the rights of certain beneficiaries of revocable trusts, see Section 3-201. For the procedure applicable to judicial proceedings, see Section 5-201 et seq. The provision in subsection (d) requiring the court to give consideration to the wishes of the beneficiaries is consistent with the Restatement. See Restatement (Second) of Trusts Section 108, comments d, i (1957).

As to obligations of successor trustees, see Section 4-304.

SUBPART 5.COMPENSATION AND INDEMNIFICATION OF TRUSTEES

Section

- 3-114. Compensation; Variance from Terms of Trust.**
- 3-115. Compensation Not Specified.**
- 3-116. Periodic Compensation.**
- 3-117. Compensation of Cotrustees.**
- 3-118. Repayment for Expenditures.**
- 3-119. Trustee's Lien.**
- 3-120. Notice of Increased Trustee's Fee.**

- 3-114. Compensation; Variance from Terms of Trust.**

(a) Subject to subsection (b), if the trust instrument provides for the trustee's compensation, the trustee is entitled to be compensated in accordance with the trust instrument.

(b) Upon proper showing, the court may fix or allow greater or lesser compensation than could be allowed under the terms of the trust in any of the following circumstances:

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

(2) Where the compensation in accordance with the terms of the trust would be inequitable or unreasonably low or high.

(3) In extraordinary circumstances calling for equitable relief.

(c) An order fixing or allowing greater or lesser

compensation under subsection (b) applies only prospectively to actions taken in administration of the trust after the order is made.

Comment.

Source: CPC Section 15680.

Subsection (b) of Section 3-114 makes clear that the court can reduce the trustee's compensation when appropriate. Subsection (c) makes clear that an order changing the amount of compensation cannot be applied retroactively to actions already taken. See also Section 3-116 (court determination of prospective compensation). Restatement (Second) of Trusts Section 242, comment f, is similar but uses somewhat different language.

3-115. Compensation Not Specified.

If the trust instrument does not specify the trustee's compensation, the trustee is entitled to reasonable compensation under the circumstances.

Comment.

Source: CPC Section 15681.

Under Section 3-115 the trustee has authority to fix and pay its compensation without the necessity of prior court review. See Section 4-226 (power to pay compensation and other expenses). See also Section 3-116 (court determination of prospective compensation). For a list of factors relevant for determining reasonable compensation, see Restatement (Second) of Trusts Section 242 (1957).

3-116. Periodic Compensation.

The court may fix an amount of periodic compensation under Sections 3-114 and 3-115 to continue for as long as

the court determines is proper.

Comment.

Source: CPC Section 15682.

Section 3-116 makes clear that the court may fix compensation prospectively.

3-117. Compensation of Cotrustees.

Unless the trust instrument otherwise provides or the trustees otherwise agree, if the trust has two or more trustees, the compensation shall be apportioned among the cotrustees according to the services rendered by them.

Comment.

Source: CPC Section 15683.

3-118. Repayment for Expenditures.

A trustee is entitled to the repayment out of the trust property for the following:

(a) Expenditures that were properly incurred in the administration of the trust.

(b) To the extent that they benefited the trust, expenditures that were not properly incurred in the administration of the trust.

Comment.

Source: CPC Section 15684.

Under Section 3-118, a trustee is not entitled to attorney's fees and expenses of a proceeding where it is determined that the trustee breached the trust, unless the court otherwise orders as provided in subsection (b). See, e.g., *Estate of Gilmaker*, 38 Cal. Rptr. 270 (Ct. App. 1964); *Estate of Vokal*, 263 P.2d 64 (Cal. App. 1953). Restatement (Second) of Trusts Sections 244-245. See also Sections 4-226 (trust to pay expenses of administration from trust), and Section 4-230 (trustee may hire agents).

3-119. Trustee's Lien.

The trustee has an equitable lien on the trust property as against the beneficiary in the amount of advances, with any interest, made for the protection of the trust, and for expenses, losses, and liabilities sustained in the administration of the trust or because of ownership or control of any trust property.

Comment.

Source: CPC Section 15685.

This section is the same in substance as a portion of Section 3(c)(18) of the Uniform Trustees' Powers Act (1964); however, the reference to the equitable nature of the lien is new. An equitable lien is not good against a transferee of trust property who gives fair consideration for the property without knowledge of the lien. See generally 1 J. Pomeroy, *Equity Jurisprudence* §§ 165, 171(4) (5th ed. 1941); see also Restatement (Second) of Trusts Section 244, comment c (1957). The reference in Section 3-119 to liabilities because of ownership or control of trust property involves liability for taxes and assessments on trust property and tort liability arising out of trust property. See also Section 6-102 (personal liability of trustee arising out of ownership or control of trust property).

3-120. Notice of Increased Trustee's Fee.

(a) As used in this section, "trustee's fee" includes,

but is not limited to, the trustee's periodic base fee, rate of percentage compensation, minimum fee, hourly rate, and transaction charge, but does not include fees for extraordinary services.

(b) A trustee may not charge an increased trustee's fee for administration of a particular trust unless the trustee first gives at least 60 days' written notice of that increased fee to all of the following persons:

(1) Each beneficiary who is entitled to an account under Section 4-120.

(2) Each beneficiary who was given the last preceding account.

(3) Each beneficiary who has made a written request to the trustee for notice of an increased trustee's fee and has given an address for receiving notice by mail.

(c) If a beneficiary files a petition under Section 5-201 for review of the increased trustee's fee or for removal of the trustee and serves a copy of the petition on the trustee before the expiration of the 60-day period, the increased trustee's fee does not take effect as to that trust until otherwise ordered by the court or the petition is dismissed.

Comment.

Source: CPC Section 15686.

See also Section 4-118 (duty of the trustee to keep beneficiaries of trust reasonably informed of the trust and

its administration). Subsection (b) requires that notice be given only to "beneficiaries". Thus, if a person is no longer a beneficiary (as in a case where the person's interest has terminated), subsection (b) does not require that notice of an increased fee be given to the person, even if the person had given the trustee a written request for notice. See also Sections 3-203 (notice to beneficiaries of revocable trust); 3-205 (notice in case of future interest).

PART 2. BENEFICIARIES

Section

3-201. Limit on Rights of Beneficiary of Revocable Trust.

3-202. Consent.

3-203. Notice to Beneficiary of Revocable Trust.

3-204. Rights of Holder of Power of Appointment or Withdrawal.

3-205. Notice; Future Interest of Beneficiary.

3-206. Attorney General Subject to Limitations on Beneficiary Rights.

3-201. Limit on Rights of Beneficiary of Revocable Trust.

Except to the extent that the trust instrument otherwise provides or where the joint action of the settlor and all beneficiaries is required, during the time that a trust is revocable and the person holding the power to revoke the trust is competent:

(1) The person holding the power to revoke, and not the beneficiary, has the rights afforded beneficiaries under this [Act].

(2) The duties of the trustee are owed to the person holding the power to revoke.

Comment.

Source: CPC Section 15800.

Section 3-201 has the effect of postponing the enjoyment of rights of beneficiaries of revocable trusts until the death or incompetence of the settlor or other person holding the power to revoke the trust. See also Section 3-204 (holder of general power of appointment or power to withdraw property from trust treated as settlor). Section 3-201 thus recognizes that the holder of a power of revocation is in control of the trust and should have the rights to enforce the trust. A corollary principle is that the holder of the power of revocation may direct the actions of the trustee. See Section 4-102 (duties of trustee of revocable trust); See also Section 2-302 (method of revocation by settlor), 2-303 (power to revoke includes power to modify). Under this section, the duty to inform and account to beneficiaries is owed to the person holding the power to revoke during the time that the trust is presently revocable. See Section 4-118 et seq. (trustee's duty to inform and account to beneficiaries). The introductory clause recognizes that the trust instrument may provide rights to beneficiaries of revocable trusts which must be honored until such time as the trust is modified to alter those rights. See Sections 4-102 (duties of trustee of revocable trust), 4-122 and 4-123 (duties with regard to discretionary trusts). The introductory clause also makes clear that this section does not eliminate the rights of beneficiaries of revocable trusts in situations where the joint action of the settlor and all beneficiaries is required. See Sections 2-305 (modification or termination by settlor and all beneficiaries), 2-311(b) (disposition of property on termination of trust with consent of settlor and all beneficiaries).

3-202. Consent.

(a) In any case where the consent of a beneficiary may be given or is required to be given before an action may be taken, during the time that a trust is revocable and the person holding the power to revoke the trust is competent, the person holding the power to revoke, and not the beneficiary, has the power to consent or withhold consent.

(b) This section does not apply where the joint consent

of the settlor and all beneficiaries is required by statute.

Comment.

Source: CPC Section 15801.

Subsection (a) of Section 3-202 recognizes the principle that the consent of a beneficiary of a revocable trust should not have any effect during the time that the trust is presently revocable, since the power over the trust is held by the settlor or other person holding the power to revoke. See the Comment to Section 3-201. See also Section 3-204 (holder of general power of appointment or power to withdraw property from trust treated as settlor). Under the rule provided in Section 3-202, the consent of the person holding the power to revoke, rather than the beneficiaries, excuses the trustee from liability as provided in Section 4-310(a) (limitations on proceedings against trustee). For provisions permitting a trustee to be relieved of liability by the beneficiaries, see Sections 4-313 (consent), 4-314 (release), 4-315 (affirmance).

Subsection (b) makes clear that this section does not eliminate the requirement of obtaining the consent of beneficiaries in cases where the consent of the settlor and all beneficiaries is required. See Section 2-305 (modification or termination by settlor and all beneficiaries).

3-203. Notice to Beneficiary of Revocable Trust.

Notwithstanding any other statute, during the time that a trust is revocable and the person holding the power to revoke the trust is competent, a notice that is to be given to a beneficiary shall be given to the person holding the power to revoke and not to the beneficiary.

Comment.

Source: CPC Section 15802.

Section 3-203 recognizes that notice to the beneficiary of a revocable trust would be an idle act in the case of a revocable trust since the beneficiary is powerless to act.

See Section 3-201 (limits on rights of beneficiary of revocable trust). See also Section 3-204 (holder of general power of appointment or power to withdraw property from trust treated as settlor).

3-204. Rights of Holder of Power of Appointment or Withdrawal.

The holder of a presently exercisable general power of appointment or power to withdraw property from the trust has the rights of a person holding the power to revoke the trust that are provided by Sections 3-201 to 3-203, inclusive, to the extent of the holder's power over the trust property.

Comment.

Source: CPC Section 15803.

Section 3-204 makes clear that a holder of a power of appointment or a power of withdrawal is treated as a settlor for purposes of Sections 3-201 to 3-203 in recognition of the fact that the holder of such power is in an equivalent position to control the trust as it relates to the property covered by the power.

3-205. Notice; Future Interest of Beneficiary.

(a) Subject to subsections (b) and (c), it is sufficient compliance with a requirement in this [Act] that notice be given to a beneficiary, or to a person interested in the trust, if notice is given as follows:

(1) Where an interest has been limited on any future contingency to persons who will compose a certain class upon the happening of a certain event without further

limitation, notice shall be given to the persons in being who would constitute the class if the event had happened immediately before the commencement of the proceeding or if there is no proceeding, if the event had happened immediately before notice is given.

(2) Where an interest has been limited to a living person and the same interest, or a share therein, has been further limited upon the happening of a future event to the surviving spouse or to persons who are or may be the distributees, heirs, issue, or other kindred of the living person, notice shall be given to the living person.

(3) Where an interest has been limited upon the happening of any future event to a person, or a class of persons, or both, and the interest, or a share of the interest, has been further limited upon the happening of an additional future event to another person, or a class of persons, or both, notice shall be given to the person or persons in being who would take the interest upon the happening of the first of these events.

(b) If a conflict of interest involving the subject matter of the trust proceeding exists between a person to whom notice is required to be given and a person to whom notice is not otherwise required to be given under subsection (a), notice shall also be given to persons not otherwise entitled to notice under subsection (a) with respect to whom the conflict of interest exists.

(c) Nothing in this section affects any of the following:

(1) Requirements for notice to a person who has requested special notice, a person who has filed notice of appearance, or a particular person or entity required by statute to be given notice.

(2) Availability of a guardian ad litem.

(d) As used in this section, "notice" includes other papers.

Comment.

Source: CPC Section 15804.

See also Section 1-102(2) ("beneficiary" defined). See Section 5-202 (request for special notice).

3-206. Attorney General Subject to Limitations on Beneficiary Rights.

Notwithstanding any other provision of law, the Attorney General is subject to the limitations on the rights of beneficiaries of revocable trusts provided by Sections 3-201 to 3-203, inclusive.

Comment.

Source: CPC Section 15805.

ARTICLE 4. TRUST ADMINISTRATION

Part

1. Duties of Trustees.

2. Powers of Trustees.
3. Liability of Trustees to Beneficiaries.

PART 1. DUTIES OF TRUSTEE

Subparts

1. Trustee's Duties in General.
2. Trustee's Standard of Care.
3. Trustee's Duty to Report Information and Account to Beneficiaries.
4. Duties with Regard to Discretionary Powers.
5. Duties of Trustees of Private Foundations, Charitable Trusts, and Split-Interest Trusts.

SUBPART 1. TRUSTEE'S DUTIES IN GENERAL

Section

- 4-101. Duty to Administer Trust.
 - 4-102. Revocable Trusts.
 - 4-103. Duty of Loyalty.
 - 4-104. Multiple Beneficiaries; Impartiality.
 - 4-105. Conflicts of Interest.
 - 4-106. Adverse Trusts.
 - 4-107. Control and Preservation of Trust Property.
 - 4-108. Productivity of Trust Property.
 - 4-109. Improper Investments; Disposal of Trust Property.
 - 4-110. Separation and Identification of Trust Property.
 - 4-111. Enforcement of Claims.
 - 4-112. Defense of Actions.
 - 4-113. Duty Not to Delegate.
 - 4-114. Cotrustees.
 - 4-115. Special Skills.
-
- 4-101. Duty to Administer Trust.

On acceptance of the trust, the trustee has a duty to administer the trust according to the trust instrument and, except to the extent the trust instrument provides otherwise, according to this [Act].

Comment.

Source: CPC Section 16000.
Section 4-101 is drawn in part from Sections 164 and

169 of the Restatement (Second) of Trusts (1957). See also Sections 3-101 (acceptance of trust by trustee), 3-201 (duties owed to persons holding power to revoke), 3-204 (duties owed to persons with general power of appointment or power to withdraw trust property), 4-102 (duties of trustee of revocable trust), 4-116 (trustee's standard of care in performing duties). For provisions permitting the beneficiaries to relieve the trustee from liability, see Sections 4-313 (consent), 4-314 (release), 4-315 (affirmance).

4-102. Revocable Trusts.

(a) Except as provided in subsection (b), the trustee of a revocable trust shall follow any written direction acceptable to the trustee given from time to time (1) by the person then having the power to revoke the trust or the part thereof with respect to which the direction is given or (2) by the person to whom the settlor delegates the right to direct the trustee.

(b) If a written direction given under subsection (a) would have the effect of modifying the trust, the trustee has no duty to follow the direction unless it complies with the requirements for modifying the trust.

Comment.

Source: CPC Section 16001.

Under subsection (a) of Section 4-102, the qualification that a direction be acceptable to the trustee does not mean that the trustee is required to determine the propriety of the direction. For the rule protecting the trustee from liability for following directions under this section, see Section 4-312. See also Sections 3-201 (duties owed to persons holding power to revoke), 4-101 (duties subject to control in trust instrument), 4-116 (standard of care in performing duties).

Subsection (b) clarifies the relationship between the duty to follow directions provided in subsection (a) and the rules governing modification of trusts. See Section 2-302 (method of revocation by settlor), 2-303 (power to revoke includes power to modify).

4-103. Duty of Loyalty.

(a) The trustee has a duty to administer the trust solely in the interest of the beneficiaries.

(b) It is not a violation of the duty provided in subsection (a) for a trustee who administers two trusts to sell, exchange, or participate in the sale or exchange of trust property between the trusts, if both of the following requirements are met:

(1) The sale or exchange is fair and reasonable with respect to the beneficiaries of both trusts.

(2) The trustee gives to the beneficiaries of both trusts notice of all material facts related to the sale or exchange that the trustee knows or should know.

Comment.

Source: CPC Section 16002.

Subsection (a) of Section 4-103 codifies the substance of Section 170(1) of the Restatement (Second) of Trusts (1957). See also Sections 4-101 (duties subject to control by trust instrument), 4-116 (trustee's standard of care in performing duties). This Part does not attempt to state all aspects of the trustee's duty of loyalty, nor does this Part seek to cover all duties that may exist. See Section 1-104 (common law as law of state). For provisions permitting the beneficiaries to relieve the trustee from liability, see Sections 4-313 (consent), 4-314 (release), 4-315 (affirmance).

Subsection (b) permits sales or exchanges between two

or more trusts that have the same trustee without running afoul of the duty of loyalty. See Restatement (Second) of Trusts Section 170, comment r (1957). Subsection (b) does not require the trustee to give notice to all beneficiaries of both trusts; for limitations on the need to give notice, see Sections 3-203 (notice to beneficiary of revocable trust) and 3-205 (notice in case involving future interest of beneficiary). See also Sections 3-201 (limits on rights of beneficiary of revocable trust), 3-202 (consent of beneficiary of revocable trust).

4-104. Multiple Beneficiaries; Impartiality.

If a trust has two or more beneficiaries, the trustee has a duty to deal impartially with them.

Comment.

Source: CPC Section 16003.

Section 4-104 codifies the substance of Section 183 of the Restatement (Second) of Trusts (1957). For provisions permitting the beneficiaries to relieve the trustee from liability, see Section 4-313 (consent), 4-314 (release), 4-315 (affirmance). See also Sections 4-101 (duties subject to control by trust instrument), 4-116 (trustee's standard of care in performing duties).

4-105. Conflicts of Interest.

(a) The trustee has a duty not to use or deal with trust property for the trustee's own profit or for any other purpose unconnected with the trust, nor to take part in any transaction in which the trustee has an interest adverse to the beneficiary.

(b) The trustee may not enforce any claim against the trust property that the trustee purchased after or in contemplation of appointment as trustee, but the court may

allow the trustee to be reimbursed from trust property the amount that the trustee paid in good faith for the claim.

(c) A transaction between the trustee and a beneficiary which occurs during the existence of the trust or while the trustee's influence with the beneficiary remains and by which the trustee obtains an advantage from the beneficiary is presumed to be a violation of the trustee's fiduciary duties. This presumption is a presumption affecting the burden of proof. This subsection does not apply to the provisions of an agreement between a trustee and a beneficiary relating to the hiring or compensation of the trustee.

Comment.

Source: CPC Section 16004.

For provisions permitting the beneficiaries to relieve the trustee from liability, see Sections 4-313 (consent), 4-314 (release), 4-315 (affirmance). See also Sections 4-101 (duties subject to control by trust instrument), 4-116 (trustee's standard of care in performing duties).

The court referred to in subsection (b) may be the court where the trust is administered, or the court where enforcement of the claim is sought, such as where the trustee seeks to foreclose a lien or seeks recognition of the claim in proceedings commenced by some other creditor.

4-106. Adverse Trusts.

The trustee of one trust has a duty not to knowingly become a trustee of another trust adverse in its nature to the interest of the beneficiary of the first trust, and a duty to eliminate the conflict or resign as trustee when the

conflict is discovered.

Comment.

Source: CPC Section 16005.

For provisions permitting the beneficiaries to relieve the trustee from liability, see Sections 4-313 (consent), 4-314 (release), 4-315 (affirmance). See also Sections 4-101 (duties subject to control by trust instrument), 4-116 (trustee's standard of care in performing duties). As to transactions between two trusts with the same trustee, see Section 4-103(b).

4-107. Control and Preservation of Trust Property.

The trustee has a duty to take reasonable steps under the circumstances to take and keep control of and to preserve the trust property.

Comment.

Source: CPC Section 16006.

Section 4-107 codifies the substance of Sections 175 and 176 of the Restatement (Second) of Trusts (1957). For provisions permitting the beneficiaries to relieve the trustee from liability, see Sections 4-313 (consent), 4-314 (release), 4-315 (affirmance). See also Sections 4-101 (duties subject to control by trust instrument), 4-116 (trustee's standard of care in performing duties), 4-210 (power to abandon trust property), 4-223 (power to insure trust property).

4-108. Productivity of Trust Property.

The trustee has a duty to make the trust property productive under the circumstances and in furtherance of the purposes of the trust.

Comment.

Source: CPC Section 16007.

Section 4-108 codifies the substance of Section 181 of the Restatement (Second) of Trusts (1957). In appropriate circumstances under Section 4-108, property may be made productive by appreciation in value rather than by production of income. If the trust instrument imposes a duty on the trustee to hold property and give possession of it to a beneficiary at a later date, this duty would override the general duty to make the property productive. See Restatement (Second) of Trusts Section 181 comment a (1957). Similarly, if a beneficiary has the right under the trust instrument to occupy a home, the trustee would have no duty to make the property productive income. For provisions permitting the beneficiary to relieve the trustee from liability, see Section 4-313 (consent), 4-314 (release), 4-315 (affirmance). See also Section 4-101 (duties subject to control by trust instrument).

This section is qualified by Section 4-208(e) (trustee may hold reasonable amounts in checking account at no interest).

4-109. Improper Investments; Disposal of Trust Property.

(a) Except as provided in subsection (b), the trustee has a duty within a reasonable time to dispose of any part of the trust property included in the trust at the time of its creation, or later acquired by or added to the trust, that would not be a proper investment for the trustee to make.

(b) Unless the trust instrument expressly provides otherwise, the trustee may, without liability, continue to hold property included in the trust at its creation or later added to the trust or acquired pursuant to proper authority, if retention is in the best interests of the trust or in furtherance of the purposes of the trust.

Comment.

Source: CPC Section 16008.

Subsection (a) of Section 4-109 codifies the substance of Section 230 of the Restatement (Second) of Trusts (1957), subject to the exception provided in subsection (b). For provisions permitting beneficiaries to relieve the trustee from liability, see Sections 4-313 (consent), 4-314 (release), 4-315 (affirmance). See also Sections 4-101 (duties subject to control by trust instrument), 4-116 (trustee's standard of care in performing duties).

Exercise of the discretion under subsection (b) is governed by the general standard of care provided in Section 4-116. See also Sections 4-204 (power to collect and hold property), 4-205 (power to receive additions to trust).

4-110. Separation and Identification of Trust Property.

The trustee has a duty to do the following:

(a) To keep the trust property separate from other property not subject to the trust.

(b) To see that the trust property is designated as property of the trust.

Comment.

Source: CPC Section 16009.

Section 4-110 codifies the substance of Section 179 of the Restatement (Second) of Trusts (1957), but the Restatement provision for keeping trust property separate from the trustee's individual property is omitted since it is redundant with subsection (a). For provisions permitting beneficiaries to relieve the trustee from liability, see Sections 4-313 (consent), 4-314 (release), 4-315 (affirmance). See also Sections 4-101 (duties subject to control by trust instrument), 4-116 (trustee's standard of care in performing duties). The duty under this section is qualified by Section 4-221, which allows trustees to hold property in the name of a nominee.

4-111. Enforcement of Claims.

The trustee has a duty to take reasonable steps to enforce claims that are part of the trust property.

Comment.

Source: CPC Section 16010.

Section 4-111 codifies the substance of Section 177 of the Restatement (Second) of Trusts (1957). 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. For provisions permitting beneficiaries to relieve the trustee from liability, see Sections 4-313 (consent), 4-314 (release), 4-315 (affirmance). See also Sections 4-101 (duties subject to control by trust instrument), 4-116 (trustee's standard of care in performing duties), 4-225 (power to settle or release claims).

4-112. Defense of Actions.

The trustee has a duty to take reasonable steps to defend actions that may result in a loss to the trust.

Comment.

Source: CPC Section 16011.

Section 4-112 codifies the substance of the first part of Section 178 of the Restatement (Second) of Trusts (1957). Depending on the circumstances of the case, it might be reasonable to settle and action or suffer a default rather than to defend an action. For provisions permitting beneficiaries to relieve the trustee from liability, see Sections 4-313 (consent), 4-314 (release), 4-315 (affirmance). See also Sections 4-101 (duties subject to control by trust instrument), 4-116 (trustee's standard of care in performing duties).

4-113. Duty Not to Delegate.

(a) The trustee has a duty not to delegate to others

the performance of acts that the trustee can reasonably be required personally to perform and may not transfer the office of trustee to another person nor delegate the entire administration of the trust to a cotrustee or other person.

(b) In a case where a trustee has properly delegated a matter to an agent, cotrustee, or other person, the trustee has a duty to exercise general supervision over the person performing the delegated matter.

Comment.

Source: CPC Section 16012.

The first part of subsection (a) of Section 4-113 codifies the substance of Section 171 of the Restatement (Second) of Trusts (1957). The second part of subsection (a) codifies the substance of Section 4 of the Uniform Trustees' Powers Act (1964). The duty not to delegate administration of the trust does not preclude employment of an agent in a proper case. For provisions permitting beneficiaries to relieve the trustee from liability, see Sections 4-313 (consent), 4-314 (release), 4-315 (affirmance). See also Sections 3-104 (actions by cotrustees), 3-105 (vacancy in office of cotrustee), 3-106 (temporary incapacity of cotrustee), 4-101 (duties subject to control by trust instrument), 4-116 (trustee's standard of care in performing duties), 4-217 (trustee may give proxies to vote shares), 4-220 (authority to delegate to protective committee in a reorganization), 4-230 (power to hire agents of trust), 4-302(b)(2) (trustee's liability for improper delegation).

Subsection (b) is drawn from comment k to Section 171 of the Restatement (Second) of Trusts (1957).

4-114. Cotrustees.

If a trust has more than one trustee, each trustee has a duty to do the following:

(a) To participate in the administration of the trust.

(b) To take reasonable steps to prevent a cotrustee from committing a breach of trust or to compel a cotrustee to redress a breach of trust.

Comment.

Source: CPC Section 16013.

Section 4-114 codifies the substance of Section 184 of the Restatement (Second) of Trusts (1957). For provisions permitting beneficiaries to relieve the trustee from liability, see Sections 4-313 (consent), 4-314 (release), 4-315 (affirmance). See also Sections 4-101 (duties subject to control by trust instrument), 4-116 (trustee's standard of care in performing duties), 4-303 (trustee's liability to beneficiary for acts of cotrustee). If a cotrustee is also a settlor under a revocable trust, a cotrustee who is not a settlor has a duty to follow the directions of the settlor-cotrustee pursuant to Section 4-102. That duty supersedes the general duty under this section.

4-115. Special Skills.

(a) The trustee has a duty to apply the full extent of the trustee's skills.

(b) If the settlor, in selecting the trustee, has relied on the trustee's representation of having special skills, the trustee is held to the standard of the skills represented.

Comment.

Source: CPC Section 16014.

Subsection (b) is similar to the last part of Section 7-302 of the Uniform Probate Code (1977) and the last part of Section 174 of the Restatement (Second) of Trusts (1957). Subsection (b) does not limit the duty provided in subsection (a). Thus, the nature of the trustee's representations to the settlor leading up to the selection

of the trustee does not affect the trustee's duty to use the full extent of his or her skills. For provisions permitting beneficiaries to relieve the trustee from liability, see Sections 4-313 (consent), 4-314 (release), 4-315 (affirmance). See also Sections 4-101 (duties subject to control by trust instrument), 4-116 (trustee's standard of care in performing duties).

SUBPART 2. TRUSTEE'S STANDARD OF CARE

Section

4-116. Standard of Care; Modification by Trust Instrument.

4-117. Effect of Compensation.

4-116. Standard of Care; Modification by Trust Instrument.

(a) The trustee shall administer the trust with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person 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 to accomplish the purposes of the trust as determined from the trust instrument.

(b) The settlor may expand or restrict the standards provided in subsection (a) by express provisions in the trust instrument. A trustee is not liable to a beneficiary for the trustee's good faith reliance on these express provisions.

Comment.

Source: CPC Section 16040.

Subsection (a) of Section 4-116 provides a general standard of care. For the specific duties with respect to the investment of trust property, see the Uniform Prudent Investor Act (1994). See also Section 4-115 (duty to use special skills). As to subsection (b), see Section 4-311, which imposes limits on exculpatory clauses in trust instruments.

4-117. Effect of Compensation.

A trustee's standard of care and performance in administering the trust is not affected by whether or not the trustee receives any compensation.

Comment.

Source: CPC Section 16041.

A different rule applies to a custodian under the Uniform Transfers to Minors Act.

**SUBPART 3. TRUSTEE'S DUTY TO REPORT INFORMATION
AND ACCOUNT TO BENEFICIARIES**

Section

- 4-118. Duty to Inform.**
 - 4-119. Request by Beneficiary.**
 - 4-120. Accounting.**
 - 4-121. Exceptions.**
- 4-118. Duty to Inform.**

The trustee has a duty to keep the beneficiaries of the trust reasonably informed of the trust and its administration.

Comment.

Source: CPC Section 16060.

Section 4-118 is drawn from the first sentence of

Section 7-303 of the Uniform Probate Code (1977). The trustee is under a duty to communicate to the beneficiary information 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 (1957). Ordinarily, the trustee is not under a duty to furnish information to the beneficiary in the absence of a request for the information. See *id.*, comment d. Thus, the general duty provided in this section is ordinarily satisfied by the compliance with Sections 4-119 and 4-120 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 in connection with the transaction that the trustee knows or should know. The trustee also has a duty to communicate material facts affecting the beneficiary's interest that 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.* During the time that a revocable trust can be revoked, the duty provided by this section is not owed to the beneficiaries but only to the settlor or other person having the power to revoke. See Section 3-201. See also Sections 1-102(2) ("beneficiary" defined), 4-101 (duties subject to control in trust instrument), 4-102 (duties of trustee of revocable trust), 4-310 (limitations on proceedings against trustee).

4-119. Request by Beneficiary.

Except as provided in Section 4-121, on reasonable request by a beneficiary, the trustee shall provide the beneficiary with a report of information about the assets, liabilities, receipts, and disbursements of the trust, the acts of the trustee, and the particulars relating to the administration of the trust relevant to the beneficiary's interest, including the terms of the trust that describe or affect the beneficiary's interest.

Comment.

Source: CPC Section 16061.

Section 4-119 is drawn from Section 7-303(b) of the Uniform Probate Code (1977). A beneficiary who is not entitled to an annual account under Section 4-120 may be entitled to information on a particular account under this section. The availability of information on request under this section does not negate the affirmative duty of the trustee to provide information under Section 4-118. During the time that a revocable trust can be revoked, the right to request information pursuant to this section does not belong to the beneficiaries but only to the settlor or other person having the power to revoke. See Section 3-201. See also Section 1-102(2) ("beneficiary" defined), 4-121 (exceptions to duty to report and account). In an appropriate case, more information may be required under this section than through the duty to account annually.

4-120. Accounting; Limitations or Waivers in Trust

Instrument.

Except as otherwise provided in Section 4-121, the trustee shall account at least annually, at the termination of the trust, and upon a change of trustees, to each beneficiary to whom income or principal is required or authorized in the trustee's discretion to be currently distributed.

Comment.

Source: CPC Section 16062.

The duty to provide information under Section 4-118 is not necessarily satisfied by compliance with Section 4-120.

4-121. Reporting and Accounting Requirement; Exceptions.

The trustee is not required to report information or account to a beneficiary in any of the following circumstances:

(a) To the extent the trust instrument waives the report or account. Regardless of a waiver of accounting in the trust instrument, upon a showing that it is reasonably likely that a material breach of the trust has occurred, the court may compel the trustee to report information about the trust and to account. (b) In the case of a beneficiary of a revocable trust, as provided in Section 3-201, for the period when the trust may be revoked.

(c) As to a beneficiary who has waived in writing the right to a report or account. A waiver of rights under this subsection may be withdrawn in writing at any time as to the most recent account and future accounts. A waiver has no effect on the beneficiary's right to petition for a report or account pursuant to Section 5-201.

(d) Where the beneficiary and the trustee are the same person.

Comment.

Source: CPC Section 16064.

Section 4-121 provides several limitations on the duty to report under Section 4-119 and the duty to account under Section 4-120. See also Section 1-102(2) ("beneficiary" defined), 3-201 (limits on rights of beneficiary of revocable trust). Notwithstanding being excused from the duty to report information, the trustee may want to provide information to the beneficiaries in order to start the running of the statute of limitations pursuant to

Section 4-310.

SUBPART 4. DUTIES WITH REGARD TO DISCRETIONARY POWERS

Section

4-122. Discretionary Power; Reasonable Exercise.

**4-123. Fiduciary Principles Applicable; Absolute, Sole,
or Uncontrolled Discretion.**

**4-124. Use of Power Held for Benefit of Others to
Discharge Obligation of Person Holding Power.**

4-122. Discretionary Power; Reasonable Exercise.

Except as provided in Section 4-123, a discretionary power conferred upon a trustee is not left to the trustee's arbitrary discretion, but shall be exercised reasonably.

Comment.

Source: CPC Section 16080.

As to judicial review of trustees' exercise of discretion, see Restatement (Second) of Trusts Section 187. For the rights of creditors with respect to discretionary trusts, see Sections 2-204 to 2-207. For the remedies available for breach of trust, see Section 4-305.

**4-123. Fiduciary Principles Applicable; Absolute, Sole,
or Uncontrolled Discretion**

(a) Subject to the additional requirements of subsection (b), if a trust instrument confers "absolute," "sole," or "uncontrolled" discretion on a trustee, the trustee shall act in accordance with fiduciary principles and shall not act in bad faith or in disregard of the purposes of the trust.

(b) Notwithstanding the settlor's use of terms like

"absolute," "sole," or "uncontrolled," a person who is a beneficiary of a trust and who, either individually or as trustee or cotrustee, holds a power to take or distribute income or principal to or for the benefit of himself or herself pursuant to a standard, shall exercise that power reasonably and in accordance with the standard. In any case in which the standard governing the exercise of the power does not clearly indicate that a broader power is intended, the holder of the power may exercise it in his or her favor only for his or her health, education, support, or maintenance.

Comment.

Source: CPC Section 16081.

Subsection (a) is similar to Restatement (Second) of Trusts, Section 187, comment j.

**4-124. Use of Power Held for Benefit of Others to
Discharge Obligation of Person Holding Power.**

Except as otherwise specifically provided in the trust instrument, a person who holds a power to appoint or distribute income or principal to or for the benefit of others, either as an individual or as trustee, may not use the power to discharge the legal obligations of the person holding the power.

Comment.

Source: CPC Section 16082.

Section 4-124 is intended to deal with problems that may arise under federal tax law. See I.R.C. §§ 674(a), 678(c), 2036.

**SUBPART 5. DUTIES OF TRUSTEES OF PRIVATE FOUNDATIONS,
CHARITABLE TRUSTS, AND SPLIT-INTEREST TRUSTS**

Section

- 4-125. Definitions.**
**4-126. Charitable Trust or Private Foundation;
Distribution of Income.**
4-127. Restrictions.
4-128. Split-Interest Trusts; Exemptions from provisions.
4-129. Incorporation of Statutes in Trust Instruments.
4-130. Proceedings.

4-125. Definitions.

As used in this article, the following definitions shall control:

(a) "Charitable trust" means a charitable trust as described in Section 4947(a)(1) of the Internal Revenue Code.

(b) "Private foundation" means a private foundation as defined in Section 509 of the Internal Revenue Code.

(c) "Split-interest trust" means a split-interest trust as described in Section 4947(a)(2) of the Internal Revenue Code.

Comment.

Source: CPC Section 16100.

Section 4-125 defines terms for purposes of this Subpart.

- 4-126. Charitable Trust or Private Foundation;**

Distribution of Income.

During any period when a trust is deemed to be a charitable trust or a private foundation, the trustee shall distribute its income for each taxable year (and principal if necessary) at a time and in a manner that will not subject the property of the trust to tax under Section 4942 of the Internal Revenue Code.

Comment.

Source: CPC Section 16101.

4-127. Restrictions.

During any period when a trust is deemed to be a charitable trust, a private foundation, or a split-interest trust, the trustee shall not do any of the following:

(a) Engage in any act of self-dealing as defined in Section 4941(d) of the Internal Revenue Code.

(b) Retain any excess business holdings as defined in Section 4943(c) of the Internal Revenue Code.

(c) Make any investments in such manner as to subject the property of the trust to tax under Section 4944 of the Internal Revenue Code.

(d) Make any taxable expenditure as defined in Section 4945(d) of the Internal Revenue Code.

Comment.

Source: CPC Section 16102.

4-128. Split-Interest Trusts; Exemptions from Provisions.

With respect to split-interest trusts:

(a) Subsections (b) and (c) of Section 4-127 do not apply to any trust described in Section 4947(b)(3) of the Internal Revenue Code.

(b) Section 4-127 does not apply with respect to any of the following:

(1) Any amounts payable under the terms of such trust to income beneficiaries, unless a deduction was allowed under Section 170(f)(2)(B), 2055(e)(2)(B), or 2522(c)(2)(B) of the Internal Revenue Code.

(2) Any amounts in trust other than amounts for which a deduction was allowed under Section 170, 545(b)(2), 556(b)(2), 642(c), 2055, 2106(a)(2), or 2522 of the Internal Revenue Code, if the amounts are segregated, as that term is defined in Section 4947(a)(3) of the Internal Revenue Code, from amounts for which no deduction was allowable.

(3) Any amounts irrevocably transferred in trust before May 27, 1969.

Comment.

Source: CPC Section 16103.
See also Section 4-125 ("split-interest trust" defined).

4-129. Incorporation of Statutes in Trust Instruments.

The provisions of Sections 4-126, 4-127, and 4-128 shall be deemed to be contained in the instrument creating every trust to which this article applies. Any provision of the instrument inconsistent with or contrary to this [Subpart] is without effect.

Comment.

Source: CPC Section 16104.

4-130. Proceedings.

A proceeding contemplated by Section 101(1)(3) of the federal Tax Reform Act of 1969 (Public Law 91-172) may be commenced pursuant to Section 5-201 by the organization involved. All specifically named beneficiaries of the organization and the Attorney General shall be parties to the proceedings. Notwithstanding Section 5-101, this provision is not exclusive and does not limit any jurisdiction that otherwise exists.

Comment.

Source: CPC Section 16105.
For the text of Section 101(1)(3) of the Tax Reform Act

of 1969, relating to judicial proceedings by a private foundation that is necessary to reform or excuse compliance with its governing instrument to comply with 26 U.S.C. § 4942, see the note following 26 U.S.C.A. § 4940.

PART 2. POWERS OF TRUSTEES

Subpart

- 1. General Provisions.**
- 2. Specific Powers of Trustees.**

SUBPART 1. GENERAL PROVISIONS

Section

- 4-201. General Powers.**
- 4-202. Power of Court; Relief from Restrictions on Powers.**
- 4-203. Exercise of Powers; Fiduciary Duties.**
- 4-201. General Powers.**

A trustee has the following powers without the need to obtain court authorization:

- (a) The powers conferred by the trust instrument.
- (b) Except as limited in the trust instrument, the powers conferred by statute.
- (c) Except as limited in the trust instrument, the power to perform any act that a trustee would perform for the purposes of the trust under the standard of care provided in Section 4-116.

Comment.

Source: CPC Section 16200.

Section 4-210 is drawn from Sections 2(a) and 3(a) of the Uniform Trustee's Power Act (1964).

The introductory clause of Section 4-201 makes clear that the trustee has the powers as provided in this section without the need to obtain court authorization. See also

Section 4-202 (power of court to relieve trustee from restrictions on powers).

Subsection (b) gives the trustee the statutory powers without the need to incorporate them. The main list of powers is provided in Subpart 2 (commencing with Section 4-204).

Under subsection (c) of this section, the trustee has the powers of a prudent person, without the need to obtain prior court approval. However, if the trustee desires court approval before exercising a power or desires court review after exercise of a power, the procedure provided in Section 5-201 et seq. is available. This subsection is drawn from Section 3(a) of the Uniform Trustee's Powers Act (1964).

The exercise of powers by the trustee is subject to various important limitations as recognized in this section and as provided elsewhere. Subsections (b) and (c) make clear that the exercise of statutory or "prudent person" powers is subject to limitations provided in the trust. Section 4-203 makes clear that the exercise of powers by the trustee is subject to the fiduciary duties owed to the beneficiaries. See the Comment to Section 4-203; see also Sections 2-308(b) (powers after trust terminates), 3-104 (exercise of powers by cotrustees), 3-111 (powers of trustee who has resigned or been removed), 4-202 (power of court to relieve trustee from restrictions on powers).

4-202. Power of Court; Relief from Restrictions on Powers.

This part does not affect the power of a court to relieve a trustee from restrictions on the exercise of powers under the trust instrument.

Comment.

Source: CPC Section 16201.

See Restatement (Second) of Trusts Section 167 (1957). For a provision permitting the court to modify a trust where there has been a material change of circumstances, see Section 2-310.

4-203. Exercise of Powers; Fiduciary Duties.

The grant of a power to a trustee, whether by the trust instrument, by statute, or by the court, does not in itself require or permit the exercise of the power. The exercise of a power by a trustee is subject to the trustee's fiduciary duties.

Comment.

Source: CPC Section 16202.

Section 4-203 recognizes that a power granted to the trustee from any source does not necessarily permit the exercise of the power, nor does it prevent the exercise of a power in a manner that conflicts with a general duty where the trust instrument so directs (see Section 4-101) or where the trustee is directed so to act by a person holding the power to revoke the trust (see Section 4-102). For example, the trust instrument may give the trustee discretion to favor one beneficiary over the others, in apparent conflict with the general duty to deal with beneficiaries imparitally under Section 4-104. See also Section 4-101 et seq. (trustee's fiduciary duties).

SUBPART 2. SPECIFIC POWERS OF TRUSTEES

Section

- 4-204. Collecting and Holding Property.**
- 4-205. Additions to Trust.**
- 4-206. Continuation of Business.**
- 4-207. Investments.**
- 4-208. Deposits.**
- 4-209. Acquisition and Disposition of Property.**
- 4-210. Management of Property.**
- 4-211. Encumbrances.**
- 4-212. Repairs and Alterations.**
- 4-213. Development of Land.**
- 4-214. Leases.**
- 4-215. Mineral Leases.**
- 4-216. Options.**
- 4-217. Voting Rights; Corporate Shares, Memberships, or Property.**
- 4-218. Payment of Calls and Assessments.**
- 4-219. Stock Subscriptions and Conversions.**
- 4-220. Consent to Change in Form of Business; Voting**
- Trusts.**
- 4-221. Holding Securities.**

- 4-222. Deposit of Securities in Securities Depository.
- 4-223. Insurance.
- 4-224. Borrowing Money.
- 4-225. Payment and Settlement of Claims.
- 4-226. Payment of Trust Expenses.
- 4-227. Loans to Beneficiary.
- 4-228. Distributions.
- 4-229. Nature and Value of Distributions.
- 4-230. Hiring Persons.
- 4-231. Execution and Delivery of Instruments.
- 4-232. Actions and Proceedings.

- 4-204. Collecting and Holding Property.

The trustee has the power to collect, hold, and retain trust property received from a settlor or any other person until, in the judgment of the trustee, disposition of the property should be made. The property may be retained even though it includes property in which the trustee is personally interested.

Comment.

Source: CPC Section 16220.

Section 4-204 is the same in substance as Section 3(c)(1) of the Uniform Trustees' Powers Act (1964).

4-205. Additions to Trust.

The trustee has the power to accept additions to the property of the trust from a settlor or any other person.

Comment.

Source: CPC Section 16221

Section 4-205 is the same in substance as Section 3(c)(2) of the Uniform Trustees' Powers Act (1964).

4-206. Continuation of Business.

(a) Subject to subsection (b), the trustee has the power to continue or participate in the operation of any business or other enterprise that is part of the trust property and may effect incorporation, dissolution, or other change in the form of the organization of the business or enterprise.

(b) Except as provided in subsection (c), the trustee may continue the operation of a business or other enterprise only as authorized by the trust instrument or by the court. For the purpose of this subsection, the lease of four or fewer residential units is not considered to be the operation of a business or other enterprise.

(c) The trustee may continue the operation of a business or other enterprise for a reasonable time pending a court hearing on the matter or pending a sale of the business or other enterprise.

Comment.

Source: CPC Section 16222.

Subsection (a) of Section 4-206 is similar to Section 3(c)(3) of the Uniform Trustees' Powers Act (1964). Under Section 4-206 the trustee may have the power to continue a business that is made part of the trust, but may not enter into a new business. This section differs from other powers conferred in this Subpart because it requires a court order or authorization in the trust instrument.

4-207. Investments.

The trustee has the power to invest in any kind of property, whether real, personal, or mixed.

Comment.

Source: CPC Section 16223.

Section 4-207 is the same in substance as Section 3(c)(5) of the Uniform Trustees' Powers Act (1964), except that surplus language has been omitted. For the standard guiding the trustee in the selection of investments, see the Uniform Prudent Investor Act (1994).

4-208. Deposits.

(a) The trustee has the power to deposit trust funds at reasonable interest in any of the following accounts:

(1) An insured account in a financial institution,
or

(2) To the extent that the account is collateralized, in an account in a bank, an account in an insured savings and loan association, or an account in an insured credit union.

(b) This section does not limit the power of a trustee in a proper case to deposit trust funds in an account described in subdivision (a) that is subject to notice or other conditions respecting withdrawal prescribed by law or governmental regulation.

(c) The court may authorize the deposit of trust funds in an account described in subsection (a) in an amount

greater than the maximum insured or collateralized amount.

(d) Nothing in this section prevents the trustee from holding an amount of trust property reasonably necessary for the orderly administration of the trust in the form of cash or in a checking account without interest.

Comment.

Source: CPC Section 16225.

See Uniform Trustees' Powers Act Section 3(c) (6) (1964).

Subsection (d) recognizes that the limitation of the power to make deposits to accounts affording reasonable interest provided in subsection (a) is not absolute, but is subject to reasonable requirements of trust administration.

4-209. Acquisition and Disposition of Property.

The trustee has the power to acquire or dispose of property, for cash or on credit, at public or private sale, or by exchange.

Comment.

Source: CPC Section 16226.

Section 4-209 is the same in substance as part of Section 3(c) (7) of the Uniform Trustees' Powers Act (1964).

Restatement (Second) of Trusts Section 190, comment j, allows trustees to sell on credit only if security is given. A sale may also be voidable for conflict of interest. See Section 4-105.

4-210. Management of Property.

The trustee has the power to manage, control, divide, develop, improve, exchange, partition, change the character

of, or abandon trust property or any interest therein.

Comment.

Source: CPC Section 16227.

Section 4-210 is the same in substance as part of Section 3(c)(7) of the Uniform Trustees' Powers Act (1964). See also Sections 4-107 (duty to preserve trust property), 4-212 (power to change character of trust property), 4-213 (power to develop land).

4-211. Encumbrance, Mortgage, or Pledge.

The trustee has the power to encumber, mortgage, or pledge trust property for a term within or extending beyond the term of the trust in connection with the exercise of any power vested in the trustee.

Comment.

Source: CPC Section 16228.

Section 4-211 is the same in substance as part of Section 3(c)(7) of the Uniform Trustees' Power Act (1964). See also Section 4-224 (power to borrow money).

4-212. Repairs and Alterations.

The trustee has the power to do any of the following:

(a) Make ordinary or extraordinary repairs, alterations, or improvements in buildings or other trust property.

(b) Demolish any improvements.

(c) Raze existing or erect new party walls or buildings.

Comment.

Source: CPC Section 16229.

Section 4-212 is the same in substance as part of Section 3(c)(8) of the Uniform Trustees' Power Act (1964).

4-213. Development of Land.

The trustee has the power to do any of the following:

(a) Subdivide or develop land.

(b) Dedicate land to public use.

(c) Make or obtain the vacation of plats and adjust boundaries.

(d) Adjust differences in valuation on exchange or partition by giving or receiving consideration.

(e) Dedicate easements to public use without consideration.

Comment.

Source: CPC Section 16230.

Section 4-213 is the same in substance as part of Section 3(c)(9) of the Uniform Trustees' Power Act (1964).

4-214. Leases.

The trustee has the power to enter into a lease for any purpose as lessor or lessee with or without the option to purchase or renew and for a term within or extending beyond the term of the trust.

Comment.

Source: CPC Section 16231.

Section 4-214 is the same in substance as part of Section 3(c)(10) of the Uniform Trustees' Power Act (1964).

4-215. Mineral Leases.

The trustee has the power to enter into a lease or arrangement for exploration and removal of gas, oil, or other minerals or geothermal energy, and to enter into a community oil lease or a pooling or unitization agreement, and for a term within or extending beyond the term of the trust.

Comment.

Source: CPC Section 16232.

Section 4-215 has the reference to a pooling or unitization agreement drawn from Section 3(c)(11) of the Uniform Trustees' Power Act (1964). The authority to make leases or agreements extending beyond the term of the trust is consistent with Section 4-214 (general power to lease).

4-216. Options.

The trustee has the power to grant an option involving disposition of trust property or to take an option for the acquisition of any property, and an option may be granted or taken that is exercisable beyond the term of the trust.

Comment.

Source: CPC Section 16233.

Section 4-216 is the same in substance as Section 3(c)(12) of the Uniform Trustees' Power Act (1964). The

authority to grant or take options exercisable beyond the term of the trust is consistent with Section 4-214 (general power to lease).

4-217. Voting Rights, etc.; Corporate Shares, Memberships, or Property.

With respect to any shares of stock of a domestic or foreign corporation, any membership in a nonprofit corporation, or any other property, a trustee has the power to do any of the following:

(a) Vote in person, and give proxies to exercise, any voting rights with respect to the shares, memberships, or property.

(b) Waive notice of a meeting or give consent to the holding of a meeting.

(c) Authorize, ratify, approve, or confirm any action that could be taken by shareholders, members, or property owners.

Comment.

Source: CPC Section 16234.

4-218. Payment of Calls and Assessments.

The trustee has the power to pay calls, assessments, and any other sums chargeable or accruing against or on account of securities.

Comment.

Source: CPC Section 16235.

Section 4-218 is the same as Section 3(c)(14) of the Uniform Trustees' Powers Act (1964).

4-219. Stock Subscriptions and Conversions.

The trustee has the power to sell or exercise stock subscription or conversion rights.

Comment.

Source: CPC Section 16236.

Section 4-219 is the same as Section 3(c)(15) of the Uniform Trustees' Powers Act (1964).

4-220. Consent to Change in Form of Business; Voting Trusts.

The trustee has the power to consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise, and to participate in voting trusts, pooling arrangements, and foreclosures, and in connection therewith, to deposit securities with and transfer title and delegate discretion to any protective or other committee as the trustee may deem advisable.

Comment.

Source: CPC Section 16237.

Section 4-220 is similar to the second part of Section 3(c)(15) of the Uniform Trustees' Powers Act (1964). See

also Section 4-206 (power to continue or change form of business).

4-221. Holding Securities.

The trustee has the power to hold a security in the name of a nominee or in other form without disclosure of the trust so that title to the security may pass by delivery.

Comment.

Source: CPC Section 16238.

Section 4-221 is the same in substance as Section 3(c)(16) of the Uniform Trustees' Powers Act (1964).

4-222. Deposit of Securities in Securities Depository.

The trustee has the power to deposit securities in a securities depository.

Comment.

Source: CPC Section 16239.

See Section 4-201 (powers subject to control by trust instrument). See also Section 3-104 (actions by cotrustees).

4-223. Insurance.

The trustee has the power to insure the property of the trust against damage or loss and to insure the trustee against liability with respect to third persons.

Comment.

Source: CPC Section 16240.

Section 4-223 is the same in substance as Section 3(c)(17) of the Uniform Trustees' Powers Act (1964). See also Section 4-107 (duty to preserve trust property).

4-224. Borrowing Money.

The trustee has the power to borrow money for any trust purpose to be repaid from trust property.

Comment.

Source: CPC Section 16241.

Section 4-224 is similar to Section 3(c)(18) of the Uniform Trustees' Powers Act (1964). See also Section 4-211 (power to mortgage trust property).

4-225. Payment and Settlement of Claims.

The trustee has the power to do any of the following:

(a) Pay or contest any claim.

(b) Settle a claim by or against the trust by compromise, arbitration, or otherwise.

(c) Release, in whole or in part, any claim belonging to the trust.

Comment.

Source: CPC Section 16242.

Section 4-225 is substantially the same as Section 3(c)(19) of the Uniform Trustee's Powers Act (1964). The trustee has the power 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 4-111 (duty to enforce claims), 4-112 (duty to defend actions).

4-226. Payment of Trust Expenses.

The trustee has the power to pay taxes, assessments, reasonable compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the collection, care, administration, and protection of the trust.

Comment.

Source: CPC Section 16243.

Section 4-226 is the same in substance as Section 3(c)(20) of the Uniform Trustees' Powers Act (1964). For other provisions relating to trustees' compensation, see Sections 3-114 to 3-117. See also Sections 3-118 (repayment of trustees for expenses incurred), 4-230 (power to hire agents).

4-227. Loans to Beneficiary.

The trustee has the following powers:

(a) To make loans out of trust property to the beneficiary on terms and conditions that the trustee determines are fair and reasonable under the circumstances.

(b) To guarantee loans to the beneficiary by encumbrances on trust property.

Comment.

Source: CPC Section 16244.

The determination of what is fair and reasonable is

subject to the fiduciary duties of the trustee and must be made in light of the purposes of the trust. If the trustee requires security for the loan to the beneficiary, adequate security under this section may consist of a charge on the beneficiary's interest in the trust. See Restatement (Second) of Trusts Section 255 (1957). The interest of a beneficiary that is subject to a spendthrift restraint may not be used for security for a loan under this section. See Section 2-201 et seq. (restraints on transfer).

4-228. Distributions.

The trustee has the power to pay any sum distributable to a beneficiary, without regard to whether the beneficiary is under a legal disability, by paying the sum to the beneficiary or by paying the sum to another person for the use or benefit of the beneficiary.

Comment.

Source: CPC Section 16245.

Section 4-228 is drawn from Section 3(c)(22) of the Uniform Trustees' Powers Act (1964). In an appropriate case, a distribution may be made to a custodian under the Uniform Transfers to Minor Act.

4-229. Nature and Value of Distributions.

The trustee has the power to effect distribution of property and money in divided or undivided interests and to adjust resulting differences in valuation. A distribution in kind may be made pro rata or non-pro rata.

Comment.

Source: CPC Section 16246.

The first sentence of Section 4-229 is the same as Section 3(c)(23) of the Uniform Trustees' Powers Act (1964). The trustee also has the power to sell property in order to make the distribution. The second sentence 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.

4-230. Hiring Persons.

The trustee has the power to hire persons, including accountants, attorneys, auditors, investment advisers, appraisers or other agents, even if they are associated or affiliated with the trustee, to advise or assist the trustee in the performance of administrative duties.

Comment.

Source: CPC Section 16247.

Section 4-230 is the same in substance as part of Section 3(c)(24) of the Uniform Trustees' Powers Act (1964). If the trustee is in doubt concerning the propriety of hiring an agent, the judicial procedure for obtaining instructions is available. An agent with a close relationship with the trustee or an insider may be hired when it is in the best interests of the trust, taking into account the duty of loyalty (see Section 4-103) and the duty to avoid conflicts of interest (see Section 4-105), and particularly as to routine matters, but in situations involving substantial matters, it is best to hire outside agents. The trustee has a duty to inform certain beneficiaries of agents hired, their relationship to the trustee, if any, and their compensation. See also Sections 4-113 (duty not to delegate), 4-115 (duty to use special skills), 4-302 (trustee's liability to beneficiary for acts of agent).

4-231. Execution and Delivery of Instruments.

The trustee has the power to execute and deliver all instruments which are needed to accomplish or facilitate the exercise of the powers vested in the trustee.

Comment.

Source: CPC Section 16248.

Section 4-231 is the same in substance as Section 3(c)(26) of the Uniform Trustees' Powers Act (1964).

**4-232. Actions and Proceedings; Wrongful Taking,
Concealing or Disposing of Trust Property;
Liability.**

(a) The trustee has the power to prosecute or defend actions, claims, or proceedings for the protection of trust property and of the trustee in the performance of the trustee's duties.

(b) A person who, in bad faith, has wrongfully taken, concealed, or disposed of property in or belonging to the trust is liable for twice the value of the property, recoverable in an action by a trustee for the benefit of the trust.

Comment.

Source: CPC Section 16249.

Section 4-232 is the same in substance as Section 3(c)(25) of the Uniform Trustees' Powers Act (1964). As to the propriety of reimbursement for attorney's fees and other expenses of an action or proceeding, see Section 3-505 and the Comment thereto. See also Sections 4-112 (duty to defend actions), 4-203 (exercise of powers is subject to

duties), 6-201 et seq. (protection of persons dealing with trustees).

PART 3. LIABILITY OF TRUSTEES TO BENEFICIARIES

Subpart

- 1. Liability for Breach of Trust.**
- 2. Remedies for Breach of Trust.**
- 3. Measure of Liability for Breach of Trust.**
- 4. Limitations and Exculpation.**

SUBPART 1. LIABILITY FOR BREACH OF TRUST

Section

- 4-301. Violations of Duties; Breach of Trust.**
- 4-302. Liability for Acts of Agents.**
- 4-303. Liability for Acts of Cotrustees.**
- 4-304. Liability for Acts of Predecessors.**
- 4-301. Violations of Duties; Breach of Trust.**

A violation by the trustee of any duty that the trustee owes the beneficiary is a breach of trust.

Comment.

Source: CPC Section 16400.

Section 4-301 is drawn from Section 201 of the Restatement (Second) of Trusts (1957). 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 3-201; see also Section 3-204 (holder of general power of appointment or power to withdraw property from trust treated as settlor).

4-302. Liability for Acts of Agents.

(a) Except as provided in subsection (b), the trustee is not liable to the beneficiary for the acts or omissions of an agent.

(b) The trustee is liable to the beneficiary for an act or omission of an agent employed by the trustee in the administration of the trust that would be a breach of the trust if committed by the trustee under any of the following circumstances:

(1) Where the trustee has the power to direct the act of the agent.

(2) Where the trustee delegates to the agent the authority to perform an act that the trustee is under a duty not to delegate.

(3) Where the trustee does not use reasonable care in the selection of the agent or the retention of the agent selected by the trustee.

(4) Where the trustee does not exercise proper supervision over the agent's conduct in a case where the trustee has the power to supervise the agent.

(5) Where the trustee conceals the act of the agent.

(6) Where the trustee neglects to take reasonable steps to compel the agent to redress the wrong in a case where the trustee knows of the agent's acts or omissions.

Comment.

Source: CPC Section 16401.

Subsections (a) and (b) of Section 4-302 are drawn from Section 225 of the Restatement (Second) of Trusts (1957). The former statutes did not provide a rule governing the trustee's liability for the acts or omissions of agents of

the trust. Whether a trustee has acted reasonably under this section depends upon application of the standard of care provided in Section 4-116. The trustee of a revocable trust is not liable where the agent's act is performed or omitted pursuant to the written instructions of the person having the power to revoke the trust. See Section 4-312. Similarly, the trustee of a revocable trust is not liable for hiring an agent where the trustee is directed to do so in writing by the person having the power to revoke. See Section 4-312. It should also be noted that the liability to beneficiaries does not include beneficiaries under a revocable trust during the time that the trust can be revoked. See Section 3-201; see also Sections 3-204 (holder of general power of appointment or power to withdraw property from trust treated as settlor), 4-101 (duty to administer trust).

The six subdivisions of subsection (b) state independent bases for imposition of liability on the trustee. For example, if the trustee has not used reasonable care in selecting or retaining an agent, the trustee may be held liable for the agent's breach under subdivision (3); but even if the trustee has no control over selection or retention of the agent, the trustee may still be held liable for the agent's breach under subdivision (1) if the trustee has the power to direct the agent's actions. It should be also noted that subdivisions (2), (5), and (6) of subsection (b) apply regardless of whether the trustee has any control over the agent.

4-303. Liability for Acts of Cotrustees.

(a) Except as provided in subsection (b), a trustee is not liable to the beneficiary for a breach of trust committed by a cotrustee.

(b) A trustee is liable to the beneficiary for a breach committed by a cotrustee under any of the following circumstances:

(1) Where the trustee participates in a breach of trust committed by the cotrustee.

(2) Where the trustee improperly delegates the

administration of the trust to the cotrustee.

(3) Where the trustee approves, knowingly acquiesces in, or conceals a breach of trust committed by the cotrustee.

(4) Where the trustee negligently enables the cotrustee to commit a breach of trust.

(5) Where the trustee neglects to take reasonable steps to compel the cotrustee to redress a breach of trust in a case where the trustee knows or has information from which the trustee reasonably should have known of the breach.

Comment.

Source: CPC Section 16402.

Section 4-303 is drawn from Section 224 of the Restatement (Second) of Trusts (1957). For the duty of a trustee with respect to cotrustees, see Section 4-114. For exemption of a dissenting cotrustee from liability, see Section 6-104. It should also be noted that the liability to beneficiaries does not include beneficiaries under revocable trusts during the time that the trust can be revoked. See Section 3-201; see also Sections 3-204 (holder of general power of appointment or power to withdraw property from trust treated as settlor), 4-101 (duty to administer trust).

4-304. Liability for Acts of Predecessors.

(a) Except as provided in subsection (b), a successor trustee is not liable to the beneficiary for a breach of trust committed by a predecessor trustee.

(b) A successor trustee is liable to the beneficiary

for breach of trust involving acts or omissions of a predecessor trustee in any of the following circumstances:

(1) Where the successor trustee knows or has information from which the successor trustee reasonably should have known of a situation constituting a breach of trust committed by the predecessor trustee and the successor trustee improperly permits it to continue.

(2) Where the successor trustee neglects to take reasonable steps to compel the predecessor trustee to deliver the trust property to the successor trustee.

(3) Where the successor trustee neglects to take reasonable steps to redress a breach of trust committed by the predecessor trustee in a case where the successor trustee knows or has information from which the successor trustee reasonably should have known of the predecessor trustee's breach.

Comment.

Source: CPC Section 16403.

Section 4-304 is the same in substance as Section 223 of the Restatement (Second) of Trusts (1957), except that the language relating to what the trustee should have known in subsection (b)(1) and (b)(3) differs from the Restatement. In certain circumstances it may not be reasonable to enforce a claim against a former trustee, depending upon the likelihood of recovery and the cost of suit and enforcement. It should also be noted that the liability to beneficiaries does not include beneficiaries under revocable trusts during the time that the trust can be revoked. See Section 3-201; see also Section 3-204 (holder of general power of appointment or power to withdraw property from trust treated as settlor). For provisions permitting a trustee to be relieved of liability for acts of

a predecessor trustee, see Sections 4-313 (consent), 4-314 (release), 4-315 (affirmance).

The principles of this section should also apply when a trustee neglects to take reasonable steps to redress misconduct by a personal representative. See Section 4-111 (duty to enforce claims of trust).

SUBPART 2. REMEDIES FOR BREACH OF TRUST

Section

4-305. Breach of Trust; Actions.

4-306. Exclusivity of Remedies.

4-305. Breach of Trust; Actions.

(a) If a trustee commits a breach of trust, or threatens to commit a breach of trust, a beneficiary or cotrustee of the trust may commence a proceeding for any of the following purposes that is appropriate:

(1) To compel the trustee to perform the trustee's duties.

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

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

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

(5) To remove the trustee.

(6) Subject to Section 6-201, to set aside acts of the trustee.

(7) To reduce or deny compensation of the trustee.

(8) Subject to Section 6-201, to impose an equitable lien or a constructive trust on trust property.

(9) Subject to Section 6-201, to trace trust property that has been wrongfully disposed of and recover the property or its proceeds.

(b) The provision of remedies for breach of trust in subsection (a) does not prevent resort to any other appropriate remedy provided by statute or the common law.

Comment.

Source: CPC Section 16420.

Subsection (a) of Section 4-305 codifies in general terms the remedies available to a beneficiary or cotrustee where a trustee has committed a breach of trust or threatens to do so. For the applicable procedure, see Section 5-201 et seq. (judicial proceedings concerning trusts). As provided in subsection (b), the list of remedies in subsection (a) is not necessarily exclusive and is not intended to prevent resort to any other appropriate remedy. See Section 1-104 (common law as law of state); see also Section 4-306 (remedies are exclusively equitable). The petitioner may seek any one or more of the remedies as is appropriate in the circumstances of the case. Section 4-305 provides a general list of remedies and does not attempt to set out the refinements and exceptions developed over many years by the common law. The availability of a particular remedy listed in Section 4-305, and its application under the circumstances, are governed by the common law. See Section 1-104 (common law as law of state).

Subdivision (1) of subsection (a) is consistent with Restatement (Second) of Trusts Section 199(a) (1957). Subdivision (2) of subsection (a) is consistent with Restatement (Second) of Trusts Section 199(b) (1957).

The reference to payment of money in subdivision (3) is comprehensive and includes liability that might be characterized as damages, restitution, or surcharge. For the measure of liability, see Subpart 3 (commencing with Section 4-307). The characterization of monetary liability does not affect the fact that the remedies for breach of trust are exclusively equitable, as provided in Section 4-306. In certain circumstances, rather than ordering the

payment of money, it may be appropriate for the court to order the trustee to transfer tangible property as a remedy for breach of trust. See also Restatement (Second) of Trusts Section 199(c) (1957).

Subdivision (4) makes explicit the authority to appoint a receiver. See also Restatement (Second) of Trusts Section 199(d) (1957). Subdivision (4) also permits appointment of a temporary trustee where appointment of a receiver would be appropriate. See Section 3-113 (appointment of trustee to fill vacancy).

As to subdivision (5), see Restatement (Second) of Trusts Section 199(e) (1957). For provisions governing removing trustees, see Sections 3-109 (grounds for removal), 3-111 (delivery of property by removed trustee).

The authority under subdivision (6) to set aside wrongful acts of the trustee is a corollary of the power to enjoin a threatened breach as provided in subdivision (2). As recognized in the introductory clause of subdivision (6), the wrongful acts of the trustee may not be set aside if to do so would impair the rights of bona fide purchasers. See also G. Bogert, *The Law of Trusts and Trustees* § 861, at 16-17 (rev. 2d ed. 1982).

Subdivision (7) is drawn from Section 243 of the Restatement (Second) of Trusts (1957).

The introductory clause of subdivision (8) recognizes that this remedy is limited by the rights of a bona fide purchaser as provided in Section 6-201. See also Restatement (Second) of Trusts Section 202 (1957).

The introductory clause of subdivision (9) recognizes that this remedy is limited by the rights of bona fide purchasers as provided in Section 6-201.

A successor trustee may also have standing to sue for a breach of trust. See Section 4-304. As to standing generally, see Restatement (Second) of Trusts Section 200.

4-306. Exclusivity of Remedies.

The remedies of a beneficiary against the trustee are exclusively in equity.

Comment.

Source: CPC Section 16421.

Section 4-306 is drawn from Section 197 of the Restatement (Second) of Trusts (1957). For a list of remedies, see Section 4-305. Under this section, for

example, the beneficiary may not commence an action against the trustee for breach of contract. See Restatement (Second) of Trusts § 197 comment b (1957). However, the trustee may be found liable for the payment of money on account of the breach. See Section 4-305(a)(3) (compelling payment of money for breach of trust), 4-307 to 4-408 (measure of liability for breach of trust).

SUBPART 3. MEASURE OF LIABILITY FOR BREACH OF TRUST

Section

4-307. Breach of Trust; Liability; Good Faith Actions.

4-308. Interest; Amount.

4-309. Availability of Other Remedies.

4-307. Breach of Trust; Liability; Good Faith Actions.

(a) If the trustee commits a breach of trust, the trustee is chargeable with any of the following that is appropriate under the circumstances:

(1) Any loss or depreciation in value of the trust estate resulting from the breach of trust, with interest.

(2) Any profit made by the trustee through the breach of trust, with interest.

(3) Any profit that would have accrued to the trust estate if the loss of profit is the result of the breach of trust.

(b) If the trustee has acted reasonably and in good faith under the circumstances as known to the trustee, the court, in its discretion, may excuse the trustee in whole or in part from liability under subsection (a) if it would be equitable to do so.

Comment.

Source: CPC Section 16440.

Subsection (a) of Section 4-307 is drawn from Section 205 of the Restatement (Second) of Trusts (1957). See also Section 4-116(b) (propriety of considering investments as part of an overall investment strategy).

Subsection (b) codifies the good faith exception to the general liability rules found in the Restatement. See Restatement (Second) of Trusts Section 205, comment g (1957).

As to defenses by the trustee, see Sections 4-310 et seq.

4-308. Interest; Amount.

If the trustee is liable for interest pursuant to Section 4-307, the trustee is liable for the greater of the following amounts:

(a) The amount of interest that accrues at the legal rate on judgments in effect during the period when the interest accrued. (b) The amount of interest actually received.

Comment.

Source: CPC Section 16441.

Subsection (a) of Section 4-308 clarifies the interest rate applicable to a determination of liability for a breach occurring before the operative date of the Trust Law. Under this rule, the legal rate of interest on judgments in effect when the liability accrued is applied. Restatement (Second) of Trusts Section 207 charges trustees with compound interest under certain circumstances.

4-309. Availability of Other Remedies.

The provisions in this article for liability of a

trustee for breach of trust do not prevent resort to any other remedy available under the statutory or common law.

Comment.

Source: CPC Section 16442.

Section 4-309 makes clear that Sections 4-307 and 4-308 do not prevent resort to any other remedy available against the trustee under the statutory or common law. See Section 1-104 (common law as law of state); see also Section 4-305 (remedies for breach of trust).

SUBPART 4. LIMITATIONS AND EXCULPATION

Section

- 4-310. Limitations of Actions.**
- 4-311. Exculpation of Trustee.**
- 4-312. Revocable Trusts; Liability for Acts Performed Pursuant to Written Directions.**
- 4-313. Beneficiary's Consent; Nonliability of Trustee.**
- 4-314. Beneficiaries Release or Contract; Discharge of Trustee's Liability.**
- 4-315. Affirmation by Beneficiary; Nonliability of Trustee.**

- 4-310. Limitations of Actions.**

(a) Unless a claim is previously barred by adjudication, consent, limitation, or otherwise:

(1) If a beneficiary has received an interim or final account in writing, or other written report, that adequately discloses the existence of a claim against the trustee for breach of trust, the claim is barred as to that beneficiary unless a proceeding to assert the claim is commenced within three years after receipt of the account or report. An account or report adequately discloses existence of a claim if it provides sufficient information so that

the beneficiary knows of the claim or reasonably should have inquired into the existence of the claim.

(2) If an interim or final account or other report does not adequately disclose the existence of a claim against the trustee for breach of trust, the claim is barred as to that beneficiary unless a proceeding to assert the claim is commenced within three years after the beneficiary discovered, or reasonably should have discovered, the subject of the claim.

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

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

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

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

Comment.

Source: CPC Section 16460.

Section 4-310 is drawn in part from Section 7-307 of the Uniform Probate Code (1977). For a provision governing consent, release, and affirmance by beneficiaries to relieve the trustee of liability, see Sections 4-313 to 4-315. The reference in the introductory clause to claims "otherwise" barred also includes principles such as estoppel and laches that apply under the common law. See Section 1-104 (common law as law of state). See also Sections 4-311 (exculpation of trustee by provision in trust instrument), 4-312 (nonliability for following instructions under revocable trust). During the time that a trust is revocable, the person holding the power to revoke is the one who must receive the account or report in order to commence the running of the limitations period provided in this section. See Sections 3-201 (limits on rights of beneficiary of revocable trust), 4-116(b) (exception to duty to account).

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

For provisions relating to the duty to report information and account to beneficiaries, see Sections 4-118 to 4-121.

4-311. Exculpation of Trustee.

(a) Except as provided in subsection (b), the trustee can be relieved of liability for breach of trust by provisions in the trust instrument.

(b) A provision in the trust instrument is not effective to relieve the trustee of liability (1) for breach of trust committed intentionally, with gross negligence, in bad faith, or with reckless indifference to the interest of the beneficiary, or (2) for any profit that the trustee derives from a breach of trust.

Comment.

Source: CPC Section 16461.

Section 4-311 is the same in substance as part of Section 222 of the Restatement (Second) of Trusts (1957), except that the reference to gross negligence does not appear in the Restatement. For special provisions applicable to revocable trusts, see Section 4-312. Although a trust may not exculpate a trustee from liability for a profit from a breach, as provided in clause (2) of subsection (b), the trust may limit the trustee's duties with the effect that the trustee does not commit a breach in that area. However, it is against public policy to attempt to eliminate liability for profits derived from a breach of a duty that the trustee does have. See Restatement (Second) of Trusts Section 222 comments b & c (1957).

Restatement (Second) of Trusts Section 222(3) also invalidates an exculpatory clause which was inserted in the instrument by an abuse of a confidential relationship.

4-312. Revocable Trusts; Liability for Acts Performed Pursuant to Written Directions.

(a) Notwithstanding Section 4-311, a trustee of a revocable trust is not liable to a beneficiary for any act performed or omitted pursuant to written directions from the person holding the power to revoke, including a person to whom the power to direct the trustee is delegated.

(b) Subsection (a) applies to a trust that is revocable in part with respect to the interest of the beneficiary in that part of the trust property.

Comment.

Source: CPC Section 16462.

See also Section 4-102 (trustee's duty to follow written directions under revocable trust).

4-313. Beneficiary's Consent; Nonliability of Trustee.

(a) Except as provided in subsections (b) and (c), a beneficiary may not hold the trustee liable for an act or omission of the trustee as a breach of trust if the beneficiary consented to the act or omission before or at the time of the act or omission.

(b) The consent of the beneficiary does not preclude the beneficiary from holding the trustee liable for a breach of trust in any of the following circumstances:

(1) Where the beneficiary was under an incapacity at the time of the consent or of the act or omission.

(2) Where the beneficiary at the time consent was given did not know of his or her rights and of the material facts (A) that the trustee knew or should have known and (B) that the trustee did not reasonably believe that the beneficiary knew.

(3) Where the consent of the beneficiary was induced by improper conduct of the trustee.

(c) Where the trustee has an interest in the transaction adverse to the interest of the beneficiary, the consent of the beneficiary does not preclude the beneficiary from holding the trustee liable for a breach of trust under any of the circumstances described in subsection (b) or where the transaction to which the beneficiary consented was not fair and reasonable to the beneficiary.

Comment.

Source: CPC Section 16463.

Section 4-313 is the same in substance as Section 216 of the Restatement (Second) of Trusts (1957). See also Sections 4-310 (limitations on proceedings against trustee), 4-314 (release), 4-315 (affirmance). As to other rules that may limit the trustee's liability, see the Comment to Section 4-310.

When one beneficiary has consented but others have not, courts give a remedy to the nonconsenting trustees. Restatement (Second) of Trusts Section 216, comment h. But consent by the settlor of a revocable trust binds all the beneficiaries under Section 3-203. See also Section 3-204 (consent by the holder of a power of withdrawal).

4-314. Beneficiary's Release or Contract; Discharge of Trustee's Liability.

(a) Except as provided in subsection (b), a beneficiary may be precluded from holding the trustee liable for a breach of trust by the beneficiary's release or contract effective to discharge the trustee's liability to the beneficiary for that breach.

(b) A release or contract is not effective to discharge the trustee's liability for a breach of trust in any of the following circumstances:

(1) Where the beneficiary was under an incapacity at the time of making the release or contract.

(2) Where the beneficiary did not know of his or her rights and of the material facts (A) that the trustee knew or reasonably should have known and (B) that the trustee did not reasonably believe that the beneficiary knew.

(3) Where the release or contract of the beneficiary was induced by improper conduct of the trustee.

(4) Where the transaction involved a bargain with the trustee that was not fair and reasonable.

Comment.

Source: CPC Section 16464.

Section 4-314 is the same in substance as Section 217 of the Restatement (Second) of Trusts (1957). See also Sections 4-310 (limitations on proceedings against trustee), 4-315 (affirmance). As to other rules that may limit the trustee's liability, see the Comment to Section 4-310.

4-315. Affirmation by Beneficiary; Nonliability of Trustee.

(a) Except as provided in subsection (b), if the trustee, in breach of trust, enters into a transaction that the beneficiary may at his or her option reject or affirm, and the beneficiary affirms the transaction, the beneficiary shall not thereafter reject it and hold the trustee liable for any loss occurring after the trustee entered into the transaction.

(b) The affirmance of a transaction by the beneficiary does not preclude the beneficiary from holding a trustee liable for a breach of trust if, at the time of the affirmance, any of the following circumstances existed:

- (1) The beneficiary was under an incapacity.
- (2) The beneficiary did not know of his or her

rights and of the material facts (A) that the trustee knew or reasonably should have known and (B) that the trustee did not reasonably believe that the beneficiary knew.

(3) The affirmance was induced by improper conduct of the trustee.

(4) The transaction involved a bargain with the trustee that was not fair and reasonable.

Comment.

Source: CPC Section 16465.

Section 4-315 is the same in substance as Section 218 of the Restatement (Second) of Trusts (1957). See also Sections 4-310 (limitations on proceedings against trustee), 4-313 (consent), 4-314 (release). As to other rules that may limit the trustee's liability, see the Comment to Section 4-310.

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

ARTICLE 5. JUDICIAL PROCEEDINGS CONCERNING TRUSTS

Part

- 1. Jurisdiction and Venue.**
- 2. Proceedings Concerning Trusts.**
- 3. Transfer of Trust to Another Jurisdiction.**
- 4. Transfer of Trust from Another Jurisdiction.**

PART 1. JURISDICTION AND VENUE

Section

- | | |
|---------------|--|
| 5-101. | Subject Matter Jurisdiction. |
| 5-102. | Principal Place of Administration of Trust. |
| 5-103. | Jurisdiction Over Trustees and Beneficiaries. |
| 5-104. | Venue. |
-
- | | |
|---------------|-------------------------------------|
| 5-101. | Subject Matter Jurisdiction. |
|---------------|-------------------------------------|

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

(b) The court having jurisdiction over the trust has concurrent jurisdiction of the following:

(1) Actions and proceedings to determine the existence of trusts.

(2) Actions and proceedings by or against creditors or debtors of trusts.

(3) Other actions and proceedings involving trustees and third persons.

Comment.

Source: CPC Section 17000.

Subsection (a) of Section 5-101 is drawn from the first sentence of Section 7-201(a) of the Uniform Probate Code (1977). Subsection (a) provides for exclusive jurisdiction in the court in matters involving the internal affairs of trusts. See Part 2 (commencing with Section 5-201).

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

5-102. Principal Place of Administration of Trust.

(a) The principal place of administration of the trust is the usual place where the day-to-day activity of the trust is carried on by the trustee or its representative who is primarily responsible for the administration of the trust.

(b) If the principal place of administration of the

trust cannot be determined under subsection (a), it shall be determined as follows:

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

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

Comment.

Source: CPC Section 17002.

Part 3 (Section 5-301 et seq.) governs transfers of trusts to another jurisdiction, while Part 4 (Section 5-401 et seq.) covers transfers of trusts into this State.

5-103. Jurisdiction Over Trustees and Beneficiaries.

(a) By accepting the trusteeship of a trust having its principal place of administration in this state the trustee submits personally to the jurisdiction of the court under this [Act].

(b) To the extent of their interests in the trust, all beneficiaries of a trust having its principal place of administration in this state are subject to the jurisdiction of the court under this [Act].

Comment.

Source: CPC Section 17003.

Section 5-103 is intended to facilitate the exercise of the court's power under this Part. This section is drawn from Section 7-103 of the Uniform Probate Code (1977). As recognized by the introductory clause, constitutional limitations on assertion of jurisdiction apply to the exercise of jurisdiction under Section 5-103. Consequently, appropriate notice must be given to a trustee or beneficiary as a condition of jurisdiction under this section. See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Section 5-103 is not a limitation on the jurisdiction of the court over the trust, trust property, or parties to the trust. See also Sections 3-101 (methods of trustee acceptance), 3-201 (limits on rights of beneficiary of revocable trust).

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

5-104. Venue.

(a) The proper county for commencement of a proceeding pursuant to this Act is either of the following:

(1) In the case of a living trust, the county where the principal place of administration of the trust is located.

(2) In the case of a testamentary trust, either the county where the decedent's estate is administered or where the principal place of administration of the trust is located.

(b) If a living trust has no trustee, the proper county for commencement of a proceeding for appointing a trustee is the county where the trust property, or some portion of the trust property, is located.

(c) Except as otherwise provided in subsections (a) and (b), the proper county for commencement of a proceeding pursuant to this Act is determined by the rules applicable to civil actions generally.

Comment.

Source: CPC Section 17005.

See Section 5-102 (principal place of administration of trust).

Subsection (b) applies only to appointment of a trustee for a living trust that has no trustee. Proceedings to appoint a trustee for a testamentary trust that has no trustee are commenced in the county where the decedent's estate is administered. See subsection (a)(2).

Subsection (c) provides venue rules applicable in cases not covered by subsections (a) and (b), such as 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. Thus, for example, 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. This subsection is drawn from Section 7-204 of the Uniform Probate Code (1977).

PART 2. PROCEEDINGS CONCERNING TRUSTS

Section

5-201. Petitions; Purposes of Proceedings.

5-202. Beneficiaries; Request for Special Notice.

5-203. Administration of Trusts; Judicial Intervention Intermittent.

5-201. Petitions; Purposes of Proceedings.

Except as provided in Section 3-201, a trustee or beneficiary of a trust may petition the court under this [Part] concerning the internal affairs of the trust or to determine the existence of the trust.

Comment.

Source: CPC Section 17200(a).

The introductory clause of Section 5-201 has the effect of giving the right to petition concerning the internal affairs of a revocable living trust to the settlor (or other person holding the power to revoke) instead of the beneficiaries during the time that the settlor (or other person holding the power to revoke) is competent. See Section 3-201 and the Comment thereto.

The procedure provided in this part is available to determine matters concerning the administration of trusts notwithstanding a purported limitation or exclusion in the trust instrument.

Proceedings concerning the internal affairs of a trust include, but are not limited to, proceedings for any of the following purposes: (1) Determining questions of construction of a trust instrument. (2) Determining the existence or nonexistence of any immunity, power, privilege, duty or right. (3) Determining the validity of a trust provision. (4) Ascertaining beneficiaries and determining to whom property shall pass or be delivered upon final or partial termination of the trust, to the extent the determination is not made by the trust instrument. (5) Settling the accounts and passing upon the acts of the trustee, including the exercise of discretionary powers. (6) Instructing the trustee. (7) Compelling the trustee to report information about the trust or account to the beneficiary. (8) Granting powers to the trustee. (9) Fixing or allowing payment of the trustee's compensation or reviewing the reasonableness of the trustee's compensation. (10) Appointing or removing a trustee. (11) Accepting the resignation of a trustee. (12) Compelling redress of a breach of trust by any available remedy. (13) Approving or directing the modification or termination of the trust. (14) Approving or directing the combination or division of trusts. (15) Amending or conforming the trust instrument in the manner required to qualify a decedent's estate for the charitable estate tax deduction under federal law, including the addition of mandatory governing instrument requirements for a charitable remainder trust as required by final regulations and rulings of the United States Internal Revenue Service, in any case in which all parties interested in the trust have submitted written agreement to the proposed changes or written disclaimer of interest. (16) Authorizing or directing transfer of a trust or trust property to or from another jurisdiction. (17) Reforming or excusing compliance with the governing instrument of an organization pursuant to Section 4-130. (18) Determining the liability of the trust for any debts of a deceased settlor.

See also Sections 1-102(2) ("beneficiary" defined), 1-102(21) ("trust" defined), 5-104 (venue).

5-202. Beneficiaries; Request for Special Notice.

(a) If proceedings involving a trust are pending, a beneficiary of the trust may, in person or by attorney, file with the court clerk where the proceedings are pending a written request stating that the beneficiary desires special notice of the filing of petitions in the proceeding and giving an address for receiving notice by mail. A copy of the request shall be personally delivered or mailed to the trustee or the trustee's attorney. If personally delivered, the request is effective when it is delivered. If mailed, the request is effective when it is received. When the original of the request is filed with the court clerk, it shall be accompanied by a written admission or proof of service. A request for special notice may be modified or withdrawn in the same manner as provided for the making of the initial request.

(b) A request for special notice made by a beneficiary whose right to notice is restricted by Section 3-203 is not effective.

Comment.

Source: CPC Section 17204.

Subsection (b) of Section 5-202 makes clear that the restrictions on rights of beneficiaries of revocable trusts apply to the right to request special notice. Section 3-205

limits the need to give notice to certain beneficiaries with future interests but does not restrict the right of such beneficiaries to request special notice. See Section 3-205(c) (1).

5-203. Administration of Trusts; Judicial Intervention Intermittent.

The administration of trusts is intended to proceed expeditiously and free of judicial intervention, subject to the jurisdiction of the court.

Comment.

Source: CPC Section 17209.
Uniform Probate Code Section 7-201(b) contains similar language. See also Section 4-201.

PART 3. TRANSFER OF TRUST TO ANOTHER JURISDICTION

Section

- 5-301. Application of Part.**
5-302. Transfer to Jurisdiction Outside State.
5-303. Order Granting Transfer.
5-304. Manner of Transfer; Discharge of Trustee.
- 5-301. Application of Part.**

(a) This [Part] applies to all of the following:

(1) A trust that is subject to this [Act].

(3) Any other trust to which the provisions of this [Part] are made applicable by statute or trust instrument.

(b) This [Part] does not prevent the transfer of the place of administration of a trust or of trust property to

another jurisdiction by any other available means.

Comment.

Source: CPC Section 17400.

Subsection (a) (1) permits the transfer of oral trusts. See 2-108 (oral trusts of personal property). Under the definition of "trust" in Section 1-102(21), this Part also applies to charitable trusts. See Section 1-106 (application of Act to charitable trusts). See also Sections 5-104 (venue).

5-302. Transfer to Jurisdiction Outside State.

The court may make an order for the transfer of the place of administration of a trust or the transfer of some or all of the trust property to a jurisdiction outside this state as provided in this [Part].

Comment.

Source: CPC Section 17401.

See also Section 1-102(15) ("property" defined), 5-101 (subject-matter jurisdiction of court).

5-303. Order Granting Transfer.

The court may, in its discretion, grant the petition and order the trustee to transfer the trust property or to transfer the place of administration of the trust to the other jurisdiction if, after hearing, all of the following appear to the court:

(a) The transfer of the trust property to a trustee in another jurisdiction, or the transfer of the place of

administration of the trust to another jurisdiction, will promote the best interests of the trust and those interested in it, taking into account the interest in the economical and convenient administration of the trust.

(b) The transfer will not violate the trust instrument.

(c) Any new trustee to whom the trust property is to be transferred is qualified, willing, and able to administer the trust or trust property under the trust instrument.

Comment.

Source: CPC Section 17404.

The requirement in subsection (c) of Section 5-303 that the trustee be willing is included for consistency with Section 5-404(a) (3).

5-304. Manner of Transfer; Discharge of Trustee.

If a transfer is ordered under this [Part], the court may direct the manner of transfer and impose terms and conditions as may be just, including, but not limited to, a requirement for the substitution of a successor trustee in any pending litigation in this state. The delivery of property in accordance with the order of the court is a full discharge of the trustee in relation to all property embraced in the order.

Comment.

Source: CPC Section 17405.

PART 4. TRANSFER OF TRUST FROM ANOTHER JURISDICTION

Section

- 5-401. Application of Part.**
 - 5-402. Order Accepting Transfer.**
 - 5-403. Venue.**
 - 5-404. Order Accepting Transfer and Appointing Trustee.**
 - 5-405. Conditional Order Accepting Transfer.**
 - 5-406. Administration; Validity; Construction.**
-
- 5-401. Application of Part.**

(a) This [Part] applies to a trust, or portion thereof, administered in a jurisdiction outside this State.

(b) This [Part] does not prevent the transfer of the place of administration of a trust or of trust property to this State by any other available means.

Comment.

Source: CPC Section 17450.

Subsection (a) permits the transfer of oral trusts. See Section 2-108 (oral trusts of personal property). See Section 1-102(21) ("trust" defined). Section 5-401 makes this Part applicable to the transfer to this state of the place of administration of trusts or trust property administered in another jurisdiction. Hence, this Part applies to trusts administered in foreign countries as well as those administered in other states.

5-402. Order Accepting Transfer.

The court may make an order accepting the transfer of the place of administration of a trust from another jurisdiction to this state or the transfer of some or all of the trust property in another jurisdiction to a trustee in this state as provided in this [Part].

Comment.

Source: CPC Section 17451.

Section 5-402 is comparable to Section 5-302. See also Section 1-102(15) ("property" defined), 5-101 (subject matter jurisdiction in court).

5-403. Venue.

(a) If the petition requests that a resident of this state be appointed trustee, the petition shall be filed in the court of the county where the proposed principal place of administration of the trust pursuant to Section 5-103 is located.

(b) If the petition requests that only a nonresident of this state be appointed trustee, the petition shall be filed in the court of the county where either (1) any beneficiary resides or (2) a substantial portion of the trust property to be transferred is located or will be located.

Comment.

Source: CPC Section 17452.

See also Section 5-101 (subject matter jurisdiction of court).

5-404. Order Accepting Transfer and Appointing Trustee.

(a) The court may, in its discretion, grant the petition and issue an order accepting transfer of trust property or the place of administration of the trust to this state and appoint a trustee to administer the trust in this

state, if, after hearing, all of the following appear to the court:

(1) The transfer of the trust property to a trustee in this state, or the transfer of the place of administration of the trust to this state, will promote the best interests of the trust and those interested in it, taking into account the interest in the economical and convenient administration of the trust.

(2) The transfer will not violate the trust instrument. (3) The trustee appointed by the court to administer the trust in this state, and to whom the trust property is to be transferred, is qualified, willing, and able to administer the trust or trust property under the trust instrument.

(4) The proper court in the other jurisdiction has approved the transfer if approval is necessary under the law of the other jurisdiction.

(b) If the court grants the petition under subsection (a), the court shall require the trustee to give a bond, if necessary under the law of the other jurisdiction or of this state, and may require bond as provided in Section 3-103.

Comment.

Source: CPC Section 17455.

See, e.g., Section 3-103(a)(3) (bond required of trustee appointed by court). See also Section 1-102(15) ("property" defined).

5-405. Conditional Order Accepting Transfer.

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.

Comment.

Source: CPC Section 17456.

Section 5-405 provides a method whereby the court can indicate its willingness to accept jurisdiction over a trust administered in another jurisdiction where the law of the other jurisdiction requires appointment of a trustee in the proposed new place of administration before approving transfer. See, e.g., Mass. Gen. Laws Ann. ch.206, § 29 (West 1969).

5-406. Administration; Validity; Construction.

A trust transferred to this State pursuant to this [Part] shall be administered in the same manner as a trust of that type created in this State.

The validity of a trust and the construction of the beneficial provisions of a trust transferred to this State are not affected by this section.

Comment.

Source: CPC Section 17457.

Under Section 5-406 a transferred trust is treated the

same as a trust that was created in this state, and so is governed by this Act. The second sentence distinguishes the rules governing the validity of a trust and the construction of its beneficial provisions from the procedural and administrative provisions covered by the first sentence of this section. See also Sections 1-106 (application of Act to charitable trusts) and 2-301 (limitation on rule that trust is revocable unless it provides otherwise). 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 trust instrument so provides and the court so determines in the order accepting transfer to this state.

ARTICLE 6. RIGHTS OF THIRD PERSONS

Part

- 1. Liability of Trustee to Third Persons.**
- 2. Protection of Third Persons.**

PART 1. LIABILITY OF TRUSTEE TO THIRD PERSONS

Section

- 6-101. Personal Liability; Limitations.**
 - 6-102. Obligations Arising from Ownership or Control of Trust Property.**
 - 6-103. Torts.**
 - 6-104. Dissenting Cotrustees.**
 - 6-105. Contract Claims.**
 - 6-106. Proceedings for Determination.**
- 6-101. Personal Liability; Limitations.**

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

Comment.

Source: CPC Section 18000.

Section 6-101 is drawn from Section 7-306(a) of the Uniform Probate Code (1977). However, unlike the Uniform Probate Code, this section excuses the trustee from personal liability on a contract where either the trustee's representative capacity or the identity of the trust is revealed in the contract. Under Section 6-101, 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. See Section 6-106 (liability as between trustee and trust estate).

To fall within the rule Section 6-101, either the trustee's status or the identity of the trust must be revealed.

6-102. Obligations Arising from Ownership or Control of Trust Property.

A trustee is personally liable for obligations arising from ownership or control of trust property only if the trustee is personally at fault.

Comment.

Source: CPC Section 18001.

Section 6-102 is the same in substance as part of Section 7-306(b) of the Uniform Probate Code (1977). A trustee is "personally at fault" when the trustee, either intentionally or negligently, acts, or fails to act. For rules governing the assertion of claims, see Section 6-105. The question of ultimate liability as between the trust and the trustee is governed by Section 6-106.

A trustee is subject to liability under CERCLA Section 107 (42 U.S.C. 9607) as "owner" when it leased land on which hazardous wastes were located. *City of Phoenix v. Garbage Services Corp.*, 827 F. Supp. 600 (D. Ariz. 1993).

6-103. Torts.

A trustee is personally liable for torts committed in the course of administration of the trust only if the trustee is personally at fault.

Comment.

Source: CPC Section 18002.

Section 6-103 is the same in substance as part of Section 7-306(b) of the Uniform Probate Code (1977). A trustee is "personally at fault" when the trustee commits a tort either intentionally or negligently. For rules governing the assertion of claims, see Section 6-105. The question of ultimate liability as between the trust and the trustee is governed by Section 6-106.

Restatement (Second) of Trusts Section 264 makes a trustee liable regardless of fault, including liability for acts of agents under respondeat superior.

6-104. Dissenting Cotrustees.

(a) A cotrustee who does not join in exercising a power held by three or more cotrustees is not liable to third persons for the consequences of the exercise of the power.

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

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

a trustee.

Comment.

Source: CPC Section 18003.

Section 6-104 is drawn from Section 114.006(a) of the Texas Trust Code. See Tex. Prop. Code Ann. § 114.006 (Vernon 1984).

As to the duties of cotrustees, see Sections 4-114 and 4-303. Under Section 3-104, cotrustees must act unanimously unless otherwise provided in the trust instrument, so subsection (b) can only apply when the instrument provides for majority control.

6-105. Contract Claims.

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 administration of the trust may be asserted against the trust by proceeding against the trustee in the trustee's representative capacity, whether or not the trustee is personally liable on the claim.

Comment.

Source: CPC Section 18004.

Section 6-105 is the same in substance as part of Section 7-306(c) of the Uniform Probate Code (1977). Section 6-105 alters the case law rule that the trustee could not be sued in a representative capacity where the trust estate was not liable. See also Section 6-106 (liability as between trustee and trust estate).

6-106. Proceedings for Determination.

The question of liability as between the trust estate

and the trustee personally may be determined in a proceeding under Section 5-201.

Comment.

Source: CPC Section 18005.

Section 6-106 is drawn from Section 7-306(d) of the Uniform Probate Code (1977). Under this section, ultimate liability as between the estate and the 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. Where judgment is entered against the trustee individually, the question of the trustee's right to reimbursement may be settled informally with the beneficiaries or in a separate proceeding in the probate court. For rules governing indemnification of trustees, see Section 3-118. See also Section 5-201 et seq. (proceedings against trustee by beneficiary).

PART 2. PROTECTION OF THIRD PERSONS

Section

6-201. Obligations of Third Persons.

**6-202. Certification of Trust; Contents; Trust Document
Excerpt Copies; Certification Reliance;**

Liability.

6-203. Application of Property Delivered to Trustee.

6-204. Transactions with Former Trustees.

6-201. Obligations of Third Persons.

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

(a) The third person is not bound to inquire whether

the trustee has power to act or is properly exercising a power and may assume without inquiry the existence of a trust power and its proper exercise.

(b) The third person is fully protected in dealing with or assisting the trustee just as if the trustee has and is properly exercising the power the trustee purports to exercise.

Comment.

Source: CPC Section 18100.

Section 6-201 is drawn from Section 7 of the Uniform Trustees' Powers Act (1964). Persons who take trust property in bad faith may be subject to double damages under Section 4-232(b).

**6-202. Certification of Trust; Contents; Trust Document
Excerpt Copies; Certification Reliance;
Liability.**

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

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

(c) The certification of trust shall not be required to

contain the dispositive provisions of the trust which set forth the distribution of the trust estate.

(d) A person may require that the trustee offering the certification of trust provide copies of those excerpts from the original trust documents 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 actual 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 of trust. Actual knowledge shall 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. Any transaction, and any lien created thereby, entered into by the trustee and a person acting in reliance upon a certification of trust shall be enforceable against the trust assets.

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

(g) Nothing in this section shall limit the rights of beneficiaries to obtain copies of the trust document or of the rights of others to obtain copies in a proceeding concerning the trust.

Comment.

Source: CPC Section 18100.5.

6-203. Application of Property Delivered to Trustee.

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

Comment.

Source: CPC Section 18101.

This section is essentially the same as the last sentence of Section 7 of the Uniform Trustees' Powers Act (1964).

6-204. Protection of Third Person Dealing with Former Trustee.

If a third person acting in good faith and for a valuable consideration enters into a transaction with a former trustee without knowledge that the person is no longer a trustee, the third person is fully protected just as if the former trustee were still a trustee.

Comment.

Source: CPC Section 18102.

This section is drafted for consistency with Section 6-201. See also Sections 3-110 (vacancy in office of trustee), 3-111 (residual powers of resigning trustee).