

DRAFT
FOR DISCUSSION ONLY

TRUST ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

June 6, 1996, Draft

TRUST ACT

With Comments

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ON UNIFORM STATE LAWS

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TRUST ACT

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ARTICLE 1.
DEFINITIONS AND GENERAL PROVISIONS

Section

- 1-101. Short Title.**
- 1-102. Definitions.**
- 1-103. Common Law of Trusts.**
- 1-104. Charitable Trusts.**

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

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

(1) "Account," as it relates to a contract of deposit between a depositor and a financial institution, includes a checking account, savings account, certificate of deposit, share account, and other like arrangements.

(2) "Beneficiary," as it relates to a trust beneficiary, includes a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer; and as it relates to a charitable trust, includes any person entitled to enforce the trust.

(3) "Child" means an individual entitled to take as a child by intestate succession from a parent whose relationship is involved and excludes a person who is only a stepchild, a foster child, a grandchild, or any more remote descendant.

(4) "Descendant" of an individual means all of the individual's lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of parent and child.

(5) "Devisee" means a person designated in a will to

receive a testamentary disposition of real or personal property.

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

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

(8) "Heir" means a person, including the spouse [and the state], who is entitled to take property of the decedent by intestate succession.

(9) "Instrument" means a signed writing.

(10) "Interested person" includes any of the following:

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

(ii) Any person having priority for appointment as personal representative; and

(iii) A fiduciary representing an interested person.

(11) "Parent" means an individual entitled to take as a parent by intestate succession from the child whose relationship is involved and excludes any individual who is only a stepparent, foster parent, or grandparent.

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

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

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

(15) "Spouse" does not include:

(i) An individual whose marriage to the decedent has been dissolved or annulled, unless, by virtue of a subsequent marriage, the individual at the time of death was married to the decedent;

(ii) An individual who obtains or consents to a final decree or judgment of dissolution of marriage from the decedent or a final decree or judgment of annulment of their marriage, which decree or judgment is not recognized as valid in this State, unless they later participate in a marriage ceremony purporting to marry each other or live together as husband and wife;

(iii) An individual who, following a decree or judgment

of dissolution or annulment of marriage obtained by the decedent, participates in a marriage ceremony with a third person; or

(iv) An individual who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.

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

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

(18) "Trust" means an express trust, private or charitable, with additions thereto, wherever and however created, including a trust created or determined by a judgment or decree under which the trust is to be administered in the manner of an express trust. The term does not include:

- (i) a Totten trust account;
- (ii) a custodial arrangement pursuant to the Uniform Transfers to Minors Act of any State;
- (iii) a business trust that is taxed as a partnership or corporation;
- (iv) an investment trust subject to regulation under the laws of this State or any other jurisdiction;
- (v) a common trust fund;
- (vi) a voting trust;

- (vii) a security arrangement;
- (viii) a transfer in trust for purpose of suit or enforcement of a claim or right;
- (ix) a liquidation trust;
- (x) a trust for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind;
- (xi) an arrangement under which a person is a nominee or escrow agent for another.

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

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

(21) "Will" includes a codicil and any testamentary instrument that merely appoints a personal representative, revokes or revises another will, nominates a guardian or conservator, [or expressly excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession].

Comment.

Source: CPC Sections 21-88.

Most of the definitions are drawn from the Uniform Probate Code, but only such portions as are pertinent to the law of trusts. The following is a comparison table:

<u>Definition</u>	<u>Subsection of Act</u>	<u>Uniform Probate Code Section</u>
account	1-102(1)	6-103(1)
beneficiary	1-102(2)	1-201(3)
child	1-102(3)	1-201(5)

descendant	1-102(4)	1-201(9)
devisee	1-102(5)	1-201(11)
fiduciary	1-102(6)	1-201(16)
heir	1-102(8)	1-201(21)
interested person	1-102(10)	1-201(24)
parent	1-102(11)	1-201(33)
property	1-102(13)	1-201(39)
security	1-102(14)	1-201(43)
spouse	1-102(15)	2-802
trust	1-102(18)	1-201(53)
trustee	1-102(20)	1-201(54)
will	1-102(21)	1-201(56)

The definition of "account" (paragraph(1)) is not used in the defined sense when employed to refer to an accounting to the beneficiaries or court. See, e.g., Section 4-211 (trustee's duty to inform and account)

"Beneficiary" (paragraph(2)) refers only to a beneficiary of a trust as defined in the Act. Other terms, such as "devisee" or "heir", are used when the reference is to a nontrust beneficiary.

The Act applies only to express trusts, whether private or charitable, and to trusts created by court judgment or decree which are to be administered in the manner of an express trust. The definition of "trust" (paragraph(18)) excludes a variety of business arrangements, which while governed by a trust instrument, are not created pursuant to a donative transfer. Also, because the Act applies only to express trusts, the Act has no effect on the law relating to constructive and resulting trusts, which are remedial devices implied by law.

Under the definition of "trust company" (paragraph(19)), whether an entity has qualified to engage in and conduct a trust business in this State depends on other law. In order to fall within the definition of "trust company", a corporation, association, or other entity must satisfy the requirements of state or federal law that apply to the particular type of entity.

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

Comment.

Source: CPC Section 15002.

The Act is not comprehensive but codifies only those portions of the law of express trusts which are most amenable to codification. The Act is at all points supplemented by the rich heritage of the common law, particularly as presented in the Restatement of Trusts. As used in this section, the common law is

not static but includes the contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and to changing conditions.

SECTION 1-104. CHARITABLE TRUSTS.

(a) A charitable trust may be created for any purpose the accomplishment of which is beneficial to the community. If the terms of the trust do not indicate a particular charitable purpose or beneficiaries, the trustee may select one or more charitable purposes or beneficiaries.

(b) Unless the terms of the trust provide expressly to the contrary, a charitable trust does not fail, in whole or in part, if a particular purpose for which the trust was created becomes impracticable, unlawful, or impossible to fulfill.

(c) Unless the terms of the trust provide for an alternate disposition, if a particular charitable purpose for which a trust was created becomes impracticable, unlawful or impossible to fulfill, the court may modify the terms of the trust or direct that the property of the trust be distributed in whole or in part to one or more charitable entities. If an administrative provision of a charitable trust becomes impracticable, unlawful, impossible to fulfill or otherwise impairs the effective administration of the trust, the court may modify the provision. Before modifying or terminating a charitable trust the court shall consider the current and future community needs in the general field of charity for which the trust was created, the settlor's other charitable interests, and the value of the available trust property.

(d) If the value of the trust property of a charitable trust falls to less than [\$50,000], the trustee may terminate the trust and distribute the trust property to any alternate takers designated by the terms of the trust, or if none, to one or more charitable entities in the general field of charity for which the trust was created or which reflect the settlor's other charitable interests.

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

(f) In making determinations with respect to a charitable trust, whether under this section or otherwise, the court shall liberally apply the doctrine of cy pres.

(g) The settlor, the trustee, the attorney general, and any charitable entity to which trust property must be distributed under the terms of the trust shall be interested persons in any proceeding brought under this section.

Comment.

Source: This section is new.

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

this section borrows extensively, being the most notable. See Wis. Stat. Ann. Sec. 701.10.

Subsection (a) provides that a charitable trust may be created for any purpose which is beneficial to the community. The result is one general test instead of the extensive list of special charitable purposes (relief of poverty, advancement of education, advancement of religion, promotion of health, and governmental or municipal purposes) listed in the Restatement (Second) of Trusts Section 368. By generalizing the test, the courts are freer to adapt the charitable purpose doctrine to the changing ways by which society may be benefitted.

Subsection (a) also ratifies a common estate planning technique whereby the trustee is granted discretion to distribute the trust property for any charitable purpose or to any charitable entity.

Subsection (b) modifies the doctrine of cy pres. Under traditional doctrine, if a specific charitable purpose becomes impossible to fulfill, the courts embark on an elusive hunt to determine whether the settlor had a general charitable intent. If so, the trust property is diverted to other charitable purposes. But if not, the trust fails. Subsection (b) is built on the assumption that in the great majority of cases the settlor would prefer that the gift be used for other charitable purposes rather than fail. Consequently, unless the terms of the trust provide expressly to the contrary, a charitable trust does not fail in whole or in part if the particular purpose for which the trust was created becomes impracticable, unlawful, or impossible to fulfill.

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

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

Subsection (d) strives to make charitable gifting more effective by permitting the nonjudicial termination of small charitable trusts, thereby avoiding the expense of a judicial termination proceeding. Nonjudicial termination is allowed if the value of the trust property falls to less than \$50,000.

While the creation of small charitable trusts is not encouraged, subsection (d) does not interfere with the right of a settlor to create such a trust. Under subsection (d), the trustee may not terminate a charitable trust which has never exceeded \$50,000 in value.

Subsection (e) authorizes the court to terminate a charitable trust. Unlike subsection (d), there is no dollar limit. In order to reduce administrative costs in relation to the size of the trust, the court, instead of terminating the trust, may appoint a new trustee.

This section does not cover all situations. In keeping with the objective of the section to make charitable giving more effective, subsection (f) requires that in addressing cases not covered by the section the court is to liberally apply the doctrine of cy pres.

Subsection (g) makes clear that in addition to the attorney general and trustee, the settlor, if living, and charitable entities who are required to receive payments from the trust are interested persons in a proceeding involving a charitable trust.

ARTICLE 2.

CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUSTS

Part

- 1. Creation And Validity of Trusts.**
- 2. Modification and Termination of Trusts.**
- 3. Spendthrift Protection.**

PART 1.

CREATION AND VALIDITY OF TRUSTS

Section

- 2-101. Methods of Creating Trusts.**
- 2-102. Requirements for Validity.**
- 2-103. Statute of Frauds.**
- 2-104. Oral Trusts of Personal Property.**
- 2-105. Honorary Trusts; Trusts for Pets.**

SECTION 2-101. METHODS OF CREATING TRUSTS. A trust may be created by any of the following methods:

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

(2) Transfer of property by the owner during the owner's lifetime to another person as trustee;

(3) Transfer of property by the owner to another person as

trustee by will or other instrument taking effect upon the death of the owner; or

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

Comment.

Source: CPC Section 15200.

This section is drawn from Section 17 of the Restatement (Second) of Trusts (1957) and Section 10 of the Restatement (Third) of Trusts (Tent. Draft No.1, 1996). A trust may be created for the benefit of the settlor or of a third person (including the trustee). Both the Restatement Second and Restatement Third provide that a trust may be created by an enforceable promise to create a trust. This section omits this provision of the Restatement as unnecessary. An enforceable promise creates a chose in action in the trustee which is itself a sufficient property interest to create a trust.

Consideration is not required to create a trust, but a promise to create a trust in the future which is not supported by consideration does not create a trust. A promise to create a trust is enforceable only if the requirements for an enforceable contract are satisfied.

SECTION 2-102. REQUIREMENTS FOR VALIDITY.

(a) A trust is created only if:

- (1) a settlor with capacity indicates an intention to create a trust;
- (2) the trust has a purpose that is not unlawful or against public policy;
- (3) if the settlor is sole trustee, the trust has one or more beneficiaries other than the settlor;
- (4) unless the trust is a charitable trust, there is a definite or ascertainable beneficiary; and
- (5) there is trust property

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

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

(c) A definite or ascertainable beneficiary includes a beneficiary or class of beneficiaries that is:

- (1) ascertainable with reasonable certainty or sufficiently described by the terms of the trust so it can be determined that some person meets the description or is within the class; or
- (2) designated pursuant to a grant by the terms of the trust of a power to the trustee or another person to select the beneficiaries based on a standard or in the discretion of the trustee or other person.

Comment.

Source: CPC Sections 15201-15205, 15209.

Subsection (a) codifies the basic requirements for the creation of a trust. Subsections (b)-(c) address specific applications of the trust purpose and definite or ascertainable beneficiary rules.

Subsection (a) is primarily derived from the Restatement of Trusts. To create a valid trust, the settlor must indicate an intention to create a trust. Restatement (Second) of Trusts Sec. 23 (1957); Restatement (Third) of Trusts Sec. 13 (Tent. Draft No. 1, 1996). Special requirements may apply to the manifestation of the settlor's intent. See Sections 2-103 (Statute of Frauds as applied to trust of real property), 2-104 (oral trust of personal property). The settlor must also have the requisite mental capacity. See Section 3-101 (capacity to create revocable trust), and Restatement (Third) of Trusts Sec. 11 (Tent. Draft, No.1, 1996). A trust may not be created for a purpose that is unlawful or against public policy. Restatement (Second) of Trusts Sec. 60-65 (1957). A trust, other than a charitable trust, must also have an ascertainable or definite beneficiary.

A trust is not created unless there is trust property. Restatement (Second) of Trusts Sec. 74-86 (1957); Restatement (Third) of Trusts Sec. 10 (Tent. Draft No. 1, 1996). The property interest need not be substantial. An enforceable promise, a dollar bill stapled to the instrument, a revocable designation of the trustee as beneficiary of a life insurance policy or employee benefit plan, all may constitute trust property. Also, a trust

created by means of a lifetime document is not invalid simply because the trust is not funded until after the settlor's death.

Subsection (a)(3) addresses what is known as the doctrine of merger. Under this doctrine, a trust is not created if the settlor is the sole trustee unless there are one or more beneficiaries other than the settlor. This doctrine has been inappropriately applied by the courts in some jurisdictions to invalidate self-declarations of trust in which the settlor is the sole life beneficiary but other persons are designated as beneficiaries of the remainder. The doctrine of merger is properly applicable only if all beneficial interests are vested in the settlor. For example, a self-declaration of trust under which the settlor names himself or herself as trustee and sole life beneficiary, and designates his or her estate as beneficiary of the remainder, violates the doctrine of merger and would be invalid under the Act. The doctrine is never violated, however, if the terms of the trust provide for a remainder beneficiary different than the settlor. Under the Act, a beneficiary of a trust includes any person who has a present or future interest, vested or contingent. See Section 1-102(2).

Under subsection (b), a trust for indefinite or general purposes may be created and enforced, even though it is not limited to charitable purposes. This changes the rule applicable under cases such as *In re Estate of Sutro*, 102 P. 920 (Cal. 1970). This section is not intended to affect the law relating to the purposes for which a charitable trust may be created. See Section 1-104(a) (purposes for which charitable trust may be created). Contrast Restatement (Second) of Trusts Section 123, under which a trust is unenforceable if its purposes are indefinite or unenforceable.

Subsection (c) requires that a beneficiary be indicated with "reasonable certainty," a requirement which is met as long as it can be determined from the terms of the trust that someone satisfies the criteria. Under subsection (c)(1), a class of beneficiaries can satisfy the requirements of this section if the class is ascertainable presently or in the future. Subsection (c)(2) affords the settlor a greater degree of flexibility in creating a trust. A disposition that would be valid as a power of appointment will not fail just because it is made in trust.

SECTION 2-103. STATUTE OF FRAUDS.

(a) Except as provided in Section 2-104, a trust is not enforceable unless evidenced by:

- (1) a written instrument signed by the trustee, or by the trustee's agent if authorized in writing; or
- (2) a written instrument conveying the trust property

signed by the settlor, or by the settlor's agent if authorized in writing.

(b) If an owner of property declares that property is held upon a trust for which a written instrument is required, the written instrument evidencing the trust must be signed by the settlor (i) before or at the time of the declaration, or (ii) after the time of the declaration but before the settlor has transferred the property.

(c) If an owner of property while living transfers property to another person to hold upon a trust for which a written instrument is required, the written instrument evidencing the trust must be signed (i) by the settlor concurrently with or before the transfer, or (ii) by the trustee concurrently with or before the transfer, or after the transfer but before the trustee has transferred the property to a third person.

Comment.

Source: CPC Section 15206(in part).

For the Statute of Frauds generally, see Restatement (Second) of Trusts Sections 40 et seq. For a description of what the writing must contain, see Restatement (Third) of Trusts Sec. 22 (Tent. Draft No. 1, 1996). Subsections (b)-(c), addressing when the written instrument must be signed, is drawn from Restatement (Third) of Trusts Sec. 23 (Tent. Draft No. 1, 1996).

SECTION 2-104. ORAL TRUSTS OF PERSONAL PROPERTY. An oral trust of personal property is enforceable only if (i) created by a transfer of property to a trustee other than the transferor, and (ii) if the transferor expresses concurrently with or prior to the transfer an intention to create a trust.

Comment.

Source: CPC Section 15207; Tex. Prop. Code Ann. Sec. 112.004.

This section recognizes that purported oral trusts of personal property, because of difficult problems of proof, are inherently suspect. This problem is particularly acute when it is maintained that a settlor, who is now deceased, created such a trust by means of an oral self-declaration. To create an oral trust of personal property under the Act, there must at a minimum be a transfer of property accompanied or preceded by an oral statement by the transferor that the transferee holds the property in trust. Constructive delivery, such as by earmarking property or recording it in the name of the transferee, is also sufficient to comply with the requirements of this section.

In the case of an oral trust, a reference in this Act to the terms of the trust means the terms of the trust as established pursuant to this section. Although Section 3-102 provides that a trust is revocable unless the terms of the trust expressly make it irrevocable, an oral trust may be shown to be irrevocable if this is one of its terms.

Nothing in this section or this Act affects the law concerning resulting or constructive trusts. In appropriate circumstances, an attempted disposition of property that fails to satisfy the requirements for an oral trust under this section may be remedied through the mechanism of a resulting or constructive trust. For the circumstances under which a resulting or constructive trust may be imposed on a failed oral trust, see Restatement (Third) of Trusts Sec. 23 (Tent. Draft No. 1, 1996).

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

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

(b) A trust for the care of a designated domestic or pet animal is valid. The trust terminates when no living animal is covered by the trust.

(c) No portion of the trust property of a trust authorized by this section may be converted to any use other than its intended use unless the terms of the trust provide otherwise or a court determines that the value of the trust property

substantially exceeds the amount required.

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

Comment.

Source: UPC Section 2-907.

Subsection (a) of this section authorizes so-called honorary trusts and places a 21-year limit on their duration. The figure "21" is bracketed to indicate that an enacting jurisdiction may select a different duration.

Subsection (b) provides special provisions for a particular type of honorary trust, a trust for the care of a domestic or pet animal. Subsection (b) is independent of (a). A trust for the care of a designated animal may last longer than 21 years if the animal designated at the trust's creation is still living.

Subsections (c) and (d) clarify that the honorary trusts authorized by this section are not optional but are valid enforceable trusts. Unless the terms of the trust provide otherwise, no portion of the trust property of such a trust may be applied other than for its intended use. Provision is made for partial termination, however, if the trust property substantially exceeds the amount needed.

This section is drawn from Section 2-907 of the Uniform Probate Code but is much less elaborate. The UPC provision deals with a number of trust issues that are addressed elsewhere in this Act.

**PART 2.
MODIFICATION AND TERMINATION OF TRUSTS**

Section

- 2-201. Termination of Trust.**
- 2-202. Modification or Termination by Settlor and All Beneficiaries.**
- 2-203. Modification or Termination of Irrevocable Trust by All Beneficiaries.**
- 2-204. Modification or Termination Due to Unanticipated Circumstances**
- 2-205. Trust with Uneconomically Low Value.**
- 2-206. Combination and Division of Trusts.**

SECTION 2-201. TERMINATION OF TRUST.

(a) In addition to the methods specified in Sections 2-202

to 2-205, a trust terminates when:

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

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

Comment.

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

Subsection (a) lists the ways in which trusts typically may terminate. See Restatement (Second) of Trusts Section 334 (1957).

Subsection (b) makes clear that even though the trust has terminated, the trustee retains limited powers needed to wind up the affairs of the trust and distribute the remaining trust property. For other provisions relating to trustees' powers, see Sections 4-401 and 4-402.

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

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

(a) If the settlor and all beneficiaries of a trust consent, they may modify or terminate the trust.

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

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

Comment.

Source: CPC Section 15404, 15410(b).

Subsections (a) and (b) of this section are drawn from Section 338 of the Restatement (Second) of Trusts (1957). A trust may be modified or terminated pursuant to this section without court approval and even over a trustee's objection, but a court order may be sought by petition under Section 5-201. A revocable trust may be modified or terminated pursuant to this section, as in a case where the method of modification or revocation specified in the trust is found to be overly restrictive. However, nothing in this section affects the right of a settlor to revoke or modify a revocable trust under Section 3-102. A trust may be modified or terminated under this section regardless of a spendthrift provision or whether its purposes have been achieved. See Restatement (Second) of Trusts Section 338, comments b-d.

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

SECTION 2-203. MODIFICATION OR TERMINATION OF IRREVOCABLE TRUST BY ALL BENEFICIARIES.

(a) If all beneficiaries of an irrevocable trust consent, they may modify or terminate the trust.

(b) Upon petition to the court, the court may prohibit a requested modification or termination if the interest in continuing the trust to accomplish its purposes outweighs the reason for termination or modification.

(c) Termination or modification of a trust under this section is not precluded by a spendthrift provision.

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

Comment.

Source: CPC Section 15403, 15410.

This section is based in part on Section 337 of the Restatement (Second) of Trusts (1957). But unlike the Restatement, this section permits termination or modification of an irrevocable trust even though the trust has a spendthrift provision. See Section 2-301 (spendthrift protection recognized). This section permits termination of the trust even if the trust provides for successive beneficiaries or postpones enjoyment of a beneficiary's interest. The consent of the settlor or trustee is not required, although the settlor or trustee may petition the court to prevent the termination or modification. This section does not follow the material purpose doctrine, which has often been rigidly construed, but permits the court to make an overall assessment of whether the reason for modification or termination outweighs the trust's purposes. For provisions governing modification or termination of trusts where the consent of all beneficiaries cannot be obtained, see Sections 2-204 (modification or termination due to unanticipated circumstances) and 2-205 (trust with uneconomically low principal). This section is limited to irrevocable trusts. If the trust is revocable by the settlor, the method of revocation specified in Section 3-102 applies. Compare Section 2-202 (modification or termination by settlor and all beneficiaries).

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

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

(b) Termination or modification of a trust under this section is not precluded by a spendthrift provision.

(c) Upon termination of a trust under this section, the trust property must be distributed in accordance with the

probable intention of the settlor under the circumstances.

Comment.

Source: CPC Section 15409-15410.

The first sentence of subsection (a) is drawn from Sections 167 and 336 of the Restatement (Second) of Trusts (1957). See also Sections 3-103 (limits on rights of beneficiary of revocable trust), 4-401(b) (power of court to relieve trustee from restrictions on powers).

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

This section permits modification or termination whenever there are circumstances not anticipated by the settlor. This may include circumstances in existence at the time of the trust's creation which were not considered by the settlor. The effect of this section is to extend the concept of equitable deviation to the dispositive provisions of the trust.

SECTION 2-205. TRUST WITH UNECONOMICALLY LOW VALUE.

(a) On petition by a trustee or beneficiary, the court may terminate or modify a trust or appoint a new trustee if it determines that the value of the trust property is insufficient to justify the cost of administration involved and continuation of the trust under its existing terms would defeat or substantially impair the accomplishment of the trust purposes.

(b) Termination or modification of a trust under this section is not precluded by a spendthrift provision.

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

Comment.

Source: CPC Section 15408,15410.

For provisions governing judicial proceedings, see Section 5-201 et seq. See also Section 3-103 (limits on rights of beneficiary of revocable trust). For a provision permitting the trustee to without court approval terminate a trust with a value of \$50,000 or less, see Section 4-402(27). For the comparable provision on termination of charitable trusts, see Section 1-104(d).

SECTION 2-206. COMBINATION OR DIVISION OF TRUSTS.

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

(b) On petition by a trustee or beneficiary, the court may divide a trust into two or more separate trusts, whether or not their terms are similar, if the court determines that dividing the trust is in the best interest of the beneficiaries and will not defeat or substantially impair the accomplishment of the trust purposes.

Comment.

Source: CPC Section 15411.

Subsection (a) recognizes that the interests of efficient trust administration may dictate that two or more trusts be combined even though their provisions are not substantially similar. This subsection, permitting judicial combination, is an alternative to Section 4-402(28), which permits a trustee without court approval to combine two or more separate trusts as long as their terms are substantially similar.

Subsection (b) authorizes a court to divide a trust, whether or not the resulting trusts are identical. Conflicts among beneficiaries, including differing investment objectives, may often dictate such a division. For a provision permitting a trustee to divide a trust without court approval, see Section 4-402(29).

A division under this section does not require the consent of the beneficiaries. For provisions governing judicial

proceedings, see Section 5-201 et seq. See also Section 3-103 (limits on rights of beneficiary of revocable trust).

This section applies to living trusts as well as testamentary trusts. In addition, a living trust and a testamentary trust may be combined. See also Section 3-103 (limits on rights of beneficiary of revocable trust).

PART 3. SPENDTHRIFT PROTECTION

Section

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

SECTION 2-301. SPENDTHRIFT PROTECTION RECOGNIZED.

(a) A settlor may provide in the terms of the trust that the interest of a beneficiary in the income or principal may not be voluntarily or involuntarily transferred.

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

[(c) A disclaimer by a beneficiary of all or part of that beneficiary's interest is not a transfer under this section.

Comment.

Source: CPC Section 15300-15302, 15309; Tex. Prop. Code Ann. Sec. 112.035.

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

applies. This section is similar to Restatement (Second) of Trusts Sections 152-153.

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

Subsection (c) is drawn from Wisconsin law. See Wis. Stat. Ann. § 701.06(3) (West 1981).

SECTION 2-302. EXCEPTIONS TO SPENDTHRIFT PROTECTION. A

term of a trust prohibiting an involuntary transfer of a beneficiary's interest shall be invalid as against claims by:

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

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

(3) a tort creditor of the beneficiary;

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

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

Comment.

Source: CPC Section 15301-15302, 15304-15305; O.C.G.A. Sec. 53-12-28; Okla. Stat Ann. Sec. 175.25; Restatement (Second) of Trusts Sec. 153, 157.

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

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

Paragraph (1) provides that a spendthrift provision is invalid as to claims of a beneficiary's spouse or child for support, or a spouse for alimony. This provision is drawn from the Oklahoma statute. See Okla. Stat. Ann. Sec. 175.25. The provision extends to support and alimony ordered by the court, as well as to claims for support by a child or spouse during the marriage. The Act does not attempt to prescribe the procedures whereby a spouse or child may collect from the trust, leaving that matter to local collection law. For an example of such a procedure, see Cal. Prob. Code Sec. 15305.

Paragraph (3), relating to claims of tort creditors, is drawn from the Georgia statute. See O.G.C.A. Sec. 53-12-28. This exception is not found in the Restatement or in most state statutes. However, commentators have long recommended the creation of such an exception. See, e.g., Comment, A Tort-Creditor Exception to the Spendthrift Trust Doctrine: A Call to the Wisconsin Legislature, 73 Marq. L. Rev. 109 (1989).

Paragraph (4) provides that a spendthrift provision is ineffective against a creditor of the settlor. For the amount such a creditor may collect from the trust, see Section 2-303. This paragraph is the same in substance as Section 156(1) of the Restatement (Second) of Trusts (1957). This section does not supersede other laws which provide spendthrift protection to pension trusts and other employee plans. See Section 1-102(18) ("trust" defined to exclude a trust for the primary purpose of paying pensions).

Paragraph (5) is based on the Restatement (Second) of Trusts Section 153 but with some modifications. Under the Restatement, a spendthrift provision is invalid to the extent a beneficiary is entitled to an immediate transfer of the principal of the trust. Under Section 152, however, a creditor may not reach a distribution of income until paid to the beneficiary. Modern portfolio theory, as articulated by the Uniform Prudent Investor Act, encourages investment without regard to the often artificial distinction between income and principal.

Paragraph (5) attempts to get at the original purpose of the Restatement provision without relying on the principal and income distinction. The objective of the original Restatement provision was to prevent a creditor from reaching periodic distributions while allowing a creditor to reach the assets following termination of the trust and before their payment to the beneficiary. Consequently, following an event terminating or partially terminating the trust, Paragraph (5) allows the creditor to secure an order compelling payment from the terminated assets.

SECTION 2-303. DISCRETIONARY TRUSTS AND TRUSTS SUBJECT TO STANDARD. Except as otherwise provided in this section, if the terms of the trust provide that the trustee shall pay to or for

the benefit of a beneficiary income or principal of the trust subject to a standard or in the discretion of the trustee, a transferee or creditor of the beneficiary may not compel a distribution from the trust, whether or not the trustee has abused the discretion or complied with the standard. To the extent the trustee has abused the discretion or has not complied with the standard, a distribution may be compelled only by a spouse or child who has a claim for support or alimony from the beneficiary, a provider of necessary services rendered or necessary supplies furnished to the beneficiary, or a tort creditor of the beneficiary.

Comment.

Source: CPC 15303.

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

See Section 4-212, which requires trustees to exercise discretion reasonably.

SECTION 2-304. SELF-SETTLED TRUSTS. If a settlor is a beneficiary of a trust created by the settlor, a transferee or creditor of the settlor may reach the maximum amount that the trustee could pay to or for the settlor's benefit, not exceeding the amount of the settlor's proportionate contribution to the trust.

Comment.

Source: CPC Section 15304(b).

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

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

For the rights of creditors if the settlor has retained a power of revocation, see Section 3-106.

ARTICLE 3. PROVISIONS RELATING TO REVOCABLE TRUSTS

Section

- 3-101. Capacity to Create Revocable Trust.
- 3-102. Revocation or Modification by Settlor or Agent.
- 3-103. Limits on Rights of Beneficiary of Revocable Trust.
- 3-104. Rights of Holder of Power of Appointment or Withdrawal.
- 3-105. Duty to Follow Written Direction.
- 3-106. Creditor's Rights Against Revocable Trust.

SECTION 3-101. CAPACITY TO CREATE REVOCABLE TRUST. An individual has capacity to create a revocable living trust to the same extent the individual has capacity to create a trust by will.

Comment.

Source: This section is new.

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

This section recognizes that the revocable trust is used primarily as a will substitute, with its key provision being the determination of the persons to receive the trust property upon the settlor's death. To solidify the use of the revocable trust as a device for transferring property at death, the settlor usually also executes a pourover will under which property not transferred to the trust during life will be consolidated with the trust property following the settlor's death. Given this primary use of the revocable trust as a device for disposing of property at death, the capacity standard for wills, and not for lifetime gifts, should apply. Should lifetime management issues arise, they may be dealt with by reformation or other appropriate remedies that will not jeopardize the overall plan of disposition

by making the standard for the trust different or higher than that for making a will. Restatement (Third) of Trusts Sec. 11 comm. b (Tent. Draft, 1996).

SECTION 3-102. REVOCATION OR MODIFICATION BY SETTLOR OR AGENT.

(a) Unless the terms of the trust expressly provide that a trust is irrevocable, the settlor may revoke the trust.

(b) A trust that is revocable by the settlor may be revoked in whole or in part by:

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

(2) unless the terms of the trust expressly make the method of revocation specified exclusive, a writing, other than a will, signed by the settlor and delivered to the trustee during the lifetime of the settlor.

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

(d) A trust may not be revoked by an agent under a power of attorney unless the power of attorney or terms of the trust expressly so permit.

(e) Except as otherwise provided by the terms of the trust, a power to revoke a trust includes the power to modify the trust by using the procedure for revocation.

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

Comment.

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

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

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

Under subsection (d), an agent under a power of attorney may revoke the trust if either the trust or power of attorney so permits.

Subsection (e) codifies the general rule that a power of revocation includes the power to modify. See Restatement (Second) of Trusts Section 331, comment g (1957). An unrestricted power to modify may also include the power to revoke a trust. See Restatement (Second) of Trusts Section 331, comment h. See also Sections 4-101 (trustee's acceptance or rejection of modification of trust).

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

This section does not address revocation by a guardian or conservator. Whether a guardian or conservator may exercise a settlor's power of revocation is a matter left to state guardianship or conservatorship law. Many states allow such a revocation with prior court approval. See, e.g., Unif. Prob. Code Sec. 5-407.

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

SECTION 3-103. LIMIT ON RIGHTS OF BENEFICIARY OF REVOCABLE TRUST. Except to the extent the terms of the trust otherwise provide or the joint action of the settlor and all beneficiaries is required, while a trust is revocable and the individual holding the power to revoke the trust is competent:

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

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

(3) if the consent of a beneficiary may be given or is required to be given before an action may be taken, the holder of the power, and not the beneficiary, has the power to consent or withhold consent; and

(4) a notice that is to be given to a beneficiary must be given to the holder of the power and not to the beneficiary.

Comment.

Source: CPC Section 15800-15802.

This section has the effect of postponing the enjoyment of rights of beneficiaries of revocable trusts until the death or incompetence of the settlor or other person holding the power to revoke the trust. See also Section 3-104 (holder of general power of appointment or power to withdraw property from trust treated as settlor). This section thus recognizes that the holder of a power of revocation is in control of the trust and should have the rights to enforce the trust. A corollary principle is that the holder of the power of revocation may direct the actions of the trustee. See Section 3-105 (duty to follow written direction); see also Section 3-102 (method of revocation by settlor, including power to modify). Under this section, the duty to inform and account to beneficiaries is owed to the person holding the power to revoke during the time that the trust is presently revocable. See Section 4-211 (trustee's duty to inform and account to beneficiaries). The introductory clause recognizes that the terms of the trust may provide rights to beneficiaries of revocable trusts which must be honored until such time as the trust is modified to alter those rights. The introductory clause also makes clear that this section does not eliminate the rights of beneficiaries of revocable trusts in situations where the joint action of the settlor and all beneficiaries is required. See Section 2-202 (modification or termination by settlor and all beneficiaries).

Paragraph (3) recognizes the principle that the consent of a beneficiary of a revocable trust should not have any effect during the time that the trust is presently revocable, since the power over the trust is held by the settlor or other person holding the power to revoke. Under the rule provided in this

subsection, the consent of the person holding the power to revoke, rather than the beneficiaries, excuses the trustee from liability as provided in Section 4-507(a) (limitations on proceedings against trustee). For provisions permitting a trustee to be relieved of liability by the beneficiaries, see Sections 4-509 (consent), 4-510 (release), 4-511 (affirmance).

Paragraph (4) recognizes that notice to the beneficiary of a revocable trust would be an idle act in the case of a revocable trust because the beneficiary is powerless to act.

SECTION 3-104. RIGHTS OF HOLDER OF POWER OF APPOINTMENT OR WITHDRAWAL. The holder of a presently exercisable general power of appointment or power to withdraw property from a trust has the rights of a holder of the power to revoke a trust under Section 3-103 to the extent of the holder's power over the trust property.

Comment.

Source: CPC Section 15803.

This section makes clear that a holder of a power of appointment or a power of withdrawal is treated as a settlor for purposes of Section 3-103 in recognition of the fact that the holder of such power is in an equivalent position to control the trust as it relates to the property covered by the power.

SECTION 3-105. DUTY TO FOLLOW WRITTEN DIRECTION.

(a) The trustee of a revocable trust shall follow any written direction acceptable to the trustee given from time to time (i) by a person then having the power to revoke the trust or the part thereof with respect to which the direction is given or (ii) by a person to whom the settlor has delegated the right to direct the trustee. If the written direction would modify the trust, the trustee need not follow the direction unless it complies with the requirements for modifying the trust.

(b) A trustee of a revocable trust is not liable to a

beneficiary for any conduct of the trustee pursuant to written direction from a holder of a power to revoke, including a person to whom the power to direct the trustee is delegated by the holder.

Comment.

Source: CPC Section 16001.

Under subsection (a), the qualification that a direction be acceptable to the trustee does not mean that the trustee is required to determine the propriety of the direction. See also Sections 3-103 (limit on rights of beneficiary of revocable trust), 4-201 (duties subject to control by terms of the trust), 4-210 (standard of care in performing duties).

SECTION 3-106. CREDITOR'S RIGHTS AGAINST REVOCABLE TRUST.

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

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

Comment.

Source: CPC Sections 18200, 19001.

**ARTICLE 4.
TRUST ADMINISTRATION**

Part

- 1. Office of Trustee.**
- 2. Duties of Trustee.**
- 3. Uniform Prudent Investor Act.**
- 4. Powers of Trustee.**

5. Liability of Trustee to Beneficiaries.
6. Rights of Third Person.

**PART 1.
OFFICE OF TRUSTEE**

Section

- 4-101. Acceptance or Rejection of Trust by Trustee.
- 4-102. Trustee's Bond.
- 4-103. Actions by Cotrustees.
- 4-104. Resignation of Trustee.
- 4-105. Removal of Trustee.
- 4-106. Vacancy in Office of Trustee.
- 4-107. Delivery of Property by Former Trustee.
- 4-108. Trustee's Refusal to Transfer Administration of Nonrevocable Trust.
- 4-109. Vacancy; Appointment.
- 4-110. Compensation of Trustee.
- 4-111. Repayment for Expenditures.
- 4-112. Trustee's Lien.
- 4-113. Notice of Increased Trustee's Fee.

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

(a) A person named as trustee accepts the trust or a modification of the trust by:

- (1) signing the trust instrument or the trust instrument as modified, or signing a separate written acceptance; or
- (2) except as provided in subsection (e), knowingly exercising powers or performing duties as trustee or under the terms of the trust as modified.

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

(c) If a person named as trustee does not accept the trust or a modification of the trust within a reasonable time after learning of the modification or of being named as trustee, the

person rejects the trust or the modification.

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

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

Comment.

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

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

The rules governing acceptance of the trust at the commencement of the trust apply by analogy to acceptance of a modification of the trust. Thus, for example, a trustee is not subject to liability for breach of a new duty imposed through a modification of the trust unless the trustee signs the trust as modified or a separate acceptance under subsection (a)(1) or performs the new duty under subsection (a)(2).

Under subsection (b), a trustee may reject new duties without having to resign as trustee. However, if a modification is rejected, the trustee remains subject to the duties and liabilities under the trust as it existed before the modification.

Under subsection (c), a mere failure to act is not an acceptance. As to resignation by a trustee after acceptance, see Section 4-104.

The provision in subsection (d) that a trustee who rejects the trust is not liable is consistent with Sections 4-101 (duty to administer trust upon acceptance) and 4-501 (violation of duty is breach of trust). The appropriate recipient of the written rejection depends upon the circumstances of the case. Ordinarily, it would be appropriate to give the rejection to the person who informs the person of the proposed trusteeship. If

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

A trustee's rejection of a trust normally precludes his or her later accepting the trust but it does not cause the trust to fail under Restatement (Second) of Trusts Section 102. As to filling vacancies, see Section 4-109.

Subsection (e) makes clear that the authority to act in an emergency does not impose a duty to act. The intention of this subsection is to permit the person named as trustee to act in an emergency without being considered to have accepted the trust under the rule set out in subsection (a) (2).

SECTION 4-102. TRUSTEE'S BOND.

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

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

(b) If a bond is required, it must be filed and in an amount and with sureties and liabilities as the court may order.

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

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

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

Comment.

Source: CPC Section 15602.

Subsections (a)-(c) of this section are drawn from Section 7-304 of the Uniform Probate Code (1977). See also Sections 4-106 (vacancy in office of trustee), 4-109 (appointment of trustee to fill vacancy).

Subsection (e) makes clear that a trust company is not required to give a bond. See Section 1-102(19) ("trust company" defined). A nonprofit or charitable corporation that acts as trustee under a charitable trust is not a trust company, as defined in Section 1-102(19), and thus is subject to the provisions of subsection (a) relating to when a bond is required. A bond is required if the terms of the trust require it (subject to the court's power to excuse the bond) or if the bond is found by the court to be necessary to protect the interests of beneficiaries.

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

(1) a power vested in two or more trustees may be exercised by majority action;

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

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

Comment.

Source: CPC 15621, 15622.

Paragraph (1) is in accordance with Restatement (Second) of Trusts Section 383, which allows action by a majority in the case of charitable trusts. Per Section 4-602, a dissenting trustee is not liable to a third party solely 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 4-503 (trustee's liability to beneficiary for acts of cotrustee).

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. If the trust provides for majority rule, the remaining trustees act by majority vote of their number, even though the number of trustees constituting a majority is now less than before the vacancy occurred. In effect, the vacant positions are not counted in determining a quorum or in determining the number constituting a majority. This rule is subject to contrary provision in the terms of the trust, as noted in the introductory clause. See also Sections 4-106 (vacancy in office of trustee), 4-109 (appointment of trustee to fill vacancy).

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

SECTION 4-104. RESIGNATION OF TRUSTEE.

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

- (1) as provided by the terms of the trust;
- (2) in the case of a revocable trust, with the consent of the person holding the power to revoke the trust;
- (3) in the case of a trust that is not revocable, with the consent of all adult beneficiaries who are receiving or are entitled to receive income under the trust or would be entitled to receive a distribution of principal if the trust were terminated at the time consent is sought; or
- (4) pursuant to a court order obtained on petition by a trustee under Section 5-201. The court shall accept the trustee's resignation and may make any orders necessary for the preservation of the trust property, including the appointment of a receiver or a temporary

trustee.

(b) If a beneficiary has a guardian or conservator, the guardian or conservator may consent to the trustee's resignation on behalf of the beneficiary without obtaining court approval. If the beneficiary has designated an agent under a power of attorney who has authority to consent to the trustee's resignation, the agent may so consent.

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

Comment.

Source: CPC Section 15640, 15641.

This section is similar to Section 106 of the Restatement (Second) of Trusts (1957), except that the class of persons whose consent is needed under subsection (a)(3) is more restricted and the Restatement section does not address revocable trusts. Under this section, court approval is not required to accomplish a resignation except under subsection (a)(4). Whether court approval is required under subsection (a)(1) depends on the terms of the trust. Subsection (a)(2) is a provision that recognizes that the person holding the power to revoke a revocable trust has control over the trust rather than the beneficiaries. See Section 3-103. Under subsection (a)(4) the court has authority to accept a resignation regardless of whether the trust provides a manner of resignation.

Subsection (b) makes clear that a guardian or conservator may consent to the resignation without the need to obtain approval of the court in which the guardianship or conservatorship is pending.

Section 4-211 requires an accounting whenever there is a change of trustees.

See also Sections 4-507 (limitations on proceedings against trustee), 4-508 (exculpation of trustee). See also Restatement (Second) of Trusts Section 106, comment a, which is in accord with subsection (c).

SECTION 4-105. REMOVAL OF TRUSTEE.

(a) A trustee may be removed in accordance with the terms of the trust, by the court on its own motion or on petition of a

settlor, cotrustee, or beneficiary under Section 5-201.

(b) The court may remove a trustee:

- (1) if the trustee has committed a breach of the trust;
- (2) if the trustee is or becomes insolvent or otherwise unfit to administer the trust;
- (3) if hostility or lack of cooperation among cotrustees impairs the administration of the trust;
- (4) if the trustee fails or declines to act;
- (5) if the trustee's compensation is excessive under the circumstances;
- (6) if in the best interest of the beneficiaries in light of the sound administration of the trust; or
- (7) for other good cause shown.

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

Comment.

Source: CPC Section 15642.

Subsection (a) of this section is the same in substance as Section 107 of the Restatement (Second) of Trusts (1957) except that it gives the settlor of an irrevocable living trust the right to petition for removal of a trustee. As to rights of a settlor of a revocable trust, see Sections 3-102 (revocation or

modification by settlor or agent), 3-103 (limit on rights of beneficiary of revocable trust). The right to petition for removal of a trustee does not give the settlor any other rights, such as the right to an account or to receive information concerning administration of the trust.

The statement of grounds for removal of the trustee by the court is drawn from the Texas Trust Code and the Restatement. See Tex. Prop. Code Ann. Sec. 113.082(a) (Vernon 1984); Restatement (Second) of Trusts Section 107, comments b-d (1957). If a trustee is removed, another may be appointed to fill the vacancy as provided in Section 4-109. For the procedure applicable to judicial removal proceedings, see Section 5-201 et seq.

SECTION 4-106. VACANCY IN OFFICE OF TRUSTEE. There is a vacancy in the office of trustee if:

- (1) the person named as trustee rejects the trust;
- (2) the person named as trustee cannot be identified or does not exist;
- (3) the trustee resigns or is removed;
- (4) the trustee dies;
- (5) a conservator or guardian of the trustee's person or estate is appointed;
- (6) the trustee files a petition for adjudication of bankruptcy or for approval of an arrangement, composition, or other extension under the federal Bankruptcy Code, or a petition filed against the trustee for any of these purposes is approved;
- (7) a trust company's charter is revoked or powers are suspended and the revocation or suspension is to be in effect for 30 days or more; or
- (8) a receiver is appointed for a trust company and the appointment is not vacated within 30 days.

Comment.

Source: CPC Section 15643.

For rules concerning filling a vacancy, see Section 4-109. See also Section 1-102(19) ("trust company" defined), 4-101 (rejection of trust), 4-104 (resignation and liability of resigning trustee), 4-105 (removal of trustee), 4-507 (limitations on proceedings against trustee), 4-603 (protection of third person dealing with former trustee).

SECTION 4-107. DELIVERY OF PROPERTY BY FORMER TRUSTEES. If a vacancy occurs in the office of trustee, the former trustee who holds property of the trust remains responsible for the property until it is delivered to the successor trustee or a person appointed by the court to receive the property. A resigning or removed trustee has the powers necessary to complete that trustee's administration of the trust and to preserve the property until it is delivered to the successor trustee.

Comment.

Source: CPC Section 15644.

See Section 4-106 (vacancy in office of trustee); see also Section 4-505(a)(4) (appointment of receiver or temporary trustee upon breach of trust). The second sentence makes clear that a trustee who has resigned or is removed has the powers needed to complete the trustee's remaining duties. The trustee who has resigned remains liable for actions or omissions during his or her term as trustee even after the property is delivered to the successor until liability is barred. See Section 4-507 (limitations on proceedings against trustee).

Section 4-211 requires an accounting whenever there is a change of trustees. Section 4-603 protects third persons who deal in good faith with a former trustee without knowledge that the person is no longer a trustee.

SECTION 4-108. TRUSTEE'S REFUSAL TO TRANSFER ADMINISTRATION OF NONREVOCABLE TRUST. If the trustee of a trust that is not revocable has refused to transfer administration of the trust to a successor trust company on request of the beneficiaries described in Section 4-104(a)(3) and the court in subsequent proceedings under Section 5-201 makes an order removing the

existing trustee and appointing a trust company as successor trustee, the court may award costs and reasonable attorney's fees incurred by the petitioner in the proceeding to be paid by the trustee or from the trust as ordered by the court.

Comment.

Source: CPC Section 15645.

This section encourages an out of court solution where the beneficiaries of a trust want to transfer administration of the trust to a successor corporate trustee. For provisions concerning consent to transfer of the trust to a successor trust company, see Sections 4-104 (resignation of trustee) and 4-109 (appointment to fill vacancy in office of trustee).

SECTION 4-109. VACANCY; APPOINTMENT.

(a) If a trust has no trustee or the terms of the trust require a vacancy in the office of a cotrustee to be filled, the vacancy must be filled as provided in this section.

(b) If the terms of the trust provide a method of appointing a trustee or names the person to fill the vacancy, the vacancy must be filled as so provided.

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

successor trustee, if the beneficiary has designated an agent who has the power under the power of attorney to agree upon a successor trustee, the agent may so agree.

(d) If a vacancy in the office of trustee is not filled as provided in subsection (b) or (c), on petition of an interested person or a person named as trustee by the terms of the trust, the court may appoint a trustee to fill the vacancy. If the terms of the trust provide for more than one trustee, the court may appoint the original number or any lesser number of trustees. In selecting a trustee, the court shall give consideration to any nomination by a beneficiary who has attained 14 years of age.

Comment.

Source: CPC Section 15660.

For a provision governing the occurrence of vacancies in the office of trustee, see Section 4-106. Subsection (a) makes clear that the vacancy in the office of a cotrustee must be filled only if the trust so requires. If the vacancy in the office of cotrustee is not filled, the remaining cotrustees may continue to administer the trust under Section 4-103, unless the terms of the trust provide otherwise.

Subsection (c) permits a vacancy in the office of trustee to be filled, without the need for court approval, by a trust company selected by agreement of the adult beneficiaries of the trust. The persons who must agree to the new trustee are the same as those who must consent to a resignation under Section 4-104(a)(3). A vacancy may be filled under subsection (c) whether or not the former trustee was a trust company. If a trustee resigns pursuant to Section 4-104(a)(3), the trust may be transferred to a trust company pursuant to subsection (c) of this section, all without court approval.

Subsection (d) gives the court discretion to fill a vacancy in a case where the trust does not name a successor who is willing to accept the trust, where the trust does not provide a method of appointment, or where the trust does not require the vacancy to be filled. For a limitation on the rights of certain beneficiaries of revocable trusts, see Section 3-103. For the procedure applicable to judicial proceedings, see Section 5-201 et seq. The provision in subsection (d) requiring the court to give consideration to the wishes of the beneficiaries is consistent with the Restatement. See Restatement (Second) of

Trusts Section 108, comments d, i (1957).

As to obligations of successor trustees, see Section 4-504.

SECTION 4-110. COMPENSATION OF TRUSTEE.

(a) Subject to subsection (b), if the terms of the trust provide for compensation to the trustee, the trustee is entitled to be compensated as so provided.

(b) Upon proper showing, the court may fix or allow more or less compensation than could be allowed under the terms of the trust:

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

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

(3) in extraordinary circumstances calling for equitable relief.

An order fixing or allowing more or less compensation applies only prospectively to actions taken in the administration of a trust after the order is made.

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

(d) The court may fix an amount of periodic compensation under subsections (b) and (c) to continue as long as the court considers proper.

(e) Unless the terms of the trust otherwise provide or all of the trustees otherwise agree, the compensation must be apportioned among the cotrustees according to the services rendered by each.

Comment.

Source: CPC Section 15680-15683.

Subsection (b) of this section makes clear that the court can reduce the trustee's compensation when appropriate. An order changing the amount of compensation does not apply retroactively to actions already taken. Restatement (Second) of Trusts Section 242, comment f, is similar but uses somewhat different language.

Section 4-402(22)) grants the trustee authority to fix and pay its compensation without the necessity of prior court review. For a list of factors relevant for determining reasonable compensation, see Restatement (Second) of Trusts Section 242 (1957).

Subsection (d) makes clear that the court may fix compensation prospectively.

SECTION 4-111. REPAYMENT FOR EXPENDITURES. A trustee is entitled to be repaid out of the trust property for:

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

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

Comment.

Source: CPC Section 15684.

Under this section, a trustee is not entitled to attorney's fees and expenses of a proceeding where it is determined that the trustee breached the trust, unless the court otherwise orders as provided in paragraph (2). See, e.g., *Estate of Gilmaker*, 38 Cal. Rptr. 270 (Ct. App. 1964); *Estate of Vokal*, 263 P.2d 64 (Cal. App. 1953). Restatement (Second) of Trusts Section 244-245. See also Sections 4-402(22) (trust to pay expenses of administration from trust), and Section 4-402(26) (trustee may hire agents).

SECTION 4-112. TRUSTEE'S LIEN. A trustee has an equitable lien on the trust property as against the beneficiary in the amount of advances, with any interest, made for the protection of the trust, and for expenses, losses, and liabilities sustained in the administration of the trust or because of ownership or control of any trust property.

Comment.

Source: CPC Section 15685.

This section is the same in substance as a portion of Section 3(c)(18) of the Uniform Trustees' Powers Act (1964); however, the reference to the equitable nature of the lien is new. An equitable lien is not good against a transferee of trust property who gives fair consideration for the property without knowledge of the lien. See generally 1 J. Pomeroy, Equity Jurisprudence §§ 165, 171(4) (5th ed. 1941); see also Restatement (Second) of Trusts Section 244, comment c (1957). The reference in this section to liabilities because of ownership or control of trust property involves liability for taxes and assessments on trust property and tort liability arising out of trust property. See also Section 4-601(b) (personal liability of trustee arising out of ownership or control of trust property).

SECTION 4-113. NOTICE OF INCREASED TRUSTEE'S FEE.

(a) As used in this section, "trustee's fee" includes a trustee's periodic base fee, rate of percentage compensation, minimum fee, hourly rate, and transaction charge, but does not include fees for extraordinary services.

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

(1) each beneficiary who is entitled to an account under Section 4-211(c);

(2) each beneficiary who was given the last preceding account; and

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

(c) If a beneficiary files a petition for review of an increased trustee's fee or for removal of a trustee and serves a copy of the petition on the trustee within the 60-day period, the increased fee does not take effect until otherwise ordered by the court or the petition is dismissed.

Comment.

Source: CPC Section 15686.

See also Section 4-211(a) (duty of the trustee to keep beneficiaries of trust reasonably informed of the trust and its administration). Subsection (b) requires that notice to be given only to "beneficiaries." Thus, if a person is no longer a beneficiary (as in a case where the person's interest has terminated), notice of an increased fee need not be given to the person, even if the person had given the trustee a written request for notice. See also Sections 3-103(4) (notice to beneficiaries of revocable trust).

PART 2. DUTIES OF TRUSTEE

Section

- 4-201. Duty to Administer Trust.**
- 4-202. Duty of Loyalty.**
- 4-203. Control and Preservation of Trust Property.**
- 4-204. Separation and Identification of Trust Property.**
- 4-205. Enforcement of Claims.**
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- 4-207. Duty Not to Delegate.**
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- 4-209. Special Skills.**
- 4-210. Standard of Care.**
- 4-211. Duty to Inform and Account.**
- 4-212. Duties with Regard to Discretionary Powers.**

SECTION 4-201. DUTY TO ADMINISTER TRUST. On acceptance of a trust, the trustee shall administer the trust according to the terms of the trust and, except to the extent the terms of the

trust provide otherwise, according to this [Act].

Comment.

Source: CPC Section 16000.

This section is drawn in part from Sections 164 and 169 of the Restatement (Second) of Trusts (1957). See also Sections 4-101 (acceptance of trust by trustee), 3-103(2) (duties owed to persons holding power to revoke), 3-104 (duties owed to persons with general power of appointment or power to withdraw trust property), 3-105 (duty to follow written direction), 4-210 (trustee's standard of care in performing duties). For provisions permitting the beneficiaries to relieve the trustee from liability, see Sections 4-509 (consent), 4-510 (release), 4-511 (affirmance).

SECTION 4-202. DUTY OF LOYALTY.

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

(b) If a trust has two or more beneficiaries, the trustee, in distributing, investing, and managing the trust property, shall deal impartially with them, taking into account any differing interests.

(c) A trustee may not use or deal with trust property for the trustee's own profit or for any other purpose unconnected with the trust, or take part in any transaction in which the trustee has an interest adverse to the beneficiary.

(d) A transaction between a trustee and a beneficiary which occurs during the existence of the trust or while the trustee's influence with the beneficiary enables the trustee to obtain an advantage from the beneficiary is presumed to be a violation of the trustee's fiduciary duties. This subsection does not apply to the provisions of an agreement between a trustee and a beneficiary relating to the hiring of or compensation payable to

the trustee.

(e) A trustee of one trust may not knowingly become a trustee of another trust adverse in its nature to the interest of a beneficiary of the first trust, and shall eliminate the conflict or resign as trustee when the conflict is discovered.

Comment.

Source: CPC Section 16002-16005.

Subsection (a) of this section codifies the substance of Section 170(1) of the Restatement (Second) of Trusts (1957). See also Sections 4-201 (duties subject to control by terms of trust), 4-210 (trustee's standard of care in performing duties). This section does not attempt to state all aspects of the trustee's duty of loyalty, nor does this Part seek to cover all duties that may exist. See Section 1-103 (common law of trusts).

Subsection (b) provides additional detail drawn from Section 6 of the Uniform Prudent Investor Act (1994), and codifies the substance of Section 183 of the Restatement (Second) of Trusts (1957).

For provisions permitting the beneficiaries to relieve the trustee from liability, see Sections 4-509 (consent), 4-510 (release), 4-511 (affirmance). See also Sections 4-201 (duties subject to control by terms of the trust), 4-210 (trustee's standard of care in performing duties). As to transactions between two trusts with the same trustee, see Section 4-402(30).

SECTION 4-203. CONTROL AND PRESERVATION OF TRUST PROPERTY.

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

Comment.

Source: CPC Section 16006.

This section codifies the substance of Sections 175 and 176 of the Restatement (Second) of Trusts (1957). For provisions permitting the beneficiaries to relieve the trustee from liability, see Sections 4-509 (consent), 4-510 (release), 4-511 (affirmance). See also Sections 4-201 (duties subject to control by terms of the trust), 4-210 (trustee's standard of care in performing duties), 4-402(6) (power to abandon trust property), 4-402(19) (power to insure trust property).

SECTION 4-204. SEPARATION AND IDENTIFICATION OF TRUST

PROPERTY. A trustee shall:

(1) keep the trust property separate from other property not subject to the trust; and

(2) cause the trust property to be designated as property of the trust.

Comment.

Source: CPC Section 16009.

This section codifies the substance of Section 179 of the Restatement (Second) of Trusts (1957), but the Restatement provision for keeping trust property separate from the trustee's individual property is omitted since it is redundant with paragraph (1). For provisions permitting beneficiaries to relieve the trustee from liability, see Sections 4-509 (consent), 4-510 (release), 4-511 (affirmance). See also Sections 4-201 (duties subject to control by terms of the trust), 4-210 (trustee's standard of care in performing duties). The duty under this section is qualified by Section 4-402(17), which allows trustees to hold property in the name of a nominee.

SECTION 4-205. ENFORCEMENT OF CLAIMS. A trustee shall take reasonable steps to enforce claims that are part of the trust property.

Comment.

Source: CPC Section 16010.

This section codifies the substance of Section 177 of the Restatement (Second) of Trusts (1957). Under this section, it may not be reasonable to enforce a claim depending upon the likelihood of recovery and the cost of suit and enforcement. For provisions permitting beneficiaries to relieve the trustee from liability, see Sections 4-509 (consent), 4-510 (release), 4-511 (affirmance). See also Sections 4-201 (duties subject to control by terms of the trust), 4-210 (trustee's standard of care in performing duties), 4-402(21) (power to settle or release claims).

SECTION 4-206. DEFENSE OF ACTIONS. A trustee shall take reasonable steps to defend against actions that may result in a loss to the trust.

Comment.

Source: CPC Section 16011.

This section codifies the substance of the first part of Section 178 of the Restatement (Second) of Trusts (1957). Depending on the circumstances of the case, it might be reasonable to settle an action or suffer a default rather than to defend an action. For provisions permitting beneficiaries to relieve the trustee from liability, see Sections 4-509 (consent), 4-510 (release), 4-511 (affirmance). See also Sections 4-201 (duties subject to control by terms of the trust), 4-210 (trustee's standard of care in performing duties).

SECTION 4-207. DUTY NOT TO DELEGATE.

(a) A trustee may not delegate to others the performance of acts that the trustee can reasonably be required personally to perform and may not transfer the office of trustee to another person or delegate the entire administration of the trust to a cotrustee or other person.

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

(c) This section does not apply to investment and management functions under Section 4-308.

Comment.

Source: CPC Section 16012.

The first part of subsection (a) codifies the substance of Section 171 of the Restatement (Second) of Trusts (1957). The second part of subsection (a) codifies the substance of Section 4 of the Uniform Trustees' Powers Act (1964). The duty not to delegate administration of the trust does not preclude employment of an agent in a proper case. For provisions permitting beneficiaries to relieve the trustee from liability, see Sections 4-509 (consent), 4-510 (release), 4-511 (affirmance). See also Sections 4-103 (actions by cotrustees), 4-201 (duties subject to control by terms of the trust), 4-210 (trustee's standard of care in performing duties), 4-402(13) (trustee may give proxies to vote shares), 4-402(16) (authority to delegate to protective committee in a reorganization), 4-402(26) (power to hire agents

of trust), 4-502 (trustee's liability for improper delegation).

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

Subsection (c) recognizes the special rule applicable under the Uniform Prudent Investor Act (1994).

SECTION 4-208. COTRUSTEES. If a trust has more than one trustee, each trustee shall:

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

Comment.

Source: CPC Section 16013.

This section codifies the substance of Section 184 of the Restatement (Second) of Trusts (1957). For provisions permitting beneficiaries to relieve the trustee from liability, see Sections 4-509 (consent), 4-510 (release), 4-511 (affirmance). See also Sections 4-201 (duties subject to control by terms of the trust), 4-210 (trustee's standard of care in performing duties), 4-503 (trustee's liability to beneficiary for acts of cotrustee). If a cotrustee is also a settlor under a revocable trust, a cotrustee who is not a settlor has a duty to follow the directions of the settlor-cotrustee pursuant to Section 3-105. That duty supersedes the general duty under this section.

SECTION 4-209. SPECIAL SKILLS.

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

Comment.

Source: CPC Section 16014.

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

nature of the trustee's representations to the settlor leading up to the selection of the trustee does not affect the trustee's duty to use the full extent of the trustee's skills. For provisions permitting beneficiaries to relieve the trustee from liability, see Sections 4-509 (consent), 4-510 (release), 4-511 (affirmance). See also Sections 4-201 (duties subject to control by terms of the trust), 4-210 (trustee's standard of care in performing duties).

SECTION 4-210. STANDARD OF CARE.

(a) A trustee shall administer the trust with the reasonable care, skill, and caution under the circumstances then prevailing that a prudent person acting in a like capacity would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of the trust as determined from the terms of the trust.

(b) A settlor may in the terms of the trust expand or restrict the standard provided in subsection (a). A trustee is not liable to a beneficiary for the trustee's good faith reliance on those provisions.

(c) A trustee's standard of care and performance in administering a trust is not affected by the payment or lack of payment of compensation to the trustee.

(d) This section does not apply to investment and management functions governed by the Uniform Prudent Investor Act (commencing with Section 4-301).

Comment.

Source: CPC Section 16040, 16041.

This section provides a general standard of care that applies where the special, more detailed rule applicable to investments and management of trust property does not apply, such as determining whether to make discretionary distributions, communicating with beneficiaries, and relations with creditors. See subsection (d).

For a special rule protecting the trustee's reasonable reliance on trust provisions concerning investments, see Section 4-302 (prudent investor rule).

SECTION 4-211. DUTY TO INFORM AND ACCOUNT.

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

(b) Except as otherwise provided in subsection (d), on reasonable request by a beneficiary, a trustee shall provide the beneficiary with a report of information about the trust property, liabilities, receipts, and disbursements of the trust, the acts of the trustee, and the particulars relating to the administration of the trust relevant to the beneficiary's interest, including the terms of the trust that describe or affect the beneficiary's interest.

(c) Except as otherwise provided in subsection (d), a trustee shall account at least annually, at the termination of the trust, and upon a change of a trustee, to each beneficiary to whom income or principal is required or authorized in the trustee's discretion to be currently distributed.

(d) A trustee need not report information or account to a beneficiary in any of the following circumstances:

(1) To the extent that the terms of the trust waive the report or account, but the court, regardless of a waiver, upon a showing that it is reasonably likely that a material breach of the trust has occurred, may compel the trustee to report information about the trust and to account;

- (2) The period during which a revocable trust may be revoked pursuant to Section 3-103 has not expired;
- (3) The beneficiary has waived in writing the right to a report or account. The waiver may be withdrawn in writing at any time as to the most recent account and future accounts. A waiver does not effect a beneficiary's right to petition for a report or account pursuant to Section 5-201; and
- (4) The beneficiary and the trustee are the same person.

Comment.

Source: CPC Section 16060-16062, 16064.

Subsection (a) is drawn from the first sentence of Section 7-303 of the Uniform Probate Code (1977). The trustee is under a duty to communicate to the beneficiary information that is reasonably necessary to enable the beneficiary to enforce the beneficiary's rights under the trust or to prevent or redress a breach of trust. See Restatement (Second) of Trusts Section 173, comment c (1957). Ordinarily, the trustee is not under a duty to furnish information to the beneficiary in the absence of a request for the information. See *id.*, comment d. Thus, the general duty provided in subsection (a) is ordinarily satisfied by complying with subsections (b) and (c) unless there are special circumstances requiring particular information to be reported to beneficiaries. However, if the trustee is dealing with the beneficiary on the trustee's own account, the trustee has a duty to communicate material facts in connection with the transaction that the trustee knows or should know. The trustee also has a duty to communicate material facts affecting the beneficiary's interest that the trustee knows the beneficiary does not know and that the beneficiary needs to know for protection in dealing with a third person. See *id.* During the time that a revocable trust can be revoked, the duty provided by this section is not owed to the beneficiaries but only to the settlor or other person having the power to revoke. See Section 3-103. See also Sections 1-102(2) ("beneficiary" defined), 4-201 (duties subject to control by terms of the trust), 3-105 (duty to follow written direction), 4-507 (limitations on proceedings against trustee).

Subsection (b) is drawn from Section 7-303(b) of the Uniform Probate Code (1977). Under this subsection, a beneficiary who is

not entitled to an annual account may be entitled to information or a particular account. The availability of information on request under this section does not negate the affirmative duty of the trustee to provide information under subsection (a). During the time that a revocable trust can be revoked, the right to request information pursuant to this section does not belong to the beneficiaries but only to the settlor or other person having the power to revoke. See Section 3-103. In an appropriate case, more information may be required under this section than through the duty to account annually.

The duty to provide information under Subsection (a) is not necessarily satisfied by compliance with subsection (c).

Subsection (d) provides several limitations on the duty to report under subsection (a) and the duty to account under Subsection (c). See also Section 1-102(2) ("beneficiary" defined), 3-103 (limits on rights of beneficiary of revocable trust). Notwithstanding being excused from the duty to report information, the trustee may want to provide information to the beneficiaries in order to start the running of the statute of limitations pursuant to Section 4-507.

SECTION 4-212. DUTIES WITH REGARD TO DISCRETIONARY POWERS.

(a) Except as otherwise provided in this section, a trustee shall exercise a discretionary power reasonably.

(b) If the terms of the trust confer "absolute," "sole," or "uncontrolled" discretion on a trustee, the trustee shall act in accordance with fiduciary principles and may not act in bad faith or in disregard of the purposes of the trust.

(c) Despite the settlor's use of terms like "absolute," "sole," or "uncontrolled," a person who is a beneficiary of a trust and who, either individually or as trustee or cotrustee, holds a power to take or distribute income or principal to or for that person's benefit pursuant to a standard, shall exercise that power reasonably and in accordance with the standard. .

Comment.

Source: CPC Section 16080, 16081.

As to judicial review of trustees' exercise of discretion, see Restatement (Second) of Trusts Section 187. For the rights

of creditors with respect to discretionary trusts, see Sections 2-303. For the remedies available for breach of trust, see Section 4-505.

The first sentence of subsection (b) is similar to Restatement (Second) of Trusts, Section 187, comment j.

PART 3

UNIFORM PRUDENT INVESTOR ACT

Section

- 4-301. Short Title.**
- 4-302. Prudent Investor Rule.**
- 4-303. Standard of Care, Portfolio Strategy, Risk and Return Objective.**
- 4-304. Diversification.**
- 4-305. Duties at Inception of Trusteeship.**
- 4-306. Investment Costs.**
- 4-307. Reviewing Compliance.**
- 4-308. Delegation of Investment and Management Functions.**
- 4-309. Language Invoking Standard of Uniform Prudent Investor Act.**
- 4-310. Application to Existing Trusts.**

SECTION 4-301. SHORT TITLE. This [Part] may be cited as the Uniform Prudent Investor Act.

Comment.

Source: CPC Section 16045.

This section has the same purpose as Section 12 of the Uniform Prudent Investor Act (1994). Most of the substance of the uniform act is set forth in this Part, but some rules already exist in other parts of the Act.

SECTION 4-302. PRUDENT INVESTOR RULE.

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

(b) The prudent investor rule, a default rule, may be

expanded, restricted, eliminated, or otherwise altered by the terms of a trust. A trustee is not liable to a beneficiary to the extent the trustee acted in reasonable reliance on the terms of the trust.

Comment.

Source: Unif. Prudent Investor Act Sec.1.

Subsection (a) and the first sentence of subsection (b) are a special application of the general duty provided in Section 4-201 (duty to administer trust according to statute, subject to control by trust).

The second sentence of subsection (b) conflicts with Section 4-210, which protects a trustee who acts in good faith.

SECTION 4-303. STANDARD OF CARE, PORTFOLIO STRATEGY, RISK AND RETURN OBJECTIVES.

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

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

(c) Among circumstances that are appropriate to consider in investing and managing trust assets are the following, to the extent relevant to the trust or its beneficiaries:

- (1) general economic conditions;
- (2) the possible effect of inflation or deflation;

- (3) the expected tax consequences of investment decisions or strategies;
- (4) the role that each investment or course of action plays within the overall trust portfolio;
- (5) the expected total return from income and the appreciation of capital;
- (6) other resources of the beneficiaries;
- (7) needs for liquidity, regularity of income, and preservation or appreciation of capital; and
- (8) an asset's special relationship or special value, if any, to the purpose of the trust or to one or more of the beneficiaries.

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

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

Comment.

Source: Unif. Prudent Investor Act Sec. 2.

Subsection (a) is the same in substance as the first paragraph and subsection (a) of Section 227 of Restatement (Third) of Trusts: Prudent Investor Rule (1992).

The second sentence of subsection (a) states the basic elements of prudence. Thus, where "prudence" is used in this article, it includes "reasonable care, skill, and caution." These elements are delineated in the Restatement:

[Care]

The duty of care requires the trustee to exercise reasonable effort and diligence in making and monitoring investments for the trust, with attention to the trust's objectives. The trustee has a related duty of care in keeping informed of rights and opportunities associated with those investments. . . .

[Skill]

The exercise of care alone is not sufficient, however,

because a trustee is liable for losses resulting from failure to use the skill of an individual of ordinary intelligence. This is so despite the careful use of all the skill of which the particular trustee is capable. On the other hand, it follows from the requirement of care as well as from sound policy that, if the trustee possesses a degree of skill greater than that of an individual of ordinary intelligence, the trustee is liable for a loss that results from failure to make reasonably diligent use of that skill. . . .

[Caution]

In addition to the duty to use care and skill, the trustee must exercise the caution of a prudent investor managing similar funds for similar purposes. In the absence of contrary provisions in the terms of the trust, this requirement of caution requires the trustee to invest with a view both to safety of the capital and to securing a reasonable return. . . .

Restatement (Third) of Trusts: Prudent Investor Rule Section 227 comments d & e (1992). For a full discussion, see *id.* Section 227, comments & Reporter's Notes (1992).

Subsection (e) makes clear that there are no categorical restrictions on proper investments. Any form of investment is permissible in the absence of a prohibition by the terms of the trust or an overriding duty. This subsection is intended to permit investment in investment company shares, mutual funds, index funds, and other modern vehicles for collective investments. While investment in these funds is not forbidden merely because discretion over the fund is delegated to others, the trustee is ultimately subject to fiduciary standards under this chapter in making the investment. See also Sections 1-102(13) ("property" defined), 4-309 (language invoking standard of Uniform Prudent Investor Act), 4-401(c) (exercise of powers is subject to duties).

Section 2(f) of the Uniform Prudent Investor Act (1994) has been omitted from this section because it is unnecessary. The same general rule is provided by Section 4-209 (duty to use special skills). An expert trustee is held to the standard of care of other experts.

SECTION 4-304. DIVERSIFICATION. A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.

Comment.

Source: Unif. Prudent Investor Act Sec. 3.

This section is similar to Section 227(b) of the Restatement (Third) of Trusts: Prudent Investor Rule (1992). See the comments to Restatement (Third) of Trusts: Prudent Investor Rule Section 227 (1992).

SECTION 4-305. DUTIES AT INCEPTION OF TRUSTEESHIP. Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of this [Part].

Comment.

Source: Unif. Prudent Investor Act Sec. 4.

For related duties, see Sections 4-201 (duty to administer trust on acceptance), 4-203 (duty to take control of and preserve trust property).

SECTION 4-306. INVESTMENT COSTS. In investing and managing trust assets, a trustee may only incur costs that are appropriate and reasonable in relation to the assets, overall investment strategy, purposes, and other circumstances of the trust.

Comment.

Source: Unif. Prudent Investor Act Sec. 7.

This section is consistent with the rules concerning costs in Section 227(c)(3) of the Restatement (Third) of Trusts: Prudent Investor Rule (1992). For related rules concerning reimbursement and compensation of trustees, see Sections 4-110 and 4-111. The duty to minimize costs applies to delegation to agents and hiring advisers as well as to other aspects of fiduciary investing. In deciding whether to delegate, the trustee must balance the projected benefits against the likely costs. Similarly, in deciding how to delegate, the trustee must take costs into account. The trustee must be alert to protect the beneficiary from "double dipping." If, for example, the trustee's regular compensation schedule presupposes that the

trustee will conduct the investment management function, it should ordinarily follow that the trustee will lower its fee if delegating the investment function to an outside manager.

SECTION 4-307. 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.

Source: Unif. Prudent Investor Act Sec. 8.

For related rules governing trustee liability, see Sections 4-506 to 4-511.

SECTION 4-308. DELEGATION OF INVESTMENT AND MANAGEMENT FUNCTIONS.

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

- (1) selecting an agent.
- (2) establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust.
- (3) periodically reviewing the agent's overall performance and compliance with the terms of the delegation.

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

(c) Except as otherwise provided in Section 4-502, a trustee who complies with the requirements of subsection (a) is not liable to the beneficiaries or to the trust for the decisions or

actions of the agent to whom the function was delegated.

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

Comment.

Source: Unif. Prudent Investor Act Sec. 9.

This section is the same as Section 9 of the Uniform Prudent Investor Act (1994), except that subsection (c) has been revised for coordination with the basic rule on liability for acts of agents in Section 4-502.

The duty to review the agent's overall performance under subsection (a)(3) includes the periodic evaluation of the continued need for and appropriateness of the delegation of authority. In particular circumstances, the trustee may need to terminate the delegation to comply with the duty under subsection (a)(1) (duty to use reasonable care, skill, and caution in selecting agent). This section provides special exceptions to the general rule concerning delegation (Section 4-207) and the trustee's liability for acts of agents (Section 4-502). See also Section 4-402(26) (power to hire accountants, auditors, investment advisors, etc.).

SECTION 4-309. LANGUAGE INVOKING STANDARD OF UNIFORM PRUDENT INVESTOR ACT. The following phrases or comparable language in the terms of a trust, unless otherwise limited or modified, authorize any investment or strategy permitted under this [Part]: "investments permissible by law for investment of trust funds," "legal investments," "authorized investments," "using the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital," "prudent man rule," "prudent trustee rule,"

"prudent person rule," and "prudent investor rule."

Comment.

Source: Unif. Prudent Investor Act Sec. 10.

SECTION 4-310. APPLICATION TO EXISTING TRUSTS. This [Part] applies to trusts existing on and created after its effective date. As applies to trusts existing on its effective date, this article governs only decisions or actions occurring after that date.

Comment.

Source: Unif. Prudent Investor Act Sec. 11.

This section is a specific application of the general transitional provisions in Section 6-101.

**PART 4.
POWERS OF TRUSTEES**

Section

4-401. General Powers.

4-402. Specific Powers.

SECTION 4-401. GENERAL POWERS.

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

- (1) the powers conferred by the terms of the trust;
- (2) except as limited by the terms of the trust, powers conferred by this [Act], including the power to perform any act that a trustee could perform for the purposes of the trust under the standard of care prescribed in Section 4-210 or 4-303.

(b) This [Part] does not affect the power of a court to relieve a trustee from restrictions in the terms of the trust on

the exercise of powers.

(c) The grant of a power to a trustee, whether by the terms of the trust, this [Act], or the court, does not in itself govern the exercise of the power. The exercise of a power by a trustee is subject to the trustee's fiduciary duties.

Comment.

Source: CPC Section 16200-16202.

Subsection (a) is drawn from Sections 2(a) and 3(a) of the Uniform Trustee's Powers Act (1964). The introductory clause makes clear that the trustee has the powers as provided in this section without the need to obtain court authorization.

Subsection (a)(2) gives the trustee the statutory powers without the need to incorporate them. The specific list of powers is provided in Section 4-402. This subsection also recognizes the authority provided in the Uniform Prudent Investor Act. See Sections 4-301 to 4-310. Under this subsection, the trustee has the powers of a prudent person, without the need to obtain prior court approval. However, if the trustee desires court approval before exercising a power or desires court review after exercise of a power, the procedure provided in Section 5-201 et seq. is available.

The exercise of powers by the trustee is subject to various important limitations as recognized in this section and as provided elsewhere. Subsection (a)(2) makes clear that the exercise of statutory or "prudent person" powers is subject to limitations provided in the trust. Subsection (c) makes clear that the exercise of powers by the trustee is subject to the fiduciary duties owed to the beneficiaries. See also Sections 2-201(b) (powers after trust terminates), 4-103 (actions by cotrustees), 4-107 (powers of trustee who has resigned or been removed).

As to the construction of trust language that refers to "investments permissible by law for investment of trust funds," "authorized by law for investment of trust funds," "legal investments," "authorized investments," or "investments acquired using the judgment and care which men of prudence, discretion, and intelligence exercise in the management of their own affairs," or other words of similar meaning in defining the powers of the trustee relative to investments, see Section 4-309.

Subsection (b) is based on Restatement (Second) of Trusts Section 167 (1957). For a provision permitting the court to modify a trust due to unanticipated circumstances, see Section 2-204.

Subsection (c) recognizes that a power granted to the trustee from any source does not necessarily permit the exercise of the power, nor does it prevent the exercise of a power in a

manner that conflicts with a general duty if the terms of the trust so direct, or where the trustee is directed so to act by a person holding the power to revoke the trust (see Section 3-105). For example, the terms of the trust may give the trustee discretion to favor one beneficiary over the others, in apparent conflict with the general duty to deal with beneficiaries impartially under Section 4-202(b). See also Section 4-201 et seq. (trustee's fiduciary duties).

SECTION 4-402. SPECIFIC POWERS OF TRUSTEES. A trustee may:

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

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

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

(4) deposit trust funds in an account in a financial institution;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(18) deposit securities in a securities depository;

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

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

(21) pay or contest any claim; settle a claim by or against

the trust by compromise, arbitration, or otherwise; and release, in whole or in part, a claim belonging to the trust;

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

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

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

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

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

(27) if the trust property does not exceed [\$50,000] in value, terminate the trust and distribute the trust property in accordance with the probable intention of the settlor under the circumstances;

(28) combine two or more trusts with substantially similar terms;

(29) divide a trust into two or more separate trusts with substantially similar terms if the trustee determines that division of the trust could result in a decrease in current or future tax liabilities;

(30) sell, exchange, or participate in the sale or exchange of trust property between two or more trusts administered by the trustee if the trustee determines (i) the sale or exchange is fair and reasonable with respect to the beneficiaries of the trusts, and (ii) the trustee has given to the beneficiaries notice of all material facts relating to the sale or exchange which the trustee knows or should know;

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

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

(33) prosecute or defend an action, claim, or proceeding in order to protect trust property and the trustee in the

performance of the trustee's duties.

Comment.

Source: CPC Section 16220-16249.

Most of the powers listed in this section are drawn from Section 3 of the Uniform Trustee's Powers Act (1964). Paragraphs (27) to (31) are new, however. In addition, several of the provisions of the Trustee's Powers Act have been modified.

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

Paragraph (5) authorizes a trustee to acquire or dispose of property, for cash or on credit, at public or private sale, or by exchange. Under the Restatement, a trustee may sell on credit only if security is given. Restatement(Second) of Trusts Section 190, comment j (1957). A sale may also be voidable for conflict of interest. See Section 4-202.

Paragraph (21) authorizes a trustee to release claims. The determination of when to release a claim depends upon the duties imposed on the trustee. As a general matter, the trustee should be able to release a claim not only when it is uncollectible, but also when it is uneconomical to attempt to collect it. See also Sections 4-205 (duty to enforce claims), 4-206 (duty to defend actions).

Paragraph (22) authorizes a trustee to pay compensation without prior court approval. For other provisions relating to trustees' compensation, see Sections 4-110. See also Sections 4-111 (repayment of trustees for expenses incurred), 4-402 (26) (power to hire agents).

Paragraph (23) allows a trustee to make loans to or guarantee loans of a beneficiary upon such terms and conditions the trustee considers fair and reasonable. The determination of what is fair and reasonable must be made in light of the fiduciary duties of the trustee and purposes of the trust. If the trustee requires security for the loan to the beneficiary, adequate security under this paragraph may consist of a charge on the beneficiary's interest in the trust. See Restatement (Second) of Trusts Section 255 (1957). The interest of a beneficiary that is subject to a spendthrift restraint may not be used for security for a loan under this paragraph. See Section 2-201 et seq. (spendthrift protection).

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

Paragraph (25) allows a trustee to make non-pro rata

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

Paragraph (26) authorizes the hiring of agents. If the trustee is in doubt concerning the propriety of hiring an agent, the judicial procedure under Section 5-201 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 4-207 (duty not to delegate), 4-209 (duty to use special skills), 4-502 (trustee's liability to beneficiary for acts of agent).

Paragraph (27) establishes a presumption that a trust with a value of \$50,000 or less is inherently uneconomical. Consequently, court approval of the termination is not required. For the comparable provision on judicial termination, see Section 2-205.

Paragraph (28), on the authority to combine trusts, is drawn from the Texas Trust Code. See Tex. Prop. Code Ann. Sec. 112.057. This paragraph allows a trustee to combine two or more separate trusts even though their terms are not identical. Trusts often vary in almost imperceptible ways, such as the presence of differing perpetuities savings periods. For the comparable provision on judicial combination, see Section 2-206(a).

Paragraph (29), on division of trusts, is adapted from the Texas Trust Code. See Tex. Prop. Code Ann. Sec. 112.057. A division of trusts is often necessitated by a desire to obtain maximum advantage of exemptions available under the federal generation-skipping tax. For the comparable provision on judicial division, see Section 2-206(b).

Paragraph (30) permits sales or exchanges between two or more trusts that have the same trustee without running afoul of the duty of loyalty. See Restatement (Second) of Trusts Sec. 170, comm. r (1957). The trustee need not give notice to all beneficiaries. For limitations on the need to give notice, see Sections 3-103 (notice to beneficiary of revocable trust), 5-203 (virtual representation), and 5-204 (nonjudicial settlement).

Paragraph (31), which addresses concerns about possible liability for violations of environmental law, is drawn from the Texas Trust Code.

Paragraph (33) authorizes a trustee to prosecute or defend an action. As to the propriety of reimbursement for attorney's

fees and other expenses of an action or proceeding, see Section 4-111 and comment. See also Sections 4-206 (duty to defend actions), 4-401(c) (exercise of powers is subject to duties), 4-603 (protection of persons dealing with trustees).

PART 5.
LIABILITY OF TRUSTEES TO BENEFICIARIES

Section

- 4-501. Violations of Duties; Breach of Trust.**
- 4-502. Liability for Conduct of Agents.**
- 4-503. Liability for Breach of Trust by Cotrustee.**
- 4-504. Liability for Breach of Trust by Predecessor.**
- 4-505. Breach of Trust; Actions.**
- 4-506. Breach of Trust; Liability; Good Faith Actions.**
- 4-507. Limitations of Actions.**
- 4-508. Exculpation of Trustee.**
- 4-509. Beneficiary's Consent; Nonliability of Trustee.**
- 4-510. Beneficiary's Release or Contract; Discharge of Trustee's Liability.**
- 4-511. Affirmation by Beneficiary; Nonliability of Trustee.**

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

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

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

Comment.

Source: CPC Section 16400, 16421.

Subsection (a) is drawn from Section 201 of the Restatement (Second) of Trusts (1957). While a trust is revocable, the trustee owes duties to the person holding the power to revoke and not to the named beneficiaries. See Section 3-103; see also Section 3-104 (holder of general power of appointment or power to withdraw property from trust treated as settlor).

Subsection (b) is drawn from Section 197 of the Restatement (Second) of Trusts (1957). For a list of remedies, see Section 4-505. Under this section, for example, the beneficiary may not commence an action against the trustee for breach of contract. See Restatement (Second) of Trusts Sec. 197 comment b (1957). However, the trustee may be found liable for the payment of money on account of the breach. See Section 4-505(a)(3) (compelling payment of money for breach of trust), 4-506 (measure of liability for breach of trust).

SECTION 4-502. LIABILITY FOR CONDUCT OF AGENTS.

A trustee is liable to a beneficiary for an act or omission of an agent employed by the trustee in the administration of the trust only if the act or omission would be a breach of trust if committed by the trustee and:

- (1) the trustee could have directed the act of the agent;
- (2) the trustee did not periodically review the agent's overall performance and compliance with the terms of the delegation;
- (3) the trustee delegated to the agent the authority to perform an act that the trustee may not to delegate;
- (4) the trustee did not use reasonable prudence in the selection of the agent or the retention of an agent selected by the trustee;
- (5) the trustee concealed the conduct of the agent; or
- (6) the trustee neglected to take reasonable steps to compel the agent to redress a wrong known to the trustee to have been caused by the conduct of the agent.

Comment.

Source: CPC Section 16401.

This section is consistent with Section 4-308 (delegation of investment and management functions), part of the Uniform Prudent Investor Act (1994). Paragraph (3) is consistent with the delegation rules governing investment and management under the Uniform Prudent Investor Act. See Section 4-308(a). Paragraph (4) refers to the use of "prudence" which includes the elements of reasonable care, skill, and caution under Section 4-210 (standard of care in non-investment functions) or Section 4-303(a) (standard of care in investment and management functions under Uniform Prudent Investor Act).

Paragraphs (1) and (2) are drawn from Section 225 of the Restatement (Second) of Trusts (1957). Whether a trustee has acted reasonably under this section depends upon application of

the standard of care provided in Section 4-210. The trustee of a revocable trust is not liable where the agent's act is performed or omitted pursuant to the written instructions of the person having the power to revoke the trust. Similarly, the trustee of a revocable trust is not liable for hiring an agent where the trustee is directed to do so in writing by the person having the power to revoke. See Section 3-105. It should also be noted that the liability to beneficiaries does not include beneficiaries under a revocable trust during the time that the trust can be revoked. See Section 3-103; see also Sections 3-104 (holder of general power of appointment or power to withdraw property from trust treated as settlor), 4-201 (duty to administer trust).

The six paragraphs of this section state independent bases for imposition of liability on the trustee. For example, if the trustee has not used reasonable care in selecting or retaining an agent, the trustee may be held liable for the agent's breach under paragraph (4); but even if the trustee has no control over selection or retention of the agent, the trustee may still be held liable for the agent's breach under paragraph (1) if the trustee has the power to direct the agent's actions. It should be also noted that paragraphs (2), (5), and (6) apply regardless of whether the trustee has any control over the agent.

SECTION 4-503. LIABILITY FOR BREACH OF TRUST BY COTRUSTEE. A

trustee is liable to a beneficiary for a breach of trust committed by a cotrustee only if:

- (1) the trustee participated in the breach of trust;
- (2) the trustee improperly delegated the administration of the trust to the cotrustee;
- (3) the trustee approved, knowingly acquiesced in, or concealed the breach of trust;
- (4) the trustee negligently enabled the cotrustee to commit the breach of trust; or
- (5) the trustee neglected to take reasonable steps to compel the cotrustee to redress the breach of trust known to the trustee or of which the trustee had information from which the trustee reasonably should have known of the breach.

Comment.

Source: CPC Section 16402.

This section is drawn from Section 224 of the Restatement (Second) of Trusts (1957). For the duty of a trustee with respect to cotrustees, see Section 4-208. For exemption of a dissenting cotrustee from liability, see Section 4-602. It should also be noted that the liability to beneficiaries does not include beneficiaries under revocable trusts during the time that the trust can be revoked. See Section 3-103; see also Sections 3-104 (holder of general power of appointment or power to withdraw property from trust treated as settlor), 4-201 (duty to administer trust).

SECTION 4-504. LIABILITY FOR BREACH OF TRUST OF PREDECESSOR.

A successor trustee is liable to a beneficiary for breach of trust committed by a predecessor trustee only if:

(1) the successor trustee knew or had information from which the successor trustee reasonably should have known of a situation constituting a breach of trust committed by the predecessor trustee;

(2) the successor trustee neglected to take reasonable steps to compel the predecessor trustee to deliver trust property to the successor trustee;

(3) the successor trustee neglected to take reasonable steps to redress a breach of trust committed by the predecessor trustee and known to the successor trustee or of which the successor trustee had information from which the successor trustee reasonably should have known of the breach.

Comment.

Source: CPC Section 16403.

This section is the same in substance as Section 223 of the Restatement (Second) of Trusts (1957), except that the language in paragraph (3) relating to what the trustee should have known differs from the Restatement. In certain circumstances it may not be reasonable to enforce a claim against a former trustee,

depending upon the likelihood of recovery and the cost of suit and enforcement. It should also be noted that the liability to beneficiaries does not include beneficiaries under revocable trusts during the time that the trust can be revoked. See Section 3-103; see also Section 3-104 (holder of general power of appointment or power to withdraw property from trust treated as settlor). For provisions permitting a trustee to be relieved of liability for acts of a predecessor trustee, see Sections 4-509 (consent), 4-510 (release), 4-511 (affirmance).

The principles of this section should also apply when a trustee neglects to take reasonable steps to redress misconduct by a personal representative. See Section 4-205 (duty to enforce claims of trust).

SECTION 4-505. BREACH OF TRUST; ACTIONS.

(a) If a trustee commits or threatens to commit a breach of trust, a beneficiary or cotrustee of the trust may maintain an action or proceeding to:

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

(9) subject to Section 4-603, trace trust property wrongfully disposed of and recover the property or its proceeds.

(b) The remedies provided in subsection (a) for breach of trust do not preclude any other remedy provided by statute or available under the common law.

Comment.

Source: CPC Section 16420.

Subsection (a) codifies in general terms the remedies available to a beneficiary or cotrustee where a trustee has committed a breach of trust or threatens to do so. For the applicable procedure, see Section 5-201 et seq. (judicial proceedings concerning trusts). As provided in subsection (b), the list of remedies in subsection (a) is not necessarily exclusive and is not intended to prevent resort to any other appropriate remedy. See Section 1-103 (common law of trusts); see also subsection (b) (remedies are exclusively equitable). The petitioner may seek any one or more of the remedies as is appropriate in the circumstances of the case. This section provides a general list of remedies and does not attempt to set out the refinements and exceptions developed over many years by the common law. The availability of a particular remedy listed in this section, and its application under the circumstances, are governed by the common law. See Section 1-103 (common law of trusts).

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

The reference to payment of money in subsection (a)(3) is comprehensive and includes liability that might be characterized as damages, restitution, or surcharge. For the measure of liability, see Section 4-506. The characterization of monetary liability does not affect the fact that the remedies for breach of trust are exclusively equitable, as provided in subsection (b). In certain circumstances, rather than ordering the payment of money, it may be appropriate for the court to order the trustee to transfer tangible property as a remedy for breach of trust. See also Restatement (Second) of Trusts Section 199(c) (1957).

Subsection (a)(4) makes explicit the authority to appoint a receiver. See also Restatement (Second) of Trusts Section 199(d) (1957). This subsection also permits appointment of a temporary trustee where appointment of a receiver would be appropriate. See Section 4-109 (appointment of trustee to fill vacancy).

As to subsection (a)(5), see Restatement (Second) of Trusts

Section 199(e) (1957). For provisions governing removing trustees, see Sections 4-105 (grounds for removal), 4-107 (delivery of property by removed trustee).

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

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

The introductory clauses of subsections (a)(6), (a)(8), and (a)(9) recognize that this remedy is limited by the rights of a bona fide purchaser as provided in Section 4-603. See also Restatement (Second) of Trusts Section 202 (1957).

A successor trustee may also have standing to sue for a breach of trust. See Section 4-504. As to standing generally, see Restatement (Second) of Trusts Section 200.

SECTION 4-506. BREACH OF TRUST; LIABILITY; GOOD FAITH ACTIONS.

(a) A trustee who commits a breach of trust is chargeable for:

- (1) any loss or depreciation in value of the trust estate resulting from the breach of trust, with interest;
- (2) any profit made by the trustee through the breach of trust, with interest; or
- (3) any profit that would have accrued to the trust and is the result of the breach.

(b) A trustee who is liable for interest is liable for the greater of:

- (1) the amount of interest that accrues at the legal rate on judgments in effect while the interest accrued;
- or

(2) the amount of interest received.

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

Comment.

Source: CPC Section 16440, 16441.

Subsection (a) is drawn from Section 205 of the Restatement (Second) of Trusts (1957).

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

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

As to defenses by the trustee, see Sections 4-507 to 4-511.

The remedies provided in this section do not preclude any other remedy provided by statute or available under the common law. See Section 1-103 (common law of trusts).

SECTION 4-507. LIMITATIONS OF ACTIONS.

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

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

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

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

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

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

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

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

Comment.

Source: CPC Section 16460.
This section is drawn in part from Section 7-307 of the

Uniform Probate Code (1977). For provisions governing consent, release, and affirmance by beneficiaries to relieve the trustee of liability, see Sections 4-509 to 4-511. The reference in the introductory clause to claims "otherwise" barred also includes principles such as estoppel and laches that apply under the common law. See Section 1-103 (common law of trusts). See also Sections 4-508 (exculpation of trustee by provision in terms of the trust), 3-105(b) (nonliability for following instructions under revocable trust). During the time that a trust is revocable, the person holding the power to revoke is the one who must receive the account or report in order to commence the running of the limitations period provided in this section. See Sections 3-103 (limits on rights of beneficiary of revocable trust), 4-211(d) (exception to duty to account).

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

For the provisions relating to the duty to report information and account to beneficiaries, see Sections 4-211.

SECTION 4-508. EXCULPATION OF TRUSTEE. The terms of the trust can relieve a trustee of liability for breach of trust except:

(1) for breach of trust committed intentionally, with gross negligence, in bad faith, or with reckless indifference to the interest of the beneficiary; or

(2) for any profit the trustee derives from a breach of trust.

Comment.

Source: CPC Section 16461.

This section is the same in substance as part of Section 222 of the Restatement (Second) of Trusts (1957), except that the reference to gross negligence does not appear in the Restatement. For a special provision applicable to revocable trusts, see Section 3-105(b). Although a trust may not exculpate a trustee from liability for a profit from a breach, as provided in paragraph (2), the trust may limit the trustee's duties with the effect that the trustee does not commit a breach in that area.

However, it is against public policy to attempt to eliminate liability for profits derived from a breach of a duty that the trustee does have. See Restatement (Second) of Trusts Section 222 comments b & c (1957).

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

SECTION 4-509. BENEFICIARY'S CONSENT; NONLIABILITY OF TRUSTEE.

(a) Except as otherwise provided in subsections (b) and (c), a beneficiary may not hold a trustee liable for a breach of trust if the beneficiary consented to the conduct constituting breach before or at the time it occurred.

(b) Consent of the beneficiary does not preclude a beneficiary from holding the trustee liable for a breach of trust if:

(1) the beneficiary was under an incapacity at the time of the consent or when the breach occurred;

(2) the beneficiary at the time consent was given 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

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

(c) If a trustee has an interest in a transaction adverse to the interest of a beneficiary, the consent of the beneficiary does not preclude the beneficiary from holding the trustee liable for a breach of trust under any of the circumstances described in subsection (b) or if the transaction to which the beneficiary

consented was not fair and reasonable to the beneficiary.

Comment.

Source: CPC Section 16463.

This section is the same in substance as Section 216 of the Restatement (Second) of Trusts (1957). See also Sections 4-507 (limitations on proceedings against trustee), 4-510 (release), 4-511 (affirmance). As to other rules that may limit the trustee's liability, see the comment to Section 4-507.

When one beneficiary has consented but others have not, courts give a remedy to the nonconsenting trustees. Restatement (Second) of Trusts Section 216, comment h. But consent by the settlor of a revocable trust binds all the beneficiaries under Section 3-103. See also Section 3-104 (consent by the holder of a power of withdrawal).

SECTION 4-510. BENEFICIARY'S RELEASE OR CONTRACT; DISCHARGE OF TRUSTEE'S LIABILITY. A beneficiary is precluded from holding a trustee liable for a breach of trust by the beneficiary's release or contract effective to discharge the trustee's liability to the beneficiary for the breach unless:

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

(2) the beneficiary did not know of the beneficiary's rights and of the material facts that the trustee knew or reasonably should have known and did not reasonably believe that the beneficiary knew;

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

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

Comment.

Source: CPC Section 16464.

This section is the same in substance as Section 217 of the Restatement (Second) of Trusts (1957). See also Sections 4-507

(limitations on proceedings against trustee), 4-511 (affirmance). As to other rules that may limit the trustee's liability, see the comment to Section 4-507.

SECTION 4-511. AFFIRMATION BY BENEFICIARY; NONLIABILITY OF TRUSTEE.

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

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

(1) the beneficiary was under an incapacity;

(2) the beneficiary did not know of the beneficiary's rights and of the material facts that the trustee knew or reasonably should have known and did not reasonably believe that the beneficiary knew;

(3) the affirmance was induced by improper conduct of the trustee; or

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

Comment.

Source: CPC Section 16465.

This section is the same in substance as Section 218 of the Restatement (Second) of Trusts (1957). See also Sections 4-507 (limitations on proceedings against trustee), 4-509 (consent), 4-510 (release). As to other rules that may limit the trustee's liability, see the comment to Section 4-507.

Restatement (Second) of Trusts Section 218, comment d, says

that this rule applies only to breaches which give beneficiaries the option to affirm or disaffirm, but in other cases the trustee may be protected by laches.

PART 6. RIGHTS OF THIRD PERSONS

Section

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

SECTION 4-601. PERSONAL LIABILITY; LIMITATIONS.

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

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

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

(d) A question of liability as between the trust and the trustee personally may be determined in a proceeding under Section 5-201.

Comment.

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

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

Under subsection (b), a trustee is "personally at fault" when the trustee, either intentionally or negligently, acts, or fails to act, or commits a tort either intentionally or negligently. For rules governing the assertion of claims, see subsection (c). The question of ultimate liability as between the trust and the trustee is governed by subsection (d).

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

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

Under subsection (d), ultimate liability between an estate and trustee need not be determined before the third person's claim can be satisfied. It is permissible, and may be preferable, for judgment to be entered against the trust without determining the trustee's ultimate liability until later. Where judgment is entered against the trustee individually, the question of the trustee's right to reimbursement may be settled informally with the beneficiaries or in a separate proceeding in the probate court. For rules governing indemnification of trustees, see Section 4-111. See also Section 5-201 et seq. (proceedings against trustee by beneficiary).

SECTION 4-602. DISSENTING COTRUSTEES.

(a) A cotrustee who does not join in exercising a power held

by three or more cotrustees is not liable to a third person for the consequences of the exercise of the power.

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

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

Comment.

Source: CPC Section 18003.

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

As to the duties of cotrustees, see Sections 4-208 and 4-503. Under Section 4-103, cotrustees may act by majority vote unless otherwise provided by the terms of the trust.

SECTION 4-603. OBLIGATIONS OF THIRD PERSONS.

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

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

(2) A third person is fully protected in dealing with or assisting a trustee, as if the trustee has and is

properly exercising the power the trustee purports to exercise.

(b) A third person who acts in good faith is not bound to ensure the proper application of trust property paid or delivered to the trustee.

(c) If a third person acting in good faith and for a valuable consideration enters into a transaction with a former trustee without knowledge that the person is no longer a trustee, the third person is fully protected as if the former trustee were still a trustee.

Comment.

Source: CPC Section 18100.

This section is drawn from Section 7 of the Uniform Trustees' Powers Act (1964). See also Sections 4-106 (vacancy in office of trustee), 4-107 (residual powers of resigning trustee).

SECTION 4-604. CERTIFICATION OF TRUST.

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

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

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

distribution of the trust estate.

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

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

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

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

Comment.

Source: CPC Section 18100.5.

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

Comment.

Source: CPC Section 16249(b).

ARTICLE 5. JUDICIAL PROCEEDINGS CONCERNING TRUSTS

Part

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

PART 1. JURISDICTION AND VENUE

Section

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

SECTION 5-101. SUBJECT MATTER JURISDICTION.

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

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

- (1) actions and proceedings to determine the existence of trusts;
- (2) actions and proceedings by or against creditors or

debtors of trusts;

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

Comment.

Source: CPC Section 17000.

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

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

SECTION 5-102. PRINCIPAL PLACE OF ADMINISTRATION OF TRUST.

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

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

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

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

Comment.

Source: CPC Section 17002.

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

SECTION 5-103. JURISDICTION OVER TRUSTEES AND BENEFICIARIES.

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

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

Comment.

Source: CPC Section 17003.

This section is intended to facilitate the exercise of the court's power under this Part. This section is drawn from Section 7-103 of the Uniform Probate Code (1977). As recognized by the introductory clause, constitutional limitations on assertion of jurisdiction apply to the exercise of jurisdiction under this section. Consequently, appropriate notice must be given to a trustee or beneficiary as a condition of jurisdiction under this section. See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). This section does not limit the jurisdiction of the court over the trust, trust property, or parties to the trust. See also Sections 4-101 (methods of trustee acceptance), 3-103 (limits on rights of beneficiary of revocable trust).

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

SECTION 5-104. VENUE.

(a) The proper county for commencement of a proceeding under this [Act] is:

(1) in the case of a living trust, the county in which

the principal place of administration of the trust is located; or

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

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

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

Comment.

Source: CPC Section 17005.

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

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

Subsection (c) provides venue rules applicable in cases not covered by subsections (a) and (b), such as where jurisdiction over a trust, trust property, or parties to a trust is based on a factor other than the presence of the principal place of administration in this state. Thus, for example, when the principal place of administration of a trust is in another state, but jurisdiction is proper in this State, the general rules governing venue apply. This subsection is drawn from Section 7-204 of the Uniform Probate Code (1977).

PART 2. PROCEEDINGS CONCERNING TRUSTS

Section

- 5-201. **Petitions; Purposes of Proceedings.**
- 5-202. **Beneficiaries; Request for Special Notice.**
- 5-203. **When Parties Bound by Others; Notice and Pleadings.**
- 5-204. **Nonjudicial Settlement.**
- 5-205. **Administration of Trusts; Judicial Intervention Intermittent.**

SECTION 5-201. PETITIONS; PURPOSES OF PROCEEDINGS.

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

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

- (1) construe and determine the terms of a trust;
- (2) determine the existence or nonexistence of any immunity, power, privilege, duty or right;
- (3) determine the validity of a trust provision;
- (4) ascertain beneficiaries and determine to whom property shall pass or be delivered upon final or partial termination of the trust;
- (5) settle accounts and pass upon the acts of the trustee, including the exercise of discretionary powers;
- (6) instruct the trustee;
- (7) compel the trustee to report information about the trust or account to the beneficiary;
- (8) grant powers to 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.

Comment.

Source: CPC Section 17200(a).

The introductory clause of Section 5-201 has the effect of giving the right to petition concerning the internal affairs of a revocable living trust to the settlor (or other person holding the power to revoke) instead of the beneficiaries during the time that the settlor (or other person holding the power to revoke) is competent. See Section 3-103 and the comment thereto.

The procedure provided in this part is available to determine matters concerning the administration of trusts notwithstanding a purported limitation or exclusion in the terms of the trust. See also Sections 1-102(2) ("beneficiary" defined), 1-102(18) ("trust" defined), 5-104 (venue).

SECTION 5-202. BENEFICIARIES; REQUEST FOR SPECIAL NOTICE.

(a) If proceedings involving a trust are pending, a beneficiary of the trust may file with the clerk of the court in which the proceeding is pending a written request stating that the beneficiary desires special notice of the filing of petitions in the proceeding and giving an address for receiving notice by

mail. A copy of the request must be personally delivered or mailed to the trustee or the trustee's attorney. If personally delivered, the request is effective when it is delivered. If mailed, the request is effective when it is received. The original of the request must be filed with the court clerk, and be accompanied by a written admission or proof of service. A request for special notice may be modified or withdrawn in the same manner as provided for the making of the initial request.

(b) A request for special notice made by a beneficiary whose right to notice is restricted by Section 3-103(4) is not effective.

Comment.

Source: CPC Section 17204.

Subsection (b) makes clear that the restrictions on rights of beneficiaries of revocable trusts apply to the right to request special notice. Sections 5-203 and 5-204 limit the need to give notice to certain beneficiaries with future interests but do not restrict the right of such beneficiaries to request special notice.

SECTION 5-203. WHEN PARTIES BOUND BY OTHERS; NOTICE AND PLEADINGS. In proceedings involving trusts, and in judicially supervised settlements, the following apply:

(1) Interests to be affected shall be described in pleadings which give reasonable information to owners by name or class, by reference to the instrument creating the interests, or in other appropriate manner.

(2) Persons are bound by orders binding others in the following cases:

(i) Orders binding the sole holder or all coholders of

a power of revocation or a presently exercisable general power of appointment, including one in the form of a power of amendment, bind other persons to the extent their interests (as objects, takers in default, or otherwise) are subject to the power.

(ii) To the extent there is no conflict of interest between the representor and those represented: (A) orders binding a conservator bind the person whose estate the conservator controls; (B) orders binding a guardian bind the ward if no conservator of the ward's estate has been appointed; (C) orders binding a trustee bind beneficiaries of the trust; (D) orders binding a personal representative bind other persons interested in the undistributed assets of the decedent's estate; and (E) orders binding a sole holder or all co-holders of a general testamentary power of appointment bind other persons to the extent their interests (as objects, takers in default, or otherwise) are subject to the power. If there is no conflict of interest and no conservator or guardian has been appointed, a parent may represent a minor child.

(iii) Unless otherwise represented, a minor or an incapacitated, unborn, or unascertained person is bound by an order to the extent the person's interest is adequately represented by another party having a substantially identical interest in the proceeding.

(3) Notice is required as follows:

(i) Notice shall be given to every interested person or to one who can bind an interested person as described in paragraph (2)(i) or (ii). Notice may be given to a person and to another who may bind the person.

(ii) Notice is given to unborn or unascertained persons, who are not represented under paragraph (2)(i) or (ii), by giving notice to all known persons whose interests in the proceedings are substantially identical to those of the unborn or unascertained persons.

(4) At any point in a proceeding, a court may appoint a guardian ad litem to represent the interest of a minor, an incapacitated, unborn, or unascertained person, or a person whose identity or address is unknown, if the court determines that representation of the interest otherwise would be inadequate. If not precluded by conflict of interest, a guardian ad litem may be appointed to represent several persons or interests. The court shall set out its reasons for appointing a guardian ad litem as a part of the record of the proceeding. In approving a settlement under this section, a guardian ad litem may consider general family benefit.

Comment.

Source: Unif. Probate Code Sec. 1-403.

This section reflects revisions proposed by the Joint Editorial Board for Uniform Probate Code which have not yet been considered by the Commissioners.

SECTION 5-204. NONJUDICIAL SETTLEMENT.

(a) Subsections (b)-(c) shall be deemed incorporated into each instrument creating a trust unless the terms of the trust indicate a contrary intent.

(b) For purposes of this section, a "fiduciary matter" includes any item listed in Section 5-201(b).

(c) Without approval of court, persons interested in a fiduciary matter may agree to a nonjudicial settlement with respect to the fiduciary matter, and may represent and bind other persons interested in the fiduciary matter as follows:

(1) The sole holder or all coholders of a power of revocation or presently exercisable power of appointment, including one in the form of a power of amendment, may bind other persons to the extent their interests (as objects, takers in default, or otherwise) are subject to the power;

(2) To the extent there is no conflict of interest between the representor and those represented with respect to the particular fiduciary matter:

(i) a conservator may represent and bind the estate the conservator controls;

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

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

(iv) a personal representative may represent and

bind the persons interested in the estate;

(v) a sole holder or all coholders of a testamentary general power of appointment may represent and bind other persons to the extent their interests (as objects, takers in default, or otherwise) are subject to the power;

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

(3) Unless otherwise represented under paragraphs (1)-(2), and to the extent there is no conflict of interest between them and the persons represented with respect to the particular fiduciary matter;

(i) a beneficiary currently entitled or eligible to receive income or principal of the trust may represent and bind the person or persons who may succeed to the trust property in whole or in part upon termination of that beneficiary's interest;

(ii) an adult, competent, and ascertained beneficiary may represent and bind a minor, incapacitated, unborn or unascertained person who is a beneficiary of the same class gift;

(iii) if an interest is in a class none of whose members are yet ascertained, the person or class of persons who would be entitled to the interest if the event making the interest future in

enjoyment had occurred immediately before the nonjudicial settlement may represent and bind those class members and potential class members who are not so entitled; and

(iv) a beneficiary of an interest which is conditioned on the occurrence of a future event or combination of future event may represent and bind the person or persons who would succeed to that interest, in whole or in part, upon the occurrence of an additional event or combination of events.

(d) In connection with a nonjudicial settlement, the court may appoint a special representative to represent the interests of designated parties. If not precluded by conflict of interest, a special representative may be appointed to represent several persons or interests. In approving a settlement, a special representative may consider general family benefit.

(e) This section applies only to instruments executed on or after its effective date.

Comment.

Source: This section is new.

SECTION 5-205. ADMINISTRATION OF TRUSTS; JUDICIAL INTERVENTION INTERMITTENT. The administration of trusts must proceed expeditiously and free of judicial intervention, subject to the jurisdiction of the court as invoked by interested parties or as 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.

PART 3. TRANSFER OF TRUST TO ANOTHER JURISDICTION

Section

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

SECTION 5-301. APPLICATION OF PART.

(a) This [Part] applies to:

- (1) a trust that is subject to this [Act]; and
- (2) any other trust to which this [Part] is made applicable by statute or the terms of the trust.

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

Comment.

Source: CPC Section 17400.
Subsection (a)(1) permits the transfer of oral trusts. See 2-104 (oral trusts of personal property). Under the definition of "trust" in Section 1-102(18), this Part also applies to charitable trusts. See also Section 5-104 (venue).

SECTION 5-302. TRANSFER OF JURISDICTION OUTSIDE STATE. The court by an order may transfer the place of administration of a trust or transfer of some or all of the trust property to a jurisdiction outside this State as provided in this [Part].

Comment.

Source: CPC Section 17401.
See also Section 1-102(13) ("property" defined), 5-101 (subject matter jurisdiction of court).

SECTION 5-303. ORDER GRANTING TRANSFER. The court may grant

a petition for transfer and order the trustee to transfer the trust property or to transfer the place of administration of the trust to the other jurisdiction if, after hearing, it appears to the court that:

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

(2) the transfer does not violate the terms of the trust;
and

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

Comment.

Source: CPC Section 17404.

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

SECTION 5-304. MANNER OF TRANSFER; DISCHARGE OF TRUSTEE. If a transfer is ordered under this [Part], the court may direct the manner of transfer and impose terms and conditions as may be just, including a requirement for the substitution of a successor trustee in any pending litigation in this State. A delivery of property in accordance with the order of the court is a full discharge of the trustee with respect to all property embraced in the order.

Comment.

Source: CPC Section 17405.

PART 4. TRANSFER OF TRUST FROM ANOTHER JURISDICTION

Section

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

SECTION 5-401. APPLICATION OF PART.

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

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

Comment.

Source: CPC Section 17450.

Subsection (a) permits the transfer of oral trusts. See Section 2-104 (oral trusts of personal property). See Section 1-102(18) ("trust" defined). Section 5-401 makes this Part applicable to the transfer to this state of the place of administration of trusts or trust property administered in another jurisdiction. Hence, this Part applies to trusts administered in foreign countries as well as those administered in other states.

SECTION 5-402. ORDER ACCEPTING TRANSFER. The court may order acceptance of a transfer of the place of administration of a trust from another jurisdiction to this State or the transfer of some or all of the trust property in another jurisdiction to a trustee in this State as provided in this [Part].

Comment.

Source: CPC Section 17451.

This section is comparable to Section 5-302. See also Section 1-102(13) ("property" defined), 5-101 (subject matter jurisdiction in court).

SECTION 5-403. VENUE.

(a) If a petition requests that a resident of this State be appointed trustee, the petition must be filed in the court of the county in which the proposed principal place of administration of the trust is located.

(b) If a petition requests that only a nonresident of this State be appointed trustee, the petition must be filed in the court of the county in which either a beneficiary resides or a substantial portion of the trust property to be transferred is or will be located.

Comment.

Source: CPC Section 17452.
See also Section 5-101 (subject matter jurisdiction of court).

SECTION 5-404. ORDER ACCEPTING TRANSFER AND APPOINTING TRUSTEE.

(a) The court may grant the petition and issue an order accepting transfer of trust property or the place of administration of the trust to this State and appoint a trustee to administer the trust in this State, if, after hearing, it appears to the court that:

(1) the transfer of the trust property to a trustee in this State, or the transfer of the place of administration of the trust to this State, will promote the best interest of the trust and those interested in

it, taking into account the interest in the economical and convenient administration of the trust;

(2) the transfer does not violate the terms of the trust;

(3) the trustee appointed by the court to administer the trust in this State, and to whom the trust property is to be transferred, is qualified, willing, and able to administer the trust or trust property under the terms of the trust; and

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

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

Comment.

Source: CPC Section 17455.

SECTION 5-405. CONDITIONAL ORDER ACCEPTING TRANSFER. If appropriate to facilitate transfer of the trust property or the place of administration of a trust to this State, the court may issue a conditional order appointing a trustee to administer the trust in this State and indicating that transfer to this State will be accepted if transfer is approved by the proper court of the other jurisdiction.

Comment.

Source: CPC Section 17456.

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

SECTION 5-406. ADMINISTRATION; VALIDITY; CONSTRUCTION. A trust transferred to this State pursuant to this [Part] must be administered in the same manner as a trust of that type created in this State. The validity of a trust and the construction of the beneficial provisions of a trust transferred to this State are not affected by this section.

Comment.

Source: CPC Section 17457.

Under this section a transferred trust is treated the same as a trust that was created in this State, and so is governed by this Act. The second sentence distinguishes the rules governing the validity of a trust and the construction of its beneficial provisions from the procedural and administrative provisions covered by the first sentence of this section. This section is not intended to provide choice of law rules. A trust that was subject to judicial supervision in another state will not be subject to continuing court jurisdiction unless the terms of the trust so provide and the court so determines in the order accepting transfer to this state.

ARTICLE 6. TRANSITIONAL PROVISIONS

SECTION 6-101. GENERAL RULE CONCERNING APPLICATION OF [ACT].

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

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

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

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

Comment.

Source: CPC Section 15001.

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

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