

DRAFT  
FOR DISCUSSION ONLY

## **TRUST ACT**

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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**October 13, 1997 Draft**

## **TRUST ACT**

With Comments

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ON UNIFORM STATE LAWS**

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# TRUST ACT

## ARTICLE 1 DEFINITIONS AND GENERAL PROVISIONS

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

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

(1) "Beneficiary" 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

1 trust, estate, trust, partnership, limited liability company,  
2 association, joint venture, or any other legal or commercial  
3 entity.

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

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

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

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

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

22 (14) "Trust" means an express trust, charitable or  
23 noncharitable, with additions thereto, wherever and however  
24 created, including a trust created or determined by a statute,  
25 judgment or decree under which the trust is to be administered in  
26 the manner of an express trust. The term applies only to the



1 types of express trusts that are used primarily for the donative  
2 transfer of property. The term excludes the types of express  
3 trusts that are used primarily for business, employment,  
4 investment, or commercial transactions, including business  
5 trusts, land trusts, voting trusts, common trust funds, security  
6 arrangements, liquidation trusts, trusts created by a deposit  
7 arrangement in a financial institution, trusts created for paying  
8 debts, dividends, interest, salaries, wages, profits, pensions,  
9 or employee benefits of any kind, and any arrangement under which  
10 a person is nominee or escrowee for another;

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

#### 14 **Comment**

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

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

29 Under the Act, only the charitable portion of a trust with  
30 both charitable and noncharitable beneficiaries qualifies as a  
31 "charitable trust" (paragraph (2)). Consequently, a split-  
32 interest trust will in certain instances be governed by two sets  
33 of provisions, one applicable to the charitable interests, the

1 other the noncharitable. Compare, e.g., Section 2-205  
2 (termination of noncharitable trust with uneconomically low  
3 value) with Section 5-103 (termination of charitable trust with  
4 uneconomically low value).

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

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

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

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

43 Determining the identity of the "settlor" (paragraph (11))  
44 is usually not an issue. The same person will both sign the trust  
45 instrument and fund the trust. Ascertaining the identity of the  
46 settlor becomes more difficult when more than one person signs

1 the trust instrument or funds the trust. The fact that a person  
2 is designated as the "settlor" by the terms of the trust is not  
3 necessarily determinative. For example, the person who executes  
4 the trust instrument may be acting as the agent for the person  
5 who will be funding the trust. In that case, the person funding  
6 the trust, and not the person signing the trust instrument, will  
7 be the settlor. Similarly, should more than one person  
8 contribute to a trust, all of the contributors will ordinarily  
9 be treated as settlors in proportion to their respective  
10 contributions, regardless of which one signed the trust  
11 instrument. However, in the case of a revocable trust, transfers  
12 made to the trust by a person who did not participate in the  
13 trust's creation will frequently be intended as a donative  
14 transfer to the person who originally created the trust. In that  
15 event, only the person who created the trust, and not the later  
16 donor, will be the settlor.

17       Ascertaining the identity of the settlor is important for a  
18 variety of reasons. It is important for determining rights in  
19 revocable trusts. See Sections 3-102 (revocation or modification  
20 of revocable trust), 3-104 (creditor claims against revocable  
21 trust), and 3-105 (limitation on contest of revocable trust). It  
22 is also important for determining rights of creditors in  
23 irrevocable trusts. See Section 2-303(claims of settlor's  
24 creditors). While the settlor of an irrevocable trust ordinarily  
25 has no continuing rights except for a right to terminate the  
26 trust with the beneficiaries' consent (see Section 2-202), under  
27 the Act the settlor of an irrevocable trust may also petition for  
28 removal of the trustee or for an order preventing the  
29 beneficiaries from terminating the trust. See Sections 2-203  
30 (judicial review of termination or modification by consent), and  
31 4-107 (removal of trustee). Also, per Section 5-104, the settlor  
32 is an interested person in a judicial proceeding involving a  
33 charitable trust.

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

46       Not all evidence may necessarily be considered in  
47 determining the terms of the trust. A manifestation of a  
48 settlor's intention does not constitute evidence of a trust's

1 terms if it would not be admissible in a judicial proceeding in  
2 which the trust's terms are in question. See Restatement (Third)  
3 of Trusts Sec. 4 comm. b (Tent. Draft No. 1, 1996). See also  
4 Restatement (Third) Property-Donative Transfers Sec. 10.2, 11.1-  
5 11.3 (Tent. Draft No. 1, 1995). For example, in many states a  
6 trust of real property is unenforceable unless evidenced by a  
7 writing, although this Act does not so require but leaves the  
8 issue of whether a trust must be evidenced by a writing to the  
9 discretion of the enacting jurisdiction. See Section 2-103  
10 (writing requirement; oral trusts). Evidence otherwise relevant  
11 to determining the terms of the trust may also be excluded under  
12 other principles of law, such as the parol evidence rule.

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

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

27 **Comment**

28 Source: Cal. Prob. Code (CPC) Section 15002.  
29 The Act is not comprehensive but codifies only those  
30 portions of the law of express trusts which are most amenable to  
31 codification. The Act is at all points supplemented by the rich  
32 heritage of the common law, including principles of equity,  
33 particularly as presented in the Restatement of Trusts. As used  
34 in this section, the common law is not static but includes the  
35 contemporary and evolving rules of decision developed by the  
36 courts in exercise of their power to adapt the law to new  
37 situations and changing conditions.

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

41 (1) a conservator may represent and bind a beneficiary whose

1 estate the conservator controls;

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

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

7 **Comment**

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

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

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

1 **Comment**

2 Source: UPC Sec. 2-703.

3 **SECTION 1-106. CONSTRUCTION AGAINST IMPLIED REPEAL.** This  
4 [Act] is a general act intended as a unified coverage of its  
5 subject matter and no part of it shall be deemed impliedly  
6 repealed by subsequent legislation if it can reasonably be  
7 avoided.

8 Source: UPC Sec. 1-105.

9 **ARTICLE 2**  
10 **CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF**  
11 **TRUSTS**

12 **PART 1**  
13 **CREATION AND VALIDITY OF TRUSTS**

14 **SECTION 2-101. METHODS OF CREATING TRUSTS.**

15 (a) A trust may be created by:

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

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

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

23 (b) Property to be subject to a declaration of trust must be  
24 identified by but need not be specifically enumerated in the  
25 terms of the trust. A reference by the settlor in the terms of  
26 the trust to "all of my property" or words of similar import is

1 sufficient to subject all of the settlor's then property to the  
2 declaration of trust.

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

6 **Comment**

7 Source: CPC Section 15200.

8 Subsection (a) is derived from Section 17 of the Restatement  
9 (Second) of Trusts (1959) and Section 10 of the Restatement  
10 (Third) of Trusts (Tent. Draft No. 1, 1996). Under all three of  
11 the methods specified in this section for creating a trust, the  
12 trust is not created until it receives property. For what  
13 constitutes an adequate property interest, see Restatement  
14 (Third) of Trusts Sec. 41 (Prel. Draft No. 3, 1997). The  
15 property interest necessary to fund and create a trust need not  
16 be substantial. A revocable designation of the trustee as  
17 beneficiary of a life insurance policy or employee benefit plan  
18 is a property interest sufficient to create a trust. See Section  
19 1-102(10) ("property" defined). Furthermore, the property  
20 interest need not be transferred contemporaneously with the  
21 signing of the trust instrument. A trust created by means of an  
22 instrument signed during lifetime is not invalid simply because  
23 the trustee does not receive property until a later date,  
24 including by will or contract at or after the settlor's death. A  
25 pourover devise to such a trust is also valid. See Uniform  
26 Probate Code Sec. 2-511 (pourover devise to trust valid  
27 regardless of existence, size, or character of trust corpus).

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

42 Consideration is not ordinarily required to create a trust,  
43 but a promise to create a trust in the future is enforceable only

1 if the requirements for an enforceable contract are satisfied.  
2 See Restatement (Third) of Trusts Sec. 15 (Tent. Draft No. 1,  
3 1996). Should the right to enforce the contract be held by the  
4 trustee, however, the chose in action thus created in the trustee  
5 is itself a property interest sufficient to create a present  
6 trust. Otherwise, the enforceable right, if held by another,  
7 does not create a present trust but may give rise to an action  
8 for breach of contract. A trust created by means of a promise  
9 enforceable by the trustee is valid notwithstanding that the  
10 trustee may resign or die before the promise is fulfilled.  
11 Unless expressly made personal, the promise can be enforced by a  
12 successor trustee. For examples of trusts created by means of  
13 promises enforceable by the trustee, see Restatement (Third) of  
14 Trusts Sec. 10 comm. e (Tent. Draft No. 1, 1996).

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

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

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



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

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

## 15 **SECTION 2-102. REQUIREMENTS FOR VALIDITY.**

16 (a) A trust is created only if:

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

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

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

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

### 27 **Comment**

28 Source: CPC Sections 15201, 15205, 15209.

29 Subsection (a) codifies the basic requirements for the  
30 creation of a trust. To create a valid trust, the settlor must  
31 indicate an intention to create a trust. Restatement (Second) of  
32 Trusts Sec. 23 (1959); Restatement (Third) of Trusts Sec. 13  
33 (Tent. Draft No. 1, 1996). But only such manifestations of  
34 intent as are admissible as proof in a judicial proceeding may be  
35 considered. See Sections 1-102(13) ("terms of trust" defined).

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

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

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

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

47 **SECTION 2-103. WRITING REQUIREMENT; ORAL TRUSTS.**

1 Except as required by other statute, a trust need not be  
2 evidenced by a writing, but an oral trust may be established only  
3 by clear and convincing evidence.

4 **Comment**

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

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

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

32 **Comment**

33 Source: CPC Section 15203.  
34 For an explication of the requirement that a trust must have  
35 a purpose that is not unlawful or against public policy, see  
36 Restatement (Third) of Trusts Sections 28-29 (Prel. Draft No. 3,  
37 1997). A trust with a purpose that is unlawful or against public

1 policy is invalid. Depending on when the violation occurred, the  
2 trust may be invalid at its inception or the invalidity may occur  
3 at a later date. The invalidity may also be limited to  
4 particular provisions. Generally, a trust has a purpose which is  
5 illegal or against public policy if: (1) its performance involves  
6 the commission of a criminal or tortious act by the trustee; (2)  
7 its enforcement would otherwise be against public policy even  
8 though not criminal or tortious; (3) the settlor's purpose in  
9 creating the trust was to defraud creditors or others; or (4) the  
10 consideration for the creation of the trust was illegal. See  
11 Restatement (Third) of Trusts Sec. 28 comm. a (Prel. Draft No. 3,  
12 1997).

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

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

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

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

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

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

34 (d) The intended use of a trust authorized by this section  
35 may be enforced by a person designated for that purpose in the

1 terms of the trust or, if none, by a person appointed by the  
2 Court.

### 3 **Comment**

4 Source: UPC Section 2-907.

5 This section validates so-called honorary trusts. Unlike  
6 honorary trusts created under the common law, which are arguably  
7 no more than unenforceable powers of appointment, the trusts  
8 created by this section are valid and enforceable and not  
9 dependent on the trustee deciding on whether to honor the  
10 settlor's wishes. For a discussion of the common law doctrine,  
11 see Restatement (Third) of Trusts Sec. 48 (Prel. Draft No. 3,  
12 1997).

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

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

27 Upon termination of an honorary trust created under either  
28 subsections (a) or (b), a resulting trust is ordinarily created  
29 in the settlor unless the terms of the trust provide for a  
30 different disposition. See Restatement (Third) of Trusts Section  
31 48 (Prel. Draft No. 3, 1997).

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

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

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

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

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

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

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

25                 (2) Upon termination, the trustee shall transfer the

1 unexpended trust property in the following order:

2 (i) as directed by the trust instrument;

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

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

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

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

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

23 (6) If no trustee is designated or no designated  
24 trustee is willing or able to serve, a court shall name a  
25 trustee. A court may order the transfer of the property to  
26 another trustee, if required to assure that the intended use is

1 carried out and if no successor trustee is designated in the  
2 trust instrument or if no designated successor trustee agrees to  
3 serve or is able to serve. A court may also make such other  
4 orders and determinations as shall be advisable to carry out the  
5 intent of the transferor and the purpose of this section.]

6 **Comment**

7 Source: UPC Sec. 2-907.

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

11 **PART 2**

12 **MODIFICATION AND TERMINATION OF TRUSTS**

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

- 16 (1) the term of the trust expires;  
17 (2) the trust purpose is fulfilled;  
18 (3) the trust purpose becomes unlawful or impossible to  
19 fulfill; or  
20 (4) the trust is revoked.

21 **Comment**

22 Source: CPC Section 15407; Tex. Prop. Code. Ann. Sec.  
23 112.052.

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

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

31 **SECTION 2-202. MODIFICATION OR TERMINATION OF IRREVOCABLE**



1     **TRUST BY CONSENT.**

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

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

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

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

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

24                           **Comment**

25           Source: CPC Section 15403, 15404, 15410.  
26           Subsection (a) of this section is based on Section 337, and  
27           subsection (b) is based on Section 338 of the Restatement

1 (Second) of Trusts (1959), and reflect well-established trust  
2 doctrine. While the beneficiaries cannot ordinarily terminate a  
3 trust unless continuation of the trust will no longer serve a  
4 material purpose, such a finding is not required if the settlor  
5 also consents. No material purpose finding is then required  
6 because all parties with an interest in the trust, both the  
7 settlor and beneficiaries, are agreed there is no further need  
8 for the trust.

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

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

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

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

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

1 Subsection (e) clarifies that the provisions of Article 6 on  
2 virtual representation and the appointment and approval of  
3 guardians ad litem and special representatives apply for purposes  
4 of determining whether all beneficiaries have signified consent.  
5 The authority to consent on behalf of another person, however,  
6 does not include the authority to consent over the other person's  
7 objection. For a listing of who may consent on behalf of another  
8 person, see Sections 6-202, 6-203, and 6-204. Virtual  
9 representation will rarely be available in a trust termination  
10 case, although its use will be frequent in cases involving trust  
11 modification, such as a grant to the trustee of additional  
12 powers. A consent obtained by virtual representation is valid  
13 only if there is no conflict of interest between the  
14 representator and the persons represented.

15 In situations involving a conflict of interest, Sections 6-  
16 206 and 6-207 of the Act allow for the court to appoint either a  
17 special representative or guardian ad litem who may give the  
18 necessary consent to the proposed modification or termination on  
19 behalf of the minor, incapacitated, unascertained or unborn  
20 beneficiary.

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

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

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

1 **Comment**

2 Source: CPC Section 15404, 15410

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

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

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

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

38 (a) On petition by a trustee or beneficiary, the Court shall

1 modify the administrative or dispositive terms of the trust or  
2 terminate the trust if, because of circumstances not anticipated  
3 by the settlor, modification or termination of the trust would  
4 substantially further the settlor's purposes in creating the  
5 trust.

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

9 **Comment**

10 Source: CPC Section 15409-15410.

11 This section permits modification or termination of a trust  
12 whenever there are circumstances not anticipated by the settlor.  
13 This may include circumstances in existence at the time of the  
14 trust's creation which were known to but not considered by the  
15 settlor. Unlike Restatement (Second) of Trusts Sections 167 and  
16 336, upon which this section is partially based, this section  
17 extends equitable deviation to the dispositive terms of a trust.  
18 Modification of the dispositive terms for the support of a  
19 beneficiary may be appropriate, for example, in a case where the  
20 beneficiary has become unable to provide for support due to poor  
21 health or serious injury.

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

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

32 **SECTION 2-205. NONCHARITABLE TRUST WITH UNECONOMICALLY LOW**  
33 **VALUE.**

34 (a) Except as otherwise provided by the terms of the trust,  
35 if the value of the trust property of a noncharitable trust is

1 less than [\$50,000], the trustee may terminate the trust.

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

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

9 **Comment**

10 Source: CPC Section 15408, 15410.

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

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

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

23  
24 (a) The terms of the trust may be reformed to conform to the  
25 settlor's intention if the failure to conform was due to a  
26 mistake of fact or law and the settlor's intent can be  
27 established.

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

31 **Comment**

32 This section is based in part on Restatement (Third) of

Property-Donative Transfers Section 12.1-12.2 (Tent. Draft No. 1, 1995).

**SECTION 2-207. COMBINATION AND DIVISION OF TRUSTS.**

(a) 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.

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

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

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

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

### 24 **PART 3**

### 25 **SPENDTHRIFT PROVISIONS AND CLAIMS BY CREDITORS**

#### 26 **SECTION 2-301. SPENDTHRIFT PROVISION RECOGNIZED.**

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

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



1 **Comment**

2 Source: CPC Section 15300-15301; Tex. Prop. Code Ann. Sec.  
3 122.035.

4 Under this section, a settlor has the power to restrain  
5 transfer of the beneficiary's interest, regardless of the nature  
6 of the interest. A restraint may be placed on an interest in the  
7 income, the principal, or both. Unless one of the exceptions  
8 under Section 2-302 applies, a creditor of the beneficiary is  
9 prohibited from attaching a protected interest and may only  
10 attempt to collect directly from the beneficiary after payment is  
11 made. This section is similar to Restatement (Second) of Trusts  
12 Sections 152-153 (1959).

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

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

31 A disclaimer, because it is a refusal to accept ownership of  
32 an interest and not a transfer of an interest already owned, is  
33 not affected by the presence or absence of a spendthrift  
34 provision. Also, most disclaimer statutes also expressly provide  
35 that the validity of a disclaimer is not affected by a  
36 spendthrift protection. See, e.g., Uniform Probate Code Sec. 2-  
37 801.

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

41 **SECTION 2-302. CLAIMS BY CREDITORS OF BENEFICIARY.**

42 (a) A creditor or assignee of a beneficiary may compel the  
43 immediate payment from the trust only of a distribution required

1 to be made to the beneficiary by the express terms of the trust  
2 or which the trustee has otherwise decided to make to the  
3 beneficiary, and then only if:

4 (1) the beneficiary's interest is not subject to a  
5 spendthrift provision as provided in Section 2-301;

6 (2) the creditor or assignee is seeking to enforce a  
7 court order to support the beneficiary's spouse or children, or a  
8 former spouse for alimony; or

9 (3) the creditor is a state or local government seeking  
10 to enforce a claim for unpaid taxes.

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

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

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

## 22 **Comment**

23 This section addresses the rights of a beneficiary's  
24 creditors or assignees to collect a debt or assignment from the  
25 beneficiary's trust interest prior to its distribution to the  
26 beneficiary. The section applies whether or not the terms of the  
27 trust contain a spendthrift provision, but claims by the  
28 creditors or assignees of a settlor and claims against a  
29 revocable trust are dealt with elsewhere. See Sections 2-303

1 (self-settled trusts), 3-104 (claims against revocable trust).  
2 Per subsection (c), also excepted from the coverage of the  
3 section are creditor claims against property subject to a power  
4 of withdrawal or power of appointment. For creditor rights  
5 against such interests, see Restatement (Property) Second-  
6 Donative Transfers Sections 13.1-13.7 (1986).

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

32 For trusts with spendthrift provisions, the effect of the  
33 statute, in accord with traditional doctrine, is to treat certain  
34 preferred claimants as if the trust did not contain a spendthrift  
35 provision but only with respect to their particular claims.  
36 Claimants not eligible for a preference are subject to the full  
37 force of the spendthrift bar. Under the Act, preferred positions  
38 are granted to claims for child and spousal support and claims  
39 for payment of state and local taxes. Unlike the Restatement  
40 (Second) of Trusts Section 157, the Act does not create a  
41 preference for nontax claims by state and local governments, a  
42 Restatement provision based on scant legal authority. Nor does  
43 the Act create a preference for creditors who have furnished  
44 necessary services or supplies to the beneficiary or have  
45 furnished services or materials which have preserved or  
46 supposedly enhanced the beneficiary's interest. For a discussion  
47 of these other exceptions to the spendthrift bar, recognized in  
48 at least some states, see Scott, The Law of Trusts Sec. 157  
49 (Fratcler 4th Ed. 1987).

1 Subsection (a) (2) provides that a spendthrift provision is  
2 invalid as to claims to enforce a court order directing the  
3 payment of support of a beneficiary's spouse or child, or of a  
4 former spouse for alimony. The Act does not attempt to prescribe  
5 the particular procedural methods for enforcing this right to  
6 collect from the trust, leaving that matter to local collection  
7 law. For an example of such a procedure, see Cal. Prob. Code  
8 Sec. 15305.

9 Subsection (a) (3) extends a similar preference to state and  
10 local tax claims. Unlike claims for child and spousal support,  
11 the claim need not first be reduced to judgment before collecting  
12 from the trust. In the case of tax payments, the beneficiary's  
13 interest in the trust is subject to a pre-judgment attachment the  
14 same as the beneficiary's other assets. While not specifically  
15 mentioned in the Act, due to preemption federal tax payments are  
16 also exempt from the spendthrift bar due to federal preemption.  
17 Instead of trying to describe the exact parameters of the  
18 exception for federal tax payments, the drafters of the Act have  
19 left this matter entirely to federal law. For a discussion of  
20 the federal tax exception, see Scott, The Law of Trusts Sec.  
21 157.4 (Fratcher 4th ed. 1987).

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

### 33 **SECTION 2-303. CLAIMS BY SETTLOR'S CREDITORS.**

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

38 (b) If a trust has multiple settlors, the amount the  
39 creditor or assignee of a particular settlor may reach may not  
40 exceed the settlor's discretionary interest in the portion of the

1 trust attributable to that settlor's contribution.

2 **Comment**

3 Source: CPC Section 15304(b).

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

13 **ARTICLE 3**

14 **PROVISIONS RELATING TO REVOCABLE TRUSTS**

15 **SECTION 3-101. CAPACITY TO CREATE REVOCABLE TRUST.** An

16 individual's capacity to create a revocable trust is the same as  
17 an individual's capacity to make a will.

18 **Comment**

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

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

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

11       The Act does not explicitly spell out the capacity necessary  
12 to create other types of trusts, although Section 2-102 does  
13 require that the settlor must have capacity. The section  
14 expressly states a capacity standard for the creation of  
15 revocable trusts because of the lack of clarity in the case law  
16 and the importance of the issue in modern estate planning. No  
17 such uncertainty exists with respect to the capacity standard for  
18 other types of trusts. To create a revocable or testamentary  
19 trust, the settlor must have the capacity to make a will. To  
20 create an irrevocable trust, the settlor must have the capacity  
21 during lifetime to transfer the property free of trust. See  
22 generally Restatement (Third) of Trusts Sec. 11 (Tent. Draft No.  
23 1, 1996).

#### 24       **SECTION 3-102. REVOCATION OR MODIFICATION.**

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

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

#### 34       **[ALTERNATIVE PROVISION FOR COMMUNITY PROPERTY STATES]**

35       [(b) Except as otherwise provided by the terms of the trust,  
36 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).

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

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

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

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

45 While revocation is ordinarily accomplished by signing a  
46 written instrument, subsection (c) does not necessarily preclude  
47 revocation by other methods, such as by oral statement or by



1 physical act coupled with a withdrawal of the property. But  
2 these less formal methods, because they provide less reliable  
3 indicia of intent, are not to be encouraged. Nor does subsection  
4 (c) require the trustee to concur in a modification of the trust.  
5 Should a modification of the trust substantially change the  
6 trustee's duties, the trustee is free to resign. See Section 4-  
7 106(a) (2).

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

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

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

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

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

40 (a) Except to the extent the terms of the trust otherwise  
41 provide, while a trust is revocable and the settlor has capacity  
42 to revoke the trust, the settlor, and not the beneficiary, has

1 the rights afforded beneficiaries under this [Act], and the  
2 duties of the trustee are owed exclusively to the settlor.

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

#### 6 **Comment**

7 Source: CPC Section 15800, 15803, 16001.

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

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

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

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

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

#### 37 **SECTION 3-104. CREDITOR CLAIMS AGAINST REVOCABLE TRUST.**

38 (a) During the lifetime of the settlor, the trust property

1 of a revocable trust is subject to the claims of the settlor's  
2 creditors.

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

#### 10 **Comment**

11 Source: CPC Sections 18200, 19001.

12 Subsection (a) is contrary to the common law rule as  
13 expressed in the Restatement. See Restatement (Second) of Trusts  
14 Section 330, comm. o (1959). But because a settlor usually also  
15 retains a beneficial interest which a creditor may reach, the  
16 common law rule is normally of little significance. See Section  
17 2-303 (rights of creditor in self-settled trust); and Restatement  
18 (Second) of Trusts Section 156(2) (1959).

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

26 This Act does not attempt to address the many procedural  
27 issues raised by the need to first exhaust the decedent's probate  
28 estate to reach the assets of the revocable trust. Nor does this  
29 Act address the priority of the creditor claims or the possible  
30 liability of the decedent's other nonprobate assets for the  
31 decedent's debts and other charges. These many questions will  
32 hopefully be addressed by the drafting committee appointed in  
33 1997 by the National Conference of Commissioners on Uniform State  
34 Laws to draft a uniform law on creditor claims against nonprobate  
35 assets.

#### 36 **SECTION 3-105. LIMITATION ON CONTEST OF REVOCABLE TRUST.**

37 (a) Unless previously barred by adjudication, consent, or

1 other limitation, a judicial proceeding to contest the validity  
2 of a revocable trust must be brought no later than three years  
3 following the death of the settlor.

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

#### 10 **Comment**

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

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

## 30 **ARTICLE 4** 31 **TRUST ADMINISTRATION**

### 32 **PART 1** 33 **OFFICE OF TRUSTEE**

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

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

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

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

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

14 (c) If there is an immediate risk of damage to the trust  
15 property, the person named as trustee may act to preserve the  
16 trust property without accepting the office of trustee, if within  
17 a reasonable time after acting the person delivers a written  
18 rejection of the trust to the settlor or, if the settlor is dead  
19 or lacks capacity, to an adult beneficiary as defined in Section  
20 4-105(c).

#### 21 **Comment**

22 Source: CPC Sections 15600, 15601; Ind. Code Ann. Sec. 30-4-  
23 2-2 (West 1979).

24 This section, specifying the requirements for a valid  
25 acceptance of office by a trustee, implicates many of the same  
26 issues as arise in determining whether a trust has been revoked.  
27 Consequently, the provisions track each other closely. Compare  
28 Section 3-102(c) (procedure for revoking or modifying trust).  
29 While procedures specified in the terms of the trust are  
30 recognized, only substantial, not literal compliance is required.

1 A failure to meet technical requirements, such as notarization of  
2 the trustee's signature, does not result in a nonacceptance.  
3 Ordinarily, the trustee will indicate an acceptance by signing  
4 the trust instrument or signing a separate written instrument.  
5 However, this section recognizes any other method indicating the  
6 necessary intent, such as an acceptance by oral statement or  
7 knowingly exercising trustee powers, unless the terms of the  
8 trust make a specified method exclusive. This section also does  
9 not preclude an acceptance by estoppel or damages for an  
10 unreasonable delay in signifying a decision as to an acceptance  
11 or rejection. For general background on issues relating to  
12 trustee acceptance and rejection, see Restatement (Third) of  
13 Trusts Sec. 36 (Prel. Draft No. 3, 1997).

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

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

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

#### 44 **SECTION 4-102. TRUSTEE'S BOND.**

45 (a) A trustee is not required to give a bond to secure

1 performance of the trustee's duties unless:

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

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

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

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

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

#### 18 **Comment**

19 Source: CPC Section 15602.

20 This provision is consistent with the Restatement and with  
21 the bonding provisions of the Uniform Probate Code. See  
22 Restatement (Third) of Trusts Sec. 35 comm. a (Prel. Draft No. 3,  
23 1997); Uniform Probate Code Sections 3-604 (personal  
24 representatives), 5-410 (conservators), and 7-304 (trustees).  
25 Because a bond is required only if the terms of the trust require  
26 bond or a bond is found by the court to be necessary to protect  
27 the interests of beneficiaries, bond will rarely be required  
28 under the Act. This section does not specifically waive bond for  
29 financial institutions with trust powers, preferring instead to  
30 leave that topic to separate legislation.

31 **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, illness, or other temporary incapacity, the remaining cotrustees may act for the trust, as if they were the only trustees, if necessary to accomplish the purposes of the trust or to avoid irreparable injury to the trust property.

#### **Comment**

Source: CPC 15621, 15622.

Paragraph (1) is in 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



1 vacancy in the office of trustee if:

2 (1) the person named as trustee rejects the trust;

3 (2) the person named as trustee cannot be identified or does  
4 not exist;

5 (3) the trustee resigns or is removed;

6 (4) the trustee dies; or

7 (5) a guardian or conservator of the trustee's person or  
8 estate is appointed.

9 **Comment**

10 Source: CPC Section 15643.

11 This section lists the typical ways in which the office of  
12 trustee becomes vacant. It does not preclude other methods, such  
13 as the suspension of the powers of a trust company under federal  
14 or state banking regulations. For the rules on filling a vacancy,  
15 see Section 4-105. See also Section 4-101 (rejection of trust),  
16 4-106 (resignation and liability of resigning trustee), 4-107  
17 (removal of trustee), 4-602 (protection of third person dealing  
18 with former trustee).

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

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

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

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

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

30 (i) by a person designated by the unanimous

1 agreement of the adult beneficiaries as defined in subsection  
2 (c); or

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

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

#### 13 **Comment**

14 Source: CPC Section 15660.

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

21  
22 Good drafting practice suggests that the terms of the trust  
23 deal expressly with the problem of vacancies, naming successors  
24 and addressing other matters such as the circumstances under  
25 which a vacancy in the office of cotrustee need be filled. For  
26 this reason, subsection (b)(1) provides that the first choice for  
27 filling the vacancy is the person named in or nominated pursuant  
28 to the method specified by the terms of the trust. Furthermore,  
29 subsection (a) clarifies that a vacancy in the office of a  
30 cotrustee must be filled only if the trust so requires. If the  
31 vacancy in the office of cotrustee is not filled, the remaining  
32 cotrustees may continue to administer the trust under Section 4-  
33 103. For a listing of the circumstances when a vacancy in the  
34 office of trustee may occur, see Section 4-104.

35 Absent an effective provision in the terms of the trust,  
36 subsection (b)(2)(i) permits a vacancy in the office of trustee  
37 to be filled, without the need for court approval, by a person

1 selected by unanimous agreement of the adult beneficiaries as  
2 defined in subsection (c). The adult beneficiaries who must  
3 agree to the new trustee are the same as those who must consent  
4 to a resignation under Section 4-106(a)(3). If a trustee resigns  
5 pursuant to Section 4-106(a)(3), the trust may be transferred to  
6 a successor appointed pursuant to subsection (b)(2)(i), all  
7 without court involvement.

8 Because of the difficulty of identifying beneficiaries with  
9 remote contingent interests and a probable lack of interest in  
10 the day-to-day affairs of the trust, subsection (b)(2)(i) limits  
11 the class of beneficiaries whose consent is required. The  
12 beneficiaries who must consent to the selection of successor  
13 trustee are those beneficiaries currently eligible to receive a  
14 distribution from the trust as well as what might be termed the  
15 first line remaindermen, that is, the beneficiaries who would  
16 receive the principal were the event triggering the trust's  
17 termination to occur on the date the agreement was made. Such a  
18 terminating event will typically be the death or deaths of the  
19 beneficiaries currently eligible to receive the income. However,  
20 because this provision requires the unanimous consent of the  
21 designated beneficiaries, this nonjudicial method for filling the  
22 vacancy would be unworkable were a beneficiary required to give  
23 an incapacitated person. For this reason, the consent of an  
24 incapacitated beneficiary not represented by an agent,  
25 conservator or agent is not required. Should the incapacitated  
26 beneficiary have a conservator, guardian or agent, the  
27 conservator, guardian or agent may approve the selection of the  
28 successor trustee on the beneficiary's behalf. See Section 1-  
29 104.

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

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

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

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

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

5                 (2) in the case of a revocable trust;

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

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

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

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

17                 (3) in the case of an irrevocable trust, with the  
18 consent of the adult beneficiaries as specified in Section 4-  
19 105(c);

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

23                 (5) upon the filing of a petition to resign under  
24 Section 6-202, the resignation to take effect upon the approval  
25 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

1 trust, by the adult beneficiaries. But there is one situation  
2 where the consent may instead be given by the cotrustees. Should  
3 a cotrustee wish to resign and the vacancy not need to be filled,  
4 subsection (a)(4) provides that the consent to the resignation  
5 must be given by the cotrustees remaining in office. The  
6 cotrustees remaining in office are the persons most likely to be  
7 impacted by the resignation.

8  
9 Section 4-213 requires a trustee's report whenever there is  
10 a change of trustees. See also Restatement (Third) of Trusts  
11 Sec. 37 comm. d (Prel. Draft No. 3, 1997), which is in accord  
12 with subsection (b).

#### 13 **SECTION 4-107. REMOVAL OF TRUSTEE.**

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

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

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

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

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

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

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

28 (6) for other good cause shown.

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

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

#### 4 **Comment**

5 Source: CPC Section 15642.

6 Subsection (a) of this section is the same in substance as  
7 Section 38 of the Restatement (Third) of Trusts (Prel. Draft No.  
8 3, 1997), except that it gives the settlor of an irrevocable  
9 trust the right to petition for removal of a trustee. As to  
10 rights of a settlor of a revocable trust, see Sections 3-102  
11 (revocation or modification), 3-103 (other rights of settlor).  
12 The right to petition for removal of a trustee does not give the  
13 settlor of an irrevocable trust any other rights, such as the  
14 right to an annual report or to receive other information  
15 concerning administration of the trust.

16 The statement of grounds for removal of the trustee by the  
17 court is drawn from the Texas Trust Code and the Restatement.  
18 See Tex. Prop. Code Ann. Sec. 113.082(a) (Vernon 1984);  
19 Restatement (Third) of Trusts Sec.38 comm. e (Prel. Draft No. 3,  
20 1997). If a trustee is removed, another may be appointed to fill  
21 the vacancy as provided in Section 4-105.

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

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

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

1 person appointed by the Court to receive the property.

2 **Comment**

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

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

14 Section 4-213 requires a trustee's report by the trustee  
15 whenever there is a change of trustees. Section 4-602 protects  
16 third persons who deal in good faith with a former trustee  
17 without knowledge that the person is no longer a trustee. See  
18 also Sections 4-104 (vacancy in office of trustee), and 4-  
19 502(4) (appointment of receiver or temporary trustee upon breach  
20 of trust).

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

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

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

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

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

33 (3) in extraordinary circumstances calling for  
34 equitable relief.



1 **Comment**

2 Source: CPC Section 15680-15681.

3 Subsection (a) establishes a standard of reasonable  
4 compensation. For a list of factors relevant in determining  
5 reasonable compensation, see Restatement (Third) of Trusts Sec.  
6 39 comm. c (Prel. Draft No. 3, 1997). In setting compensation,  
7 the services actually performed and responsibilities assumed by  
8 the trustee should be closely examined. For example, an  
9 adjustment in compensation may be appropriate if the trustee has  
10 delegated significant duties. On the other hand, a trustee with  
11 special skills, such as those of a real estate agent, may be  
12 entitled to extra compensation for performing services that would  
13 ordinarily be delegated. See Restatement (Third) of Trusts Sec.  
14 39 comm. f (Prel. Draft No. 3, 1997).

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

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

38  
39 The standard of reasonable compensation also applies to a  
40 trust with multiple trustees. The mere fact that a trust has  
41 more than one trustee does not mean that the trustees together  
42 are entitled to more compensation than had either one acted  
43 alone. Nor does the appointment of multiple trustees mean that  
44 the trustees are eligible to receive the compensation in equal  
45 shares. The total amount of the compensation to be paid and how  
46 it should be divided will depend on the totality of the  
47 circumstances. Factors to be considered include the settlor's  
48 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

determination, see Restatement (Second) of Trusts Section 245  
comm. g (1959).

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

## **PART 2**

### **FIDUCIARY DUTIES OF TRUSTEE**

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

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

(b) The terms of the trust may expand, restrict, eliminate,  
or otherwise alter the duties prescribed by this [Part], and the  
trustee may reasonably rely on those terms, but 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

1 obligation to act in good faith and in light of fiduciary  
2 principles is a fundamental concept the application of which is  
3 not limited to this section. See Sections 4-214 (duties with  
4 regard to discretionary powers), 4-505 (exculpation of trustee).  
5 See also Sections 4-202 (duty of loyalty), and 4-203 (duty to act  
6 with prudence). In addition and perhaps stating the obvious, the  
7 trustee is not required to perform a duty prescribed by the terms  
8 of the trust if performance would be impossible. Furthermore,  
9 because the Act prohibits the creation of trusts for certain  
10 purposes, terms premised on those invalid purposes are also  
11 invalid. Consequently, a trustee need not comply with a term of  
12 the trust if it requires the performance of an illegal act or an  
13 act violative of public policy.

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

20 For background on the trustee's duty to administer the  
21 trust, see Restatement (Second) of Trusts Sections 164-169  
22 (1959).

23 For a provision requiring the trustee to follow the terms of  
24 the trust with respect to the making of investments, see Section  
25 4-301(b).

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

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

31 (b) Any transaction involving the trust property which is  
32 affected by a substantial conflict between the trustee's  
33 fiduciary and personal interests is voidable by a beneficiary  
34 affected by the transaction unless (i) the transaction was  
35 authorized by the terms of the trust; (ii) the beneficiary  
36 consented to or affirmed the transaction or released the trustee

1 from liability as provided in Section 5-406; or (iii) the  
2 transaction is approved by the Court following notice to the  
3 beneficiaries. A transaction is presumed to be affected by a  
4 substantial conflict between personal and fiduciary interests if  
5 it involves a sale, encumbrance, or other transaction concerning  
6 the trust property entered into by the trustee, the spouse,  
7 descendants, siblings, parents, agent, or attorney of a trustee,  
8 or by a corporation or other enterprise in which the trustee has  
9 a substantial beneficial interest.

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

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

#### 24 **Comment**

25 Source: CPC Section 16002-16004.

26 Subsection (a) of this section, which recites the trustee's  
27 overriding obligations of loyalty and impartiality, is based on

1 Sections 170(1) and 232 of the Restatement (Second) of Trusts  
2 (1959).

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

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

41 Subsection (c) creates a presumption that certain  
42 transaction between a trustee and beneficiary outside of trust  
43 are an abuse of a confidential relationship by the trustee. This  
44 section has a limited scope. If the trust has terminated, there  
45 must be proof that the trustee's influence with the beneficiary  
46 remains. Furthermore, whether or not the trust has terminated,  
47 there must be proof that the trustee obtained an advantage from  
48 the relationship. The fact the trustee profited is insufficient

1 to show an abuse if a third party would have similarly profited  
2 in an arm's length transaction.

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

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

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

19 **Comment**

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

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

34 **Comment**

35 Source: Unif. Prudent Investor Act Sec. 7.  
36 This section is consistent with the rules concerning costs  
37 in Section 227(c)(3) of the Restatement (Third) of Trusts:

1 Prudent Investor Rule (1992). For related rules concerning  
2 reimbursement and compensation of trustees, see Sections 4-109  
3 and 4-110. The duty to minimize costs applies to delegation to  
4 agents as well as to other aspects of trust administration. In  
5 deciding whether and how to delegate, the trustee must be alert  
6 to balancing projected benefits against the likely costs. The  
7 trustee must also be alert to adjusting compensation for  
8 functions which the trustee has delegated to others in order to  
9 protect the beneficiary against "double dipping."

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

#### 13 **SECTION 4-205. TRUSTEE'S SKILLS.**

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

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

#### 19 **Comment**

20 Source: CPC Section 16014.

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

#### 30 **SECTION 4-206. DELEGATION BY TRUSTEE.**

31 (a) A trustee may not delegate to an agent or cotrustee the  
32 entire administration of the trust or the responsibility to make  
33 or participate in the making of decisions with respect to  
34 discretionary distributions, but a trustee may otherwise delegate  
35 the performance of functions that a prudent trustee of comparable



1 skills might delegate under similar circumstances.

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

4 (1) selecting an agent;

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

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

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

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

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

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

21 **Comment**

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

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

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

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

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

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

1 For provisions permitting beneficiaries to relieve the  
2 trustee from liability, see Section 4-506. See also Sections 4-  
3 103 (actions by cotrustees), 4-201 (duties subject to control by  
4 terms of the trust), 4-203 (trustee's standard of prudence in  
5 performing duties), 4-402(13) (trustee may give proxies to vote  
6 shares), 4-402(16) (authority to delegate to protective committee  
7 in a reorganization), 4-402(26) (power to hire agents of trust).

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

#### 14 **SECTION 4-207. DIRECTORY POWERS.**

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

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

#### 25 **Comment**

26 This section is based on Restatement (Second) of Trusts  
27 Section 185 and comments. Directory powers in the terms of a  
28 trust usually relate either to choice of investment or management  
29 of closely-held business interests. A directory power must be  
30 distinguished from a veto power. Under a directory power, action  
31 is initiated and is within the control of a third party and the  
32 trustee usually has no responsibility other than to carry out the  
33 direction when made. But if a third party holds a veto power,  
34 the trustee is responsible for initiating the decision, subject  
35 to the third party's approval. A trustee who administers a trust  
36 subject to a veto power occupies a position akin to that of a  
37 cotrustee and is responsible for taking appropriate action if the

1 third party's refusal to consent would result in a breach of  
2 trust. See Restatement (Second) of Trusts Sec. 185 comm. g  
3 (1959); Section 4-208 (duties of cotrustees).

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

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

#### 27 **SECTION 4-208. COTRUSTEES.**

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

- 30 (1) participate in the administration of the trust; and  
31 (2) take reasonable steps to prevent a cotrustee from  
32 committing a breach of trust and to compel a cotrustee to redress  
33 a breach of trust.

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

37 **Comment**

1 Source: CPC Section 16013.

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

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

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

19 **Comment**

20 Source: CPC Section 16006.

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

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

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

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

1 **Comment**

2 Source: CPC Section 16009.

3 The duty to earmark trust assets and the duty of a trustee  
4 not to mingle the assets of the trust with the trustee's own are  
5 closely related. This section, which is derived from Section 179  
6 of the Restatement (Second) of Trusts 179 (1959), addresses both  
7 duties. Paragraph (2) addresses the duty to earmark the trust  
8 assets, requiring that the trust property be designated in such a  
9 manner that the interest of the trust clearly appears. Unlike  
10 the Restatement, however, this section does not require that  
11 assets normally issued in registrable form must be registered in  
12 the name of the trustee. See Restatement (Second) of Trusts Sec.  
13 179 comm. d. As long as the interest of the trustee clearly  
14 appears in the trustee's established record keeping system,  
15 paragraph (2) permits the joint investment of trust funds with  
16 the funds of others, but not the trustee's own. Recognizing the  
17 inherent risks of commingling, paragraph (1) strictly prohibits  
18 the trustee from commingling the assets of the trust with the  
19 trustee's own.

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

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

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

27 **Comment**

28 Source: CPC Section 16010-16011.

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

37 **SECTION 4-212. PRIOR FIDUCIARIES.** A trustee shall take  
38 reasonable steps to (i) compel a former trustee or other  
39 fiduciary to deliver trust property to the trustee, and (ii)

1 redress a breach of trust known to the trustee to have been  
2 committed by a prior trustee or other fiduciary.

3 **Comment**

4 Source: CPC Section 16403.

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

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

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

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

30 **SECTION 4-213. DUTY TO INFORM AND REPORT.**

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

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

37 (c) Within [30] days after accepting the office of trustee,

1 the trustee shall inform the beneficiaries of the acceptance.  
2 Within [30] days after the death of the settlor of a revocable  
3 trust, the trustee shall inform the beneficiaries of their  
4 respective interests in the trust.

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

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

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

21 (1) the adult beneficiaries as defined in Section 4-  
22 105(c); and

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

26 (g) A trustee's report and other information required under



1 this section may be waived if the persons entitled to the report  
2 or other information consent in writing.

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

#### 7 **Comment**

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

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

32 The standard is different if the beneficiary makes a  
33 specific request for information, however. In that event,  
34 subsection (a) requires the trustee to promptly comply with the  
35 beneficiary's request unless unreasonable under the  
36 circumstances. Further recognizing this principle that the  
37 beneficiary should be allowed to make an independent assessment  
38 of what information is relevant to protecting the beneficiary's  
39 interest, subsection (b) requires the trustee to on request  
40 furnish a beneficiary with a complete copy of the trust  
41 instrument. Subsections (a) and (b) have only limited  
42 application to revocable trusts, however. During the time that a  
43 trust is revocable and the settlor has capacity, the right to

1 request information or a copy of the trust instrument pursuant to  
2 this section does not belong to the beneficiaries but only to the  
3 settlor. See Section 3-103.

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

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

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

43 While the principle that the trustee must keep the  
44 beneficiaries reasonably informed is well established, less well  
45 established is who among the many different types of  
46 beneficiaries must be given the required notice. Subsection (f)  
47 requires that the information must be given to the beneficiaries

1 who have a right to appoint a successor in the event of a vacancy  
2 (see Section 4-105(c)), as well as other beneficiaries who have  
3 requested a copy of the report or other information. The result  
4 of this limitation is that the information need not be furnished  
5 to beneficiaries with remote remainder interests unless they have  
6 filed a specific request with the trustee.

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

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

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

#### 29 **Comment**

30 Despite the breadth of discretion purportedly granted by  
31 the wording of a trust, a grant of discretion, whether with  
32 respect to management of distribution, is never absolute. A  
33 grant of discretion establishes a range within which the trustee  
34 may act. The greater the grant of discretion, the broader the  
35 range. A trustee's action must always be in good faith, not  
36 induced by an improper motive, and to some extent reasonable,  
37 although the greater the discretion given the more the

1 flexibility that will be given to the concept of reasonableness.  
2 See Edward C. Halbach, Jr., Problems of Discretion in  
3 Discretionary Trusts, 61 Colum. L. Rev. 1425 (1961). See also  
4 Restatement (Second) of Trusts Sec. 187 (1959).

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

7 **PREFATORY NOTE**

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

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

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

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

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

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

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

40 (5) The much criticized former rule of trust law  
41 forbidding the trustee to delegate investment and management

functions has been reversed. Delegation is now permitted,  
subject to safeguards. UPIA § 9.

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

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

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

**Remedies.** This Act does not undertake to address issues of

1 remedy law or the computation of damages in trust matters.  
2 Remedies are the subject of a reasonably distinct body of  
3 doctrine. See generally Restatement (Second) of Trusts  
4 §§ 197-226A (1959) [hereinafter cited as Restatement of Trusts  
5 2d; also referred to as 1959 Restatement].

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

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

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

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

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

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

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

14                                   **Comment**

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

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

25       **Prior legislation.** The Model Prudent Man Rule Statute  
26 (1942), sponsored by the American Bankers Association, undertook  
27 to codify the language of the *Amory* case. See Mayo A. Shattuck,  
28 *The Development of the Prudent Man Rule for Fiduciary Investment*  
29 *in the United States in the Twentieth Century*, 12 *Ohio State L.J.*  
30 491, at 501 (1951); for the text of the model act, which inspired  
31 many state statutes, see *id.* at 508-09. Another prominent  
32 codification of the *Amory* standard is Uniform Probate Code  
33 § 7-302 (1969), which provides that "the trustee shall observe  
34 the standards in dealing with the trust assets that would be  
35 observed by a prudent man dealing with the property of another .  
36 . . ."

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

11 **Prior Restatement.** The Restatement of Trusts 2d (1959) also  
12 tracked the language of the *Amory* case: "In making investments of  
13 trust funds the trustee is under a duty to the beneficiary . . .  
14 to make such investments and only such investments as a prudent  
15 man would make of his own property having in view the  
16 preservation of the estate and the amount and regularity of the  
17 income to be derived . . . ." Restatement of Trusts 2d § 227  
18 (1959).

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

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

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

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

40 (b) A trustee's investment and management decisions



1     respecting individual assets must be evaluated not in isolation  
2     but in the context of the trust portfolio as a whole and as a  
3     part of an overall investment strategy having risk and return  
4     objectives reasonably suited to the trust.

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

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

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

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

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

7 **Comment**

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

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

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

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

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

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

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

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

31 Subsection (c)(8), allowing the trustee to take into account  
32 any preferences of the beneficiaries respecting heirlooms or  
33 other prized assets, derives from the Illinois act, 760 ILCS  
34 § 5/5(a)(4) (1992).

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

40 **Duty to investigate.** Subsection (d) carries forward the  
41 traditional responsibility of the fiduciary investor to examine  
42 information likely to bear importantly on the value or the  
43 security of an investment -- for example, audit reports or  
44 records of title. E.g., *Estate of Collins*, 72 Cal. App. 3d 663,  
45 139 Cal. Rptr. 644 (1977) (trustees lent on a junior mortgage on

1 unimproved real estate, failed to have land appraised, and  
2 accepted an unaudited financial statement; held liable for  
3 losses).

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

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

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

43       **Professional fiduciaries.** The distinction taken in  
44 subsection (f) between amateur and professional trustees is  
45 familiar law. The prudent investor standard applies to a range  
46 of fiduciaries, from the most sophisticated professional  
47 investment management firms and corporate fiduciaries, to family

1 members of minimal experience. Because the standard of prudence  
2 is relational, it follows that the standard for professional  
3 trustees is the standard of prudent professionals; for amateurs,  
4 it is the standard of prudent amateurs. Restatement of Trusts 2d  
5 § 174 (1959) provides: "The trustee is under a duty to the  
6 beneficiary in administering the trust to exercise such care and  
7 skill as a man of ordinary prudence would exercise in dealing  
8 with his own property; and if the trustee has or procures his  
9 appointment as trustee by representing that he has greater skill  
10 than that of a man of ordinary prudence, he is under a duty to  
11 exercise such skill." Case law strongly supports the concept of  
12 the higher standard of care for the trustee representing itself  
13 to be expert or professional. See Annot., Standard of Care  
14 Required of Trustee Representing Itself to Have Expert Knowledge  
15 or Skill, 91 A.L.R. 3d 904 (1979) & 1992 Supp. at 48-49.

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

31 **Matters of proof.** Although virtually all express trusts are  
32 created by a written instrument, oral trusts are known, and  
33 accordingly, this Act presupposes no formal requirement that  
34 trust terms be in writing. When there is a written trust  
35 instrument, modern authority strongly favors allowing evidence  
36 extrinsic to the instrument to be consulted for the purpose of  
37 ascertaining the settlor's intent. See Uniform Probate Code  
38 § 2-601 (1990), Comment; Restatement (Third) of Property:  
39 Donative Transfers (Preliminary Draft No. 2, ch. 11, Sept. 11,  
40 1992).

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

[illegible]

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.

**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.

80

1 configured the portfolio differently -- to include investments in  
2 different industries. This is uncompensated risk -- nobody pays  
3 the investor for owning shares in too few industries and too few  
4 companies. Risk that can be eliminated by adding different  
5 stocks (or bonds) is uncompensated risk. The object of  
6 diversification is to minimize this uncompensated risk of having  
7 too few investments. "As long as stock prices do not move  
8 exactly together, the risk of a diversified portfolio will be  
9 less than the average risk of the separate holdings." R.A.  
10 Brealey, *An Introduction to Risk and Return from Common Stocks*  
11 103 (2d ed. 1983).

12 There is no automatic rule for identifying how much  
13 diversification is enough. The 1992 Restatement says:  
14 "Significant diversification advantages can be achieved with a  
15 small number of well-selected securities representing different  
16 industries . . . . Broader diversification is usually to be  
17 preferred in trust investing," and pooled investment vehicles  
18 "make thorough diversification practical for most trustees."  
19 Restatement of Trusts 3d: Prudent Investor Rule § 227, General  
20 Note on Comments e-h, at 77 (1992). See also Macey, *supra*, at  
21 23-24; Brealey, *supra*, at 111-13.

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

31 Most states have legislation authorizing common trust funds;  
32 see 3 Austin W. Scott & William F. Fratcher, *The Law of Trusts*  
33 § 227.9, at 463-65 n.26 (4th ed. 1988) (collecting citations to  
34 state statutes). As of 1992, 35 states and the District of  
35 Columbia had enacted the Uniform Common Trust Fund Act (UCTFA)  
36 (1938), overcoming the rule against commingling trust assets and  
37 expressly enabling banks and trust companies to establish common  
38 trust funds. 7 Uniform Laws Ann. 1992 Supp. at 130 (schedule of  
39 adopting states). The Prefatory Note to the UCTFA explains: "The  
40 purposes of such a common or joint investment fund are to  
41 diversify the investment of the several trusts and thus spread  
42 the risk of loss, and to make it easy to invest any amount of  
43 trust funds quickly and with a small amount of trouble." 7  
44 Uniform Laws Ann. 402 (1985).

45 **Fiduciary investing in mutual funds.** Trusts can also  
46 achieve diversification by investing in mutual funds. See  
47 Restatement of Trusts 3d: Prudent Investor Rule, § 227, Comment

1 m, at 99-100 (1992) (endorsing trust investment in mutual funds).  
2 ERISA § 401(b)(1), 29 U.S.C. § 1101(b)(1), expressly authorizes  
3 pension trusts to invest in mutual funds, identified as  
4 securities "issued by an investment company registered under the  
5 Investment Company Act of 1940 . . . ."

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

14                               **Comment**

15       This section, requiring the trustee to dispose of unsuitable  
16 assets within a reasonable time, is old law, codified in  
17 Restatement of Trusts 3d: Prudent Investor Rule § 229 (1992),  
18 lightly revising Restatement of Trusts 2d § 230 (1959). The duty  
19 extends as well to investments that were proper when purchased  
20 but subsequently become improper. Restatement of Trusts 2d § 231  
21 (1959). The same standards apply to successor trustees, see  
22 Restatement of Trusts 2d § 196 (1959).

23       The question of what period of time is reasonable turns on  
24 the totality of factors affecting the asset and the trust. The  
25 1959 Restatement took the view that "[o]rdinarily any time within  
26 a year is reasonable, but under some circumstances a year may be  
27 too long a time and under other circumstances a trustee is not  
28 liable although he fails to effect the conversion for more than a  
29 year." Restatement of Trusts 2d § 230, comment b (1959). The  
30 1992 Restatement retreated from this rule of thumb, saying, "No  
31 positive rule can be stated with respect to what constitutes a  
32 reasonable time for the sale or exchange of securities."  
33 Restatement of Trusts 3d: Prudent Investor Rule § 229, comment b  
34 (1992).

35       The criteria and circumstances identified in Section 4-302  
36 as bearing upon the prudence of decisions to invest and manage  
37 trust assets also pertain to the prudence of decisions to retain  
38 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 *g*, at 371 (1959).

No form of so-called "social investing" is consistent with the duty of loyalty if the investment activity entails sacrificing the interests of trust beneficiaries -- for example, by accepting below-market returns -- in favor of the interests of the persons supposedly benefitted by pursuing the particular social cause. See, e.g., John H. Langbein & Richard Posner, *Social Investing and the Law of Trusts*, 79 Michigan L. Rev. 72, 96-97 (1980) (collecting authority). For pension trust assets, see generally Ian D. Lanoff, *The Social Investment of Private Pension Plan Assets: May it Be Done Lawfully under ERISA?*, 31 Labor L.J. 387 (1980). Commentators supporting social investing tend to concede the overriding force of the duty of loyalty. They argue instead that particular schemes of social investing may not result in below-market returns. See, e.g., Marcia O'Brien Hylton, *"Socially Responsible" Investing: Doing Good Versus Doing Well in an Inefficient Market*, 42 American U.L. Rev. 1 (1992). In 1994 the Department of Labor issued an Interpretive Bulletin reviewing its prior analysis of social investing questions and reiterating that pension trust fiduciaries may

invest only in conformity with the prudence and loyalty standards of ERISA §§ 403-404. Interpretive Bulletin 94-1, 59 Fed. Regis. 32606 (Jun. 22, 1994), to be codified as 29 CFR § 2509.94-1. The Bulletin reminds fiduciary investors that they are prohibited from "subordinat[ing] the interests of participants and beneficiaries in their retirement income to unrelated objectives."

**SECTION 4-306. 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.

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**Comment**

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

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

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

**Comment**

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

**SECTION 4-309. 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,

1 consistent with the purposes and terms of the trust; and

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

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

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

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

15 **Comment**

16 This section reverses the much-criticized rule that forbade  
17 trustees to delegate investment and management functions. The  
18 language of this section is derived from Restatement of Trusts  
19 3d: Prudent Investor Rule § 171 (1992), discussed *infra*, and from  
20 the 1991 Illinois act, 760 ILCS § 5/5.1(b), (c) (1992).

21 **Former law.** The former nondelegation rule survived into the  
22 1959 Restatement: "The trustee is under a duty to the  
23 beneficiary not to delegate to others the doing of acts which the  
24 trustee can reasonably be required personally to perform." The  
25 rule put a premium on the frequently arbitrary task of  
26 distinguishing discretionary functions that were thought to be  
27 nondelegable from supposedly ministerial functions that the  
28 trustee was allowed to delegate. Restatement of Trusts 2d § 171  
29 (1959).

30 The Restatement of Trusts 2d admitted in a comment that  
31 "There is not a clear-cut line dividing the acts which a trustee  
32 can properly delegate from those which he cannot properly  
33 delegate." Instead, the comment directed attention to a list of  
34 factors that "may be of importance: (1) the amount of discretion

involved; (2) the value and character of the property involved; (3) whether the property is principal or income; (4) the proximity or remoteness of the subject matter of the trust; (5) the character of the act as one involving professional skill or facilities possessed or not possessed by the trustee himself." Restatement of Trusts 2d § 171, comment d (1959). The 1959 Restatement further said: "A trustee cannot properly delegate to another power to select investments." Restatement of Trusts 2d § 171, comment h (1959).

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

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

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

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

**ERISA's delegation rule.** The Employee Retirement Income

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

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

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

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

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

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

**Protecting the beneficiary against unreasonable delegation.**

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

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

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

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

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

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

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

#### 25                   **Comment**

26       This provision is taken from the Illinois act, 760 ILCS  
27 § 5/5(d) (1992), and is meant to facilitate incorporation of the  
28 Act by means of the formulaic language commonly used in trust  
29 instruments.

### 30                   **PART 4. POWERS OF TRUSTEES**

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

32 (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

1 elsewhere in this Act and which are recognized by this Section  
2 include all of the specific powers listed in Section 4-402.

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

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

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

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

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

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

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

32 (5) acquire or dispose of property, for cash or on credit,

1 at public or private sale, or by exchange;

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

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

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

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

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

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

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

26 (13) with respect to shares of stock of a domestic or

1 foreign corporation, any membership in a nonprofit corporation,  
2 or other property;

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

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

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

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

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

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

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

24 (18) deposit securities in a securities depository;

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

1 persons;

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

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

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

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

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

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

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

26 (27) inspect or investigate property that the trustee holds

1 or has been asked to hold, or property owned or operated by an  
2 entity in which the trustee holds or has been asked to hold an  
3 interest for the purpose of determining the application of  
4 environmental law with respect to the property; and take action  
5 to prevent, abate, or otherwise remedy any actual or potential  
6 violation of any environmental law affecting property held  
7 directly or indirectly by the trustee;

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

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

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

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

#### 21 **Comment**

22 Source: CPC Section 16220-16249.

23 Most of the powers listed in this section are drawn from  
24 Section 3 of the Uniform Trustee's Powers Act (1964). Several of  
25 the paragraphs are new, however, and other provisions of the  
26 Trustee's Powers Act have been modified.

27 Paragraph (3) authorizes the trustee to continue or  
28 incorporate a business. Any such decision by the trustee must be  
29 made in light of the standards of prudent investment stated in

1 Part 3 of this article. The authority under this paragraph is  
2 broader than that granted under Section 3(c)(3) of the Uniform  
3 Trustee's Powers Act. Under the Trustee's Powers Act, a trustee  
4 may continue a business only if authorized by the terms of the  
5 trust or court order.

6 Paragraph (5) authorizes a trustee to acquire or dispose of  
7 property, for cash or on credit, at public or private sale, or by  
8 exchange. Under the Restatement, a trustee may sell on credit  
9 only if security is given. Restatement(Second) of Trusts Section  
10 190, comment j (1959).

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

17 Paragraph (22) authorizes a trustee to pay compensation  
18 without prior court approval. For other provisions relating to  
19 trustees' compensation, see Section 4-109. See also Sections 4-  
20 110 (repayment to trustees for expenses incurred), 4-402  
21 (26) (power to hire agents).

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

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

38 Paragraph (25) allows a trustee to make non-pro rata  
39 distributions and distribute undivided interests. The trustee  
40 also has the power to sell property in order to make the  
41 distribution. This paragraph recognizes the authority to take  
42 gains and losses into account for tax purposes when making  
43 distributions. This power provides needed flexibility and avoids  
44 the possibility of a taxable event arising from a non-pro rata  
45 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



1 (Second) of Trusts (1959). While a trust is revocable, the  
2 trustee owes duties to the person holding the power to revoke and  
3 not to the named beneficiaries. See Section 3-103. See also  
4 Section 3-103(b) (holder of presently exercisable power of  
5 withdrawal treated as settlor).

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

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

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

25 **Comment**

26 Source: CPC Section 16420.

27 This section codifies in general terms the remedies  
28 available to a beneficiary or cotrustee when a trustee has  
29 committed a breach of trust or threatens to do so. The list of  
30 remedies is not necessarily exclusive and is not intended to  
31 prevent resort to any other appropriate remedy. This section  
32 provides a general list of remedies and does not attempt to set  
33 out the refinements and exceptions developed over many years by

1 the common law. The availability of a particular remedy listed  
2 in this section, and its application under the circumstances, are  
3 governed by the common law. See Section 1-103 (common law of  
4 trusts). The petitioner may seek any one or more of the remedies  
5 listed as is appropriate in the circumstances of the case.

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

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

19 Paragraph (4) makes explicit the authority to appoint a  
20 receiver. See also Restatement (Second) of Trusts Section 199(d)  
21 (1959). This paragraph also permits appointment of a temporary  
22 trustee if appointment of a receiver would be appropriate. See  
23 Section 4-105 (appointment of trustee to fill vacancy).

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

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

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

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

40 **SECTION 4-503. BREACH OF TRUST; LIABILITY.** A beneficiary may  
41 charge a trustee who commits a breach of trust with the amount

1 required to restore the value of the trust property and trust  
2 distributions to what they would have been had the breach not  
3 occurred, or, if greater, the amount of profit that the trustee  
4 made by reason of the breach.

#### 5 **Comment**

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

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

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

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

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

#### 28 **SECTION 4-504. LIMITATION OF ACTION AGAINST TRUSTEE** 29 **FOLLOWING FINAL REPORT OR OTHER STATEMENT.**

30 (a) Unless previously barred by adjudication, consent, or  
31 other limitation, a claim against a trustee for breach of trust  
32 is barred as to a beneficiary who has received from the trustee a  
33 report or other statement adequately disclosing the existence of  
34 the claim unless a judicial proceeding to assert the claim is

1 commenced within two years after the later of (i) the receipt of  
2 the report or statement, or (ii) the termination of the trust  
3 relationship between the beneficiary and that particular trustee.  
4 A report or statement adequately discloses the existence of a  
5 claim if it provides sufficient information so that the  
6 beneficiary knows of the claim or reasonably should have inquired  
7 into its existence.

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

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

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

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

21 **Comment**

22 Source: CPC Section 16460.

23 This section is based in part on Section 7-307 of the  
24 Uniform Probate Code. For provisions governing consent, release,  
25 and affirmance by beneficiaries to relieve the trustee of  
26 liability, see Section 4-506. The reference in the introductory  
27 clause to claims previously barred also includes principles such  
28 as estoppel and laches that apply under the common law. See  
29 Section 1-103 (common law of trusts). During the time that a  
30 trust is revocable, the person holding the power to revoke is the

1 one who must receive the report or other statement in order to  
2 commence the running of the limitations period provided in this  
3 section. See Sections 3-103 (rights of settlor).

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

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

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

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

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

#### 25 **Comment**

26 Source: CPC Section 16461.

27 Paragraph (1) is the same in substance as Section 222 of the  
28 Restatement (Second) of Trusts (1959), except that the reference  
29 to gross negligence does not appear in the Restatement. There is  
30 a distinction between an exculpatory provision and the negation  
31 of a duty. While the terms of the trust may negate a duty (see  
32 Section 4-201(b)), if the trustee is required under the terms of  
33 the trust or this Act to perform the duty, the trustee may not be  
34 totally absolved from liability for a breach. See  
35 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 affirmance 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 affirmance of the beneficiary was induced by improper conduct of the trustee.

**Comment**

Source: CPC Section 16463-16465.  
This section is drawn from Sections 216 to 218 of the Restatement (Second) of Trusts (1959). When one beneficiary has

1 consented but others have not, courts give a remedy to the  
2 nonconsenting beneficiaries. Restatement (Second) of Trusts  
3 Section 216, comment h. But consent by the settlor of a  
4 revocable trust or by the holder of a presently exercisable power  
5 of withdrawal binds all of the beneficiaries. See Section 3-103.

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

## 11 **PART 6** 12 **RIGHTS OF THIRD PERSONS**

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

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

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

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

1 (d) A question of liability between the trust and the  
2 trustee personally may be determined in a judicial proceeding  
3 under Section 6-103.

#### 4 **Comment**

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

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

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

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

30 Under subsection (d), ultimate liability between an estate  
31 and trustee need not be determined before the third person's  
32 claim can be satisfied. It is permissible, and may be  
33 preferable, for judgment to be entered against the trust without  
34 determining the trustee's ultimate liability until later. If  
35 judgment is entered against the trustee individually, the  
36 question of the trustee's right to reimbursement may be settled  
37 informally with the beneficiaries or in a separate judicial  
38 proceeding in the probate court. For rules governing  
39 indemnification of trustees, see Section 4-110. See also Section  
40 6-103 (judicial proceedings against trustee by beneficiary).

#### 41 **SECTION 4-602. PROTECTION OF PERSONS DEALING WITH TRUSTEE.**



1 (a) A person who in good faith and for value assists or  
2 deals with a trustee without knowledge that the trustee is  
3 exceeding the trustee's powers or improperly exercising them is  
4 protected as though the trustee properly exercised the power;  
5 The fact that a person knowingly deals with a trustee does not  
6 alone require the person to inquire into the existence of a power  
7 of the propriety of its exercise. A person need not see to the  
8 proper application of assets of the trust paid or delivered to a  
9 trustee.

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

14 **Comment**

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

18 **SECTION 4-603. CERTIFICATION OF TRUST.**

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

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

1 (c) A certification of trust need not contain the  
2 dispositive terms of the trust which set forth the distribution  
3 of the trust estate.

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

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

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

26 (g) This section does not limit the rights of beneficiaries

1 to obtain copies of the trust instrument or rights of others to  
2 obtain copies in a judicial proceeding concerning the trust.

3 **Comment**

4 Source: CPC Section 18100.5.

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

10 **Comment**

11 Source: CPC Section 16249(b).

12 **ARTICLE 5**  
13 **CHARITABLE TRUSTS**

14 **GENERAL COMMENT**

15 The purpose of this Article is to substantially broaden the  
16 authority of courts and trustees to make charitable gifts more  
17 effective. Many of the concepts expressed in this Article are  
18 not new, but have long been advocated by commentators. See,  
19 e.g., Roger G. Sisson, *Relaxing the Dead Head's Grip: Charitable*  
20 *Efficiency and the Doctrine of Cy Pres*, 74 Va. L. Rev. 635  
21 (1988); Report, *Cy Pres and Deviation: Current Trends and*  
22 *Application*, 8 Real Prop. Prob. & Trust J. 391 (1971); Joseph A.  
23 DiClerico, Jr., *Cy Pres: A Proposal for Change*, 47 B.U.L. Rev.  
24 153 (1967); Kenneth L. Karst, *The Efficiency of the Charitable*  
25 *Dollar: An Unfulfilled State Responsibility*, 73 Harv. L. Rev. 433  
26 (1960). A liberalizing trend is also apparent in a number of the  
27 state statutes, with the reforms in Wisconsin, from which this  
28 Article borrows extensively, being the most notable. See Wis.  
29 Stat. Ann. Sec. 701.10.

30 **SECTION 5-101. CHARITABLE PURPOSES.** A charitable trust may  
31 be created for the relief of poverty, the advancement of  
32 education or religion, the promotion of health, or any other

1 purpose the accomplishment of which is beneficial to the  
2 community. If the terms of the trust do not indicate a  
3 particular charitable purpose or beneficiaries, the trustee may  
4 select one or more charitable purposes or beneficiaries.

#### 5 **Comment**

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

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

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

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

20 (2) If a particular charitable purpose for which a trust was  
21 created becomes impracticable, unlawful or impossible to fulfill,  
22 the trust property shall not revert to the settlor but the Court  
23 shall instead either modify the terms of the trust or direct that  
24 the property of the trust be distributed in whole or in part in a  
25 manner best meeting the settlor's general charitable purposes.

26 If an administrative term of a charitable trust becomes  
27 impracticable, unlawful, impossible to fulfill or otherwise  
28 impairs the effective administration of the trust, the Court may

1 modify the term.

2 **Comment**

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

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

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

43 The doctrine of cy pres is not limited to charitable trusts,  
44 but applies as well to other types of charitable dispositions,  
45 such as not-for-profit corporations. This Section, because it is  
46 part of a Trust Act, does not apply to charitable dispositions

1 made in nontrust form, but in formulating the rules for such  
2 dispositions the courts are of course free to adopt the  
3 principles of this Section.

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

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

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

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

16                           **Comment**

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

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

34           For the comparable provision on termination of small  
35 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.

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

7 **Comment**

8 Source: CPC Section 17000.  
9 Subsection (a) of this section is drawn from Section 7-  
10 201(a) of the Uniform Probate Code. Subsection (b) is drawn from  
11 Section 7-204 of the Uniform Probate Code.

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

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

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

- 18 (1) construe and determine the terms of the trust;
- 19 (2) determine the existence of any immunity, power,  
20 privilege, duty or right;
- 21 (3) determine the validity of a term of the trust;
- 22 (4) ascertain beneficiaries and determine to whom  
23 property shall pass or be delivered upon final or partial  
24 termination of the trust;
- 25 (5) settle accounts and pass upon the acts of the  
26 trustee, including the exercise of discretionary powers;
- 27 (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

1 involving the administration of the trust. See Section 6-102.

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

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

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

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

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

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

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

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

23 **Comment**

24 Source: CPC Section 17002; Az. Rev. Stat. Ann. Sec. 14-7202.  
25 Section 6-109 governs transfer of jurisdiction over trusts  
26 to and from other jurisdictions.

27 **SECTION 6-105. JURISDICTION OVER TRUSTEES AND BENEFICIARIES.**

1 (a) While a trust's principal place of administration is in  
2 this State:

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

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

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

16 **Comment**

17 Source: CPC Section 17003.

18 This section, which is intended to provide the widest  
19 possible long-arm effect consistent with constitutional  
20 principles, is based on Arizona Revised Statutes Annotated Sec.  
21 14-7202.  
22

23 **SECTION 6-106. VENUE.**

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

29 (b) If a trust not created by will has no trustee, a

1 judicial proceeding for appointing a trustee shall be commenced  
2 in the [county] in which either a beneficiary resides or the  
3 trust property, or some portion of the trust property, is  
4 located.

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

8 **Comment**

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

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

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

26 **SECTION 6-107. NOTICE AND NECESSARY PARTIES.** Judicial  
27 proceedings under this [Act] are commenced by filing a petition  
28 in the Court and by giving notice to interested persons. Notice  
29 to the trustee by mail may be addressed to the trustee at the  
30 trust's principal place of administration. The Court may order  
31 that notice be given to additional persons. An order of Court is  
32 valid as to all who are given notice of the proceeding even  
33 though less than all interested persons are notified.

1 **Comment**

2 Source: UPC Sec. 7-206.

3 **SECTION 6-108. DISMISSAL OF MATTERS RELATING TO FOREIGN**

4 **TRUSTS.** The Court shall not, over the objection of a party,  
5 entertain proceedings involving a trust which is under the  
6 continuing supervision of a court outside of this State, or is  
7 registered in or has its principal place of administration  
8 outside of this State unless:

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

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

16 **Comment.**

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

18 **SECTION 6-109. TRANSFER OF JURISDICTION.**

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

23 (b) A trustee, with the consent of the beneficiaries as  
24 defined in Section 4-105(c), otherwise with the approval of the  
25 Court, may transfer the trust's place of administration to  
26 another jurisdiction or to another place within this State.

1 (c) The Court may transfer the place of administration of a  
2 trust to or from this State or to a different place within this  
3 State, or transfer some or all of the trust property to a  
4 different trustee in or outside of this State if it finds that:

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

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

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

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

26 (e) If the Court grants a petition to transfer a trust or

1 trust property to this State, the Court may require bond as  
2 provided in Section 4-102.

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

#### 6 **Comment**

7 Source: CPC Sections 17401, 17404, 17405, 17451, 17455-  
8 17457; UPC Sec. 7-305.

9 This section is not limited to transfers to or from other  
10 states, but may include a transfer to or from different  
11 countries. See also Section 6-102 (subject matter jurisdiction  
12 of court).

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

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

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

## 32 **PART 2**

### 33 **SETTLEMENT AGREEMENTS AND REPRESENTATION**

#### 34 **SECTION 6-201. DEFINITION AND APPLICABILITY.**

35 (a) For purposes of this [Part], "fiduciary matter"  
36 includes any item listed in Section 6-103(b).

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

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

10 **SECTION 6-202. REPRESENTATION BY HOLDERS OF POWERS.**

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

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

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



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

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

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

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

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

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

17 **SECTION 6-205. NOTICE OF JUDICIAL SETTLEMENT.** Notice of a  
18 proposed judicial settlement shall be given to every interested  
19 person or to one who can bind an interested person as described  
20 in Sections 6-202 and 6-203. Notice may be given to a person and  
21 to another who may bind the person. Notice is given to unborn or  
22 unascertained persons, who are not represented under Sections 6-  
23 202 and 6-203, by giving notice to all known persons whose  
24 interests in the judicial proceedings are substantially identical  
25 to those of the unborn or unascertained persons.

26 **SECTION 6-206. APPOINTMENT OF GUARDIAN AD LITEM.** At any

1 point in a judicial proceeding, the Court may appoint a guardian  
2 ad litem to represent and approve a settlement on behalf of the  
3 interest of a minor, an incapacitated, unborn, or unascertained  
4 person, or a person whose identity or address is unknown, if the  
5 Court determines that representation of the interest otherwise  
6 would be inadequate. If not precluded by conflict of interest, a  
7 guardian ad litem may be appointed to represent several persons  
8 or interests. The Court shall set out its reasons for appointing  
9 a guardian ad litem as a part of the record of the judicial  
10 proceeding. In approving a judicially supervised settlement, a  
11 guardian ad litem may consider general family benefit.

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

22 **ARTICLE 7**  
23 **TRANSITIONAL PROVISIONS**

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

26 (a) This [Act] takes effect on \_\_\_\_\_.

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

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

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

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

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

18 (5) an act done before the effective date in any  
19 proceeding and any accrued right is not impaired by this [Act].  
20 If a right is acquired, extinguished or barred upon the  
21 expiration of a prescribed period of time which has commenced to  
22 run by the provisions of any statute before the effective date,  
23 the provisions shall remain in force with respect to that right.

24 **Comment**

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

27 This section addresses the applicability of the Act,

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

12 For effective dates applicable to particular matters under  
13 California law but not reproduced in this draft, see California  
14 Probate Code Sections 15401(e) (rules governing method of  
15 revocation by settlor), 16042 (interpretation of the trust terms  
16 concerning legal investments), 16062 (application of duty to  
17 account annually to beneficiaries), 16203 (application of rules  
18 governing trustees' powers), 16401(c) (application of rules  
19 governing trustees' liability to beneficiary for acts of  
20 cotrustee), 16403(c) (application of rules governing trustees  
21 liability to beneficiary for acts of predecessor trustee),  
22 18000(b) (application of rule governing personal liability of  
23 trustee to third persons on contracts).

#### 24 **SECTION 8-102. SPECIFIC REPEALER AND AMENDMENTS.**

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

26 (1)

27 (2)

28 (3)

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

30 (1)

31 (2)

32 (3)

#### 33 **Comment**

34 Source: UPC Sec. 8-102.

