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## TRUST ACT

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TRUST ACT

ARTICLE 1
DEFINITIONS AND GENERAL PROVISIONS

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

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

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

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

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

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

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

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

(7) "Interested person" includes a trustee, a successor trustee, a beneficiary, and a fiduciary representing an interested person. The meaning as it relates to particular persons may vary from time to time according to the particular purposes of, and matters involved in, any judicial proceeding.

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

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

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

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

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

(13) "Terms of the trust" means the manifestation of the settlor's intent regarding a trust's provisions at the time of the trust's creation or amendment that is expressed in a manner admitting of its proof in a judicial proceeding. The terms may be expressed in writing or orally or inferred from conduct, and may include constructional preferences or rules.

(14) "Trust" means an express trust, charitable or noncharitable, with additions thereto, wherever and however created, including a trust created or determined by a statute, judgment or decree under which the trust is to be administered in the manner of an express trust. The term applies only to the
types of express trusts that are used primarily for the donative
transfer of property. The term excludes the types of express
trusts that are used primarily for business, employment,
investment, or commercial transactions, including business
trusts, land trusts, voting trusts, common trust funds, security
arrangements, liquidation trusts, trusts created by a deposit
arrangement in a financial institution, trusts created for paying
debts, dividends, interest, salaries, wages, profits, pensions,
or employee benefits of any kind, and any arrangement under which
a person is nominee or escrowee for another;

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

**Comment**

"Beneficiary" (paragraph (1)) refers only to a beneficiary
of a trust as defined in the Act. The term includes not only
beneficiaries who received their interests under the terms of the
trust but also beneficiaries who received their interests by any
other means, including by an assignment, the exercise of a power
of appointment, by a resulting trust upon the failure of an
interest or gap in a disposition, or through the operation of an
antilapse statute upon the predecease of a named beneficiary.

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

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

The definition of “fiduciary” (paragraph (5)) refers to the person holding the office as opposed to the fiduciary duties or obligations of the office. A fiduciary is an “interested person” (paragraph (7)) who may act on behalf of those whom the fiduciary represents. A trustee may engage in transactions with another trust, decedent’s estate or conservatorship estate of which the trustee is the fiduciary (Section 4-202(d)). A trustee has a duty to redress a breach of trust committed by a prior trustee or other fiduciary from whom the trustee received trust property (Section 4-212).

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

The term “interested person”(paragraph (7)) is used sparingly in the Act. It refers to the persons who may bring judicial proceedings in connection with charitable trusts (see Sections 5-103 and 5-104), although a special definition is used for that purpose (see Section 5-104). It is used in connection with the notice requirements for judicial proceedings (see Section 6-107). Interested persons must also receive notice of judicial settlements (see Section 6-205). While the Act does not prohibit interested persons from either bringing or receiving notice of other judicial proceedings concerning a trust, only a trustee or beneficiary has an absolute right to participate in the judicial proceedings concerning the internal affairs of trusts that are enumerated in Section 6-103.

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

Determining the identity of the "settlor" (paragraph (11)) is usually not an issue. The same person will both sign the trust instrument and fund the trust. Ascertaining the identity of the settlor becomes more difficult when more than one person signs
the trust instrument or funds the trust. The fact that a person
is designated as the "settlor" by the terms of the trust is not
necessarily determinative. For example, the person who executes
the trust instrument may be acting as the agent for the person
who will be funding the trust. In that case, the person funding
the trust, and not the person signing the trust instrument, will
be the settlor. Similarly, should more than one person
contribute to a trust, all of the contributors will ordinarily
be treated as settlors in proportion to their respective
contributions, regardless of which one signed the trust
instrument. However, in the case of a revocable trust, transfers
made to the trust by a person who did not participate in the
trust's creation will frequently be intended as a donative
transfer to the person who originally created the trust. In that
event, only the person who created the trust, and not the later
donor, will be the settlor.

Ascertaining the identity of the settlor is important for a
variety of reasons. It is important for determining rights in
revocable trusts. See Sections 3-102 (revocation or modification
of revocable trust), 3-104 (creditor claims against revocable
trust), and 3-105 (limitation on contest of revocable trust). It
is also important for determining rights of creditors in
irrevocable trusts. See Section 2-303 (claims of settlor's
creditors). While the settlor of an irrevocable trust ordinarily
has no continuing rights except for a right to terminate the
trust with the beneficiaries' consent (see Section 2-202), under
the Act the settlor of an irrevocable trust may also petition for
removal of the trustee or for an order preventing the
beneficiaries from terminating the trust. See Sections 2-203
(judicial review of termination or modification by consent), and
4-107 (removal of trustee). Also, per Section 5-104, the settlor
is an interested person in a judicial proceeding involving a
charitable trust.

"Terms of the trust" (paragraph (13)) is a defined term used
with some frequency in the Act. While the wording of a written
trust instrument is almost always the most important determinant
of a trust's terms, the definition is not so limited. Oral
statements, the settlor's family circumstances, and, to the
extent the settlor was otherwise silent, rules of construction,
all may have a bearing on determining a trust's meaning. If a
trust established by order of court is to be administered as an
express trust, the terms of the trust are determined from the
court order as interpreted in light of the general rules
governing interpretation of judgments. See Restatement (Third)
of Trusts Sec. 4 and comm. f (Tent. Draft No. 1, 1996).

Not all evidence may necessarily be considered in
determining the terms of the trust. A manifestation of a
settlor's intention does not constitute evidence of a trust's
terms if it would not be admissible in a judicial proceeding in which the trust's terms are in question. See Restatement (Third) of Trusts Sec. 4 comm. b (Tent. Draft No. 1, 1996). See also Restatement (Third) Property-Donative Transfers Sec. 10.2, 11.1–11.3 (Tent. Draft No. 1, 1995). For example, in many states a trust of real property is unenforceable unless evidenced by a writing, although this Act does not so require but leaves the issue of whether a trust must be evidenced by a writing to the discretion of the enacting jurisdiction. See Section 2-103 (writing requirement; oral trusts). Evidence otherwise relevant to determining the terms of the trust may also be excluded under other principles of law, such as the parol evidence rule.

Under the Act, a "trust" (paragraph (14)) means an express trust, whether private or charitable, including a trust created by court judgment or decree which is to be administered in the manner of an express trust. The Act is directed primarily at express trusts which arise in an estate planning or other donative context. Excluded from the Act’s coverage are constructive trusts, which are not express trusts but remedial devices imposed by law. Also excluded from the Act’s coverage are a variety of express trusts which arise primarily in a business, employment, investment or commercial context and which are regulated by other law.

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

Comment


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

SECTION 1-104. REPRESENTATION OF INCAPACITATED BENEFICIARIES. Whenever a consent or other action by a beneficiary is required or may be given under this [Act]:

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

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

(3) an agent with authority who was appointed by the beneficiary may represent and bind the principal.

Comment

This section clarifies that a fiduciary with authority to act on behalf of a beneficiary may represent and bind the beneficiary whenever a consent or other action is required or may be given be the beneficiary. The provision is consistent with but broader than Section 6-203, which authorizes a conservator, guardian or agent with authority to represent and bind a beneficiary with respect to certain judicial or nonjudicial settlements. This provision, for example, will apply to the beneficiaries' appointment of a new trustee (see Section 4-105), to the acceptance of a trustee's resignation (see Section 4-106), and to the receipt of a trustee's report or other information on a beneficiary's behalf (see Section 4-213). The Act leaves to agency law the issue of whether a power of attorney must specifically authorize an agent to act on a beneficiary's behalf with respect to particular matters. However, recognizing the authority of the agent to act pursuant to a general grant of authority would better facilitate the use of powers of attorney and reduce the need for unnecessary guardian or conservator appointments.

This section applies only to the authority of a conservator, guardian or agent to act on behalf of a beneficiary. For provisions relating to the power of a conservator, guardian, or agent to act on behalf of a settlor, see Sections 2-202 (modification and termination of trust of irrevocable trust by consent), 3-102 (modification or termination of revocable trust), and 4-106 (resignation of trustee).

SECTION 1-105. CHOICE OF LAW. The meaning and effect of the terms of the trust is determined by the local law of the state selected in the terms of the trust, unless the application of that law is contrary to a public policy of this State applicable to the disposition.
SECTION 1-106. CONSTRUCTION AGAINST IMPLIED REPEAL. This [Act] is a general act intended as a unified coverage of its subject matter and no part of it shall be deemed impliedly repealed by subsequent legislation if it can reasonably be avoided.

Source: UPC Sec. 1-105.

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

PART 1 CREATION AND VALIDITY OF TRUSTS

SECTION 2-101. METHODS OF CREATING TRUSTS.

(a) A trust may be created by:

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

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

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

(b) Property to be subject to a declaration of trust must be identified by but need not be specifically enumerated in the terms of the trust. A reference by the settlor in the terms of the trust to “all of my property” or words of similar import is
sufficient to subject all of the settlor's then property to the
declaration of trust.

(c) A transfer of property to a trustee need not be made by
separate instrument but may be accomplished by the terms of the
trust, which may constitute a deed of conveyance.

Comment

Source: CPC Section 15200.
Subsection (a) is derived from Section 17 of the Restatement
(Second) of Trusts (1959) and Section 10 of the Restatement
(Third) of Trusts (Tent. Draft No. 1, 1996). Under all three of
the methods specified in this section for creating a trust, the
trust is not created until it receives property. For what
constitutes an adequate property interest, see Restatement
(Third) of Trusts Sec. 41 (Prel. Draft No. 3, 1997). The
property interest necessary to fund and create a trust need not
be substantial. A revocable designation of the trustee as
beneficiary of a life insurance policy or employee benefit plan
is a property interest sufficient to create a trust. See Section
1-102(10)("property" defined). Furthermore, the property
interest need not be transferred contemporaneously with the
signing of the trust instrument. A trust created by means of an
instrument signed during lifetime is not invalid simply because
the trustee does not receive property until a later date,
including by will or contract at or after the settlor's death. A
pourover devise to such a trust is also valid. See Uniform
Probate Code Sec. 2-511 (pourover devise to trust valid
regardless of existence, size, or character of trust corpus).

While a trust created by will may come into existence
immediately at the testator's death and not necessarily only upon
the later transfer of title from the personal representative, the
nominated trustee does not have a duty to act until there is an
acceptance of office, express or implied. See Section 4-101
(acceptance or rejection of trust by trustee). To avoid an
implied acceptance, a nominated testamentary trustee who is
monitoring the actions of the personal representative but who has
not yet made a final decision on acceptance should inform the
beneficiaries that it has assumed only a limited role. The
failure to so inform the beneficiaries could result in liability
if the misleading conduct causes harm to the trust beneficiaries.
See Restatement (Third) of Trusts Sec. 36 comm. b (Prel. Draft
No. 3, 1997).

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

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

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

Subsection (b) addresses some of the practical funding concerns which have arisen with respect to self-declarations of trust. The very nature of the self-declaration of trust negates a requirement that title to trust assets be reregistered and retransferred into the name of the settlor as trustee. See, e.g., In re Estate of Heggstad, 20 Cal. Rptr. 2d 43 (App. 1993) (citing relevant sections from Restatement (Second) of Trusts). See also Restatement (Third) of Trusts Sec. 10 comm. e (Prel. Draft No. 3, 1997). This subsection validates the practice of merely attaching a schedule listing the assets that are to be subject to the trust without executing separate instruments of transfer. It also recognizes that the settlor may simply state that all of his or her then assets are to be subject to the trust. But such a statement does not extend to after-acquired property. To subject after-acquired property to the trust, the settlor must either specifically and separately so declare or reregister the after-acquired assets into the settlor’s name as trustee.
While subsection (b) confirms that separate documents of transfer are not required to subject specific assets to a self-declaration of trust, to avoid possible later problems with third party transferees and to better protect the interests of the beneficiaries, it is recommended that settlors not rely on the rule of this subsection but instead perfect title to the trust assets by going ahead and executing separate instruments of transfer.

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

SECTION 2-102. REQUIREMENTS FOR VALIDITY.

(a) A trust is created only if:

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

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

(3) unless the trust is a charitable trust or a trust for a valid noncharitable purpose or care of a pet animal as provided in Section 2-105, the trust has a definite beneficiary or a beneficiary who may be validly ascertained in the future.

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

Comment

Source: CPC Sections 15201, 15205, 15209.

Subsection (a) codifies the basic requirements for the creation of a trust. To create a valid trust, the settlor must indicate an intention to create a trust. Restatement (Second) of Trusts Sec. 23 (1959); Restatement (Third) of Trusts Sec. 13 (Tent. Draft No. 1, 1996). But only such manifestations of intent as are admissible as proof in a judicial proceeding may be considered. See Sections 1-102(13) ("terms of trust" defined).
To create a trust, a settlor must have the requisite mental capacity. To create a revocable or testamentary trust, the settlor must have the capacity to make a will. To create an irrevocable trust, the settlor must have capacity during lifetime to transfer the property free of trust. See Section 3-101 (capacity to create revocable trust), and see generally Restatement (Third) of Trusts Sec. 11 (Tent. Draft No. 1, 1996).

Subsection (a)(2) addresses what is known as the doctrine of merger. Under this doctrine, a trust is not created if the settlor is the sole trustee unless there are one or more beneficiaries other than the settlor. The doctrine of merger has been inappropriately applied by the courts in some jurisdictions to invalidate self-declarations of trust in which the settlor is the sole life beneficiary but other persons are designated as beneficiaries of the remainder. The doctrine of merger, however, is properly applicable only if all beneficial interests, both life interests and remainders, are vested in the same person. Under the Act, a beneficiary of a trust includes any person who has a present or future interest, vested or contingent. See Section 1-102(1) ("beneficiary" defined).

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

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

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

Comment

While settlors are strongly encouraged to always reduce their trusts to writing, the Act does not specifically invalidate oral trusts. Absent some specific statutory provision, such as a provision requiring that transfers of real property be in writing, no writing is required to evidence a trust. While a writing is not required, the creation of an oral self-declaration of trust will ordinarily necessitate more than just the making of the oral statement itself. States with statutes of frauds or other provisions requiring that the creation of certain trusts must be evidenced by a writing may wish to specifically cite such provisions in lieu of the phrase “other statute.”

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

SECTION 2-104. TRUST PURPOSES. A trust may be created if its purposes are lawful and in accord with public policy. A charitable trust must be created for a charitable purpose as specified in Section 5-101. Except as provided in Section 2-105 with respect to a trust for a valid noncharitable purpose or trust for the care of a pet animal, a noncharitable trust must have a purpose which is for the benefit of its beneficiaries.

Comment

Source: CPC Section 15203.

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

For the requirement that a trust must have a purpose which
is for the benefit of its beneficiaries, see Restatement (Third)
of Trusts Sec. 27 (Prel. Draft No. 3, 1997). Excepted from this
requirement, however, are trusts for the care of a pet animal,
which may be performed for the life of the animal, and trusts for
a valid noncharitable purpose, which may be performed for 21
years. See Section 2-105.

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

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

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

(b) A trust without a definite or definitely ascertainable
beneficiary which is created for another noncharitable purpose is
valid but may not be enforced for more than [21] years.

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

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

Comment

Source: UPC Section 2-907.
This section validates so-called honorary trusts. Unlike
honorary trusts created under the common law, which are arguably
no more than unenforceable powers of appointment, the trusts
created by this section are valid and enforceable and not
dependent on the trustee deciding on whether to honor the
settlor's wishes. For a discussion of the common law doctrine,
see Restatement (Third) of Trusts Sec. 48 (Prel. Draft No. 3,
1997).

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

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

Upon termination of an honorary trust created under either
subsections (a) or (b), a resulting trust is ordinarily created
in the settlor unless the terms of the trust provide for a
different disposition. See Restatement (Third) of Trusts Section

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

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

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

15
(a) [Honorary Trusts.] Subject to subsection (c), if (i) a trust is for a specific lawful noncharitable purpose or for lawful nonlawful noncharitable purposes to be selected by the trustee and (ii) there is no definite or definitely ascertainable beneficiary designated, the trust may be performed by the trustee for [21] years but no longer, whether or not the terms of the trust contemplate a longer duration.

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

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

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

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

(i) as directed by the trust instrument;

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

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

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

(4) Except as ordered by the court or required by the trust instrument, no filing, report, registration, periodic accounting, separate maintenance of funds, appointment, or fee is required by reason of the existence of the fiduciary relationship of the trustee.

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

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

Comment

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

PART 2
MODIFICATION AND TERMINATION OF TRUSTS

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

(1) the term of the trust expires;

(2) the trust purpose is fulfilled;

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

(4) the trust is revoked.

Comment

112.052.
This section lists the ways in which trusts typically
terminate. In addition to other powers granted under this Act or
by the terms of the trust, a trustee has the powers appropriate
to wind up the affairs of the trust. See Section 4-402(31).

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

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

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

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

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

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

(e) Without precluding the right of a person to object, for purposes of this section, the consent of a person who may bind a beneficiary or otherwise act on a beneficiary’s behalf as provided in [Article 6] is considered the consent of the beneficiary.

Comment

Source: CPC Section 15403, 15404, 15410. Subsection (a) of this section is based on Section 337, and subsection (b) is based on Section 338 of the Restatement
(Second) of Trusts (1959), and reflect well-established trust doctrine. While the beneficiaries cannot ordinarily terminate a trust unless continuation of the trust will no longer serve a material purpose, such a finding is not required if the settlor also consents. No material purpose finding is then required because all parties with an interest in the trust, both the settlor and beneficiaries, are agreed there is no further need for the trust.

A trust may be modified or terminated pursuant to this section without court approval and even over a trustee's objection. For the circumstances under which the settlor, trustee, or beneficiary may petition the court to approve or prevent a termination or modification under this section, see Section 2-203. For provisions governing modification or termination of trusts if the consent of all beneficiaries cannot be obtained, see Sections 2-204 (modification or termination due to unanticipated circumstances) and 2-205 (trust with uneconomically low value).

This section is limited to irrevocable trusts. If the trust is revocable by the settlor, the method of revocation specified in Section 3-102 applies.

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

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

Similarly, subsection (d) assumes that the termination or modification of the settlor’s trust is a sufficiently important transaction that a conservator should not be allowed to consent without first consulting with and obtaining the approval of the court supervising the conservatorship. Many conservatorship statutes, in fact, expressly require that the conservator obtain court approval to create, amend or revoke a trust. See, e.g., Uniform Probate Code Sec. 5-407.
Subsection (e) clarifies that the provisions of Article 6 on virtual representation and the appointment and approval of guardians ad litem and special representatives apply for purposes of determining whether all beneficiaries have signified consent. The authority to consent on behalf of another person, however, does not include the authority to consent over the other person’s objection. For a listing of who may consent on behalf of another person, see Sections 6-202, 6-203, and 6-204. Virtual representation will rarely be available in a trust termination case, although its use will be frequent in cases involving trust modification, such as a grant to the trustee of additional powers. A consent obtained by virtual representation is valid only if there is no conflict of interest between the representator and the persons represented.

In situations involving a conflict of interest, Sections 6-206 and 6-207 of the Act allow for the court to appoint either a special representative or guardian ad litem who may give the necessary consent to the proposed modification or termination on behalf of the minor, incapacitated, unascertained or unborn beneficiary.

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

(a) Upon petition by a settlor, trustee or beneficiary, and after finding that the standards of Section 2-202 have or have not been met, the court may affirm or prevent the proposed modification or termination of the trust.

(b) If a beneficiary does not consent to a requested modification or termination of a trust by the other beneficiaries or by the settlor and other beneficiaries, the Court, with the consent of the other beneficiaries, and of the settlor, if required, may approve a requested modification or partial termination if the rights of the beneficiaries who do not consent are not significantly impaired. Upon modification or partial termination of the trust, the trustee must distribute the trust property as ordered by the Court.
Comment

Source: CPC Section 15404, 15410

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

Subsection (b), which authorizes the court to approve a modification or partial termination over the objection or failure to consent of a beneficiary, is based in part on Section 338(b) of the Restatement (Second) of Trusts (1959). Unlike the Restatement, however, subsection (b) authorizes such a partial termination without or even over the objection of the settlor. But such a partial termination can only occur over the settlor’s objection if the court finds that the trust no longer serves a material purpose.

Subsection (b) will be used most often not in situations where a beneficiary objects but where the consent of a beneficiary cannot be obtained due to such factors as minority or incapacity and virtual representation is either unavailable or its application is uncertain. Subsection (b) allows the court to fashion an appropriate order protecting the interests of such beneficiaries while at the same time permitting the remainder of the trust property to be distributed without restriction.

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

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

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

Comment

Source: CPC Section 15409-15410.
This section permits modification or termination of a trust
whenever there are circumstances not anticipated by the settlor.
This may include circumstances in existence at the time of the
trust's creation which were known to but not considered by the
settlor. Unlike Restatement (Second) of Trusts Sections 167 and
336, upon which this section is partially based, this section
extends equitable deviation to the dispositive terms of a trust.
Modification of the dispositive terms for the support of a
beneficiary may be appropriate, for example, in a case where the
beneficiary has become unable to provide for support due to poor
health or serious injury.

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

See also Sections 2-104 (trust must have purpose for benefit
of beneficiaries), and 4-401(b) (power of court to relieve trustee
from restrictions or confer additional powers).

SECTION 2-205. NONCHARITABLE TRUST WITH UNECONOMICALLY LOW

Value.

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

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

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

Comment

Source: CPC Section 15408, 15410.

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

Subsection (b) establishes the general principle that trusts should not be continued on the same terms if the costs of administration are excessive. A court termination procedure may be utilized for a trust of any size but most cases will involve smaller trusts although ones greater than $50,000 in value. For the comparable provision on charitable trusts, see Section 5-103.

SECTION 2-206. REFORMATION; TAX OBJECTIVES.

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

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

Comment

This section is based in part on Restatement (Third) of
SECTION 2-207. COMBINATION AND DIVISION OF TRUSTS.

(a) Without approval of court and except as otherwise provided by the terms of the trust, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts, if the combination or division does not impair the rights of any of the beneficiaries or substantially affect the accomplishment of the trust purposes.

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

Comment

Source: CPC Section 15411, 15412.

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

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

Division of trusts is often beneficial and, in certain circumstances, almost routine. For example, a division of trusts is often necessitated by a desire to obtain maximum advantage of exemptions available under the federal generation-skipping tax. While the terms of the trusts which result from such a division are identical, the division will permit differing investment objectives to be pursued and also allow for discretionary distributions to be made from one trust and not the other.
While the terms of the trusts resulting from a division will usually be identical, this section authorizes a trustee to divide a trust even if the trusts that result are dissimilar. Conflicts among beneficiaries, including differing investment objectives, often invite such a division, although as is the case with a proposed combination of trusts, the farther away the terms of the divided trusts are from the original plan the less likely it is that the settlor’s purposes will be achieved and the less likely it is that the division should be approved.

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

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

For a provision authorizing a trustee, in distributing the assets of the divided trust, to make non-pro-rata distributions, see Section 4-402(25).

PART 3
SPENDTHRIFT PROVISIONS AND CLAIMS BY CREDITORS

SECTION 2-301. SPENDTHRIFT PROVISION RECOGNIZED.

(a) Except as otherwise provided in this [Part], if the terms of a trust restrain both voluntary and involuntary transfer of a beneficiary’s interest, the beneficiary may not transfer the interest and the interest may not be attached by the beneficiary’s creditors or assignees.

(b) A reference by the settlor in the terms of the trust that the interest of a beneficiary is to be held subject to a “spendthrift trust” or words of similar import is sufficient to restrain both the voluntary and involuntary transfer of the beneficiary’s entire interest.
Under this section, a settlor has the power to restrain transfer of the beneficiary's interest, regardless of the nature of the interest. A restraint may be placed on an interest in the income, the principal, or both. Unless one of the exceptions under Section 2-302 applies, a creditor of the beneficiary is prohibited from attaching a protected interest and may only attempt to collect directly from the beneficiary after payment is made. This section is similar to Restatement (Second) of Trusts Sections 152-153 (1959).

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

Subsection (b), which is derived from the Texas Trust Code, allows a settlor to provide maximum spendthrift protection simply by stating in the instrument that all interests are held subject to a “spendthrift trust” or words of similar effect. For other recognitions in this Act and elsewhere of the use of shorthand phrases to express concepts that might otherwise require detailed drafting, see Section 2-102 (reference by settlor to “all of my property” or words of similar import sufficient to subject all of settlor’s then property to declaration of trust); Uniform Probate Code Sec. 2-213 (waiver of “all rights” or equivalent language in pre- or post-marital agreement sufficient to waive rights to elective share, exempt property, and homestead and family allowances).

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

A voluntary assignment by a beneficiary as to periodic payments otherwise due the beneficiary may be honored by a trustee but is revocable by the beneficiary at any time.
to be made to the beneficiary by the express terms of the trust
or which the trustee has otherwise decided to make to the
beneficiary, and then only if:

   (1) the beneficiary’s interest is not subject to a
spendthrift provision as provided in Section 2-301;
   (2) the creditor or assignee is seeking to enforce a
court order to support the beneficiary’s spouse or children, or a
former spouse for alimony; or
   (3) the creditor is a state or local government seeking
to enforce a claim for unpaid taxes.

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

(c) This section does not apply to the claims of a creditor
of the settlor, to a revocable trust during the lifetime of the
settlor, or to creditor claims against the holder of a power of
withdrawal or power of appointment.

(d) This section does not limit the right of a beneficiary
to compel a trustee to make a distribution to which the
beneficiary is entitled.

Comment

This section addresses the rights of a beneficiary’s
creditors or assignees to collect a debt or assignment from the
beneficiary’s trust interest prior to its distribution to the
beneficiary. The section applies whether or not the terms of the
trust contain a spendthrift provision, but claims by the
creditors or assignees of a settlor and claims against a
revocable trust are dealt with elsewhere. See Sections 2-303
(self-settled trusts), 3-104 (claims against revocable trust).
Per subsection (c), also excepted from the coverage of the
section are creditor claims against property subject to a power
of withdrawal or power of appointment. For creditor rights
against such interests, see Restatement (Property) Second-

For trusts without a spendthrift provision, the controlling
provision is subsection (a), subsection (b) being superfluous.
Absent a spendthrift provision, any creditor or assignee of a
beneficiary may intercept a distribution required to be made to
the beneficiary by the express terms of the trust. The creditor
may also intercept any other distribution which the trustee has
decided to make. Typical examples of distributions required to
be made by the express terms of the trust include mandatory
income payments and distributions occurring upon the termination
or partial termination of the trust. Distributions which the
trustee has otherwise decided to make refer to proposed
distributions not expressly required by the trust terms,
including distributions made pursuant to the trustee’s exercise
of discretion and distributions made pursuant to some standard,
such as amounts needed for the beneficiary’s support. Consistent
with Restatement (Second) of Trusts Section 155, the Act does not
permit a creditor to force a trustee to exercise discretion, but
if the trustee decides to do so, the creditor, in the absence of
a spendthrift provision, may intercept the payment prior to its
receipt by the beneficiary. The power to force a distribution
due to an abuse of discretion or failure to comply with a
standard belongs solely to the beneficiary. See subsection (d).
Under Section 4-214, a trustee must always exercise a
discretionary power within the bounds of reasonable judgment and
in accordance with fiduciary principles.

For trusts with spendthrift provisions, the effect of the
statute, in accord with traditional doctrine, is to treat certain
preferred claimants as if the trust did not contain a spendthrift
provision but only with respect to their particular claims.
Claimants not eligible for a preference are subject to the full
force of the spendthrift bar. Under the Act, preferred positions
are granted to claims for child and spousal support and claims
for payment of state and local taxes. Unlike the Restatement
(Second) of Trusts Section 157, the Act does not create a
preference for nontax claims by state and local governments, a
Restatement provision based on scant legal authority. Nor does
the Act create a preference for creditors who have furnished
necessary services or supplies to the beneficiary or have
furnished services or materials which have preserved or
supposedly enhanced the beneficiary’s interest. For a discussion
of these other exceptions to the spendthrift bar, recognized in
at least some states, see Scott, The Law of Trusts Sec. 157
(Fratcher 4th Ed. 1987).
Subsection (a)(2) provides that a spendthrift provision is invalid as to claims to enforce a court order directing the payment of support of a beneficiary's spouse or child, or of a former spouse for alimony. The Act does not attempt to prescribe the particular procedural methods for enforcing this right to collect from the trust, leaving that matter to local collection law. For an example of such a procedure, see Cal. Prob. Code Sec. 15305.

Subsection (a)(3) extends a similar preference to state and local tax claims. Unlike claims for child and spousal support, the claim need not first be reduced to judgment before collecting from the trust. In the case of tax payments, the beneficiary’s interest in the trust is subject to a pre-judgment attachment the same as the beneficiary’s other assets. While not specifically mentioned in the Act, due to preemption federal tax payments are also exempt from the spendthrift bar due to federal preemption. Instead of trying to describe the exact parameters of the exception for federal tax payments, the drafters of the Act have left this matter entirely to federal law. For a discussion of the federal tax exception, see Scott, The Law of Trusts Sec. 157.4 (Fratcher 4th ed. 1987).

For creditors not granted a preference, the presence of a spendthrift provision in the trust is close to a complete bar. Under subsection (b), these creditors may attach only amounts which the trustee was required to but has failed to distribute within a reasonable time. Subsection (b) recognizes that following a reasonable period necessary to accomplish a distribution, required payments from the trust are in effect being held by the trustee as agent for the beneficiary. Consequently, with respect to creditor claims, they should be treated the same as any other of the beneficiary’s personal assets.

**SECTION 2-303. CLAIMS BY SETTLOR’S CREDITORS.**

(a) Whether or not the terms of the trust contain a spendthrift provision, a creditor or assignee of the settlor may reach the maximum amount that the trustee could pay to or for the settlor's benefit.

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

Comment

Source: CPC Section 15304(b).

This section is based on Section 156 of the Restatement (Second) of Trusts (1959). The theory of this section, the Restatement, and also of traditional American trust doctrine is that a settlor should not be permitted to receive benefits from a trust which the settlor has created while at the same time employing the trust as a shield against the settlor’s creditors. For the rights of creditors if the settlor has retained a power of revocation, see Section 3-104. For the definition of "settlor", see Section 1-102(11).

ARTICLE 3
PROVISIONS RELATING TO REVOCABLE TRUSTS

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

Comment

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

This section recognizes that the revocable trust is used primarily as a will substitute, with its key provision being the determination of the persons to receive the trust property upon the settlor's death. To solidify the use of the revocable trust as a device for transferring property at death, the settlor usually also executes a pourover will under which following the settlor’s death the property not transferred to the trust during life will be consolidated with the trust property which the settlor managed to convey. Given this primary use of the revocable trust as a device for disposing of property at death, the capacity standard for wills, and not for lifetime gifts, should apply. Should lifetime management issues implicating the standard of capacity arise, they may be dealt with by reformation or other appropriate remedies that will not jeopardize the overall plan of disposition by making the standard for the trust different or higher than that for making a will. Restatement (Third) of Trusts Sec. 11 comm. b (Tent. Draft No. 1, 1996).
The application of the capacity standard for wills does not mean that the revocable trust must be executed with the formalities of a will. There are no execution requirements for trusts, and a trust, at least one containing personal property, may be created by an oral statement. See Section 2-103. Nor does the application of the capacity standard for wills, and the fact that most states prohibit a guardian or conservator from making a will for the ward or protected person, mean that a guardian or conservator cannot create a trust, if allowed under local guardianship or conservatorship law.

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

SECTION 3-102. REVOCATION OR MODIFICATION.

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

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

[ALTERNATIVE PROVISION FOR COMMUNITY PROPERTY STATES]

[(b) Except as otherwise provided by the terms of the trust, if a trust is created or funded by more than one settlor:}
(1) to the extent the trust consists of community property, the trust may be revoked by either spouse acting alone;

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

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

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

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

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

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

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

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

Comment

Source: CPC 15400-15402, 15410(a).
Subsection (a), which provides that a settlor may revoke or modify a trust unless the terms of the trust expressly state that the trust is irrevocable, is contrary to the common law. See Restatement (Second) of Trusts Sec. 330 (1959). This subsection will not govern certain trusts created in other states. Choice of law principles may dictate that the law of a state following the common law rule is to govern, in which event the trust would be irrevocable unless expressly made revocable. In addition, this subsection does not prevent a trust from being reformed to make it irrevocable if the settlor was proceeding under a mistake of law at the time of its creation. See Section 2-206 (reformation of trust). But far easier than relying on choice of law rules or reformation is for the drafter to simply express in the terms of the trust whether the trust is revocable or irrevocable.

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

Subsection (b) provides a default rule for revocation or modification of a trust with multiple settlors. An individual settlor of such a trust may revoke the portion of the trust attributable to that settlor's contribution but may modify the trust only upon the joint action of all of the settlors. The reason for the distinction is that a modification will likely affect the other settlor's portion of the trust. But in order not to inhibit free transferability of property and to avoid the taxable gift that might result were joint consent required, the Act grants settlors complete access to and a right to withdraw their own contribution without the other settlor's consent. Because of the inherent complexity of a trust with multiple settlors, better practice is not to automatically rely on the Act, which is a default rule, but to draft a specific provision addressing the settlors' situation. For the definition of "settlor", see Section 1-102(11)

Under subsection (c), the settlor may revoke a revocable trust by a writing delivered to the trustee or by a will even if the terms of the trust specify a method of revocation. Only if the method specified by the terms of the trust is exclusive are use of the other methods prohibited, and even then a failure to comply with a technical requirement, such as required notarization, may be excused, as long as compliance with the method specified in the terms of the trust is otherwise substantial.

While revocation is ordinarily accomplished by signing a written instrument, subsection (c) does not necessarily preclude revocation by other methods, such as by oral statement or by
physical act coupled with a withdrawal of the property. But
these less formal methods, because they provide less reliable
indicia of intent, are not to be encouraged. Nor does subsection
(c) require the trustee to concur in a modification of the trust.
Should a modification of the trust substantially change the
trustee’s duties, the trustee is free to resign. See Section 4-
106(a)(2).

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

Under subsection (e), an agent under a power of attorney may
revoke a revocable trust but only to the extent the terms of the
trust or power of attorney expressly so permits. The revocable
trust is granted this position of primacy because it, and not the
power of attorney, is usually intended by the settlor to function
as the settlor’s principal property management device. The power
of attorney is usually intended to act as a backstop or to
address specific topics, such as the power to sign tax returns or
apply for certain government benefits, which are beyond the
authority which can be granted to the trustee.

Many states allow a conservator to exercise the settlor’s
power of revocation with the prior court approval of the court
supervising the conservatorship. See, e.g., Unif. Prob. Code
Sec. 5-407. The effect of subsection (f) is to allow the
settlor, by the terms of the trust, to direct that this other law
not apply. But the fact that the conservator is prohibited from
revoking the trust does not mean that the conservator is
prohibited from taking appropriate action if the settlor, now
under conservatorship, is also a beneficiary of the trust.
Possible remedies include removal of the trustee (see Section 4-
107), reformation of the trust (see Section 2-206), and an action
to enforce a trust (see Section 6-202). Per Section 1-104, a
conservator may act on behalf of the beneficiary whose estate the
conservator controls whenever a consent or other action by the
beneficiary is required or may be given under the Act.

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

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

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

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

Comment

Source: CPC Section 15800, 15803, 16001.

This section has the effect of postponing the enjoyment of
rights of beneficiaries of revocable trusts until the death or
incapacity of the settlor or other person holding the power to
revoke the trust. This section thus recognizes that the settlor
of a revocable trust is in control of the trust and should have
the rights to enforce the trust. A corollary principle, also
recognized in this section, is that the settlor of a revocable
trust may direct the actions of the trustee.

Under this section, the duty to inform and report to
beneficiaries is owed to the settlor of a revocable trust as long
as the settlor has capacity. See Section 4-213 (trustee’s duty to
inform and report to beneficiaries). The introductory clause
recognizes that the terms of the trust may grant rights to the
beneficiaries which, under this section, would otherwise be held
by the holder of the power to revoke.

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

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

See also Section 6-202, which authorizes the settlor of a
revocable trust and the holder of a presently exercisable power
of withdrawal to represent and bind the beneficiaries to judicial
orders and nonjudicial settlements.

SECTION 3-104. CREDITOR CLAIMS AGAINST REVOCABLE TRUST.

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

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

Comment

Source: CPC Sections 18200, 19001.

Subsection (a) is contrary to the common law rule as expressed in the Restatement. See Restatement (Second) of Trusts Section 330, comm. o (1959). But because a settlor usually also retains a beneficial interest which a creditor may reach, the common law rule is normally of little significance. See Section 2-303 (rights of creditor in self-settled trust); and Restatement (Second) of Trusts Section 156(2) (1959).

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

This Act does not attempt to address the many procedural issues raised by the need to first exhaust the decedent's probate estate to reach the assets of the revocable trust. Nor does this Act address the priority of the creditor claims or the possible liability of the decedent's other nonprobate assets for the decedent's debts and other charges. These many questions will hopefully be addressed by the drafting committee appointed in 1997 by the National Conference of Commissioners on Uniform State Laws to draft a uniform law on creditor claims against nonprobate assets.

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

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

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

Comment

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

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

ARTICLE 4
TRUST ADMINISTRATION

PART 1
OFFICE OF TRUSTEE

SECTION 4-101. ACCEPTANCE OR REJECTION OF TRUST BY TRUSTEE.
(a) A person named as trustee accepts the office of trustee by:

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

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

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

(c) If there is an immediate risk of damage to the trust property, the person named as trustee may act to preserve the trust property without accepting the office of trustee, if within a reasonable time after acting the person delivers a written rejection of the trust to the settlor or, if the settlor is dead or lacks capacity, to an adult beneficiary as defined in Section 4-105(c).

Comment


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

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

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

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

SECTION 4-102. TRUSTEE'S BOND.

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

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

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

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

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

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

Comment
Source: CPC Section 15602.
This provision is consistent with the Restatement and with the bonding provisions of the Uniform Probate Code. See Restatement (Third) of Trusts Sec. 35 comm. a (Prel. Draft No. 3, 1997); Uniform Probate Code Sections 3-604 (personal representatives), 5-410 (conservators), and 7-304 (trustees). Because a bond is required only if the terms of the trust require bond or a bond is found by the court to be necessary to protect the interests of beneficiaries, bond will rarely be required under the Act. This section does not specifically waive bond for financial institutions with trust powers, preferring instead to leave that topic to separate legislation.

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

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

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

Comment

Source: CPC 15621, 15622.

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

Under paragraph (2), a vacancy in the office of a cotrustee
is disregarded in the operation of the trust if there is at least
one trustee remaining. This is consistent with Section 4-105,
which provides, unless the terms of the trust state otherwise,
that a vacancy in the office of cotrustee need be filled only if
there is no cotrustee remaining in office.

Paragraph (2) also addresses a problem that may arise when a
cotrustee is temporarily unable to perform duties but the office
of trustee is not vacant.

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

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

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

Comment

Source: CPC Section 15643.
This section lists the typical ways in which the office of trustee becomes vacant. It does not preclude other methods, such as the suspension of the powers of a trust company under federal or state banking regulations. For the rules on filling a vacancy, see Section 4-105. See also Section 4-101 (rejection of trust), 4-106 (resignation and liability of resigning trustee), 4-107 (removal of trustee), 4-602 (protection of third person dealing with former trustee).

SECTION 4-105. FILLING VACANCY.

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

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

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

(i) by a person designated by the unanimous
agreement of the adult beneficiaries as defined in subsection (c); or

(ii) by a person appointed by the Court on petition of a beneficiary or of a person named as trustee by the terms of the trust;

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

Comment

Source: CPC Section 15660.

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

Good drafting practice suggests that the terms of the trust deal expressly with the problem of vacancies, naming successors and addressing other matters such as the circumstances under which a vacancy in the office of cotrustee need be filled. For this reason, subsection (b)(1) provides that the first choice for filling the vacancy is the person named in or nominated pursuant to the method specified by the terms of the trust. Furthermore, subsection (a) clarifies that a vacancy in the 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 4-103. For a listing of the circumstances when a vacancy in the office of trustee may occur, see Section 4-104.

Absent an effective provision in the terms of the trust, subsection (b)(2)(i) permits a vacancy in the office of trustee to be filled, without the need for court approval, by a person
selected by unanimous agreement of the adult beneficiaries as defined in subsection (c). The adult beneficiaries who must agree to the new trustee are the same as those who must consent to a resignation under Section 4-106(a)(3). If a trustee resigns pursuant to Section 4-106(a)(3), the trust may be transferred to a successor appointed pursuant to subsection (b)(2)(i), all without court involvement.

Because of the difficulty of identifying beneficiaries with remote contingent interests and a probable lack of interest in the day-to-day affairs of the trust, subsection (b)(2)(i) limits the class of beneficiaries whose consent is required. The beneficiaries who must consent to the selection of successor trustee are those beneficiaries currently eligible to receive a distribution from the trust as well as what might be termed the first line remaindermen, that is, the beneficiaries who would receive the principal were the event triggering the trust’s termination to occur on the date the agreement was made. Such a terminating event will typically be the death or deaths of the beneficiaries currently eligible to receive the income. However, because this provision requires the unanimous consent of the designated beneficiaries, this nonjudicial method for filling the vacancy would be unworkable were a beneficiary required to give an incapacitated person. For this reason, the consent of an incapacitated beneficiary not represented by an agent, conservator or agent is not required. Should the incapacitated beneficiary have a conservator, guardian or agent, the conservator, guardian or agent may approve the selection of the successor trustee on the beneficiary’s behalf. See Section 1-104.

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

Because the settlor of a revocable trust with capacity has all the powers of the beneficiaries, in the case of a revocable trust, the appointment of a successor will normally be made directly by the settlor. See Section 3-103. As to the duties of successor trustees, see Section 4-212.
SECTION 4-106. RESIGNATION OF TRUSTEE.

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

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

(2) in the case of a revocable trust;

   (i) with the consent of the settlor if the settlor has capacity;

   (ii) with the consent of the settlor’s conservator, guardian or agent if the settlor lacks capacity but is represented by a conservator, guardian or agent;

   (iii) with the consent of the adult beneficiaries as defined in Section 4-105(c) if the settlor lacks capacity and is not represented by a conservator, guardian, or agent; or

   (iv) upon written notice to the settlor of the revocable trust if the settlor has substantially changed the trustee’s duties and the trustee does not concur;

(3) in the case of an irrevocable trust, with the consent of the adult beneficiaries as specified in Section 4-105(c);

(4) in the case of any trust, if the appointment of a successor is not required under Section 4-105, with the consent of the cotrustee or cotrustees remaining in office;

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

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

Comment

Source: CPC Section 15640, 15641.

This section provides several alternative choices for
accomplishing the resignation of a trustee. As provided in
subsection (a)(1), a trustee may always resign as provided by the
terms of the trust. Should the terms of the trust not provide a
method for resignation or should the method for whatever reason
not be followed, other methods are available, including
resignation by consent. Under subsection (a)(5), court approval
of a resignation is required only if none of the other
alternatives specified are available.

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

While many trust instruments permit a trustee to resign
merely by the giving of notice, such a method of resignation is
generally not allowed under this section but there is one
significant exception. Under subsection (a)(2)(iv), the
resignation by a trustee of a revocable trust may be accomplished
solely by the giving of notice to the settlor if the settlor,
without the trustee’s consent, has substantially changed the
trustee’s duties. Unlike the statutes in some states, the Act
does not require that the trustee consent to the settlor’s
modification. See Section 3-102. Should the modification be
unacceptable to the trustee and the trustee and settlor are
unable to work out their disagreement, the trustee is free to
resign.

For a revocable trust, consent to a resignation under the
Act will normally be given by the settlor, and for an irrevocable
trust, by the adult beneficiaries. But there is one situation
where the consent may instead be given by the cotrustees. Should
a cotrustee wish to resign and the vacancy not need to be filled,
subsection (a)(4) provides that the consent to the resignation
must be given by the cotrustees remaining in office. The
 cotrustees remaining in office are the persons most likely to be
impacted by the resignation.

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

SECTION 4-107. REMOVAL OF TRUSTEE.

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

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

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

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

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

   (4) if the trustee's investment performance is
   persistently or substantially substandard;

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

   (6) for other good cause shown.

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

Comment

Source: CPC Section 15642.
Subsection (a) of this section is the same in substance as
Section 38 of the Restatement (Third) of Trusts (Prel. Draft No.
3, 1997), except that it gives the settlor of an irrevocable
trust the right to petition for removal of a trustee. As to
rights of a settlor of a revocable trust, see Sections 3-102
(revocation or modification), 3-103 (other rights of settlor).
The right to petition for removal of a trustee does not give the
settlor of an irrevocable trust any other rights, such as the
right to an annual report or to receive other information
concerning administration of the trust.

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

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

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

Unless a cotrustee remains in office, a former trustee, or if the
trustee’s appointment terminated because of death or disability,
the former trustee’s personal representative or guardian or
conservator, is responsible for and has the powers necessary or
essential to protect the trust property and administer the trust
until the property is delivered to a successor trustee or a
person appointed by the Court to receive the property.

Comment

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

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

Section 4-213 requires a trustee’s report by the trustee whenever there is a change of trustees. Section 4-602 protects third persons who deal in good faith with a former trustee without knowledge that the person is no longer a trustee. See also Sections 4-104 (vacancy in office of trustee), and 4-502(4) (appointment of receiver or temporary trustee upon breach of trust).

SECTION 4-109. COMPENSATION OF TRUSTEE.

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

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

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

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

(3) in extraordinary circumstances calling for equitable relief.
Comment

Source: CPC Section 15680-15681.

Subsection (a) establishes a standard of reasonable compensation. For a list of factors relevant in determining reasonable compensation, see Restatement (Third) of Trusts Sec. 39 comm. c (Prel. Draft No. 3, 1997). In setting compensation, the services actually performed and responsibilities assumed by the trustee should be closely examined. For example, an adjustment in compensation may be appropriate if the trustee has delegated significant duties. On the other hand, a trustee with special skills, such as those of a real estate agent, may be entitled to extra compensation for performing services that would ordinarily be delegated. See Restatement (Third) of Trusts Sec. 39 comm. f (Prel. Draft No. 3, 1997).

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

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

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

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

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

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

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

Comment

Source: CPC Section 15684.

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

Paragraph (1) clarifies that a trustee is entitled to reimbursement from the trust for incurring expenses within the trustee's authority. The trustee may also withhold appropriate reimbursement for expenses before making distributions to the beneficiaries. Restatement (Third) of Trusts Sec. 39 comm. b (Prel. Draft No. 3, 1997). But a trustee is ordinarily not entitled to reimbursement for incurring unauthorized expenses. Such expenses are normally the personal responsibility of the trustee.

Only if the unauthorized expenditures benefitted the trust, as provided in paragraph (2), is the trustee entitled to reimbursement. The purpose of paragraph (2), which is derived from Restatement (Second) of Trusts Section 245, is not to ratify the unauthorized conduct of the trustee, but to prevent the unjust enrichment of the trust. Given this purpose, a court, on grounds of equity, may delay or even deny reimbursement for expenses which benefitted the trust. For a list of factors which the court may wish to take into consider in making this
Reimbursement under this section may include attorney's fees and expenses incurred by the trustee in defending an action. However, a trustee is not ordinarily entitled to attorney's fees and expenses if it is determined that the trustee breached the trust. See, e.g., Estate of Gilmaker, 38 Cal. Rptr. 270 (Ct. App. 1964); Estate of Vokal, 263 P.2d 64 (Cal. App. 1953).

PART 2
FIDUCIARY DUTIES OF TRUSTEE

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

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

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

Comment

Source: CPC Section 16000.

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

A settlor is free to vary the duties prescribed by this Part but only within limits. Pursuant to subsection (b), a trustee must always act in good faith and in accordance with the purposes of the trust and the interests of the beneficiaries. This
obligation to act in good faith and in light of fiduciary
principles is a fundamental concept the application of which is
not limited to this section. See Sections 4-214 (duties with
regard to discretionary powers), 4-505 (exculpation of trustee).
See also Sections 4-202 (duty of loyalty), and 4-203 (duty to act
with prudence). In addition and perhaps stating the obvious, the
trustee is not required to perform a duty prescribed by the terms
of the trust if performance would be impossible. Furthermore,
because the Act prohibits the creation of trusts for certain
purposes, terms premised on those invalid purposes are also
invalid. Consequently, a trustee need not comply with a term of
the trust if it requires the performance of an illegal act or an
act violative of public policy.

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

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

For a provision requiring the trustee to follow the terms of
the trust with respect to the making of investments, see Section
4-301(b).

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

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

(b) Any transaction involving the trust property which is
affected by a substantial conflict between the trustee's
fiduciary and personal interests is voidable by a beneficiary
affected by the transaction unless (i) the transaction was
authorized by the terms of the trust; (ii) the beneficiary
consented to or affirmed the transaction or released the trustee
from liability as provided in Section 5-406; or (iii) the
transaction is approved by the Court following notice to the
beneficiaries. A transaction is presumed to be affected by a
substantial conflict between personal and fiduciary interests if
it involves a sale, encumbrance, or other transaction concerning
the trust property entered into by the trustee, the spouse,
descendants, siblings, parents, agent, or attorney of a trustee,
or by a corporation or other enterprise in which the trustee has
a substantial beneficial interest.

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

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

Comment

Source: CPC Section 16002-16004.
Subsection (a) of this section, which recites the trustee’s
overriding obligations of loyalty and impartiality, is based on
Sections 170(1) and 232 of the Restatement (Second) of Trusts (1959).

Transactions involving trust property entered into by the trustee or by persons with close business or personal ties to the trustee have the potential to be tainted by conflict of interest. Because of this serious risk and the unfair burden that would be placed on the beneficiary were the beneficiary required to prove that the trustee has taken an unfair advantage, a “no further inquiry” rule is applied. See Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1916) (Cardozo, J.). A transaction involving the trust property entered into by the trustee or with persons having close ties to the trustee is voidable by the beneficiary without further proof. But while the principle is well-established, the exact parameters of the principle are less certain. Subsection (b), which is based on comparable provisions of the Uniform Probate Code for personal representatives and conservators, articulates the doctrine with more precision. Compare UPC Sections 3-713 (personal representatives, 5-421 (conservators). Under this subsection, a transaction involving the trust property which was entered into by the trustee or specified relatives or business associates of the trustee is presumed to be premised on an impermissible advantage based on conflict of interest and is consequently voidable by the beneficiaries. Transactions involving trust property with parties not on the list are not necessarily valid, however. While a presumption is not available, a transaction may still be voided if the beneficiary proves that a substantial conflict between personal and fiduciary interests exists and that the transaction was affected by the conflict.

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

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

Subsection (d) excepts from the general duty of loyalty
sales or other transactions between two or more trusts that have
the same trustee, or transactions with a decedent’s or
conservatorship estate of which the trustee is personal
representative or conservator. See Restatement (Second) of
Trusts Sec. 170, comm. r (1959). The trustee need not give
advance notice of the transaction to the beneficiaries unless
required by some other provision. See, e.g., Section 4-213(d)
(duty to inform beneficiaries in advance of certain proposed
sales).

The duty of loyalty is applied to investment decisions in
Section 4-305.

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

Comment

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

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

Comment

Source: Unif. Prudent Investor Act Sec. 7.

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

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

SECTION 4-205. TRUSTEE'S SKILLS.

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

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

Comment

Source: CPC Section 16014.

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

SECTION 4-206. DELEGATION BY TRUSTEE.

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

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

1. selecting an agent;
2. establishing the scope and terms of a delegation, consistent with the purposes and terms of the trust;
3. periodically reviewing an agent's overall performance and compliance with the terms of the delegation; and
4. redressing an action or decision of an agent which would constitute a breach of trust if performed by the trustee.

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

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

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

Comment

This section, following the lead of the Uniform Prudent Investor Act, codified at Article 4, Part 3 of this Act, eliminates the traditional emphasis against delegation by a trustee and the often futile attempt to distinguish between specified ministerial functions, which were delegable, versus discretionary functions, which the trustee was required personally to perform. See Unif. Prudent Investor Act Sec. 9 comm.; and John H. Langbein, Reversing the Nondelegation Rule of Trust-Investment Law, 59 Mo. L. Rev. 105 (1994).
Under this section, the emphasis is instead placed on encouraging and protecting the trustee in making delegations appropriate to the facts and circumstances of the particular trust. Under Subsection (a), the only functions which a trustee is absolutely forbidden to delegate is the entire administration of the trust and the obligation to make or participate, with a cotrustee, in the making of decisions with respect to discretionary distributions. Allowing for delegation of the entire administration would make the appointment of the trustee a useless gesture. Delegation of authority to make discretionary distributions is forbidden because this is the one function which more than any other is intrinsic to the office of trustee. However, while the trustee must make the final decision, the trustee may of course seek appropriate advice from others.

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

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

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

Under subsection (b)(3), the duty to review the agent's overall performance includes the periodic evaluation of the continued need for and appropriateness of the delegation of authority. In particular circumstances, the trustee may need to terminate the delegation to comply with the duty under subsection (b)(1) (duty to use reasonable care, skill, and caution in selecting agent).
For provisions permitting beneficiaries to relieve the
trustee from liability, see Section 4-506. See also Sections 4-
103 (actions by cotrustees), 4-201 (duties subject to control by
terms of the trust), 4-203 (trustee's standard of prudence in
performing duties), 4-402(13) (trustee may give proxies to vote
shares), 4-402(16) (authority to delegate to protective committee
in a reorganization), 4-402(26) (power to hire agents of trust).

Delegation to a cotrustee is different than a cotrustee’s
assumption of duties due to a trustee’s inability to perform the
office. Under 4-103(2), a cotrustee, without a delegation, may
assume the functions of another trustee who is unavailable to
perform duties because of absence, illness, or other temporary
incapacity.

SECTION 4-207. DIRECTORY POWERS.

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

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

Comment

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

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

Directory powers work most effectively when the trustee is not deterred from honoring the exercise of the power due to concerns about possible liability. On the other hand the trustee does bear overall responsibility for seeing that the terms of the trust are honored. For this reason, subsection (a) provides that the trustee need not honor an attempted exercise of a directory power if the attempted exercise manifestly violates the terms of the trust or the trustee is aware that the attempted exercise violates a fiduciary duty which the person owes the beneficiaries of the trust.

SECTION 4-208. COTRUSTEES.

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

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

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

(b) A trustee who complies with subsection (a) is not liable to the beneficiaries, to the trust or to third parties for the decisions or actions of a cotrustee.
Source: CPC Section 16013.

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

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

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

Comment

Source: CPC Section 16006.

This section codifies the substance of Sections 175 and 176 of the Restatement (Second) of Trusts (1959). The duty to take control of and safeguard trust property is an aspect of the trustee’s duty to act with prudence. See Section 4-203. See also Sections 4-402(1) (power to collect, control and hold trust property), 4-402(6) (power to abandon trust property), 4-402(19) (power to insure trust property). This section, like the other sections in this Part, is subject to limitation in the terms of the trust. For example, the settlor may provide that the spouse or other beneficiary may occupy the settlor’s former residence rent free, in which event the trustee will be specifically precluded by the terms of the trust from taking complete control.

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

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

(2) cause the trust property to be designated in such a manner that the interest of the trust clearly appears.
Source: CPC Section 16009.

The duty to earmark trust assets and the duty of a trustee not to mingle the assets of the trust with the trustee’s own are closely related. This section, which is derived from Section 179 of the Restatement (Second) of Trusts 179 (1959), addresses both duties. Paragraph (2) addresses the duty to earmark the trust assets, requiring that the trust property be designated in such a manner that the interest of the trust clearly appears. Unlike the Restatement, however, this section does not require that assets normally issued in registrable form must be registered in the name of the trustee. See Restatement (Second) of Trusts Sec. 179 comm. d. As long as the interest of the trustee clearly appears in the trustee’s established record keeping system, paragraph (2) permits the joint investment of trust funds with the funds of others, but not the trustee’s own. Recognizing the inherent risks of commingling, paragraph (1) strictly prohibits the trustee from commingling the assets of the trust with the trustee’s own.

See also Section 4-402(17), which in conformity with this section, confirms that a trustee may hold property in nominee form.

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

Source: CPC Section 16010-16011.

This section codifies the substance of Sections 177 and 178 of the Restatement (Second) of Trusts (1959). Under this section, it may not be reasonable to enforce a claim depending upon the likelihood of recovery and the cost of suit and enforcement. It might also be reasonable to settle an action or suffer a default rather than to defend an action. See also Section 4-402(21) (power to pay, contest, settle or release claims).

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

Comment

Source: CPC Section 16403.

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

This section is a specific application of Section 4-211 on the duty to enforce claims, which could include a claim against a predecessor trustee for breach of trust. In certain circumstances it may not be reasonable to enforce a claim against a predecessor trustee or other fiduciary, depending upon the likelihood of recovery and the cost of suit and enforcement.

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

For a provision permitting the beneficiaries to relieve a trustee of liability for acts of a predecessor trustee or other fiduciary, see Section 4-506.

SECTION 4-213. DUTY TO INFORM AND REPORT.

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

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

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

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

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

(f) Copies of trustee reports and other information required under this section shall be sent to:

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

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

(g) A trustee’s report and other information required under
this section may be waived if the persons entitled to the report or other information consent in writing.

(h) Except as to a trustee’s report or other information required to be furnished to a beneficiary who is also a settlor, the requirements of this section may not be waived by the terms of the trust.

Comment

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

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

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

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

To effectively protect their interests, it is essential that
the beneficiaries at least know the identity of the trustee.
Subsection (c) requires that a trustee inform the beneficiaries
of the trustee’s acceptance of office within thirty days.
Because prior to the settlor’s death the beneficiaries of a
revocable trust do not even have a right to be informed of the
trust’s existence, subsection (c) also requires that the trustee,
within 30 days following the settlor’s death, must inform the
beneficiaries of the trust’s existence and of their respective
interests.

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

While the principle that the trustee must keep the
beneficiaries reasonably informed is well established, less well
established is who among the many different types of
beneficiaries must be given the required notice. Subsection (f)
requires that the information must be given to the beneficiaries
who have a right to appoint a successor in the event of a vacancy (see Section 4-105(c)), as well as other beneficiaries who have requested a copy of the report or other information. The result of this limitation is that the information need not be furnished to beneficiaries with remote remainder interests unless they have filed a specific request with the trustee.

Subsection (g), which allows trustee reports and other required information to be waived upon written consent, is derived from South Dakota law. A prudent trustee will not rely on a waiver, however. A waiver of a trustee’s report or other information is not a waiver of the trustee’s accountability and potential liability for items that the report or other information would have disclosed.

Subsection (h) authorizes the creation of the so called “blind” trust. While the terms of the trust may not prohibit the trustee from furnishing the beneficiaries with the information required under this section, such a prohibition is valid with respect to a beneficiary who is also a settlor.

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

Comment

Despite the breadth of discretion purportedly granted by the wording of a trust, a grant of discretion, whether with respect to management of distribution, is never absolute. A grant of discretion establishes a range within which the trustee may act. The greater the grant of discretion, the broader the range. A trustee’s action must always be in good faith, not induced by an improper motive, and to some extent reasonable, although the greater the discretion given the more the
flexibility that will be given to the concept of reasonableness. See Edward C. Halbach, Jr., Problems of Discretion in Discretionary Trusts, 61 Colum. L. Rev. 1425 (1961). See also Restatement (Second) of Trusts Sec. 187 (1959).

PART 3
UNIFORM PRUDENT INVESTOR ACT

PREFATORY NOTE

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

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

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

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

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

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

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

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


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


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

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

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

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

SECTION 4-301. PRUDENT INVESTOR RULE.

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

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

Comment

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

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

Prior legislation. The Model Prudent Man Rule Statute (1942), sponsored by the American Bankers Association, undertook to codify the language of the Amory case. See Mayo A. Shattuck, The Development of the Prudent Man Rule for Fiduciary Investment in the United States in the Twentieth Century, 12 Ohio State L.J. 491, at 501 (1951); for the text of the model act, which inspired many state statutes, see id. at 508-09. Another prominent codification of the Amory standard is Uniform Probate Code § 7-302 (1969), which provides that "the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another. . . ."
Congress has imposed a comparable prudence standard for the administration of pension and employee benefit trusts in the Employee Retirement Income Security Act (ERISA), enacted in 1974. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a), provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims . . . ."

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

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

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

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

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

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

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

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

(d) A trustee shall make a reasonable effort to verify
facts relevant to the investment and management of trust
property.
(e) A trustee may invest in any kind of property or type of investment consistent with the standards of this [Act].

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

Comment

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

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

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

Risk and return. Subsection (b) also sounds the main theme of modern investment practice, sensitivity to the risk/return curve. See generally the works cited in the Prefatory Note to this Act, under "Literature." Returns correlate strongly with risk, but tolerance for risk varies greatly with the financial and other circumstances of the investor, or in the case of a trust, with the purposes of the trust and the relevant circumstances of the beneficiaries. A trust whose main purpose is to support an elderly widow of modest means will have a lower risk tolerance than a trust to accumulate for a young scion of great wealth.
Subsection (b) follows Restatement of Trusts 3d: Prudent Investor Rule § 227(a), which provides that the standard of prudent investing "requires the exercise of reasonable care, skill, and caution, and is to be applied to investments not in isolation but in the context of the trust portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the trust."

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

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

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

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

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

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

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

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

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

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

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

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

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


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

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

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

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

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

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

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

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

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

Comment

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

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


The criteria and circumstances identified in Section 4-302 as bearing upon the prudence of decisions to invest and manage trust assets also pertain to the prudence of decisions to retain or dispose of inception assets under this section.
SECTION 4-305. LOYALTY. A trustee shall invest and manage the trust property solely in the interest of the beneficiaries.

Comment

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

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

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

invest only in conformity with the prudence and loyalty standards
32606 (Jun. 22, 1994), to be codified as 29 CFR § 2509.94-1. The
Bulletin reminds fiduciary investors that they are prohibited
from "subordinat[ing] the interests of participants and
beneficiaries in their retirement income to unrelated
objectives."

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

Comment

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

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

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

SECTION 4-307. INVESTMENT COSTS. In investing and managing
trust property, a trustee may only incur costs that are
appropriate and reasonable in relation to the property, the
purposes of the trust, and the skills of the trustee.
Wasting beneficiaries’ money is imprudent. In devising and implementing strategies for the investment and management of trust assets, trustees are obliged to minimize costs.

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

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

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

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

(1) selecting an agent;

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

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

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

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

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

Comment

This section reverses the much-criticized rule that forbade
trustees to delegate investment and management functions. The
language of this section is derived from Restatement of Trusts
3d: Prudent Investor Rule § 171 (1992), discussed infra, and from

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

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

Restatement of Trusts 2d § 171, comment d (1959). The 1959
Restatement further said: "A trustee cannot properly delegate to another power to select investments." Restatement of Trusts 2d § 171, comment h (1959).


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

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

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

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

Commentators have explained the rationale for ERISA's encouragement of delegation:

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


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

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

Protecting the beneficiary against unreasonable delegation.

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

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

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

Although subsection (c) exonerates the trustee from personal responsibility for the agent's conduct when the delegation satisfies the standards of subsection (a), subsection (b) makes the agent responsible to the trust. The beneficiaries of the trust can, therefore, rely upon the trustee to enforce the terms of the delegation.
**Costs.** The duty to minimize costs that is articulated in Section 4-307 applies to delegation as well as to other aspects of fiduciary investing. In deciding whether to delegate, the trustee must balance the projected benefits against the likely costs. Similarly, in deciding how to delegate, the trustee must take costs into account. The trustee must be alert to protect the beneficiary from "double dipping." If, for example, the trustee's regular compensation schedule presupposes that the trustee will conduct the investment management function, it should ordinarily follow that the trustee will lower its fee when delegating the investment function to an outside manager.

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

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

**Comment**

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

**PART 4. POWERS OF TRUSTEES**

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

(a) A trustee, without authorization by the Court, may exercise:
(1) the powers conferred by the terms of the trust;
(2) except as limited by the terms of the trust:
   (i) all powers over the trust property which an
       unmarried adult owner has over individually owned property;
   (ii) any other powers necessary to accomplish the
        proper management, investment, and distribution of the trust
        property; and
   (iii) any other powers conferred by this [Act].
(b) The Court may relieve a trustee from restrictions in
the terms of the trust on the exercise of powers, confer on a
trustee additional powers whether or not authorized by the terms
of the trust, or restrict the exercise of a power otherwise given
to the trustee by the terms of the trust or this [Act].
(c) The grant of a power to the trustee, whether by the
terms of the trust, this [Act], or the Court, does not require
that it be exercised.
(d) Any power granted by the terms of the trust, this [Act]
or the Court must be exercised in good faith, with regard to the
purposes of the trust and the interest of the beneficiaries, and
except as modified by the terms of the trust, in accordance with
the duties of the trustee as prescribed by Article 4, Parts 2 and
3.

Comment
This section is intended to grant trustees the broadest
possible powers, but to be exercised always in accordance with
the terms of the trust and fiduciary principles. The fiduciary
principles referred to in this Section include all of the duties
specified in Article 4, Parts 2 and 3. The powers conferred
elsewhere in this Act and which are recognized by this Section include all of the specific powers listed in Section 4-402.

The powers conferred by this Act may be exercised without court approval and recourse to the courts is not encouraged. But should court approval of the exercise of a power be desired, a petition may be filed under Section 6-103. Subsection (b) also authorizes the court to grant additional powers or to restrict the exercise of any power.

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

SECTION 4-402. SPECIFIC POWERS OF TRUSTEES. In addition to the powers otherwise conferred by the terms of the trust and this Act, a trustee has the power to:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(18) deposit securities in a securities depository;

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

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persons;

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

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

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

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

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

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

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

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

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

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

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

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

Comment

Source: CPC Section 16220-16249.
Most of the powers listed in this section are drawn from
Section 3 of the Uniform Trustee's Powers Act (1964). Several of
the paragraphs are new, however, and other provisions of the
Trustee's Powers Act have been modified.

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

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

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

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

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

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

Paragraph (25) allows a trustee to make non-pro rata distributions and distribute undivided interests. The trustee also has the power to sell property in order to make the distribution. This paragraph recognizes the authority to take gains and losses into account for tax purposes when making distributions. This power provides needed flexibility and avoids the possibility of a taxable event arising from a non-pro rata distribution.
Paragraph (26) authorizes the hiring of agents. If the trustee is in doubt concerning the propriety of hiring an agent, the judicial procedure under Section 6-202 for obtaining instructions is available. An agent with a close relationship with the trustee or an insider may be hired when it is in the best interests of the trust, taking into account the duty of loyalty and duty to avoid conflicts of interest (see Section 4-202), and particularly as to routine matters, but in situations involving substantial matters, it is best to hire outside agents. The trustee has a duty to inform certain beneficiaries of agents hired, their relationship to the trustee, if any, and their compensation. See also Sections 4-205 (duty to use special skills), and 4-206 (delegation).

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

Paragraph (30) authorizes a trustee to prosecute or defend an action. As to the propriety of reimbursement for attorney's fees and other expenses of an action or judicial proceeding, see Section 4-110 and comment. See also Sections 4-211 (duty to defend actions), 4-401(c)(exercise of powers subject to fiduciary principles), 4-602 (protection of persons dealing with trustees).

Paragraph (31), which is similar to Section 344 of the Restatement (Second) of Trusts, clarifies that even though the trust has terminated, the trustee retains the powers needed to wind up the affairs of the trust and distribute the remaining trust property. While such terminations should not be delayed, neither should they be hasty or ill-considered. By anticipating the termination prior to the terminating event, many of the problems that typically arise can usually be avoided.

PART 5
LIABILITY OF TRUSTEES TO BENEFICIARIES

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

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

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

Comment

Source: CPC Section 16400, 16421.
Subsection (a) is drawn from Section 201 of the Restatement
(Second) of Trusts (1959). While a trust is revocable, the trustee owes duties to the person holding the power to revoke and not to the named beneficiaries. See Section 3-103. See also Section 3-103(b) (holder of presently exercisable power of withdrawal treated as settlor).

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

SECTION 4-502. BREACH OF TRUST; ACTIONS. To remedy a breach of trust which has occurred or may occur, a beneficiary or cotrustee of the trust may request the Court to:

(1) compel the trustee to perform the trustee's duties;
(2) enjoin the trustee from committing a breach of trust;
(3) compel the trustee to redress a breach of trust by payment of money or otherwise;
(4) appoint a receiver or temporary trustee to take possession of the trust property and administer the trust;
(5) suspend or remove the trustee;
(6) reduce or deny compensation to the trustee;
(7) subject to Section 4-602, nullify an act of the trustee, impose an equitable lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds.

Comment

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

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

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

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

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

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

The authority under paragraph (7) to set aside wrongful acts of the trustee is a corollary of the power to enjoin a threatened breach as provided in paragraph (2). As recognized in the introductory clause, the wrongful acts of the trustee may not be set aside if to do so would impair the rights of bona fide purchasers as provided in Section 4-602. See Restatement (Second) of Trusts Section 202 (1959). See also G. Bogert, The Law of Trusts and Trustees Sec. 861, at 16-17 (rev. 2d ed. 1982).

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

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

Comment

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

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

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

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

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

SECTION 4-504. LIMITATION OF ACTION AGAINST TRUSTEE FOLLOWING FINAL REPORT OR OTHER STATEMENT.

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

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

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

(2) In the case of an adult who is not reasonably
capable of understanding the report or other statement, if it is
received by the adult's conservator, guardian, or agent with
authority.

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

Comment

Source: CPC Section 16460.
This section is based in part on Section 7-307 of the
Uniform Probate Code. For provisions governing consent, release,
and affirrnance by beneficiaries to relieve the trustee of
liability, see Section 4-506. The reference in the introductory
clause to claims previously barred also includes principles such
as estoppel and laches that apply under the common law. See
Section 1-103 (common law of trusts). During the time that a
trust is revocable, the person holding the power to revoke is the
one who must receive the report or other statement in order to commence the running of the limitations period provided in this section. See Sections 3-103 (rights of settlor).

Subsection (b) provides special rules concerning who must receive the report or other statement for it to have the effect of later barring claims based on the information disclosed. This subsection addresses only the issue of when the clock will start to run for purposes of the statute of limitations. Should the trustee wish to immediately foreclose possible claims based on the information disclosed, a consent to the report or other information must be obtained under Section 4-506.

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

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

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

(2) was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor. An exculpatory clause drafted by the trustee is presumed to have been inserted as a result of such abuse.

Comment

Source: CPC Section 16461.

Paragraph (1) is the same in substance as Section 222 of the Restatement (Second) of Trusts (1959), except that the reference to gross negligence does not appear in the Restatement. There is a distinction between an exculpatory provision and the negation of a duty. While the terms of the trust may negate a duty (see Section 4-201(b)), if the trustee is required under the terms of the trust or this Act to perform the duty, the trustee may not be totally absolved from liability for a breach. See Restatement (Second) of Trusts Section 222 comments b & c (1959).
Paragraph (2) is intended to reverse the holding of cases such as Marsman v. Nasca, 573 N.E. 2d 1025 (Mass. Ct. App. 1991), which hold that an exculpatory clause in a trust instrument drafted by the trustee is valid absent proof that it was inserted as a result of an abuse of a fiduciary relationship. Paragraph (2) presumes that all such insertions are an abuse of a prior fiduciary, typically attorney-client relationship, between the settlor and trustee. Among the factors that the court may wish to consider in determining whether the presumption has been rebutted are: (1) the extent of the prior relationship between the settlor and trustee; (2) whether the settlor received independent advice; (3) the sophistication of the settlor with respect to business and fiduciary matters; (4) the trustee’s reasons for inserting the clause; (5) whether the settlor and trustee discussed the clause; and (6) the scope of the particular provision inserted. See Restatement (Second) of Trusts Sec. 222 comm. d (1959).

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

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

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

Comment

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

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

**PART 6**

**RIGHTS OF THIRD PERSONS**

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

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

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

(c) A claim based on a contract entered into by a trustee in the trustee's representative capacity, on an obligation arising from ownership or control of trust property, or on a tort committed in the course of administering a trust may be asserted against the trust by judicial proceeding against the trustee in the trustee's representative capacity, whether or not the trustee is personally liable on the claim.
(d) A question of liability between the trust and the trustee personally may be determined in a judicial proceeding under Section 6-103.

Comment

Source: CPC Section 18000-18002, 18004-18005.
This section is based on Section 7-306 of the Uniform Probate Code (1977). However, unlike the Uniform Probate Code, this section excuses the trustee from personal liability on a contract if either the trustee's representative capacity or the identity of the trust is revealed in the contract. Under this section, it is assumed that either one of these statements in a contract puts the person contracted with on notice of the fact that the other person is a trustee. The protection afforded the trustee by this section applies only to contracts that are properly entered into in the trustee's fiduciary capacity, meaning that the trustee is exercising an available power and is not violating a duty. This section does not excuse any liability the trustee may have for breach of trust. To fall within the rule of subsection (a), either the trustee's status or the identity of the trust must be revealed.

Subsection (b) addresses liability for situations where the trustee, either intentionally or negligently, acts, or fails to act, or commits a tort either intentionally or negligently. This is contrary to Restatement (Second) of Trusts Section 264, which imposes liability on a trustee regardless of fault, including liability for acts of agents under respondeat superior.

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

Under subsection (d), ultimate liability between an estate and trustee need not be determined before the third person's claim can be satisfied. It is permissible, and may be preferable, for judgment to be entered against the trust without determining the trustee's ultimate liability until later. If judgment is entered against the trustee individually, the question of the trustee's right to reimbursement may be settled informally with the beneficiaries or in a separate judicial proceeding in the probate court. For rules governing indemnification of trustees, see Section 4-110. See also Section 6-103 (judicial proceedings against trustee by beneficiary).
(a) A person who in good faith and for value assists or deals with a trustee without knowledge that the trustee is exceeding the trustee’s powers or improperly exercising them is protected as though the trustee properly exercised the power; The fact that a person knowingly deals with a trustee does not alone require the person to inquire into the existence of a power of the propriety of its exercise. A person need not see to the proper application of assets of the trust paid or delivered to a trustee.

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

Comment

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

SECTION 4-603. CERTIFICATION OF TRUST.

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

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

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

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

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

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

Comment
Source: CPC Section 18100.5.

SECTION 4-604. LIABILITY FOR WRONGFUL TAKING, CONCEALING OF DISPOSING OF TRUST PROPERTY. A person who, in bad faith, wrongfully takes, conceals, or disposes of trust property is liable for twice the value of the property, recoverable in an action by a trustee for the benefit of the trust.

Comment
Source: CPC Section 16249(b).

ARTICLE 5
CHARITABLE TRUSTS

GENERAL COMMENT

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

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

Comment

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

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

SECTION 5-102. APPLICATION OF CY PRES. Unless the terms of the trust provide to the contrary:

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

(2) If a particular charitable purpose for which a trust was created becomes impracticable, unlawful or impossible to fulfill, the trust property shall not revert to the settlor but the Court shall instead either modify the terms of the trust or direct that the property of the trust be distributed in whole or in part in a manner best meeting the settlor's general charitable purposes. If an administrative term of a charitable trust becomes impracticable, unlawful, impossible to fulfill or otherwise impairs the effective administration of the trust, the Court may
modify the term.

**Comment**

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

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

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

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

SECTION 5-103. CHARITABLE TRUST WITH UNECONOMICALLY LOW VALUE.

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

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

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

Comment

Subsection (a) strives to make charitable gifting more effective by permitting the nonjudicial termination of small charitable trusts, thereby avoiding the expense of a judicial termination proceeding. Nonjudicial termination is allowed if the value of the trust property is less than $50,000. While the creation of small charitable trusts is not encouraged, subsection (a) does not interfere with the right of a settlor to create such a trust. Under this subsection, the trustee may not terminate a charitable trust with a value of less than $50,000 if such termination is prohibited by the terms of the trust.

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

For the comparable provision on termination of small noncharitable trusts, see Section 2-205.
SECTION 5-104. JUDICIAL PROCEEDINGS CONCERNING CHARITABLE TRUSTS. The settlor, the trustee, the attorney general, and any charitable entity or other person with a special interest in the trust shall be interested persons in a judicial proceeding under this [Act] involving a charitable trust.

Comment
This section is based on Restatement (Second) of Trusts Sec. 391 (1959), except that the Restatement, unlike this section, does not authorize the settlor to enforce a charitable trust. This section also modifies the definition of “interested person” but only in the context of charitable trusts. See Section 1-102(7) (“interested person” defined). A person with a special interest is a person, such as an individual awarded a scholarship, who is entitled to a benefit under the trust and who may take action to secure this benefit.

ARTICLE 6 DISPUTE RESOLUTION

PART 1 JUDICIAL PROCEEDINGS CONCERNING TRUSTS

SECTION 6-101. JUDICIAL INTERVENTION. The administration of trusts shall proceed expeditiously and free of judicial intervention, except to the extent the jurisdiction of the Court is invoked by interested parties or otherwise exercised as provided by law.

Comment
Source: CPC Section 17209. Uniform Probate Code Section 7-201(b) contains similar language. See also Section 4-401.

SECTION 6-102. SUBJECT MATTER JURISDICTION
(a) The Court has exclusive jurisdiction of judicial proceedings concerning the internal affairs of a trust.
(b) The Court has concurrent jurisdiction with other courts of this State of actions and judicial proceedings to determine the existence of a trust; actions and judicial proceedings by or against creditors or debtors of trusts; and other actions and judicial proceedings involving trustees, beneficiaries and third persons.

Comment

Source: CPC Section 17000.
Subsection (a) of this section is drawn from Section 7-201(a) of the Uniform Probate Code. Subsection (b) is drawn from Section 7-204 of the Uniform Probate Code.

SECTION 6-103. PETITIONS; PURPOSES OF JUDICIAL PROCEEDINGS.

(a) A trustee or beneficiary of a trust may petition the Court under this [Part] concerning the internal affairs of the trust or to determine the existence of the trust.

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

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

Comment

Source: CPC Section 17200(a).
While this Section provides that a beneficiary may petition the Court on a variety of matters, such right does not belong to the beneficiaries of a revocable trust while the settlor has capacity. It that instance, the right belongs solely to the settlor. Section 3-103 provides that while the settlor of a revocable trust has capacity the settlor is afforded all the rights of the beneficiaries.

The items listed in subsection (b) are illustrative and not exclusive. The court has jurisdiction to hear any matter
involving the administration of the trust. See Section 6-102.

**SECTION 6-104. PRINCIPAL PLACE OF ADMINISTRATION OF TRUST.**

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

(b) If the principal place of administration of the trust cannot be determined under subsection (a), the principal place of administration is:

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

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

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

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

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

**Comment**


**SECTION 6-105. JURISDICTION OVER TRUSTEES AND BENEFICIARIES.**
(a) While a trust’s principal place of administration is in this State:

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

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

(b) This Section does not preclude a court not located at the trust’s principal place of administration from exercising jurisdiction over either the trustee, the trust property, or the beneficiaries in accordance with applicable rules of civil procedure.

Comment

Source: CPC Section 17003. This section, which is intended to provide the widest possible long-arm effect consistent with constitutional principles, is based on Arizona Revised Statutes Annotated Sec. 14-7202.

SECTION 6-106. VENUE.

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

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

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

Comment

Source: CPC Section 17005.
See Section 6-104 (principal place of administration of trust).

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

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

SECTION 6-107. NOTICE AND NECESSARY PARTIES. Judicial proceedings under this [Act] are commenced by filing a petition in the Court and by giving notice to interested persons. Notice to the trustee by mail may be addressed to the trustee at the trust's principal place of administration. The Court may order that notice be given to additional persons. An order of Court is valid as to all who are given notice of the proceeding even though less than all interested persons are notified.
SECTION 6-108. DISMISSAL OF MATTERS RELATING TO FOREIGN TRUSTS. The Court shall not, over the objection of a party, entertain proceedings involving a trust which is under the continuing supervision of a court outside of this State, or is registered in or has its principal place of administration outside of this State unless:

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

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

Comment.


SECTION 6-109. TRANSFER OF JURISDICTION.

(a) The terms of the trust relating to the place of administration and to changes in the place of administration are controlling unless compliance would be contrary to efficient administration or the purposes of the trust.

(b) A trustee, with the consent of the beneficiaries as defined in Section 4-105(c), otherwise with the approval of the Court, may transfer the trust’s place of administration to another jurisdiction or to another place within this State.
(c) The Court may transfer the place of administration of a trust to or from this State or to a different place within this State, or transfer some or all of the trust property to a different trustee in or outside of this State if it finds that:

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

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

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

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

(e) If the Court grants a petition to transfer a trust or
trust property to this State, the Court may require bond as
provided in Section 4-102.

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

Comment

Source: CPC Sections 17401, 17404, 17405, 17451, 17455-
17457; UPC Sec. 7-305.
This section is not limited to transfers to or from other
states, but may include a transfer to or from different
countries. See also Section 6-102 (subject matter jurisdiction
of court).

This section provides a method whereby the court can
indicate its willingness to accept jurisdiction over a trust
administered in another jurisdiction if the law of the other
jurisdiction requires appointment of a trustee in the proposed
new place of administration before approving the transfer. See,

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

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

PART 2
SETTLEMENT AGREEMENTS AND REPRESENTATION

SECTION 6-201. DEFINITION AND APPLICABILITY.

(a) For purposes of this [Part], "fiduciary matter"
includes any item listed in Section 6-103(b).
(b) Persons interested in a fiduciary matter may approve a judicial settlement and represent and bind other persons interested in the fiduciary matter as provided in this [Part].

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

SECTION 6-202. REPRESENTATION BY HOLDERS OF POWERS.

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

SECTION 6-203. REPRESENTATION BY FIDUCIARIES AND PARENTS. To the extent there is no conflict of interest between the representor and those represented with respect to the fiduciary matter:

(1) a conservator may represent and bind the person whose estate the conservator controls;
(2) a guardian may represent and bind the ward if no conservator of the ward's estate has been appointed;
(3) an agent with authority may represent and bind the principal;
(4) a trustee may represent and bind the beneficiaries of the trust;
(5) a personal representative may represent and bind the persons interested in the decedent's estate; and
(6) if no conservator or guardian has been appointed, a parent may represent and bind a minor child.

SECTION 6-204. REPRESENTATION BY HOLDERS OF SIMILAR INTERESTS. Unless otherwise represented, a minor or an incapacitated, unborn, or unascertained person may be represented by and bound by another person having a substantially identical interest with respect to the fiduciary matter but only to the extent that the person's interest is adequately represented.

SECTION 6-205. NOTICE OF JUDICIAL SETTLEMENT. Notice of a proposed judicial settlement shall be given to every interested person or to one who can bind an interested person as described in Sections 6-202 and 6-203. Notice may be given to a person and to another who may bind the person. Notice is given to unborn or unascertained persons, who are not represented under Sections 6-202 and 6-203, by giving notice to all known persons whose interests in the judicial proceedings are substantially identical to those of the unborn or unascertained persons.

SECTION 6-206. APPOINTMENT OF GUARDIAN AD LITEM. At any
point in a judicial proceeding, the Court may appoint a guardian
ad litem to represent and approve a settlement on behalf of the
interest of a minor, an incapacitated, unborn, or unascertained
person, or a person whose identity or address is unknown, if the
Court determines that representation of the interest otherwise
would be inadequate. If not precluded by conflict of interest, a
guardian ad litem may be appointed to represent several persons
or interests. The Court shall set out its reasons for appointing
a guardian ad litem as a part of the record of the judicial
proceeding. In approving a judicially supervised settlement, a
guardian ad litem may consider general family benefit.

SECTION 6-207. APPOINTMENT OF SPECIAL REPRESENTATIVE. In
connection with a nonjudicial settlement, the Court may appoint a
special representative to represent the interests of and approve
a settlement on behalf of designated persons. If not precluded
by conflict of interest, a special representative may be
appointed to represent several persons or interests. In approving
a settlement, a special representative may consider general
family benefit. As a condition for approval, a special
representative may require that those represented receive a
benefit.

ARTICLE 7
TRANSITIONAL PROVISIONS

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

(a) This [Act] takes effect on ____________.
(b) Except as provided elsewhere in this [Act], on the
effective date of this [Act]:

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

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

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

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

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

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

Comment

Source: CPC Section 15001; UPC Section 8-101; S.D. Codified
Laws Ann. Sec. 29A-8-101.
This section addresses the applicability of the Act,
including application to pending judicial proceedings and the
administration of existing trusts. The Act is intended to
receive the widest possible application. The Act applies to all
trusts subject to the jurisdiction of the enacting state, whether
created before or after the date of enactment. But recognizing
constitutional concerns, excluded from coverage are trusts
created prior to the Act’s effective date if such application
would impair a vested right. For such an impairment to occur,
however, the trust would have to be irrevocable as of the
effective date and the particular provision of the Act would have
to actually reduce or otherwise threaten a beneficial interest.

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

SECTION 8-102. SPECIFIC REPEALER AND AMENDMENTS.

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

(1)

(2)

(3)

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

(1)

(2)

(3)

Comment

Source: UPC Sec. 8-102.